

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA11-1006

ROGER DALE MIDKIFF and  
MELINDA MIDKIFF  
APPELLANTS

V.

CRAIN FORD JACKSONVILLE, LLC  
APPELLEE

Opinion Delivered February 29, 2012

APPEAL FROM THE ARKANSAS  
COUNTY CIRCUIT COURT,  
SOUTHERN DISTRICT,  
[NO. CV-2010-5SD]

HONORABLE DAVID G. HENRY,  
JUDGE,

APPEAL DISMISSED

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**ROBIN F. WYNNE, Judge**

Roger Dale Midkiff and Melinda Midkiff appeal from an order of the circuit court granting summary judgment in favor of Crain Ford Jacksonville, LLC. The Midkiffs argue that the grant of summary judgment in favor of Crain was improper. Because the order appealed from is not final, the appeal must be dismissed.

The disagreement between the parties involves a 2009 Ford Mustang. The Midkiffs took the vehicle home from Crain and shortly thereafter discovered a receipt in the vehicle from a body shop indicating that the car had previously been damaged and repaired, a fact that had not been disclosed to the Midkiffs. Crain contacted the Midkiffs, informed them that their financing had been denied, and requested that they return the vehicle, citing a provision in a retail purchase order signed by Roger Dale Midkiff. The Midkiffs declined to return the vehicle, and Crain hired a company to repossess the vehicle. In the process of repossessing



the vehicle, the company broke into a locked garage on the Midkiffs' property and removed the vehicle. On January 26, 2010, the Midkiffs filed a complaint against Crain in which they alleged conversion, wrongful repossession, and violation of the Arkansas Deceptive Trade Practices Act. On April 16, 2010, Crain filed an amended answer and counterclaim. In the counterclaim, Crain sought court costs, attorney's fees, and fees for repossession, repair, storage, and sale of the vehicle.

Crain filed a motion for summary judgment on January 18, 2011. On February 7, 2011, the Midkiffs filed a response and cross-motion for summary judgment. After a hearing on the competing motions for summary judgment, the circuit court entered an order on June 15, 2011, in which it granted Crain's motion for summary judgment and denied the Midkiffs' motion for summary judgment. On July 11, 2011, the Midkiffs filed a motion for issuance of a final order in which they asked the circuit court to dispose of Crain's outstanding counterclaim against them. Crain filed a motion for voluntary nonsuit of its counterclaim pursuant to Arkansas Rule of Civil Procedure 41(a) on July 20, 2011. On July 21, 2011, the circuit court entered an order in which it dismissed Crain's counterclaim without prejudice. The Midkiffs filed a timely appeal from the circuit court's summary-judgment order.

The circuit court dismissed Crain's counterclaim without prejudice after Crain filed a motion to voluntarily nonsuit the claim pursuant to Rule 41(a). This court and our supreme court have held that an order or judgment providing for the nonsuit of compulsory counterclaims while entering a judgment on a plaintiff's claims is not a final, appealable order because the counterclaimant has an absolute right to refile a counterclaim that has been



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voluntarily dismissed pursuant to Rule 41(a) within the time period provided by the savings statute, Arkansas Code Annotated section 16-56-126. *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008); *Haile v. Ark. Power and Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Killian v. Gibson*, 2011 Ark. App. 245. This holding has been applied to voluntary nonsuits of counterclaims by the appellee. *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, 361 S.W.3d 262; *Killian, supra*. The counterclaim filed by Crain arose out of the same transaction or occurrence as the Midkiffs' complaint and was a compulsory counterclaim. See *Bevans, supra*; see also *Killian, supra*. The order on appeal is not final because Crain's counterclaim could potentially be refiled. The appeal is therefore dismissed.

Appeal dismissed.

ROBBINS and ABRAMSON, JJ., agree.

*Keech Law Firm, P.A.*, by: *Kevin P. Keech* and *Rachel V. Hampton*, for appellants.

*The Barber Law Firm*, by: *Michael L. Alexander*, *T. Kent Smith*, and *Rick Behring, Jr.*, for appellee.