

**NO. 05-03-01310-CV**  
**NO. 05-03-01334-CV**

IN THE COURT OF APPEALS  
FOR THE FIFTH DISTRICT OF TEXAS  
AT DALLAS

CITY OF DALLAS, Appellant v. DAVID S. MARTIN, ET AL, APPELLEES

CITY OF DALLAS, Appellant v. GEORGE G. PARKER, ET AL, APPELLEES

**APPELLEES CONSOLIDATED RESPONSE TO APPELLANT CITY OF DALLAS  
CONSOLIDATED BRIEF**

On appeal from the 382nd Judicial District Court  
Rockwall County, Texas

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*City of Dallas vs. David S. Martin, et al*

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O.J. (Jay) Adair<sup>1[1]</sup>

### **PLAINTIFFS/APPELLEES IN CAUSE NO. 05-03-01334-CV**

*City of Dallas vs. George G. Parker, et al*

George G. Parker

Joe M. Gunn

Stephen W. Toth

Nathan L. Trammell

Todd A. Stratman<sup>2[2]</sup>

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<sup>1[1]</sup> The named Plaintiffs-who are current or former employees in the sworn ranks of the Dallas Fire Department-have sued individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Fire Department.

<sup>2[2]</sup> The named Plaintiffs-who are current or former employees in the sworn ranks of the Dallas Police Department-have sued individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Police Department.

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<sup>3[3]</sup> The Defendant City of Dallas failed to mention that this lawyer was also one of the class counsel in *Parker and Martin*.

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## STATEMENT OF THE CASE

*Nature of the Case:*

Plaintiff fire fighters and police officers filed these class action lawsuits seeking back pay, declaratory relief, and other monetary damages from the City of Dallas for the City's breach of their employment contract. See 1310 CR 67; 1334 CR 70.

No monetary amount has been pled by the Plaintiffs and the City of Dallas' contention that these Plaintiffs seek over \$1 billion wholly falls outside of the record.

The city filed pleas to the jurisdiction based on its governmental immunity from suit in breach-of-contract cases. See 1310 CR 54; 1334 CR 57.

*Trial Court:*

The Defendant's statement of the trial court proceedings is partially correct. Additionally, former District Court Judges Richard Bosworth and Paul Banner also presided over these cases.

*Trial Court Disposition:*

The City of Dallas has correctly stated the disposition.

### **RESPONSE TO ISSUE PRESENTED BY THE CITY**

The trial court correctly exercised jurisdiction over these breach of contract cases because the Dallas City Charter provides that the city "Shall have the following powers:" . . . (2) "*to sue and be sued*", (3) "*to implead and be impleaded in all Courts*", . . . and (5) "*to contract and be contracted with*"<sup>4[4]</sup> and because §51.075 of the Texas Local Government Code provides that home rule cities such as the City of Dallas, "may plead and be impleaded in any Court", thereby clearly expressing a waiver of sovereign immunity.

### **RECORD REFERENCES**

The clerk's records in these cases will be referenced by the last four numbers of the appellate cause number followed by the page number. For example, page 67 of the clerk's record in *City of Dallas v. David S. Martin*, Cause No. 05-03-01310-CV, will be referred to herein as "1310 CR 67".

The clerk's records in these cases will be referenced by the last four numbers of the appellate cause number followed by the page number. For example, page 70 of the clerk's record

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<sup>4[4]</sup> Dallas City Charter, Chapter II, §1(2), (3), and (5), Appendix A.

in *City of Dallas v. George G. Parker*, Cause No. 05-03-01334-CV, will be referred to herein as "1334 CR 70".

The parties will be referenced as they were in the trial court, i.e., *Parker & Martin* will be referred to as Plaintiffs and the City of Dallas will be referred to as the Defendant.

## STATEMENT OF FACTS

The Plaintiffs agree with the Defendant City of Dallas' statement of the facts with the following exceptions and/or clarifications.

The *Martin* fire fighters class consist of approximately 3,800 current officers and retired officers. 1310 CR 74.

The *Parker* - police class actions consist of approximately 3,800 current officers, and retired officers. 1334 CR 77.

Page 2 of the Defendant City of Dallas' Brief argues that both the Martin and Parker class actions seek over \$1 billion in damages in the form of back pay, benefits, and pre-judgment interest. There are no pleadings to support this naked allegation and this Court should not be concerned with any potential amount in controversy.

Plaintiffs disagree with the statement at pages 2 and 3 of the Defendant's Brief that the Legislature enacted §311.034 of the Texas Government Code shortly after *Arredondo v. City of*

*Dallas*, 79 S.W.3d 657 (Tex. App. - Dallas 2002, pet. denied) was decided.<sup>5[5]</sup> Section 311.034 of the Texas Government Code was effective June 15, 2001.

The Plaintiffs also dispute the City of Dallas' contentions concerning Plaintiffs' pleadings as they relate to the governmental immunity issue. The Plaintiffs' pleadings cited the Dallas City Charter provisions regarding "*to sue and be sued*" and "*to implead and be impleaded*", which the City of Dallas references, but the Plaintiffs also pleaded that the Dallas City Charter gave the city the power "*to contract and be contracted with*". DALLAS CITY CHARTER, Chapter II, §1, (2), (3) and (5) respectively. 1310 CR 68, 69 and 1334 CV 71, 72.

Finally, the City of Dallas neglected to mention at page 3 of its' Brief that the City of Dallas is a home rule municipality and that is the reason that § 51.075 of the TEX. LOC. GOV'T CODE, which states that the city "may plead and be impleaded in any Court", applies in this case. *Id.*

### ***SUMMARY OF THE ARGUMENT***

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<sup>5[5]</sup> Arredondo is one of the 4 companion pay cases filed in Collin County, Texas that's currently before this Court. No. 05-03-01299-CV. *See also* No. 05-03-01297, 03-01298, and 03-1300.

Over thirty-three (33) years ago, in *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970), the Texas Supreme Court ruled that a 1925 act relating to navigation districts that stated "All navigation districts established under this Act may, by and through the navigation and canal commissioners, *sue and be sued* in all courts of this State in the name of such navigation district, and all courts of this State shall take judicial notice of the establishment of all districts" was a "quite plain" statement that gave "general consent for district to be sued in the Courts of Texas in the same manner as other Defendants", *Missouri Pacific R.R.*, 453 S.W.2d at 813.<sup>6[6]</sup> *Missouri Pacific* has never been overruled by the Texas Supreme Court. *Webb v. City of Dallas*, 314 F.2d 787 (5th Cir. 2002) has construed the same provisions that are at issue herein and have found waiver of governmental immunity.

The City of Dallas' reliance upon *City of Dallas v. Reata Constr. Corp.*, 83 S.W.3d 392, 398 (Tex. App. - Dallas 2002, pet. filed), is inappropriate because that case is a tort claim case (see TEX. CIV. PRAC. & REM. CODE §101.021 and 101.025) (the "Texas Tort Claims Act") and its' ruling is not precedent in this breach of contract case. Likewise, the City of Dallas' reliance upon *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, No. 05-0300004-CV, 2003 WL 22221024 (Tex. App. - Dallas Sept. 26, 2003, mot. reh. filed) is not controlling. *Satterfield* did not involve a home rule municipality whose City Charter provisions in three (3) places and §51.075 to the TEX. LOC. GOV'T CODE<sup>7[7]</sup> effected an express waiver of governmental immunity.

## STANDARD OF REVIEW

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<sup>6[6]</sup> Texas A & M University - Kingsville v. Lawson, 87 S.W.3d 518, 521 (Tex. 2002) at footnote 21 reaffirms this holding.

<sup>7[7]</sup> See *City of Garland v. Shierk*, (2000 Tex. App. Lexis 3706 - Dallas, June 6, 2000, pet. denied) an unpublished opinion by the Dallas Court of Appeals that holds §51.075 TEX. LOC. GOV'T. CODE alone waives sovereign immunity for a home rule city. *Id.* at p. 2.

In determining whether a trial court has subject matter jurisdiction to hear a case, the trial court must not weigh the merits of the case, but instead looks only to Plaintiffs' pleadings and the evidence pertinent to the jurisdictional issue. *County of Cameron v. Brown*, 80 S.W.3d 549, 555-556 (Tex. 2002). In doing so, the trial court must construe the plaintiffs' pleadings liberally in favor of jurisdiction, *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989), and must take all factual allegations as true, unless the defendant pleads and proves that the allegations were fraudulently made in order to confer jurisdiction. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996).

In all other respects, the Plaintiffs agree with Defendants' characterization that the review of the trial court's decision is *de novo*. *Tex. Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002).

## **ARGUMENT**

In this case, it is undisputed that the City is a home rule municipality. *City of Dallas v. Parker*, 737 S.W.2d 845 (Tex.App.-Dallas 1987, no writ). In §51.075 of the Texas Local Government Code, the Texas legislature has provided that home rule municipalities, such as the City, "*may plead and be impleaded in any court*". In addition, the Dallas City Charter provides that the City "shall have the following powers: . . . (2) *to sue and be sued*, (3) *to implead and be impleaded in all Courts*", and "(5) *to contract and be contracted with*". See DALLAS CITY CHARTER, Chapter II, §1(2), (3) and (5)<sup>8[8]</sup>. Thus, the Texas Legislature and the City have both given Plaintiffs consent to file this suit. See *Avmanco, supra*, at 165. A copy of the relevant

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<sup>8[8]</sup> In fact, the City of Dallas Charter of 1856, Ch. LVI, §1 provides that the City "may sue and be sued, plead and be impleaded". 23A *Brooks*, Texas Practice, Appendix B.

Dallas City Charter provisions is attached hereto as Appendix "A". Plaintiffs ask the Court to take judicial notice of these provisions as well.

Generally, municipalities and other governmental entities have governmental or sovereign immunity from private litigation. Sovereign immunity encompasses two distinct principals: ***immunity from liability and immunity from suit***. *Federal Signs v. Texas Southern University*, 951 S.W.2d 401, 405 (Tex. 1997). However, this immunity is not absolute.

When a governmental entity contracts with a private citizen, it waives ***immunity from liability***. *Id* at 405. A contract is just as binding on a municipal corporation, such as the City, as it is upon a private party. *Travis County v. Pelzel & Associates, Inc.*, 77 S.W.3d 246, 248 (Tex. 2002). The Defendant contracted with the Plaintiffs and has waived it's immunity from liability under those contracts.

A municipality's ***immunity from suit*** is waived when the legislature or the municipality expressly, clearly and unambiguously gives permission or consent to sue. *Federal Signs, supra*, at 405. *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970). In the case of *Avmanco v. City of Grand Prairie*, 835 S.W.2d 160 (Tex.App.-Ft. Worth 1992, dismissed), the Fort Worth Court of Appeals held that a city charter provision providing that the city "may sue and be sued" waives the city's immunity from suit. *Id.* at 165.

In this case, the District Court correctly found a clear and unambiguous waiver of governmental immunity from suit for the Plaintiffs' breach of contract claims, because of the three (3) provisions of the City of Dallas Charter, *supra*, as well as §51.075 of the TEX. LOC. GOV'T CODE.

The District Court's Orders Denying the City's Pleas to the Jurisdiction in both *Martin* and *Parker* were proper and this appeal should be denied and the case remanded to the District Court for further proceedings on the merits.

**I. THE DISTRICT COURT CORRECTLY EXERCISED JURISDICTION OVER THE BREACH OF CONTRACT CASES BECAUSE THE PLAINTIFFS DEMONSTRATED AN EXPRESS WAIVER OF GOVERNMENTAL IMMUNITY FROM SUIT.**

**A. The three (3) provisions of the Dallas City Charter as well as §51.075 of the Local Government Code waives the City's immunity from suit.**

In the Plaintiffs current live pleadings in their First Amended Original Petition in *Martin* (1310 CR 67-69) as well as in *Parker* in their Second Amended Original Petition (1334 CR 70-72) alleged an express waiver of governmental immunity from suit by virtue of §51.075 of the TEX. LOC. GOV'T CODE, the Dallas City Charter, Chapter II, §1, "(2) *to sue and be sued*, (3) *to implead and be impleaded in all Courts*", and "(5) *to contract and be contracted with*".

**B. *Missouri Pacific***

Over thirty-three (33) years ago, in *Missouri Pacific*, the Supreme Court issued a clear, succinct, and precise three (3) page opinion on the issue that directly confronts the Court in this case. This case is not a case of first impression but rather, it is a case which requires the Court of Appeals to follow well settled Texas law.

The *Missouri Pacific* case arose after a brakeman for the Missouri Pacific Railroad Company died after being knocked from a train ladder by a crane that had been left too close to the track. The brakeman's heirs and beneficiaries sued Missouri Pacific, who filed a cross-action for indemnity against the Brownsville Navigation District. Missouri Pacific complained that the Navigation District had entered into a contract with Missouri Pacific whereby the Navigation

District agreed not to allow construction or placement of any obstruction which would violate any law or regulation respecting clearance or safety margins in the vicinity of the railroad tracks. The Trial Court sustained the Navigation's Plea to the Jurisdiction on the grounds that the district had sovereign immunity and had not consented to being sued. The Court of Appeals affirmed. *Missouri Pacific R.R.*, 453 S.W.2d at 813.

The act creating the Navigation District, which was enacted in 1925, contained the following provision:

"All navigation districts established under this Act, may, by and through the navigation and canal commissioners, *sue and be sued* in all courts of the State in the name of such navigation district, and all courts of this State shall take judicial notice of the establishment of all districts". *Id.* (emphasis added).

Obviously the issue was whether or not the phrase "sue and be sued" was a waiver of the navigation district's immunity from suit. The Supreme Court concluded quite unequivocally:

"In our opinion Article 8263(h) [the Navigation District Statute] is *quite plain and gives general consent for District to be sued* in the courts of Texas in the same manner as other defendants". *Id.* (emphasis added).

### **C. *Federal Sign***

More recently, in *Federal Sign v. Texas Southern University*, 951 S.W.2d, 401, 408 (Tex. 1997), recalling the *Missouri Pacific* decision, the Texas Supreme Court reiterated "that a statute that provided that the Navigation District could "*sue and be sued*" met the legislative permission requirement". *Id.* at 408.

The *Missouri Pacific* decision is controlling on the "sue and be sued" language and other Courts of Appeals have agreed that the "sue and be sued" language is plain enough and clear enough to constitute a waiver of sovereign or governmental immunity. See, e.g., *City of Mexia v. Tooke*, \_\_\_ S.W.3d \_\_\_ 2003 Tex. App. Lexis 6450, at p. 3 (Tex. App. - Waco July 23, 2003, no pet. h.); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex. App. - El Paso 2003, pet. filed); *Tarrant County Hospital Dist. v. Henry*, 52 S.W.3d 434, 448-49 (Tex. App.- Fort Worth 2001, no pet.); *Knowles v. City of Grand Prairie*, 953 S.W.2d 19, 23 (Tex. App. - Fort Worth 1997, pet. denied) and *Webb v. City of Dallas*, 314 F.3d 787 (5th. Cir. 2002).

However, the Dallas Court of Appeals in *Reata, supra*, and *Satterfield, supra*, have come to an apparently opposite conclusion.

**D. Webb**

In *Webb v. City of Dallas*, 314 F.3d 787 (5th. Cir. 2002), the heirs of Tennyson Park in Dallas, Texas sued the City for damages and a reverter of title. The City of Dallas claimed governmental immunity. The Webbs urged waiver based on § 51.075 TEX. LOC. GOV'T CODE and DALLAS CITY CHARTER ch. II, §1(2) and (3), the *sue and be sued and plead and be impleaded* provisions at issue herein. The Fifth Circuit confirmed that *Missouri Pacific* was still good law, and that the "sue and be sued" language constituted an express waiver of sovereign immunity. The Fifth Circuit expressly declined to follow the cases that the City of Dallas relies upon in it's Brief at pages 6 - 10.

In any event, there are distinguishing features of the present cases. Unlike *Reata* which was a Texas Tort Claims Act Case, or the *Satterfield* case which held that the Texas Education Code, §11.151(a), which provided "the Trustees of an independent school district . . . may . . .

sue and be sued . . ." was *not* a clear and unambiguous waiver of governmental immunity, *Parker* and *Martin* compel a different conclusion.

In *Parker* and *Martin*, there are three (3) provisions of the Dallas City Charter which must be construed and given full force and effect in accordance with the Code Construction Act, TEX. LOC. GOV'T CODE §311.001, et seq., as well as §51.075 of the TEX. LOC. GOV'T CODE. Whether taken individually or in conjunction with each other, these provisions of the law express a clear and unambiguous expression of waiver of governmental immunity.

Finally, in considering all of the facts and circumstances, the Court of Appeals is reminded that this lawsuit is grounded upon a Referendum. 1310 CR 17-20, 74-75, 93-96 and 1334 CR 11-14, 77-78 and 96-99. A Referendum supported by the majority of voters of the City of Dallas (57% to 43%) supplanted their will on the City Council of Dallas when the voters went to the polls in 1979 and granted the Plaintiffs herein their salary structure and rights and remedies. This case does not revolve around a mere contract between the city and a private litigant/contractor such as *Reata* and *Satterfield* but rather deals with a contract between the city and its' police officers and fire fighters that was mandated by a public Referendum of the voters of the City of Dallas.

**E.** *Pelzel*

Likewise, the City's reliance upon *Travis County v. Pelzel & Assoc., Inc.*, 77 S.W.3d 246 (Tex. 2002), is puzzling. If anything, the *Pelzel* decision spurred the Texas Legislature to enact a statute that expressly overrules the *Pelzel* decision. See *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, \_\_\_ S.W.3d \_\_\_ 2003 Tex.App. LEXIS 8403 (Tex. App. -

Dallas Sept. 26, 2003) [dissenting opinion by Justice Lang at p. 13 - 14) and see Appendix "C".<sup>9[9]</sup>

In *Pelzel*, the Supreme Court held that TEX. LOC. GOV'T CODE, §89.004 does not contain clear and unambiguous language of waiver of immunity. Section 89.004 provided that "[a] person may not sue on a claim against a county unless the person has presented the claim to the Commissioner's Court and the Commissioner's Court has neglected or refused to pay all or part of the claim. *Id.* at §89.004(a). (emphasis added).

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<sup>9[9]</sup> §89.004 TEX. LOC. GOV'T CODE was amended by Senate Bill No. 1017 and effective September 1, 2003. Additionally, Chapter 262 of the TEX. LOC. GOV'T CODE was amended by adding §262.007 which states as follows: §262.007 SUIT AGAINST COUNTY ARISING UNDER CERTAIN CONTRACTS "(a) county that is a party to a written contract for engineering, architectural, or construction services . . . *may sue or be sued, plead or be impleaded, or defend or be defended* on a claim arising under the contract". Two of these three provisions are identical to the Dallas City Charter provision cited above.

*Pelzel* was contracted to construct an office building for Travis County. *Pelzel* substantially completed the building, the county accepted the building and occupied it. *Pelzel* filed a claim that it was owed over \$130,000.00 and presented its' claim to the County Commissioner's Court pursuant to §89.004(a) of the Local Government Code. The Court considered the history of the presentation of claim statute and noted that from 1846 to 1879, the statute contained the language "*may sue and be sued, plead and be impleaded, defend and to be defended, in any court of record or other place where justice may be administered*".<sup>10[10]</sup> After 1879, the statute was changed and when *Pelzel* was decided, the Texas Supreme Court held that the current language of the Government Code, *supra*, was not clear and unambiguous. The Supreme Court stated:

"Thus well over a hundred years ago, the Legislature deleted the only language arguable waiving sovereign immunity, suggesting that it intended to preserve counties' immunity from suit. *See Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998) (stating that in construing statute in which the Legislature changed the word "company" to "person," the Court does not "lightly presume that the Legislature may have done a useless act"); *In Re Ament*, 890 S.W.2d 39, 41 (Tex. 1994) (stating that omissions from existing statutory provisions when new provisions are enacted are presumed to be intentional). *Id.* at 249-250.

As mentioned above, the original statute provided that the county "*may sue and be sued, plead and be impleaded, defend and be defended in any court of record or any other place where justice may be administered*". The Supreme Court held that the changed language of the statute did not clearly constitute a waiver of sovereign immunity. *Id.* at 249. In other words, *Pelzel* reaffirmed that the "sue and be sued" as well as the "plead and be impleaded" language were adequate to constitute a waiver of governmental immunity. *Id.* at 249-250. As earlier mentioned, the legislature has now expressly overruled *Pelzel*, because they recognized the inequity of allowing a private litigant like a contractor from fully performing a contract under

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<sup>10[10]</sup> 123 years later the Legislature places this language back on the books as a clear and unambiguous waiver of sovereign immunity. See footnote 9, *supra*.

which it should have been awarded additional funds, being barred by the doctrine of governmental immunity from seeking access to the Courts to acquire those funds.

In short, the three (3) provisions of the Dallas City Charter plus §51.075 of the TEX. LOC. GOV'T CODE, constitute express,

clear and unambiguous waivers, either I independently or jointly and severally in this case, of the City of Dallas' governmental

immunity.

**F. OTHER AUTHORITY CITED BY DEFENDANT IS NOT ON POINT.**

The Defendant cites the cases of *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692 (Tex. 2003) and *Catalina Development, Inc. vs. County of El Paso*, 46 Tex. Sup. Ct. J. 636, 2002 WL 32088025 (May 9, 2003) in support of their arguments. *Wichita Falls* involved the construction of Chapter 321 of the Health and Safety Codes, Patients Bill of Rights. *Wichita Falls* involves an examination of the Patients Bill of Rights. No where in the statutory scheme was there any language of *sue and be sued*, *plead and be impleaded* or *contract and contracted* with. Although §321.003(a) and (b) provided that "a person who has been harmed by a violation may sue" that was not a clear and unambiguous waiver of sovereign immunity.

In *Catalina Development* the Court was confronted with another waiver by conduct case. In that case, the County of El Paso had taken a number of steps toward closing a land purchase deal. Ultimately, it declined to complete the transaction. The Court, in reviewing §272.001 TEX. LOC. GOV'T CODE, did not find any clear and unambiguous waiver of sovereign immunity.

Both *Wichita Falls* and *Catalina* are distinguishable from the present case.

As mentioned earlier, *Reata* is simply distinguishable by virtue of the fact that it is a tort claims case and it's ruling is not precedent in this breach of contract case.

*Satterfield & Pontikes, supra*, is also not controlling. *Satterfield* did not involve a home rule municipality whose city charter provision in three (3) places and §51.075 of the TEX. LOC. GOV'T CODE, affected an express waiver of governmental immunity.

In *Satterfield, supra*, the Dallas Court of Appeals recognized *Missouri Pacific's* holding that a sue and be sued statute constitutes a waiver of immunity from suit. *Id.* at 4. However, relying principally on *Pelzel* and *Taylor, supra*, the *Satterfield* court refused to follow *Missouri Pacific's* holding that a "sue and be sued" provision constitutes a waiver of immunity from suit. Justice Lang, vigorously dissenting, traced the history of governmental immunity in Texas and came to the opposite conclusion, i.e., *Missouri Pacific* is still controlling the law.

In any event, *Satterfield* construed Texas Education Code §11.151 which states:

- (a) Trustees of an independent school district . . . "may acquire and hold real and personal property, sue and be sued, and receive bequest and donations or other monies or funds coming legally into their hands" as failing the clear and unambiguous test.

As stated earlier, the Dallas City Charter is much more clear and unambiguous as it contains a *sue and be sued* provision, a *plead and be impleaded* provision and a *contract and be contracted* provision. As pointed out above, the legislature has recently seen fit to overrule *Pelzel* using nearly identical language. See footnote 9, *supra*.

In short, *Satterfield* is distinguishable at best and wrongly decided at the worst.

## **II. THE PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF IS NOT BARRED BY GOVERNMENTAL IMMUNITY.**

Assuming, arguendo, that the City of Dallas' position is correct and that the Plaintiffs in *Parker* and *Martin* cannot sue for money damages, then declaratory relief, including an award of

attorneys fees and costs, is still appropriate. If the City of Dallas is or has violated the Referendum, then declaratory relief to declare the rights, remedies and responsibilities of the parties, and to construe the referendum and determine its' effects on pay scales, benefits, and other of employment is appropriate and is ***not barred by the doctrine of governmental immunity***. TEX. CIV. PRAC. & REM. CODE §37.009 and *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 444 - 446, (Tex. 1994); *Duncan v. Pogue*, 759 S.W.2d 435, 436 (Tex, 1988); *City of El Paso v. Croom Const. Co.*, 864 S.W.2d 153, 155 (Tex. App. - El Paso 1993, writ denied).

In *Leeper, supra*, the Supreme Court stated: "We conclude that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorneys fees, the DJA [Declaratory Judgment Act] ***necessarily waives governmental immunity for such awards***".(emphasis added).

Additionally, the Defendant's reliance on the decision in *City of San Benito v. Ebarb*, 88 S.W.3d 711 (Tex.App. - Corpus Christi 2002, pet. denied) is misplaced. *Ebarb* is a pleading insufficiency case. *Livecchi v. City of Grand Prairie*, 109 S.W.3d 920, 922-23 (Tex.App. - Dallas, 2003 pet. filed). *Ebarb* failed to plead any statutory or city charter authority to support a waiver of governmental immunity. As pointed out above, Plaintiffs herein have properly pled their claims.

## **CONCLUSION AND PRAYER**

The City of Dallas ***is not immune from suit***. The provisions of the DALLAS CITY CHARTER, Chapter II, §1, (2), (3) and (5) and § 51.075 TEX. LOC. GOV'T CODE compel such a conclusion.

The Plaintiffs declaratory judgment action is also proper and the City of Dallas does not have governmental immunity to those claims.

Plaintiffs pray that this Court affirm the trial court's rulings and remand this case for a trial on the merits.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded regular mail to all other counsel of record on this \_\_\_ day of October, 2003.

\_\_\_\_\_  
ROBERT C. LYON

<sup>1</sup> The named Plaintiffs-who are current or former employees in the sworn ranks of the Dallas Fire Department-have sued individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Fire Department.

<sup>2</sup> The named Plaintiffs-who are current or former employees in the sworn ranks of the Dallas Police Department-have sued individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Police Department.

<sup>3</sup> The Defendant City of Dallas failed to mention that this lawyer was also one of the class counsel in *Parker and Martin*.

<sup>1[4]</sup> Dallas City Charter, Chapter II, §1(2), (3), and (5), Appendix A.

<sup>1[5]</sup> Arredondo is one of the 4 companion pay cases filed in Collin County, Texas that's currently before this Court. No. 05-03-01299-CV. *See also* No. 05-03-01297, 03-01298, and 03-1300.

<sup>1[6]</sup> Texas A & M University - Kingsville v. Lawson, 87 S.W.3d 518, 521 (Tex. 2002) at footnote 21 reaffirms this holding.

<sup>1[7]</sup> See *City of Garland v. Shierk*, (2000 Tex. App. Lexis 3706 - Dallas, June 6, 2000, pet. denied) an unpublished opinion by the Dallas Court of Appeals that holds §51.075 TEX. LOC. GOV'T. CODE alone waives sovereign immunity for a home rule city. *Id.* at p. 2.

<sup>1[8]</sup> In fact, the City of Dallas Charter of 1856, Ch. LVI, §1 provides that the City "may sue and be sued, plead and be impleaded". 23A *Brooks*, Texas Practice, Appendix B.

<sup>1[9]</sup> §89.004 TEX. LOC. GOV'T CODE was amended by Senate Bill No. 1017 and effective September 1, 2003. Additionally, Chapter 262 of the TEX. LOC. GOV'T CODE was amended by adding §262.007 which states as follows: §262.007 SUIT AGAINST COUNTY ARISING UNDER CERTAIN CONTRACTS "(a) county that is a party to a written contract for engineering, architectural, or construction services . . . may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract". Two of these three provisions are identical to the Dallas City Charter provision cited above.

<sup>1[10]</sup> 123 years later the Legislature places this language back on the books as a clear and unambiguous waiver of sovereign immunity. See footnote 9, *supra*

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