

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01683**

**THOMAS FOSTER, CLARENCE POWELL,
ROY L. WILLIAMS, and HUE L. FLEMING
for the use of THE CITY OF RULEVILLE,
MISSISSIPPI**

APPELLANTS

V.

**SHIRLEY JEAN EDWARDS, HATTIE
ROBINSON JORDAN, JAMES JOHNSON,
JOHNNY HILL, MARO ROBINSON,
JAMES BUTCH JENKINS, In Their
Individual Capacities**

APPELLEES

APPELLANTS' BRIEF

SUBMITTED BY:

**OTTOWA E. CARTER, JR. MSB [REDACTED]
OTTOWA E. CARTER, JR., P.A.
108 E. NORTHSIDE DRIVE
POST OFFICE BOX 31
CLINTON, MISSISSIPPI 39056
TELEPHONE: (601) 910-5001**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01683**

**THOMAS FOSTER, CLARENCE POWELL,
ROY L. WILLIAMS, and HUE L. FLEMING
for the use of THE CITY OF RULEVILLE,
MISSISSIPPI**

APPELLANTS

V.

**SHIRLEY JEAN EDWARDS, HATTIE
ROBINSON JORDAN, JAMES JOHNSON,
JOHNNY HILL, MARO ROBINSON,
JAMES BUTCH JENKINS, In Their
Individual Capacities**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Thomas Foster, Plaintiff/Appellant

Clarence Powell, Plaintiff/Appellant

Roy L. Williams, Plaintiff/Appellant

Hue L. Fleming, Plaintiff/Appellant

City of Ruleville, Mississippi, Plaintiff/Appellant

Shirley Jean Edwards, Defendant/Appellee

Hattie Robinson Jordan, Defendant/Appellee

James Johnson, Defendant/Appellee

Johnny Hill, Defendant/Appellee

Maro Robinson, Defendant! Appellee

James Butch Jenkins, Defendant/Appellee

Honorable Richard A. Smith, Trial Court Judge

Ottowa E. Carter, Jr., Counsel for Plaintiffs/ Appellants

Daniel J. Griffith. Counsel for Defendants/Appellees

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW	1
B. STATEMENT OF FACTS	3
III. SUMMARY OF THE ARGUMENT	7
V. ARGUMENT	9
A. STANDARD OF REVIEW	9
B. THE TRIAL COURT ERRED IN FINDING THAT THE CHANCERY COURT'S DISMISSAL OF THE CHANCERY COURT SUIT FOR LACK OF. SUBJECT MATTER JURISDICTION BARRED PLAINTIFFS SUIT IN THE CIRCUIT COURT	10
C. THE CHANCERY COURT ERRED IN RULING THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL APPLIED AND THEREFORE BARRED PROSECUTION OF THE CIRCUIT COURT SUIT	11
1. Res Judicata Only Applies to Decisions on the Merits	11
2. The Four Identities Are Not Present	12
D. THE TRIAL COURT ERRED IN RULING THAT SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE PLAINTIFFS FAILED TO PRODUCE COMPETENT EVIDENCE TO SHOW THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT	13
1. Defendants Never Established the Absence of Genuine Issues of Material Facts	13
2. Defendants Did Not Establish Entitlement to Summary Judgment as Matter of Law	15
V. CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Adickes v. S. H. Kress & Company</i> , 90 S. Ct. 1598, 398 U. S. 144, 26 L.Ed. 2d 142 (1970) . . .	15
<i>Aetna Cas. & Surety Co. V. Berry</i> , 669 So.2d 56, 66 (Miss. 1996)	11
<i>Cook v. Stringer</i> , 764 So. 2d 481, 483 (Miss.App. 2000)	9
<i>Costello v. United States</i> , 365 U.S. 265, 81 S.Ct. 534, 544 5L.Ed.2d (1961)	11, 12
<i>Deposit Guaranty National Bank v. Roberts</i> , 483 So.2d 348 (Miss. 1986)	10
<i>Foster v. Noel</i> , 715 So. 2d 174, 180 (Miss. 1998)	9, 15
<i>Hawkins v. Scottish Union & Nat'l Ins. Co.</i> , 110 Miss. 23 69 So. 710, 713 (1915)	10
<i>Lott v. Purvis</i> , 2009-CA-02082 (COA 2009)	9
<i>Marshall v. Kansas City so. Railways Co.</i> , 2006-CT-00519-SCT, ¶ 25 (Miss. March 5, 2009)	10
<i>Wilbourn v. Stennett, Wilkerson, & Ward</i> , 687 So. 2d 1205, 1213 (Miss. 1996)	9
<i>Williams v. Vintage Petroleum, Inc.</i> , 825 So.2d 685, 688 (Miss. COA 2002)	11, 12

Rules and Statutes

<i>Miss. Code Ann.</i> § 11-51-75	2, 5
<i>Miss. Code Ann.</i> § 15-1-69	10
<i>Miss. Code Ann.</i> § 21-17 -5(2)(g)	6
<i>Miss. Code Ann.</i> § 21-19-2(c)	6
<i>Miss. Code Ann.</i> § 31-7-57	1, 2, 4-6, 13, 14, 15
Mississippi Constitution Art. 4, § 66 and § 96	6

MRCP 12(b)	2, 4
MRCP 56(c)	9
<i>Wright, Miller, Kane</i> , Federal Practice and Procedure: Civil 3d § 2739	9

I. STATEMENT OF THE ISSUES

- (i) Whether the trial court erred in finding that the chancery court's dismissal of the chancery court suit for lack of jurisdiction barred Plaintiffs' circuit court suit?
- (ii) Whether the trial court erred in ruling that the doctrines of *res judicata* and *collateral estoppel* applied and therefore barred prosecution of the circuit court suit?
- (iii) Whether the trial court erred in ruling that summary judgment was appropriate because Plaintiffs failed to produce competent evidence to establish the existence of a genuine issue of material fact?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

This appeal arises from a judgment of the Circuit Court of Sunflower County, Mississippi in which the Court issued its order Denying in Part and Granting in Part Plaintiffs' Motion for Reconsideration. [R.E. 4-12]¹ The suit sought damages and injunctive relief on behalf of the City of Ruleville against the Mayor and the Board of Aldermen in their individual capacities for illegal actions under the authority of *Miss. Code Ann. § 31-7-57*, et seq. [C.P. 4-13]

On March 26, 2007, several citizens of Ruleville, Mississippi, Thomas Foster, George Ingram, Clarence Powell, William Perryman, Roy L. Williams, and Hue Fleming (Concerned Citizens) sued the City of Ruleville, Shirley Jean Edwards (Edwards or the Mayor), Hattie Robinson Jordan, James Johnson, Johnny Hill, Maro Robinson, and James Butch Jenkins. Edwards was sued individually and in her official capacity as Mayor of Ruleville, and Jordan, Johnson Hill Robinson and Jenkins were sued individually and in their capacities as Aldermen in the City of Ruleville (the

¹C.P. refers to the Clerk papers; R.E. refers to the record excerpts.

Board) in the Sunflower County Chancery Court. [C.P. 41] The Plaintiffs alleged that the Defendants, including the City itself, had engaged in prohibited activities by illegally increasing garbage fees and passing the illegal increases along to the garbage pickup service. [C.P. 44-45] The suit sought damages for the individual plaintiffs and other citizens of the City, injunctive relief, and an accounting. [C.P. 47]

In May, 2007, the Defendants filed their Renewed Motion to Dismiss or Transfer in the Alternative, claiming the Complaint should be dismissed pursuant to MRCP 12(b), lack of jurisdiction and standing and *res judicata* and/or *collateral estoppel*. They also claimed the Concerned Citizens waived their right to any relief by failing to appeal the decisions of the Board of Aldermen under *Miss. Code Ann. §11-51-75*. [C.P. 50] The Chancellor granted Defendants' Motion to Dismiss on July 9, 2009, stating that "pursuant to Section 11-51-75..., the Chancery Court lacks subject matter jurisdiction to hear this matter and Plaintiff not having requested transfer of the matter to Circuit Court prior to the Court's ruling, that the Motion to Dismiss is hereby granted." [See Order of Dismissal, R.E. 19] (Emphasis added)

On September 15, 2008, Thomas Foster, Clarence Powell, Roy L. Williams, and Hue L. Fleming *for the use of The City of Ruleville, Mississippi*, filed suit against Shirley Jean Edwards, Hattie Robinson Jordan, James Johnson, Johnny Hill, Maro Robinson, and James Butch Jenkins, in Their Individual Capacities in the Sunflower County Circuit Court. [See Circuit Court Complaint, C.P. 4-13] The factual allegations were essentially the same as those in the chancery court complaint except that the named Plaintiffs sued on behalf of the City of Ruleville pursuant to *Miss. Code Ann. § 31-7-57*. [See Circuit Court Complaint, C.P. 4-13]. On October 6, 2008, Defendants filed their Motion to Dismiss or Summary Judgment in the Alternative, claiming the doctrines of *res judicata*,

collateral estoppel and *law of the case* applied. [CP. 32-76] Plaintiffs filed their Response to Defendant's Motion to Dismiss or Summary Judgment in the Alternative on October 17, 2008 and Defendants filed their Rebuttal in Support of Motion to Dismiss or Summary Judgment in the Alternative on October 22, 2008. [C.P. 77-86]

After a hearing on February 17, 2009, the Circuit Court issued its Order Granting Defendants' Motion for Summary Judgment on March 30, 2009. The court stated that it was bound by the Chancery Court's ruling based on the law of the case doctrine; *res judicata* and *collateral estoppel* applied; and Defendants were entitled to summary judgment as the Plaintiffs failed to show there existed genuine issues of material fact. [C.P. 13-18] On April 14, 2009, Plaintiffs filed their Motion for Reconsideration, arguing that summary judgment was improvidently granted.² [C.P. 95-103] Defendants filed their Response in Opposition to Plaintiffs' Motion for Reconsideration on May 1, 2009. [C.P. 113-116] Plaintiffs filed their Reply on May 8, 2009. [C.P. 117-122] The circuit court filed its Order Denying in Part and Granting in Part Plaintiffs' Motion for Reconsideration on September 11, 2009. [R.E. 17-18] The Court clarified its prior order, stating that it was affirmed except to the extent that it "seemed to rest only on the notion of Plaintiffs' failure to respond with factual evidence versus this being a decision of law, the prior decision is reversed..." and/or "seemed to reason on 'the law of the case.'" [R.E. 17-18] The Plaintiffs timely appealed to this Court.

B. STATEMENT OF FACTS

On March 26, 2007, the Concerned Citizens sued the City, Mayor and Board in the Chancery

²In an Order filed April 14, 2009, the Circuit Court granted Plaintiffs additional time to file this Motion because Plaintiffs' counsel could not access his computer files as the result of a virus that compromised his computers on April 2, 2003.

Court of Sunflower County, Mississippi. [C.P. 41] They alleged that in or about June, 2003, the City entered into a contract with Griffin's Waste Service of Indianola, Mississippi to provide residential garbage pickup services at a contract price of \$10.75 per residential unit. [C.P. 44] In March, 2004, the Board approved a \$.75 monthly increase in garbage fees per household which should have meant a total of \$11.50 per residential household. [C.P. 44] Despite the vote for increase of only \$.75, the subsequent publication showed an increase of \$1.75 per household. [C.P. 44] In contravention of the approved increase, each household was illegally charged a monthly garbage fee of \$12.50. [C.P. 44] On December, 2005, the garbage fee was again increased by \$2.00 per household from \$12.50 to \$14.50. This \$2.00 increase was illegal as it was implemented without Board approval. [C.P. 44]

The Concerned Citizens further alleged that the City had engaged in, and continued to engage in, the illegal practice of allowing City equipment to be used for the benefit of private citizens and personal gain. [C.P. 44-45] They averred that the City allowed its backhoe to be used to dig private graves for a fee of \$75.00 per grave dug with the proceeds being paid to the operator of the backhoe. [C.P. 45] They further alleged that they had advised the Board of the aforementioned illegalities and requested that it take steps to correct same. [C.P. 45] The Board failed and refused to correct their actions. [C.P. 45] Consequently, the Concerned Citizens claimed they and the other citizens of the City suffered damages. [C.P. 45] They sought a permanent injunction against the illegal actions of the Defendants; an accounting to determine the amount of the illegally collected fees; , a refund of the illegally collected fees; attorney's fees; costs; pre and post judgment interest, and other relief. [C.P. 47] The Defendants answered on or about March 5, 2008, alleging that the chancery court complaint should be dismissed pursuant to MRCP 12(b), lack of jurisdiction and

standing, *res judicata* and/or *collateral estoppel*.³ They also claimed the Concerned Citizens waived their right to any relief by failing to appeal the decisions of the Board pursuant to *Miss. Code Ann.* § 11-51-75. [See Renewed Motion to Dismiss or Transfer in the Alternative, C.P. 49-59]

On July 9, 2009, the Chancellor ruled that “pursuant to Section 11-51-75..., the Chancery Court lacks subject matter jurisdiction to hear this matter and Plaintiff not having requested transfer of the matter to Circuit Court *prior to the Court’s ruling*, the Motion to Dismiss is hereby granted.” [See Order of Dismissal, R.E. 19]

On September 15, 2008, three months after the chancery court’s dismissal, Thomas Foster, Clarence Powell, Roy L. Williams, and Hue L. Fleming *for the use of The City of Ruleville, Mississippi* (Circuit Court Plaintiffs or Plaintiffs), sued the Mayor and Board in their individual capacities only. [See Circuit Court Complaint, C.P. 4] While the factual allegations in the circuit court complaint were essentially the same as those in the chancery court complaint, this suit was filed on behalf of the City pursuant to *Miss. Code Ann.* § 31-7-57. [(See Circuit Court Complaint, C.P. 4-13] Under this statute, “[a]ny elected or appointed public officer of an agency or a governing authority, any employee or agent of an agency or governing authority, who appropriates or authorizes the expenditure of any money to any object not authorized by law, shall be liable personally for up to the full amount of the appropriation or expenditures as will fully and *completely compensate and repay such public funds* for any actual loss caused by such appropriation or expenditure...” (Emphasis added). Thus, the City was no longer a defendant, it became “the” Plaintiff in the circuit court suit.

³Although *collateral estoppel* was asserted, Defendants made no effort to show how it applied in this case.

The Circuit Court Plaintiffs alleged that the Mayor and Board failed to comply with the publication requirements of *Miss. Code Ann. § 21-19-2(c)* before increasing the fees or charges for garbage collection. [C.P. 7] They also alleged that the Mayor and each member of the Board were personally liable for all actual losses of the City under *Miss. Code Ann. § 31-7-57(1)*. [C.P. 9]. They claimed that in allowing the expenditure of funds in contravention of Mississippi law, the Mayor and each member of the Board were individually liable and upon their official bonds for compensatory damages up to the full amount of such expenditures as will fully and completely compensate the City for all actual losses caused by such unlawful expenditures. [See Circuit Court Complaint, C.P. 9-10] Moreover, the Mayor and the Board members were individually liable and upon their official bonds for penal damages assessed by the Circuit Court up to three (3) times the amount of such expenditure or payment. [See Circuit Court Complaint, C.P. 7]

The Circuit Court Plaintiffs contended that the City's practice of allowing use of the backhoe for private use constituted a donation in violation of Mississippi Constitution Art. 4, § 66 and § 96 and *Miss. Code Ann. § 21-17 -5(2)(g)*. [C.P. 10] They also contended that the expenditure of public funds to Griffin Waste Services in contravention of Mississippi law and the digging of graves with public equipment and the City's labor for private individuals either for no compensation or for payment to City employees, constituted donations. [C.P. 10]

The Circuit Court Plaintiffs sought an injunction to stop the illegal practices complained of; an accounting of the illegally collected garbage fees and their subsequent appropriation and for grave digging using of the City's backhoe; attorneys fees, as they were acting as private attorneys generals for the benefit of the City; compensatory damages in an amount sufficient to compensate the City for its damages; punitive damages; costs; pre and post judgment interest; and other relief.

[C.P. 10-11]

On October 8, 2008, Defendants filed their Motion to Dismiss or Summary Judgment in the Alternative, asserting that the Complaint should be dismissed based on the doctrines of *res judicata*, *collateral estoppel* and *law of the case*. [C.P. 32-76] After Plaintiffs' response and Defendant's rebuttal, a hearing was held before the Circuit Court Judge on February 17, 2009. [C.P. 77-80] The Court issued its Order Granting Defendants' Motion for Summary Judgment on March 30, 2009. [See R.E. 13-18] The circuit court ruled that it was bound by the chancery court's ruling based on the law of the case doctrine; *res judicata* and *collateral estoppel* applied. The circuit court also stated that Defendants were entitled to summary judgment as the Plaintiffs failed to show the existence of disputed genuine issues of material fact. [See Circuit Court Order, R.E. 17-18] On April 14, 2009, Plaintiffs filed their Motion for Reconsideration of Defendants' Grant of Summary Judgment, arguing the summary judgment was improvidently granted.⁴ [C.P. 95-103] The Circuit Court filed its Order Denying in Part and Granting in Part Plaintiffs' Motion for Reconsideration on September 11, 2009. [R.E. 4-12] The Court clarified its prior order, stating that it was affirmed except to the extent that it "seemed to rest only on the notion of Plaintiffs' failure to respond with factual evidence versus this being a decision of law, the prior decision is reversed... and/or that it "seemed to reason on 'the law of the case.'" [R.E. 11-12]

III. SUMMARY OF THE ARGUMENT

The trial court's ruling that the chancery court dismissal for lack of subject matter jurisdiction barred the circuit court suit is without any basis in law. This is so because suits filed in the wrong

⁴In an Order filed April 14, 2009, the Circuit Court granted Plaintiffs additional time to file this Motion as Plaintiffs' counsel could not access his computer files as the result of a virus that compromised his computers on April 2, 2003.

court can be refiled within one year after dismissal under Mississippi's savings statute if the dismissal was for a matter of form. Mississippi law is clear that a dismissal for lack of subject matter jurisdiction is for a matter of form. Because the chancery court dismissal was for a matter of form, Circuit Court Plaintiffs had one year to file this suit after said dismissal.

The Defendants' claim that *res judicata*, *collateral estoppel* and the law of the case doctrines entitle them to dismissal is also without basis. The doctrine of *res judicata* applies to final judgments which are entered on the merits. Dismissals without prejudice are not adjudications on the merits and do not operate as *res judicata* in subsequent suits.

In addition, *res judicata* only applies when each of the four required identities are present. The identities are: (a) identity of the subject matter; (b) identity of the cause of action; (c) identity of the parties to the cause of action, and (d) quality of the character of the person for or against whom the suit is brought, are present. Clearly, the identity of the parties is not present because the City was a defendant in the chancery court suit and plaintiff in the circuit court suit. The quality of the character of the person against whom the suit is brought is also not present since the Plaintiffs are suing in a representative capacity in the circuit court suit whereas they were individual plaintiffs in the chancery court suit. Also, the City is the Plaintiff in the circuit court suit whereas it was a defendant in the chancery court suit.

The Circuit Court Judge's ruling that summary judgment was appropriate is clearly erroneous since Defendants never established the absence of a genuine issue of material fact for trial. Thus, the burden never shifted to the Plaintiffs to respond to the Defendants' motion for summary judgment. In addition, the Defendants never established that they were entitled to summary judgment as a matter of law.

V. ARGUMENT

A. STANDARD OF REVIEW

The Mississippi Supreme Court and Court of appeals conduct a *de novo* review when considering the propriety of the grant or failure to grant motions for summary judgment. *Cook v. Stringer*, 764 So. 2d 481, 483 (Miss.App. 2000) This standard is the same utilized by the trial court. *Id.* Such grants “shall be rendered forthwith if the pleadings, depositions, answers, to interrogatories and admissions on file, *show* that there is no genuine issue as to any material fact *and* that the moving party *is entitled to a judgment as a matter of law.*” MRCP 56(c) (emphasis added).

Although the non-moving party has the burden of production, “the burden of rebuttal arises, ..., *only* after the moving party has satisfied its burden of proving that no genuine issue of fact exists.” *Foster v. Noel*, 715 So. 2d 174, 180 (Miss. 1998) (emphasis added); see also, *Lott v. Purvis*, 2009-CA-02082 (COA 2009), ¶ 11, *quoting Wilbourn v. Stennett, Wilkerson, & Ward*, 687 So. 2d 1205, 1213 (Miss. 1996) (“Once the moving party “has shown an absence of a genuine issue of material fact, the ‘burden of rebuttal falls upon the [non-moving] party’ to produce specific facts showing there is a genuine material issue for trial.”)

The leading authority in civil procedure makes it clear that “[n]o defense is required by Rule 56(e) if the movant fails to meet its burden of showing the absence of any genuine issue of material fact.” *Wright, Miller, Kane*, Federal Practice and Procedure: Civil 3d § 2739. Thus, the moving party is not entitled to “to summary judgment by default where the non-moving party files no response, for even in the absence of a response the court may enter judgment only ‘if appropriate, i.e., if no genuine material facts exist.” *Id.* (Citations omitted). Therefore, [a] trial court must deny a motion for summary judgment, even if the non-movant party makes no response whatsoever, so

long as all the data before the court,..., viewed in the light most favorable to the non-moving party, raises a triable issue concerning a disputed material fact.” *Id.*

B. THE TRIAL COURT ERRED IN FINDING THAT THE CHANCERY COURT'S DISMISSAL OF THE CHANCERY COURT SUIT FOR LACK OF SUBJECT MATTER JURISDICTION BARRED PLAINTIFFS SUIT IN THE CIRCUIT COURT

The trial court's ruling that the chancery court dismissal barred the circuit court suit is not supported by Mississippi law. The chancery court determined that it did not have subject matter jurisdiction and the suit should be brought in circuit court. While Plaintiffs' position is that the ruling was erroneous, this ruling does not prevent such a suit because the legislature has made provisions for instances in which an action is filed in the wrong court. *See Miss. Code Ann. § 15-1-69*. Commonly known as the savings statute, section 15-1-69 allows any action which is dismissed for a matter of form to be refiled within one year of the dismissal. This statute provides in pertinent part:

If in any action, duly commence within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or *for any matter of form...* the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit.

Miss. Code Ann. § 15-1-69 (emphasis added). The savings statute is construed liberally. *See Hawkins v. Scottish Union & Nat'l Ins. Co.*, 110 Miss. 23 69 So. 710, 713 (1915).

In *Deposit Guaranty National Bank v. Roberts*, 483 So.2d 348 (Miss. 1986), the Mississippi Supreme Court stated that “[w]e found that the ‘savings statute’ did apply to the order of dismissal for lack of jurisdiction.” *Id.* at 353; *see also Marshall v. Kansas City so. Railways Co.*, 2006-CT-00519-SCT, ¶ 25 (Miss. March 5, 2009) (“[D]ismissals for lack of subject matter jurisdiction are considered dismissals as a matter of form.”)

Thus, because the chancery court suit was dismissed for lack of subject matter jurisdiction, a clear matter of form, the Plaintiffs had one year to refile the suit in the Circuit Court of Sunflower County, Mississippi. Because the Plaintiffs did so, there is no merit to the argument that the chancery court's dismissal barred the second suit.

C. THE CHANCERY COURT ERRED IN RULING THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL APPLIED AND THEREFORE BARRED PROSECUTION OF THE CIRCUIT COURT SUIT

The Defendants claim this action is barred "as a matter of law" and because the chancery court dismissed these claims, "it is now impossible for any court to declare the actions at issue illegal." [See Motion to Dismiss or Summary Judgment in the Alternative, C.P. 77-86]. They also claim that *res judicata*, *collateral estoppel* and the law of the case doctrines entitle them to dismissal. This argument is fatally flawed.

1. Res Judicata Only Applies to Decisions on the Merits

The doctrine of *res judicata* provides "that when a court of *competent jurisdiction* enters final judgment *on the merits* of an action, the parties or their privies are precluded from relitigating claims that were decided or could have been raised in that action." *Aetna Cas. & Surety Co. V. Berry*, 669 So.2d 56, 66 (Miss. 1996). *Res judicata* does not apply when the decision in the prior case was not on the merits. See *Williams v. Vintage Petroleum, Inc.*, 825 So.2d 685 (Miss. COA 2002) ("[D]ismissal taken without prejudice is not an adjudication on the merits and does not operate as *res judicata* in subsequent suits.")

In this case, the chancery court determined that it "lack[ed] ... subject matter jurisdiction." [C.P. 19] However, dismissals for lack of subject matter jurisdiction are not adjudications on the merits. See *Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534, 544 5L.Ed.2d (1961); see also

Williams v. Vintage Petroleum, Inc., 825 So.2d 685, 688 (Miss. COA 2002) (“[a] dismissal taken without prejudice [as in this case] *is not an adjudication on the merits* and does not operate as *res judicata* in subsequent suits.”) The *Costello* Court explained that “if the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, *or the want of jurisdiction*, or was disposed of on any ground which did not go to the merits of the action, *the judgment rendered will prove no bar to another suit.*” *Id.* (Emphasis added) Since the chancery court’s dismissal was for lack of subject matter jurisdiction, it has no preclusive effect and it provides no basis for application of *res judicata*, *collateral estoppel* or any other such doctrine. Therefore, dismissal of the chancery court suit does not bar the circuit court suit.

2. The Four Identities Are Not Present

Even if the chancery court suit had been decided on the merits, *res judicata* would still not apply because the four required identities are not present: (a) identity of the subject matter; (b) identity of the cause of action; (c) identity of the parties to the cause of action, and (d) quality of the character of the person for or against whom the suit is brought. *Id.* at 688-9. With respect to the identity of the parties, the City was a defendant in the chancery court suit and is the plaintiff in the circuit court action. Consequently, the City in the circuit court suit, and the Concerned Citizens in the chancery court suit are not in privity with one another.

In *Williams v. Vintage Petroleum, Inc.*, 825 So.2d at 688, the Mississippi Court of Appeals stated that “if someone is appearing in some limited capacity in one case and personally in the other, that party’s ‘quality or character’ is not the same in the two actions.” *Id.* ¶47. The Court stated that the Plaintiff’s “quality of character was different when he appeared in federal court requesting the dismissal...as he was there as the representative of his mother’s estate and not as a beneficiary.” *Id.*

In the chancery court suit, the Concerned Citizens sued the City as individuals, seeking compensatory damages from the City, the Board of Aldermen and the Mayor. [See Chancery Court Complaint, C.P. 41] In this case, however, the Plaintiffs are suing in representative capacities. In fact, this is the only way this suit could have been brought as *Miss. Code Ann. § 31-7-57* provides that any illegal expenditure is “to be recovered by suit in the name of the governmental entity involved, or *in the name of any person who is a taxpayer suing for the use of the governmental entity involved.*” (Emphasis added) Like the plaintiff in *Williams*, the Concerned Citizens appeared as individuals in the chancery court suit. In the circuit court suit, however, the Plaintiffs appeared in a representative capacity, for the use of the City. Therefore, the identity of the character of the person is not present and neither *res judicata* nor *collateral estoppel* apply.

D. THE TRIAL COURT ERRED IN RULING THAT SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE PLAINTIFFS FAILED TO PRODUCE COMPETENT EVIDENCE TO SHOW THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT

1. Defendants Never Established the Absence of Genuine Issues of Material Facts

In Defendants' nine page Motion to Dismiss or Summary Judgment in the Alternative, Defendants devoted a grand total of *one a one-half lines* to their alleged motion for summary judgment. (Emphasis added) With the exception of 5 exhibits, their entire motion was included in their claim that “[s]ummary judgment ... is appropriate based upon the existence of *no basis* for a genuine issue of disputed fact.” (Emphasis added). This allegation makes clear that Defendants did not point to one uncontested genuine issue of material fact. Not one! Rather, they grounded their claim for summary judgment on their assertion of “the existence of **no basis** for a genuine issue of disputed fact.” (emphasis added)

Although Defendants did not attempt to establish the nonexistence of a genuine issues of material fact, they did submit the following exhibits: (1) the Chancery Court Complaint, Exhibit "A"; (2) Defendants' Renewed Motion to Dismiss or Transfer in the Alternative [Chancery Court] - Exhibit "B"; (3) Chancery Court's Order of Dismissal- Exhibit "C"; (4) Circuit Court Complaint - Exhibit "D"; and (5) Comparison Between Complaints - Exhibit "E." The Chancery and Circuit Court complaints (Exhibits "A" and "D") were used to show that they contained some of the same allegations which were set forth in the Comparison Between Complaints (Exhibit "E"). [C.P. 32-76] There is nothing in these documents that shows the absence of a genuine issue of material fact and the Defendants never attempted to show there was.

The Circuit Court attempted to make such a showing in pointing out that in Defendants' Renewed Motion to Dismiss or Transfer in the Alternative, Defendants alleged there is no dispute that (1) the city lawfully entered into a Waste Disposal Contract in June of 2003; (2) the City took certain corrective action in 2006 to remedy the fact that a 2005 increase in garbage rates appeared on customer's bills one month too early; the City refunded the amount overcharged to its customers; and (3) Griffith Waste Company refunded the overpayment to the City. [R.E. 5] Without any basis for accepting these averments as true, the circuit court then quotes from this motion stating that "Plaintiffs' concerned Citizens or Ruleville's principal claim in this case is thus a challenge to the legality of this corrective action." [R.E. 5]

Giving credence to this assertion makes little to no sense, however, when it is clear that *Miss. Code Ann. § 31-7-57* provides for recovery of funds for the benefit of the City. There is nothing in these alleged facts as set forth by the circuit court which shows that the City fully recovered all the monies to which it is entitled. Neither did the Defendants establish that such facts bar the suit

against the Mayor and Board under *Miss. Code Ann. § 31-7-57*.

2. Defendants Did Not Establish Entitlement to Summary Judgment as Matter of Law

Even if the so-called undisputed material facts as established by the circuit court are taken as true, however, the Defendants still did not meet the second part of its burden of establishing their entitlement to judgment as a matter of law. To be entitled to summary judgment, the moving party must foreclose the possibility of a genuine issue of material fact. *See Adickes v. S. H. Kress & Company*, 90 S. Ct. 1598, 398 U. S. 144, 26 L.Ed. 2d 142 (1970). In *Adickes*, the United States Supreme Court overturned a grant of summary judgment because of the defendant's "failure to foreclose the possibility that there was a policeman in the Kress Store while petitioner was awaiting service, and that the policeman reached an understanding with some Kress employee that petitioner was not to be served." *Adickes*, 398 U.S. 157. Because the Defendant had presented no affidavit which denied the policeman's presence in the store, the plaintiff was not required to prove that he was present. *See Id.*

In this case, the Defendants failed to foreclose the issue of whether or not the City suffered damages as a result of the Mayor and Board's alleged corrective action. Additionally, Defendants made no attempt to foreclose the possibility that the City suffered damages as a result of their illegal action in allowing its backhoe to be used for the benefit of private parties. Thus, Defendants failed to meet the second part of their burden. Consequently, the Plaintiffs' burden to respond to this alleged motion for summary judgment never materialized. *See Foster*, 715 So.2d at 180. Thus, the grant of summary judgment was improvidently granted.

V. CONCLUSION

For the reasons set forth above, this Court should reverse the grant of summary judgment to the Defendants in this action and remand to the Circuit Court for a trial on the merit.

RESPECTFULLY submitted, this the 3rd day of May, 2010.

THOMAS FOSTER, CLARENCE POWELL, ROY L.
WILLIAMS, and HUE L. FLEMING, for the use of THE
CITY OF BULEVILLE, APPELLANTS

BY: 

OTTOWA E. CARTER, JR.
Their Attorney

OF COUNSEL:

Ottowa E. Carter, Jr., MSB [REDACTED]
OTTOWA E. CARTER, JR., P.A.
108 E. Northside Drive - Suite C (39056)
P. O. Box 31
Clinton, MS 39060-0031
Telephone: (601) 910-5001
Facsimile: (601) 910-5003

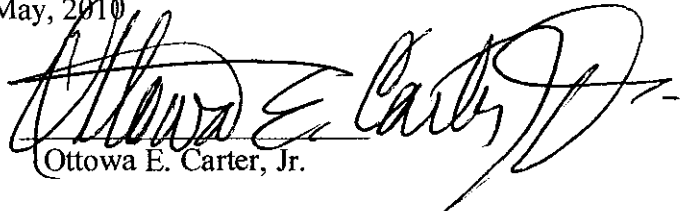
CERTIFICATE OF SERVICE

I hereby certify that I have this day hand-delivered a true and correct copy of the foregoing
to the following:

Honorable Richard A. Smith
Fourth District Circuit Court Judge
P. O. Box 1953
Greenwood, MS 38935-1953

Daniel J. Griffith, Esquire
Griffith & Griffith
123 South Court Street
P. O. Drawer 1680
Cleveland, MS 38732

So Certified, this 2nd day of May, 2010


Ottawa E. Carter, Jr.