

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA12-712

THE EVANGELICAL LUTHERAN
GOOD SAMARITAN SOCIETY; THE
EVANGELICAL LUTHERAN GOOD
SAMARITAN SOCIETY D/B/A GOOD
SAMARITAN CAMPUS - HOT SPRING
S VILLAGE; CORINNE WHITE, IN HER
CAPACITY AS ADMINISTRATOR OF
GOOD SAMARITAN SOCIETY - HOT
SPRINGS VILLAGE

APPELLANTS

V.

ROBERT KOLESAR, AS ATTORNEY
IN FACT FOR VERA KOLESAR

APPELLEE

Opinion Delivered March 27, 2013

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. CV 2010-9972]

HONORABLE GARY ARNOLD,
JUDGE

REMANDED TO SUPPLEMENT
AND SETTLE THE RECORD;
REBRIEFING ORDERED

ROBERT J. GLADWIN, Chief Judge

This is an appeal from the Saline County Circuit Court's denial of appellants' motion to compel arbitration. Appellee Robert Kolesar brought this medical-malpractice action against appellants, the Evangelical Lutheran Good Samaritan Society; the Evangelical Lutheran Good Samaritan Society d/b/a Good Samaritan Campus–Hot Springs Village; and Corinne White, administrator of Good Samaritan Campus–Hot Springs Village (collectively, the nursing home or appellants) for injuries allegedly sustained by his wife, Vera Kolesar, while she was a resident at the nursing home. The nursing home responded with a motion to



compel arbitration, citing a provision in the admissions agreement that appellee had signed requiring both parties to submit any disputes to arbitration and to waive their rights to a jury trial. The circuit court denied the motion without specifying its basis. The nursing home appeals. We are unable to reach the merits of the nursing home's argument.

Vera Kolesar was admitted to the nursing home in March 2009. Her family sought admission because Ms. Kolesar needed long-term care after falling at home. On December 2, 2010, appellee filed suit against appellants, the Good Samaritan Insurance Company, and John Does 1 through 5. Appellee asserted multiple counts, contending that while his wife was a patient at the nursing home, she was a victim of nursing-home negligence, which caused her to lose her personal dignity and to suffer extreme, unnecessary pain, degradation, anguish, otherwise unnecessary hospitalizations, and emotional trauma. Appellee sought compensatory and punitive damages.

On January 3, 2011, appellants filed notice that they were removing the case to federal court on the basis of diversity of citizenship. Appellants filed an answer in federal court that denied the allegations, pled affirmative defenses, and reserved the right to enforce any applicable arbitration agreement. The federal court later remanded the case to the Saline County Circuit Court on April 15, 2011, finding that appellants had failed to carry their burden of establishing diversity jurisdiction.

On May 19, 2011, appellants filed a motion to compel arbitration, contending that appellee, on behalf of his wife, signed a binding arbitration agreement when he admitted her to the nursing home. Both parties submitted extensive briefs on the issue.



Cite as 2013 Ark. App. 195

The circuit court conducted an evidentiary hearing on the motion to compel on November 3, 2011. Linda Gragg, a representative of the nursing home; appellee; and a forensic handwriting expert each testified. The court took the matter under advisement.

On May 21, 2012, the court entered its order disposing of the motion to compel arbitration. The body of the order states in full as follows:

1. The court held a hearing on the Motion to Compel Arbitration, and took testimony, and the parties have submitted briefs on the issue and, after considering all of the facts, together with the rules, and all the case law applicable to this issue, the court denies the Motion to Compel Arbitration.

2. The court announced this decision in open court in a hearing on May 18, 2012.

IT IS SO ORDERED.

On May 29, 2012, appellants filed a motion seeking specific findings of fact and conclusions of law. The circuit court did not rule on the motion, and it was deemed denied on June 28, 2012. On July 20, 2012, appellants filed their notice of appeal.

The problem necessitating remand arises because, in its order denying appellants' motion to compel arbitration, the circuit court said that it had announced its decision in open court during a hearing on May 18, 2012. However, there is no transcript of such a hearing either in the addendum or in the record.

Arkansas Supreme Court Administrative Order No. 4 provides that, “[u]nless waived on the record by the parties, it *shall* be the duty of any circuit court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it.” (Emphasis added). *See also* Ark. Code Ann. § 16-13-510 (Repl. 1999); *Evins v. Carvin*, 2012 Ark. App.



622. The supreme court has said that it strictly construes and applies Administrative Order No. 4. *Thompson v. Guthrie*, 373 Ark. 443, 284 S.W.3d 455 (2008); *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003); *see also Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003) (emphasizing that a verbatim record of the proceedings is a requirement). If anything material to either party is omitted from the record, by error or by accident, we may direct that the omission or misstatement be corrected, and, if necessary, that a supplemental record be certified and transmitted. Ark. R. App. P.–Civ. 6(e) (2012); *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, at 6.

We therefore remand this matter to the circuit court for settlement of the record; specifically, the parties are to settle the record regarding any ruling the circuit court made from the bench on May 18, 2012. The parties are given thirty days from the date of this opinion to complete this task and to file the supplemental record with our court.

Within fifteen days of entry of the supplemental record, appellants shall file a substituted abstract, addendum, and brief including the circuit court’s bench ruling. *See Ark. Sup. Ct. R. 4-2(b)(3)* (2012) (stating that a party who files a deficient brief is allowed an opportunity to file a conforming brief). If appellants fail to do so, the order denying the motion to compel may be affirmed for noncompliance with Rule 4-2. Should appellants file a substituted abstract, brief, and addendum, appellee may revise or supplement his brief within fifteen days of the filing of appellants’ brief or may rely on the brief previously filed.

Remanded to supplement and settle the record; rebriefing ordered.

HARRISON and WHITEAKER, JJ., agree.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *R.T. Beard* and *Zachary T. Steadman*, for appellants.

Ludwig Law Firm, by: *Gene Ludwig*; and *David A. Hodges*, for appellee.