

CAUSE NO. 2016-80991

Mary Johnson,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
Dawn Fudge d/b/a Last Concert Café,	§	
Dolce Frida, Inc., Union Pacific	§	
Corporation and Union Pacific Railroad	§	
	§	
Defendants.	§	129th JUDICIAL DISTRICT

**PLAINTIFF’S THIRD AMENDED PETITION**

COMES NOW, Mary Johnson, (hereinafter “Plaintiff”), complaining of Union Pacific Railroad Company, Dawn Fudge d/b/a Last Concert Café, and Dolce Frida, Inc., (“Defendants”) and for cause of action would respectfully show the Court the following:

**I.**

**DISCOVERY LEVEL**

1. Discovery in this matter may be conducted under Level 2 of the Texas Rules of Civil Procedure.

**II.**

**JURISDICTION AND VENUE**

2. The claims asserted arise under the common and statutory laws of Texas. This Court has jurisdiction and venue is proper because a substantial part of the events or omissions underlying Plaintiff’s claims occurred in Harris County. TEX. CIV. PRAC. & REM. CODE § 15.002. Further, this action is not removable under the forum defendant rule. *See* 28 U.S.C. § 1441; *see also In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 391 (5th Cir. 2009).

### **III.**

#### **PARTIES**

3. Plaintiff is a resident of Texas.

4. Defendant Dawn Fudge d/b/a Last Concert Café (“Dawn Fudge”) is an individual citizen of Texas doing business in this County. Defendant Dawn Fudge has answered this case through counsel.

5. Defendant Dolce Frida, Inc. (“Dolce Frida”) is a Texas corporation with its principal place of business in this County. Defendant Dolce Frida has answered this case through counsel.

6. Defendant Union Pacific Railroad Company (“Union Pacific”) is a foreign for-profit corporation doing substantial business in Texas. Union Pacific has answered and appeared in this case through counsel.

### **IV.**

#### **FACTS**

7. On or about March 5, 2016, Plaintiff was severely injured when she was struck by a Union Pacific train. Union Pacific’s engineer and conductor failed to stop the train before striking Plaintiff. Union Pacific’s engineer and conductor could have stopped the train before striking Plaintiff if the lights on the locomotive were bright enough to illuminate Plaintiff on the tracks 800 feet ahead as is required by federal law.

8. Earlier that day Plaintiff was a patron at the Last Concert Café, located at 1403 Nance St. Houston, Texas 77002. Defendants Dawn Fudge and Dolce Frida jointly possess, own, manage, and/or operate the business located at 1403 Nance St. Houston, Texas 77002. Even though Defendants Dawn Fudge and Dolce Frida were actually aware that Plaintiff was

intoxicated, they continued to serve her. After being over-served by Defendants Dawn Fudge and Dolce Frida and their agents, Plaintiff left the establishment.

9. As a result of the incident, Plaintiff was tragically injured. Her leg was amputated, lost multiple fingers, and she sustained a severe brain injury. She also sustained other injuries to her legs, arms, hands, head, and other parts of her body, which has required extensive, ongoing medical treatment.

**V.**  
**CAUSES OF ACTION**

***A. Negligence and Gross Negligence Against Union Pacific***

10. Plaintiff repeats and re-alleges each allegation contained above.

11. Plaintiff sustained injuries because of Defendant Union Pacific's negligence and gross negligence when Union Pacific:

- a. Failed to properly supervise its employees and/or agents;
- b. Failed to properly train its employees and/or agents;
- c. Failed to provide the necessary and proper safety procedure;
- d. Failed to take action to prevent the incident in question;
- e. Failed to follow recognized industry standards. Specifically, industry standards for train operation are set forth in Union Pacific's manuals and the GCOR. GCOR 1.1.1 is titled Maintaining a Safe Course. This requires Union Pacific train operators to "take the safe course" "In case of doubt or uncertainty." Union Pacific's train operators failed to take the safe course in this case when there was doubt and uncertainty about whether Ms. Johnson was a person on the tracks and whether Ms. Johnson was going to move on

the tracks. Union Pacific also failed to follow other train handling standards as set forth in Union Pacific's policies and GCOR as further explained in the expert reports of David Rangel and Danny Phillips;

- f. Failed to follow applicable statutes and laws including but not limited to 49 C.F.R. § 229.125 and as otherwise discussed in the expert reports of Dave Rangel and Danny Phillips;
- g. Failed to operate the train in a safe and prudent manner;
- h. Failed to adequately use lighting on the train to identify Plaintiff in time to stop;
- i. Failed to engage the train's horn, have a headlamp, and/or apply the train's emergency brakes in a proper manner to avoid the collision;
- j. Failed to stop the train before striking Plaintiff;
- k. Failed to keep a proper lookout;
- l. Failed to ensure that the railroad crossing warnings were working properly;
- m. Other acts deemed negligent and grossly negligent, including but not limited to: failing to engage the emergency stop even after it was recognized that Ms. Johnson was a person on the track who was not moving; failing to drive at a slower speed through downtown Houston when Union Pacific was aware of other incidents with individuals on the tracks in downtown Houston.

12. Plaintiff sustained severe injuries to her body and mind, which resulted in physical pain, mental anguish, and other medical problems. Plaintiff has sustained severe pain, physical impairment, cognitive injury, discomfort, mental anguish, and distress. In all

reasonable probability, Plaintiff's physical pain, physical impairment, and mental anguish will continue indefinitely. Plaintiff has also suffered a loss of earnings in the past, as well as a loss of future earning capacity. Plaintiff has incurred and will incur pharmaceutical and medical expenses in connection with her injuries.

13. Specifically, as a direct and proximate result of Union Pacific's negligent and grossly negligent acts and/or omissions, Plaintiff suffered severe and debilitating injuries when she was struck by a Union Pacific train. In addition to past surgeries and medical care resulting from the incident, Plaintiff will require extensive physical therapy in order to have hope of any sort of recovery. Plaintiff has been damaged in a sum far in excess of the minimum jurisdictional limits of this Honorable Court, for which she now sues.

14. Plaintiff is also entitled to exemplary damages because the aforementioned actions and/or inactions of Union Pacific amount to gross negligence. Union Pacific was subjectively aware of the risks involved and proceeded in conscious indifference to Plaintiff's safety and welfare. Also, Union Pacific's actions and/or inactions, viewed objectively, subjected Plaintiff to an extreme degree of harm.

***B. Negligence Per Se Against Union Pacific***

15. Plaintiff repeats and re-alleges each allegation contained above.

16. Union Pacific's conduct described herein constitutes an unexcused breach of duties imposed by 49 CFR § 229.125 (Headlights and auxiliary lights) which states in relevant part: "Each headlight shall be arranged to illuminate a person at least 800 feet ahead and in front of the headlight."

17. Specifically, Union Pacific did not have headlights on the locomotive in question that would illuminate a person at least 800 feet ahead and in front of the headlight.

18. If Union Pacific had headlights on the locomotive in question, Union Pacific's engineer would have been able to stop the train prior to running over Plaintiff Mary Johnson.

19. Plaintiff Mary Johnson is a member of the class that 49 CFR § 229.125 was designed to protect.

20. Union Pacific's unexcused breach of the duties imposed by 49 CFR § 229.125 proximately caused Plaintiff Mary Johnson's injuries described herein.

***C. Negligence and Gross Negligence Against Dawn Fudge and Dolce Frida***

21. Plaintiff repeats and re-alleges each allegation contained above.

22. Plaintiff sustained injuries because of Defendants Dawn Fudge and Dolce Frida's negligence and gross negligence when Defendants Dawn Fudge and Dolce Frida:

- a. Failed to properly supervise its employees;
- b. Failed to properly train its employees;
- c. Failed to provide necessary and proper procedures;
- d. Failed to prepare and encourage strict compliance of the existing laws governing serving of excess alcohol to minors;
- e. Failed to ensure their employees or agents were qualified, trained and/or license to serve alcohol;
- f. Instructed employees to perform their job in an unsafe manner;
- g. Over served Plaintiff alcoholic beverages when she was obviously intoxicated;
- h. Failed to maintain a lawful establishment;
- i. Failed to follow applicable laws on the serving of alcohol to persons; and
- j. Other acts deemed negligent and grossly negligent.

23. Plaintiff sustained severe injuries to her body and mind, which resulted in physical pain, mental anguish, and other medical problems. Plaintiff has sustained severe pain, physical impairment, cognitive injury, discomfort, mental anguish, and distress. In all reasonable probability, Plaintiff's physical pain, physical impairment, and mental anguish will continue indefinitely. Plaintiff has also suffered a loss of earnings in the past, as well as a loss of future earning capacity. Plaintiff has incurred and will incur pharmaceutical and medical expenses in connection with her injuries.

24. Specifically, as a direct and proximate result of Dawn Fudge and Dolce Frida's negligent and grossly negligent acts and/or omissions, Plaintiff suffered severe and debilitating injuries as a result of Dawn Fudge and Dolce Frida's actions. In addition to past surgeries and medical care resulting from the incident, Plaintiff will require extensive physical therapy in order to have hope of any sort of recovery. Plaintiff has been damaged in a sum far in excess of the minimum jurisdictional limits of this Honorable Court, for which she now sues.

25. Plaintiff is also entitled to exemplary damages because the aforementioned actions and/or inactions of Dawn Fudge and Dolce Frida amounts to gross negligence. Dawn Fudge and Dolce Frida were subjectively aware of the risks involved and proceeded in conscious indifference to Plaintiff's safety and welfare. Also, Dawn Fudge and Dolce Frida's actions and/or inactions, viewed objectively, subjected Plaintiff to an extreme degree of harm.

***C. Dram Shop Violation by Defendants Dawn Fudge and Dolce Frida***

26. Plaintiff repeats and re-alleges each allegation contained above.

27. The Texas legislature enacted the Dram Shop Act to hold liquor providers liable when their intoxicated patrons injure themselves or others. *See* TEX. ALCO. BEV. CODE § 2.02.

28. At the time Defendants Dawn Fudge and Dolce Frida served Plaintiff on the night of the accident, it was apparent to Defendants Dawn Fudge and Dolce Frida and their employees and/or agents that Plaintiff was obviously intoxicated and presented a clear danger to herself and others.

29. Defendants Dawn Fudge and violated the Texas Alcoholic Beverage Code and the intoxication of the Plaintiff was a proximate cause of the damages suffered.

**VI.**

**JURY DEMAND**

30. Plaintiff hereby requests a trial by jury on all claims and submits her jury fee herewith.

**VII.**

**PRAYER**

Plaintiff prays that this citation issue and be served upon Defendants in a form and manner prescribed by law, requiring Defendants appear and answer, and that upon final hearing, Plaintiff has judgment against Defendants in a total sum in excess of the minimum jurisdictional limits of this Court, plus pre-judgment and post-judgment interests, all costs of Court, and all such other relief to which Plaintiff show herself justly entitled. As required by Rule 47 of the Texas Rules of Civil Procedure, Plaintiff affirmatively states that she seeks damages in excess of \$1,000,000. Plaintiff defers completely to the jury in the amount of damages to award in this case. Per Union Pacific's special exception and demand that Plaintiff state a maximum amount of damages sought, Plaintiff states that she is seeking a maximum amount of damages of \$150,000,000. However, Plaintiff may or may not ask for this amount or a lesser amount at trial and will ultimately defer completely to the jury on the amount of



damages to award. Plaintiff is only adding this amount to the petition as a result of Defendant UP insisting on it, and will continue to assess her damages as discovery progresses.

Plaintiff prays for relief and judgment, as follows:

- Compensatory damages against Defendants;
- Actual damages;
- Consequential damages;
- Pain and suffering;
- Exemplary damages;
- Past and future mental anguish;
- Past and future impairment;
- Disfigurement;
- Past and future disfigurement;
- Interest on damages (pre- and post-judgment) in accordance with law;
- Plaintiff's reasonable attorneys' fees;
- Costs of court;
- Expert witness fees;
- Costs of copies of depositions; and
- Such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

ARNOLD & ITKIN LLP

*/s/ Roland Christensen*

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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by electronic filing upon all counsel of record pursuant to the Texas Rules of Civil Procedure on September 30, 2019.

*/s/ Roland Christensen*  
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Roland Christensen