

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-488

FIRST TENNESSEE BANK NATIONAL
ASSOCIATION

APPELLANT

V.

PAUL MORTENSEN AND
ANGELA MORTENSEN

APPELLEES

Opinion Delivered January 30, 2013

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. CIV-11-1807-2]

HONORABLE JON B. COMSTOCK,
JUDGE

DISMISSED

BRANDON J. HARRISON, Judge

First Tennessee Bank National Association appeals a summary-judgment order entered in favor of Paul and Angela Mortensen. The circuit court’s order decided First Tennessee’s claims against the Mortensens, but it did not address the Mortensens’ pending counterclaim (abuse of process) against First Tennessee. Because the circuit court’s order is not a final one for appellate-review purposes, we dismiss this appeal without prejudice.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil (2012) states that an appeal may be taken from a final judgment or decree. A final order, for our purposes, is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *Davis v. Brown*, 2011 Ark. App. 789, at 2. Absent a properly executed certificate from the circuit court making an “express determination, supported by specific factual findings, that there is no just reason for delay”—which we do not have here and is no rote procedural exercise—an order that fails to adjudicate all of the parties’ claims



cannot be appealed. Ark. R. Civ. P. 54(b) (2012); *Davis*, 2011 Ark. App. 789, at 2.

The parties know this. That is why the Mortensens argued in their brief that this court lacks jurisdiction because the order First Tennessee appealed from did not also decide their counterclaim. And First Tennessee understandably replies that the Mortensens themselves tried to dismiss the counterclaim—they just did so after the record on appeal was lodged with this court. The timing is important because after the record was filed with our clerk, the circuit court lost jurisdiction to dismiss the counterclaim. *See Myers v. Yingling*, 369 Ark. 87, 89, 251 S.W.3d 287, 290 (2007) (explaining that after the record is lodged in the appellate court the circuit court loses jurisdiction over the parties and the subject matter in controversy). First Tennessee also says that it would be a waste of time and resources to make the parties go back to the circuit court just so the counterclaim could be dismissed.

We acknowledge that the parties apparently tried to create an appealable order the first time around. But the oversight is an entrenched jurisdictional defect we cannot overlook. *Stephens v. Bredemeyer*, 2011 Ark. App. 727, at 3. We also note the Mortensens' additional argument that the order appealed from is not final because the court had not ruled on attorney's fees. Our supreme court has held that an attorney's-fee award is a collateral matter that does not destroy the finality of a final judgment on the case's merits. *Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, at 7, 378 S.W.3d 761, 764–65.

Dismissed.

WYNNE and GRUBER, JJ., agree.

Paul Hickey, for appellant.

The Kester Law Firm, by: *Charles M. Kester*, for appellees.