Affirmed and Opinion filed February 15, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00217-CV

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RALPH BOYD WELSH, Appellant

V.

TEXACO GRAND PRIX OF HOUSTON, L.L.C., TEXACO, INC., and THE CITY OF HOUSTON, Appellees

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On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 99-47280

O P I N I O N

In this appeal from a summary judgment based on the doctrine of res judicata, appellant asserts one point of error. We affirm.

In 1998, appellant filed suit against the City of Houston and organizers of the Texaco Grand Prix auto race, claiming that it is unconstitutional to use the downtown public streets to operate the annual race. The trial court signed a final judgment in that suit in favor of appellees on May 18, 1999. The First Court of Appeals affirmed the trial court's judgment, and the Texas Supreme Court denied appellant's petition for review. *See Welsh v. Texaco*

Grand Prix of Houston, L.L.C., Texaco, Inc. and City of Houston, Texas, 01-99-00981-CV, 1999 WL 1208525 (Tex. App.—Houston [1st Dist.], 1999, pet. denied) (not designated for publication).

In 1999, appellant filed this suit against the same defendants, raising essentially the same claims. Appellant sought a temporary restraining order to stop the race and declare the racing agreement and the ordinance approving it void, asserting that the City is without legal authority to pass an ordinance as an emergency measure which creates a special privilege. Appellees moved for summary judgment on the ground that the doctrine of res judicata prevents appellant from relitigating these claims. Appellant also moved for summary judgment, asserting that the City had created a special privilege condoning the violation of numerous traffic laws. The trial court denied appellant's motion and granted appellees' motion for summary judgment that appellant take nothing. Appellant brings this appeal.

The standard we follow in reviewing a summary judgment is well established. The movant for summary judgment has the burden to show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985); TEX. R. CIV. P. 166a(c). When a defendant moves for summary judgment based on an affirmative defense, its burden is to prove conclusively all elements of the affirmative defense as a matter of law such that there is no genuine issue of material fact. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984).

In appellant's sole point of error, he argues that the conduct condoned and permitted by the City Ordinance violates state law with regard to the operation of motor vehicles on public roadways in an urban district.[1] Appellant asserts that the City unlawfully passed

[1] Appellant is pro se. Appellant's original brief was struck for failure to comply with the Rules of Appellate Procedure and appellant was ordered to rebrief. We review his amended brief. Appellant has not raised a point of error challenging the ground on which the summary judgment was granted. Where an appellant fails to attack the grounds on which the judgment was granted in a specific or general point of error challenging the summary judgment, the summary judgment must be affirmed. *See Malooly Bros., Inc. v.* (continued...)

Ordinance #97-1056 approving the auto race agreement. Specifically, appellant asserts that Article VII, Section 7 of the Houston City Charter provides that "no ordinance or resolution making a grant of any *franchise or special privilege* shall ever be passed as an emergency measure." (emphasis added). In the 1998 suit, appellant argued that the ordinance approving the race was a "franchise." In this suit, appellant argues the same ordinance created a "special privilege."

Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

The trial court correctly found that the elements of res judicata were proved. Appellant's argument that this suit raises different claims is without merit. Appellant challenges the City's authority based upon the identical provision in the City charter. Appellant's claims *could have been raised* in the first suit. We overrule appellant's sole issue.

Appellees ask that Rule 45 damages should be awarded against appellant for filing a frivolous appeal. *See* TEX. R. APP. P. 45. Appellees argue that this appeal has absolutely no merit and the assessment of damages is especially appropriate where there is a clear attempt to relitigate matters previously litigated in violation of well established law.[2] *See Ambrose*

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[1] (...continued)
Napier, 461 S.W.2d 119, 121 (Tex. 1970); *Warner v. Orange County*, 984 S.W.2d 357, 358 (Tex. App.—Beaumont 1999, no pet.). Because appellant does assert in his brief that res judicata is inapplicable, we will address the issue.

[2] Appellees also accused appellant of intentionally misleading this Court by stating that his petition for review was pending before the Texas Supreme Court, when it had been denied on May 11, 2000. In his (continued...)

v. Mack, 800 S.W.2d 380, 383-84 (Tex. App.—Corpus Christi 1990, writ denied) (assessing damages where claims clearly could have been brought in previous suit).

Whether to grant sanctions is a matter of discretion, which we exercise with prudence and caution, and only after careful deliberation. *Chapman v. Hootman*, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Although imposing sanctions is within our discretion, we will do so only in circumstances that are truly egregious. *City of Houston v. Crabb*, 905 S.W.2d 669, 676 (Tex. App.—Houston [14 th Dist.] 1995, no writ). Where an appellant's argument on appeal fails to convince the court, but has a reasonable basis in law and constitutes an informed, good-faith challenge to the trial court's judgment, sanctions are not appropriate. *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (interpreting former TEX. R. APP. P. 84).

Because we find that the this appeal was brought without a reasonable basis in law and does not constitute an informed, good-faith challenge to the trial court's judgment, we exercise our discretion to assess damages in the sum of $500.00 against appellant and in favor of appellees.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed February 15, 2001.
Panel consists of Chief Justice Murphy, Justices Hudson and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] (...continued)
reply brief, appellant apologized to the Court, stating that any misrepresentation was unintentional because he was not aware of the ruling when he filed his brief on May 31, 2000.