

Irving GAUDINEER et ux v. CITY
OF RUSSELLVILLE et al

77-294

563 S.W. 2d 711

Opinion delivered April 3, 1978
(Division I)

1. JUDGMENTS — SUMMARY JUDGMENT, MOTION FOR — ATTACHMENT TO MOTION OF PLEADINGS IN PRIOR CASE PROPER WHEN ASSERTING RES JUDICATA AS DEFENSE. — The defense of *res judicata* may be raised by summary judgment, but the pleadings in the prior case should be attached to the motion so that the court may make a ruling based on the facts as evidenced by all the relevant court records.
2. JUDGMENTS — SUMMARY JUDGMENT, MOTION FOR — INSUFFICIENCY OF CONCLUSIONARY AFFIDAVIT AS EVIDENCE. — A summary judgment granted on the basis of an affidavit of the mayor of a defendant city that the facts in the case had been previously judicially decided and that he knew of no genuine issue of material fact is conclusionary in nature and the judgment cannot stand.

Appeal from Pope Circuit Court, *John Lineberger*, Judge;
reversed and remanded.

J. Marvin Holman, for appellants.

John C. Harris, for appellees.

DARRELL HICKMAN, Justice. This is an appeal from a summary judgment granted by the Pope County Circuit Court to the appellees — the City of Russellville.

The appellants, Irving Gaudineer and his wife, filed this lawsuit, one of three lawsuits, to try and force the City of Russellville to issue a permit for utilities to be connected to a house trailer.

The city filed a motion for summary judgment and attached to it was an affidavit signed by the mayor. The mayor stated that he had personal knowledge of the facts of the case and that the case was the same as one previously decided in Pope County Chancery Court and another case filed in Pope County Circuit Court. The mayor's affidavit went on to say he personally knew of no genuine issue of material fact.

The defense of *res judicata*, of course, may be raised by summary judgment but normally the pleadings are attached to the motion so the court may make a ruling based on the facts as evidenced by all the relevant court records. The affidavit here is conclusory in nature. See *Miskimins v. The City National Bank*, 248 Ark. 1194, 456 S.W. 2d 673 (1970).

The appellants did not file any affidavits. However, there is no requirement that affidavits be filed. The question in this case is, can the summary judgment stand on the basis of the evidence presented to the trial judge. In view of the fact the only evidence the court had in the record was the affidavit of the mayor, we find that it cannot stand.

Reversed and remanded.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and HOWARD, JJ.