

## ARKANSAS COURT OF APPEALS

DIVISION I

No. CA10-218

JONNIE LOCKE

APPELLANT

V.

CONTINENTAL CASUALTY  
COMPANY, et al.

APPELLEES

**Opinion Delivered** FEBRUARY 2, 2011

APPEAL FROM THE JEFFERSON  
COUNTY CIRCUIT COURT  
[NO. CV-2007-403-1]

HONORABLE JODI RAINES  
DENNIS, JUDGE

REMANDED TO SETTLE THE  
RECORD

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### JOSEPHINE LINKER HART, Judge

Jonnie Locke appeals from the circuit court's decision to grant summary judgment to Continental Casualty Company in Locke's direct-action negligence suit in which Locke alleged that she suffered injuries resulting from a fall at Jefferson Regional Medical Center, which was insured by Continental. One of the grounds for reversal put forth by Locke is her assertion that the circuit court erred by finding that certain JRMC documents were privileged and thus not discoverable. These documents, however, were not included in the record on appeal, and we remand to settle the record.

According to Locke's complaint, on January 20, 2005, she went to JRMC to check on her daughter, who was in the emergency room. Locke exited her car and was walking down the sidewalk when she tripped and fell over four exposed bolts protruding from the

sidewalk. These bolts once held in place a “handicapped” sign.

Locke propounded interrogatories and requests for production of documents, asking about the existence of reports and records of the accident, and Continental objected. Locke filed a motion to compel, and Continental responded, asserting that the documents were privileged and therefore not discoverable under Ark. Code Ann. § 16-46-105 (Repl. 1999).

A hearing was held on the motion. Counsel for the parties made their respective arguments before the court, but no testimony was taken at the hearing. Counsel for Continental noted that he had a copy of the documents with him. After arguing that the documents were privileged and confidential, counsel for Continental asked to “bring [the documents] to the Court for presentation in camera.” After further argument by respective counsels, the court stated, “Okay. I don’t want to hold this. It might slip out, and then somebody would blame me.” But the court then stated, “Well, I will reread it, and we’ll decide. I’ll let you know.” Subsequently, the court entered an order denying Locke’s motion to compel, citing the statute relied on by Continental.

At a hearing on the motion for summary judgment, counsel for Locke renewed his motion to compel. He noted:

The Court took some time at that hearing to look at that document in camera. I don’t even think you’ve got it in your possession. It’s not part of the record. But, you know, in light of all this, I would love to be able to have looked at that document and see where this might lead me in other areas of discovery. I don’t know what’s on there.

The court later granted summary judgment in favor of Continental. In her notice of appeal, Locke requested “the entire record and all proceedings (including, without limitation, all pre-

trial hearings and rulings), orders, pleadings, exhibits, testimony and other evidence presented, introduced or proffered in the matter.”

One of the issues raised by Locke is whether the circuit court erred in finding that the statutory privilege applied to the documents. Locke asserts on appeal that it was Continental’s burden to prove entitlement to the privilege and that it failed to meet this burden. Continental replies that the documents fell squarely within the privilege. It is apparent that the documents were in Continental’s possession; that Locke never had possession of the documents and sought to compel their production; that Continental refused to disclose and asserted that the privilege applied to the documents; and that the circuit court examined them and based its ruling solely on the contents of the documents, as there was no other evidence presented. The documents, however, are not in the record.

Our appellate rules provide that “[i]f anything material to either party is omitted from the record by error or accident or is misstated therein . . . the appellate court . . . on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted.” Ark. R. App. P.–Civ. 6(e). The question to be resolved by the circuit court is whether the documents should be made part of the record. We simply cannot tell from the record if the documents were never part of the record or instead were introduced as exhibits, filed with the clerk, or filed with the court, and simply omitted from the record by error or accident. If the documents were part of the record, the record should be supplemented. The omission, however, must be due to an error

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or accident, and the record should only be corrected when it does not “truly disclose[ ] what occurred in the circuit court[.]” *Id.* The record should be “made to conform to the truth.” *Id.* Accordingly, we remand to the circuit court for it to settle the record. If the record is supplemented, the parties shall have the opportunity to file substituted abstracts, addenda, and briefs. Ark. Sup. Ct. R. 4-2(b).

Remanded to settle the record.

PITTMAN and MARTIN, JJ., agree.