

**IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT
CIVIL DIVISION**

**TIMOTHY ABNER,
in his capacity as
Special Administrator of the Estate of
Jimmy Don Abner, deceased**

PLAINTIFF

VS.

NO. CV- 2015- _____

BOST, INC.

DEFENDANTS

COMPLAINT

COMES NOW the Plaintiff, Timothy Abner, in his capacity as Special Administrator of the Estate of Jimmy Don Abner, deceased, and for his cause of action against the Defendant Bost, Inc. states:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Timothy Abner is the duly appointed and acting Special Administrator of the Estate of Jimmy Don Abner, having been appointed by the Circuit Court of Sebastian County. Timothy Abner currently resides in Crawford County at 5272 Highway 282, Rudy, Arkansas. Exhibit A.

2. Defendant Bost, Inc. (hereinafter "Bost") is a nonprofit corporation organized and existing under the laws of Arkansas.

3. The registered agent on file with the Arkansas Secretary of State for service of process on Bost is Kent C. Jones, 5812 Remington Circle, Fort Smith, AR 72903.

4. Bost is vicariously liable for the acts and omissions of all persons or entities under its control, whether directly or indirectly, including its employees, agencies, or pools, to the

extent such persons or entities caused or contributed to the injuries, harms, and death of Jimmy Don Abner while acting within the scope of agency or employment.

5. This is an action for wrongful death, medical injury, ordinary negligence, medical negligence, and punitive damages that occurred in Sebastian County, Arkansas.

6. This Court has subject matter jurisdiction over this action pursuant to A.C.A. § 16-13-201.

7. This Court has personal jurisdiction over this action pursuant to A.C.A. § 16-4-101.

8. The Sebastian County Circuit Court is the proper venue for this action pursuant to A.C.A. § 16-60-112.

FACTS

9. Bost hired Shawn Howard (hereinafter “Howard”) as its employee and/or agent to be the full-time, live-in caregiver for Jimmy Don Abner, an individual with the mental faculties of a five year old child. At all times pertinent to the facts herein, Howard was acting within the scope of his employment and/or agency as an employee and/or agent of Bost. Howard had been Jimmy Don Abner’s caregiver for approximately seven years as of February 2015. Howard was to provide care twenty-four hours a day, seven days a week, and was to be relieved by another Bost employee any time he left Jimmy Don Abner. Howard provided care to Jimmy Don Abner at Jimmy Don Abner’s home at 3202 S. 62nd St. No. 14 in Fort Smith.

10. In addition, Bost assigned a case manager and/or a case coordinator to make monthly contact with Jimmy Don Abner to ensure that his health and safety were always maintained.

11. On February 10, 2015, Howard reported Jimmy Don Abner missing. Jimmy Don Abner was 57 years old at the time.

12. Howard told the Fort Smith Police Department (hereinafter “the police”) that, while he was in the shower, Jimmy Don Abner had left his apartment with an African-American man named Eugene. He said that he saw Jimmy Don Abner and Eugene leave in a white Nissan pickup truck.

13. Howard told police that Jimmy Don Abner was in good health and weighed 134 pounds at the time that he went missing.

14. The police later received a letter, ostensibly from Eugene, stating that he and Jimmy Don Abner had gone to Joplin, Missouri to obtain a same-sex marriage and that Eugene would kill both himself and Jimmy Don Abner if the police continued to look for them. The police determined that the handwriting on the letter matched Howard’s and that the letter was postmarked in Oklahoma, Howard’s place of residence.

15. The police also spoke with Ceilia Howard, a friend of Howard’s, who initially corroborated Howard’s story regarding the disappearance. Upon further examination, however, Ceilia Howard admitted that Howard had paid her to corroborate his story to the police.

16. On February 12, 2015, Jimmy Don Abner’s body was found nineteen to twenty feet off of Cedarville Road in a wooded area near Cedarville, Arkansas. He was naked except for a pair of socks.

17. Jimmy Don Abner’s body was examined by the Arkansas State Crime Laboratory on February 15, 2015. That autopsy determined that the cause of Jimmy Don Abner’s death was dehydration and sepsis due to pressure necrosis of the right hip and thigh due to protein calorie malnutrition. There was no food in Jimmy Don Abner’s stomach at the time of the autopsy. The

examiner ruled Jimmy Don Abner's death a homicide. The autopsy is attached to this complaint as Exhibit B and is incorporated by reference herein.

18. Medical records indicate that Jimmy Don Abner weighed approximately 125 pounds on October 1, 2014. A copy of this record is attached as Exhibit C. In the interval between the doctor's visit in October 2014 and his death, Jimmy Don Abner lost a significant amount of body weight. The autopsy stated that Jimmy Don Abner weighed 92 pounds when the police discovered his body. As the autopsy notes, the only reason for the loss of this body weight was that Jimmy Don Abner did not receive adequate nutrition during that interval.

19. Police inspection of Jimmy Don Abner's residence revealed the absence of food and the presence of alcohol in the residence.

20. The autopsy further notes that at a certain point, individuals who are severely malnourished become lethargic or even comatose. In such a situation, development of pressure sores can easily occur. The autopsy stated that a full-time caregiver like Howard should have noticed Abner's condition and sought medical help when his malnourishment reached the point of lethargy and abandonment of normal activities.

21. The autopsy noted that there was physical evidence of dehydration and electrolyte changes which were also characteristic of dehydration.

22. The autopsy showed that two severe decubitus ulcers were present on Jimmy Don Abner's right hip and right thigh. The examiner noted that such ulcers would have taken days to develop and would have been readily visible to a caretaker. The examiner further noted that the appearance of such a bed sore should have provided further interest for the caretaker to seek medical attention.

23. The autopsy further noted that pressure sores of the severity seen in this case are inevitably associated with bacterial infection, and sepsis would have resulted. The medical examiner concluded that sepsis from these sores was one of the causes of Jimmy Don Abner's death.

24. A number of superficial injuries were present on Jimmy Don Abner's body which the medical examiner concluded had occurred around the time of death or immediately after.

25. Bost employee and/or agent Ms. Inthavong (first name unknown) was the case manager assigned to make monthly contact with Jimmy Don Abner to ensure that his health and safety were maintained. At all times pertinent to the facts herein, Ms. Inthavong acted within the scope of her employment and/or agency. She reported to police that the last few times that she had gone to check on Jimmy Don Abner, she had been unable to view the condition of his body because he was in a bubble bath, and she did not ask him to stand.

26. Police investigation uncovered evidence that, despite Howard's responsibility to remain at Jimmy Don Abner's apartment unless relieved by another Bost employee, Howard spent nearly every day in January 2015 at the Choctaw Casino in Pocola, Oklahoma.

COUNT I –MEDICAL NEGLIGENCE

27. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 26 as if stated herein word-for-word.

28. Bost was negligent in failing to attend to and provide adequate care and treatment for Jimmy Don Abner.

29. As a direct and proximate consequence thereof, Jimmy Don Abner suffered grievous physical injury, conscious and extreme physical pain, suffering, and mental anguish.

30. Jimmy Don Abner developed each of the following injuries while under the care and treatment of Bost, its agents, staff, and employees:

- a. Dehydration;
- b. Sepsis;
- c. Protein calorie malnutrition;
- d. Pressure necrosis of the right hip and thigh due to protein calorie malnutrition; and
- e. Other injuries.

31. In addition to the injuries set forth in Paragraph 30, Jimmy Don Abner suffered numerous other personal injuries and indignities while under the care of Bost and its employees, agents, and staff.

32. Each of the physical injuries set forth were directly and proximately caused by and attributable to Bost.

33. Bost owed a duty to Jimmy Don Abner and its other patients to practice with the standard of care applicable to providers of similar healthcare services.

34. Bost and its agents, staff, and employees breached that standard as they failed to possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of their profession, in good standing, engaged in the same type of service or specialty in the same or similar community.

35. The medical negligence of Bost and its agents, staff, and employees includes, but is not limited to the following:

- a. Failure to provide Jimmy Don Abner with proper nutrition and fluids to avoid malnutrition and dehydration;

- b. Failure to treat Jimmy Don Abner with the necessary care to prevent otherwise avoidable pressure ulcers and/or bed sores from developing;
- c. Failure to treat Jimmy Don Abner's dehydration;
- d. Failure to treat Jimmy Don Abner's malnutrition;
- e. Failure to treat Jimmy Don Abner's pressure ulcers;
- f. Failure to assess the level of Jimmy Don Abner's care;
- g. Failure to monitor the provision of services to Jimmy Don Abner;
- h. Failure to provide Jimmy Don Abner with the necessary care to prevent him from acquiring otherwise avoidable infections; and

36. The breach of the standard of care by Bost and its agents, staff, and employees directly and proximately caused Jimmy Don Abner damages.

COUNT II – ORDINARY NEGLIGENCE

37. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 36 as if stated herein word-for-word.

38. Bost owed a duty to Jimmy Don Abner to exercise reasonable care for him as his physical condition required.

39. Without limiting the foregoing, Bost owed a duty to Jimmy Don Abner to provide adequate medical care and to hire and retain sufficient numbers of qualified agents, staff, and employees to provide such care.

40. Bost and its agents, staff, and employees breached that duty to Jimmy Don Abner. Specifically, the negligence of Bost and its agents, staff, and employees includes, but is not limited to, the following:

- a. Failure to offer the necessary level of care for a patient with the mental capacity of Jimmy Don Abner;
- b. Failure to examine Jimmy Don Abner for signs of ill health or abuse;
- c. Failure to diagnose abuse and neglect of Jimmy Don Abner;
- d. Failure to use the necessary medical equipment in the treatment of Jimmy Don Abner;
- e. Failure to adequately hire, train, and supervise qualified agents, staff, employees, or other personnel; and
- f. Generally exhibiting a reckless disregard for the health and well-being of Jimmy Don Abner.

41. Bost is liable for negligently hiring, training, and retaining its employees, staff, and agents; and is liable for the negligent supervision of such employees, staff, and agents; and is furthermore responsible for the damages incurred by Jimmy Don Abner.

42. The breach of the duty to exercise reasonable care by Bost and its agents, staff, and employees directly and proximately caused Jimmy Don Abner's damages.

COUNT III – NEGLIGENCE HIRING, RETENTION, AND SUPERVISION

43. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 42 as if stated herein word-for-word.

44. Bost owed a duty to Jimmy Don Abner to exercise reasonable care in hiring, retaining, and supervising the employees and/or agents hired to provide him care.

45. Bost knew, or in the exercise of reasonable care should have known, that Shawn Howard subjected others to an unreasonable risk of harm.

46. Bost and its agents, staff, and employees breached that duty to Jimmy Don Abner. Specifically, the negligence of Bost and its agents, staff, and employees includes, but is not limited to, the following:

- a. Failure to properly perform background checks when hiring Shawn Howard;
- b. Failure to properly train Shawn Howard;
- c. Failure to properly supervise Shawn Howard's provision of care to Jimmy Don Abner;
- d. Failure to discover Shawn Howard's mistreatment of Jimmy Don Abner; and
- e. Failure to dismiss Shawn Howard.

47. Bost is liable for negligently hiring, training, retaining, and supervising Shawn Howard; Bost is furthermore responsible for the damages incurred by Jimmy Don Abner.

48. The breach of the duty to exercise reasonable care by Bost and its agents, staff, and employees directly and proximately caused Jimmy Don Abner's damages.

COUNT IV – WRONGFUL DEATH

49. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 48 as if stated herein word-for-word.

50. Bost and its agents, staff, and employees breached the standard of care as they failed to possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of their profession, in good standing, engaged in the same type of service of specialty in the same or similar community.

51. Such negligence, including but not limited to the acts and omissions listed above, was the proximate cause of the death of Jimmy Don Abner.

52. Pursuant to A.C.A. §§ 16-62-101 and 102, Jimmy Don Abner's statutory beneficiaries are entitled to recover for such wrongful death. Timothy Abner, as special administrator of the Estate of Jimmy Don Abner, claims damages on behalf of all statutory beneficiaries under A.C.A. § 16-62-102.

DAMAGES

53. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 52 as if stated herein word-for-word.

54. Plaintiff is entitled to recover for the following elements of damages:

- a. The wrongful death of Jimmy Don Abner as a result of medical negligence;
- b. The nature and extent of any injury caused by the negligence of the Defendant and its agents, staff, and employees, whether temporary or permanent;
- c. The emotional pain and distress, mental anguish, conscious pain and suffering, and pecuniary loss suffered by Jimmy Don Abner;
- d. Scars and disfigurement suffered by Jimmy Don Abner;
- e. Funeral expenses;
- f. The emotional pain and distress, mental anguish, grief, and any other damages allowed by the Arkansas Wrongful Death Statute; and
- g. Any and all damages allowed by Arkansas law.

PUNITIVE DAMAGES

55. Plaintiff incorporates, restates, and adopts all of the allegations contained in Paragraphs 1 through 54 as if stated herein word-for-word.

56. Upon the placement of Jimmy Don Abner in Shawn Howard's care by Bost, Jimmy Don Abner was in stable, treatable condition.

57. Bost knew or should have known that its conduct would naturally and probably result in injury to patients, yet it continued such conduct in reckless disregard of the consequences from which malice may be inferred.

58. Bost's deviation from appropriate standards and procedure constituted wanton, gross, flagrant, reckless, and/or conscious indifference to the rights and safety of Jimmy Don Abner and other patients in the Fort Smith community and other communities served by Bost, which Bost knew, or should have known, would result in the pain, suffering, and mental anguish of Jimmy Don Abner.

59. Nevertheless, Bost continued the above-mentioned conduct with reckless disregard for the consequences, from which malice may be inferred and punitive damages assessed.

60. Bost acted in reckless disregard for Jimmy Don Abner's safety by not properly training and supervising Howard and in its failure to properly examine Jimmy Don Abner during the periodic visits of the case manager.

61. For the singular purpose of profit over quality of care, Bost continued a pattern of conduct and deviations from appropriate standards that was wanton, gross, flagrant, reckless, or otherwise consciously indifferent to the rights and well-being of Jimmy Don Abner and other patients in its care, which Bost knew, or should have known, would result in extreme pain, suffering, human agony, mental anguish, and death of Jimmy Don Abner.

62. Therefore, Plaintiff prays for punitive damages sufficient to punish Bost and to deter others from similar conduct.

JURY DEMAND

63. Plaintiff requests a trial by jury.

WHEREFORE, Timothy Abner, as Special Administrator of the Estate of Jimmy Don Abner, deceased, prays for judgment against Bost, Inc. in an amount sufficient to provide relief, punitive damages sufficient to punish Bost, Inc. and to deter others from similar conduct, with such sum being in excess of the minimum amount necessary to confer jurisdiction upon the United States District Court in diversity of citizenship cases, and for all other just and proper relief.

Dated this ___ day of December, 2015.

Respectfully submitted,

Timothy Abner, as Special
Administrator of the Estate of
Jimmy Don Abner, deceased

PLAINTIFF

By: _____
Joey McCutchen, Bar No. 88045
A. Tyler Hudgens, Bar No. 2015192
MCCUTCHEN BUCKLEY – THE LAW FIRM
1622 North B Street
Fort Smith, AR 72901
Telephone: (479) 783-0036
Facsimile: (479) 783-5168