

# ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-671

JOE BERRY and BEULAH BERRY  
APPELLANTS

V.

NEAL MOON and ANNA MOON  
APPELLEES

**Opinion Delivered** FEBRUARY 2, 2011

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[NO. CV-2008-324(I)]

HONORABLE GARY R. COTTRELL,  
JUDGE

APPEAL DISMISSED

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**ROBIN F. WYNNE, Judge**

Joe Berry and Beulah Berry appeal from an order of the circuit court finding that appellees, Neal Moon and Anna Moon, established entitlement to an easement by prescription over their property. Because the circuit court failed to dispose of a counterclaim filed by appellants in the order appealed from, the order is not final and the appeal is dismissed.

The parties are neighbors in Crawford County. Appellees purchased their property in 1996. Appellants purchased their property in 2007. From the time that they purchased their property, appellees would access the rear portion of their property by crossing over appellants' property using, for at least part of the way, a stretch of pavement that went down the side of appellants' property. The first year that appellants owned their property, they allowed appellees to access the rear portion of their property in this manner. In May 2008, appellants had a survey performed after which they fenced their property and denied appellees access.

On July 11, 2008, Neal Moon filed a petition for declaratory judgment in which he sought a declaration by the circuit court that an easement by prescription existed to his benefit upon the property of Joe Berry. On July 25, 2008, Joe Berry filed an answer, counterclaim, and prayer for proper joinder.<sup>1</sup> For his counterclaim, Berry asked that appellees be “restrained and enjoined” from trespassing on his property. On July 13, 2009, appellants filed a second answer and counterclaim. In the counterclaim, appellants again alleged that appellees had been trespassing on their property. Appellants also alleged that appellees had been throwing “materials” onto their property and leaving vehicles on the property that blocked the easement described in the deeds for ingress and egress to appellants’ property.

Following a hearing, the court issued an order of easement in which it found that appellees have a prescriptive easement over appellants’ property for the sole purpose of providing access to the lower portion of appellees’ property. The court indicated in the order that the prescriptive easement was platted on a survey performed on December 30, 2009. No such survey is in the record. The court did not address appellants’ counterclaim. Appellants filed a timely notice of appeal.

Our supreme court has previously held that where a trial court does not rule on a counterclaim, the resulting order is not final. *See Stockton v. Sentry Ins.*, 332 Ark. 417, 965 S.W.2d 762 (1998). Because appellants’ counterclaim against appellees was not addressed in

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<sup>1</sup>In response to Berry’s prayer for proper joinder, Neal Moon filed an amended petition for declaratory judgment on July 6, 2009, in which he named his spouse, Anna Moon, and Joe Berry’s spouse, Beulah Berry, as additional parties.

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the trial court's order and is still outstanding, the order appealed from is not final and the appeal is dismissed without prejudice.

Appeal dismissed.

ROBBINS and GLOVER, JJ., agree.