

CAUSE NO. 2019-07278

KACY CLEMENS AND
CONNER CAPEL
Plaintiffs

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IN THE DISTRICT COURT OF

VS.

HARRIS COUNTY, TEXAS

34th S&S, LLC D/B/A
CONCRETE COWBOY AND
DANIEL JOSEPH WIERCK
Defendants

113th JUDICIAL DISTRICT

PLAINTIFFS' FOURTH AMENDED PETITION

Plaintiffs, Kacy Clemens and Conner Capel (“Plaintiffs”) file this Fourth Amended Petition, complaining of Defendants, 34th S&S, LLC d/b/a Concrete Cowboy and Daniel Joseph Wierck and in support thereof would respectfully show the Court:

I. PARTIES

1.1 Plaintiff, Kacy Clemens (“Clemens”), is an individual residing in Harris County, Texas.

1.2 Plaintiff, Conner Capel (“Capel”), is an individual residing in Harris County, Texas.

1.3 Defendant, 34th S&S, LLC d/b/a Concrete Cowboy (“Concrete Cowboy”) is a Texas Corporation whose principal office is in Harris County, Texas, and has appeared and answered herein.

1.4 Defendant Daniel Joseph Wierck (“Wierck”) is an individual residing in Harris County, Texas, and has appeared and answered herein.

II. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over this case under its general jurisdiction as conferred by the Texas Constitution because Plaintiffs' damages exceed the minimum jurisdictional requirements of this Court and no other court has exclusive jurisdiction over this case.

2.2 This Court has personal jurisdiction over Defendant, 34th S&S LLC d/b/a Concrete Cowboy, because this Defendant is engaged in business enterprises and commercial activities in the State of Texas and committed a tort within the State of Texas and in Harris County, Texas.

2.3 This Court has personal jurisdiction over Defendant, Daniel Joseph Wierck, because he is a resident and/or citizen of the State of Texas, and committed a tort within the State of Texas in Harris County, Texas.

2.4 Venue is proper in Harris County under TEX. CIV. PRAC. & REM. CODE §15.002(a)(1) because Harris County is the county where all or a substantial part of the events giving rise to Plaintiffs' claims occurred.

III. FACTS

3.1 On or about January 1, 2019, Clemens and Capel were in the Concrete Cowboy, located at 5317 Washington Avenue, Suite B, Houston, Texas 77007. As they approached the bar, a Concrete Cowboy bouncer told Capel to move. Capel complied with the request, but apparently not to the liking of the Concrete Cowboy bouncer.

3.2 Without warning or provocation, the bouncer became upset when he suddenly and violently began attacking Capel first and then Clemens, along with others. Wierck and other

Concrete Cowboy bouncers knowingly and intentionally physically assaulted Capel and Clemens, causing injuries to both young men. Wierck used a weapon as a part of the felony assault, and it is likely others used flashlights or other weapons as a part of the felony assault. After the felony assault, Wierck (owner/managing partner of Concrete Cowboy) ran out the back door to avoid identification and arrest. As a result, another security member was falsely arrested as one person noted:



3.3 The fact Wierck was one of the major assaulters is confirmed by one of the Concrete Cowboy employees in a body cam video found at:

<https://www.youtube.com/watch?v=QDXmmzyq4t4&feature=youtu.be>

3.4 Feeling guilty, Wierck and/or Concrete Cowboy paid for the lawyer of the bouncer. To this date, Wierck and Concrete Cowboy have yet to identify any conduct of

Clemens or Capel that in any way caused or contributed to the injuries they sustained. To illustrate the severity of the injuries sustained by Mr. Capel, please see below:

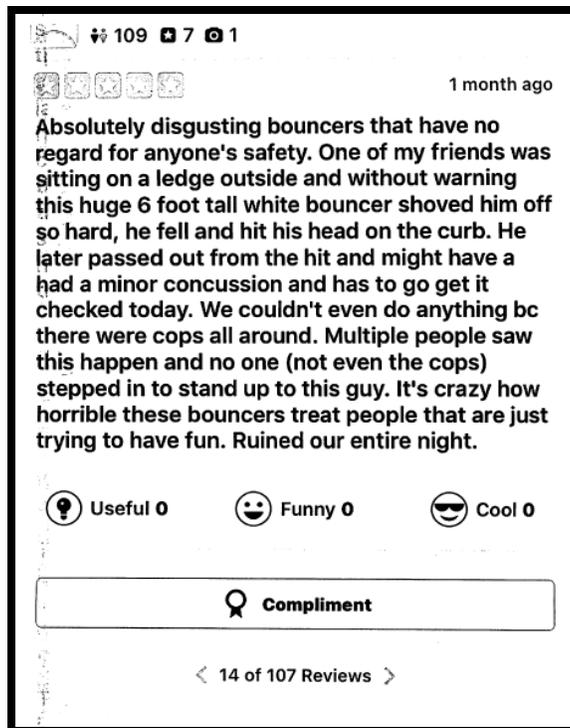




3.5 The assault on plaintiffs was not the first assault on a patron that night. Before Clemens and Capel were assaulted, John Paul Austin was also physically assaulted by the bouncers and staff at Concrete Cowboy. As a result of his injuries, this patron sought medical treatment and was significantly injured. Additionally, another patron, Carlos Garza, was assaulted that night before the attack on Mr. Capel and Mr. Clemens.

3.6 The violence that occurred against John Paul Austin and/or Carlos Garza put Concrete Cowboy on notice of the dangerousness of the premises for violence, including assaults on patrons. This was the same location, same activity and similar injuries.

3.7 The violent culture at Concrete Cowboy has earned a reputation, as this isn't the first time an incident like this has happened at this establishment. In fact, Concrete Cowboy is notorious for its staff and bouncers' aggressive, rude, and violent treatment of its patrons, as indicated by some of their Yelp reviews below:



51 1 0

1 month ago

This is the worst establishment i have ever seen . Last night I was closing my tab . When all of a sudden one of the bouncers kept pushing me to leave . All I told him was to chill because I'm closing my tab . Before I knew it , I was pushed to the ground and manhandled by 5 or 6 bouncers. The manager (short white female) was not helpful, in fact she was supporting all this abuse. Now I have bruises all over my body because bouncers get too happy to push people out. These bouncer need to learn how to treat humans with respect . They will never see any of my hard earn money in that establishment.

Useful 1 Funny 0 Cool 0

Mark F. voted for this review

Compliment

< 16 of 107 Reviews >

 **Belinda K.**
Allen, TX
0 friends
2 reviews
6 photos

★ ★ ★ ★ ★ 1/28/2019

Yes, this place seems like they have a problem with big strong handsome black men. Especially when they are with two white girls. My friend was quietly eating dinner around 10 when he was asked to leave. He refused because there was absolutely no reason that he should leave. They did not even attempt to explain why he needed to leave. 6 bouncers then 'helped' him out. He now has two deep cuts on his face and will need a plastic surgeon. I advised him to sue or at the very least send them the doctor bill. If you do decide to go to this disgusting establishment, be prepared to leave immediately if you are black. I guess I've been naive thinking our world had changed. I had no idea these things were still so prevalent. It makes me sick that there have already been so many people mistreated at this location.
This place should be boycotted!!!!!!

Was this review ... ?

Useful Funny Cool

**IV. NEGLIGENCE BY DEFENDANT 34TH S&S LLC,
D/B/A CONCRETE COWBOY**

4.1 At the time and on the occasion in question, Defendant Concrete Cowboy had a duty to exercise the degree of reasonable care that a reasonably prudent bar owner would use to avoid harm to others under circumstances similar to those described herein, and to protect its patrons.

4.2 Plaintiffs' injuries were directly and proximately caused by Concrete Cowboy's negligent, careless, and reckless disregard of said duty.

4.3 On the occasion in question, Plaintiffs' damages were proximately caused by the negligence, carelessness, recklessness and felony assault by Defendant, Wierck and the bouncers of Concrete Cowboy in one or more of the following non-exclusive particulars:

- a. In failing to keep patrons safe from being assaulted by Concrete Cowboy employees or owners while on the premises;
- b. In failing to use ordinary care to ensure its patrons were safely treated on the premises by Concrete Cowboy employees;
- c. In failing to properly train its employees on safe treatment methods of patrons in the premises;
- d. In failing to use ordinary care to avoid using excessive force to against patrons in the premises;
- e. In failing to use ordinary care in the screening, investigating, hiring, retaining, and supervising of competent or unfit employees; and
- f. In allowing its bouncers and owner Wierck to knowingly and intentionally committing aggravated assault.

4.4 Each and all of the above and foregoing acts, both omission and commission, singularly or in combination with others, constituted negligence which proximately caused the occurrence made the basis of this suit, and Plaintiffs' injuries and damages pled herein.

**V. FELONY ASSAULT BY DEFENDANT
DANIEL JOSEPH WIERCK AND OTHER CONCRETE COWBOY BOUNCERS**

5.1 At the time and on the occasion in question, Defendant Wierck intentionally, knowingly, or recklessly caused Plaintiffs bodily injuries by violently injuring Plaintiffs and/or striking Plaintiffs with his fists and/or a flashlight or other deadly weapon. Wierck's unjustified and unprovoked actions constitute felony criminal and civil assault for which Plaintiffs seek the recovery of actual and exemplary damages.

- a. In failing to keep patrons safe from being assaulted by Concrete Cowboy employees or owners while on the premises;
- b. In failing to use ordinary care to ensure its patrons were safely treated on the premises by Concrete Cowboy employees;
- c. In failing to properly train its employees on safe treatment methods of patrons in the premises;
- d. In failing to use ordinary care to avoid using excessive force to against patrons in the premises;
- e. In failing to use ordinary care in the screening, investigating, hiring, retaining, and supervising of competent or unfit employees; and
- f. In allowing its bouncers and owner Wierck to knowingly and intentionally committing aggravated assault.

5.2 Each and all of the above and foregoing acts, both omission and commission, singularly or in combination with others, constituted negligence which proximately caused the occurrence made the basis of this suit, and Plaintiffs' injuries and damages pled herein.

**VI. NEGLIGENT SECURITY BY DEFENDANT 34TH S&S LLC,
D/B/A CONCRETE COWBOY**

6.1 The Concrete Cowboy Defendant made a conscious decision to either train its bouncers, employees and owners to violently attack and abuse the customers, or failed to train its bouncers, employees and owners to protect its customers. Additionally, to the extent Concrete

Cowboy alleges there was criminal activity by a third party that may have caused or contributed to the injuries of either plaintiff, Concrete Cowboy was on notice of past specific instances of similar criminal conduct sufficient enough to require properly trained staff to prevent these types of injuries from occurring. Concrete Cowboy had knowledge of previous activity at 5317 Washington Avenue, including recent activity that night/morning and in the months immediately preceding this event. There were similar events that occurred quite often and Concrete Cowboy had notice of these from its own social media platforms. Concrete Cowboy:

1. Failed to monitor security cameras;
2. Failed to maintain security cameras that recorded;
3. Failed to properly respond to disruptive behavior in the bar;
4. Failed to properly train its bouncers, employees and owners;
5. Failed to prevent its customers from being injured by other patrons, bouncers, employees and owners;
6. Failed to be attentive; and
7. Failed to observe ordinary care and prudence under the circumstances.

6.2 Concrete Cowboy's acts and omissions, taken singularly or in combination with others, constituted negligence which proximately caused the occurrence made the basis of this action and caused injury to both plaintiffs.

VII. NEGLIGENT SECURITY REACTION BY DEFENDANT 34TH S&S LLC, D/B/A CONCRETE COWBOY

7.1 Prior to Plaintiffs being injured, Concrete Cowboy knew or should have known of conditions that posed an unreasonable risk of harm its customers. Concrete Cowboy (through its bouncers, employees and owners) were aware of injuries that occurred in the evening prior to those suffered by Plaintiffs. As such, Concrete Cowboy had a duty to take reasonable and

prudent action to reduce the risk of harm to patrons at the bar and to protect them and warn them. This cause of action has been recognized by the Supreme Court of Texas for ten years in *Del Lago Partners v. Smith*, 307 S.W.3d 762 (Tex. 2010). In fact, the Court noted, “The Third Restatement of Torts clarifies further: ‘[I]n certain situations criminal misconduct is sufficiently foreseeable as to require a full negligence analysis of the actor’s conduct. Moreover, the actor may have sufficient knowledge of the *immediate circumstances* to foresee that party’s misconduct.’” (italics in the original). “More generally, criminal misconduct is sometimes foreseeable because of immediately preceding conduct.” “Del Lago’s duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that very night. When a landowner ‘has *actual* or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent’ to reduce or eliminate that risk.” (emphasis in original).

7.2 Concrete Cowboy, through its bouncers, employees, contractors, and owners, knew or should have known of previous assault of conduct. John Paul Austin and Carlos Garza had been injured that night, with Mr. Austin also receiving a fractured skull. Concrete Cowboy failed to act reasonably under the circumstances in numerous ways including, but not limited to:

1. Failed to properly respond to disruptive behavior in the bar;
2. Failed to properly train its bouncers, employees and owners;
3. Failed to prevent its customers from being injured by other patrons, bouncers, employees and owners;
4. Failed to be attentive; and
5. Failed to observe ordinary care and prudence under the circumstances.

Concrete Cowboy’s failure to act reasonably under the circumstances proximately caused the injuries suffered by the Plaintiffs.

VIII. RESPONDEAT SUPERIOR AND DIRECT NEGLIGENCE

8.1 Pursuant to the doctrine of *respondeat superior*, Defendant Concrete Cowboy is vicariously liable for the conduct of its employees, who were acting in the course and scope of their employment as bouncers for Defendant Concrete Cowboy during the occurrence made the basis of this lawsuit and whose conduct directly and proximately caused Plaintiffs' injuries and damages. Further, Defendant Concrete Cowboy is also directly liable for Plaintiffs' injuries and damages, as described herein.

8.2 Further, the conduct of Defendants, either individually or through its employees violates Section 2202 of the Texas Penal Code because they caused serious bodily injury to the plaintiffs, as well as the commission of an assault.

IX. GROSS NEGLIGENCE AND FELONY CONDUCT BY DEFENDANTS 34TH S&S, LLC D/B/A CONCRETE COWBOY AND DANIEL JOSEPH WIERCK

9.1 Defendants' acts and/or omissions set forth above constitute gross negligence under §41.001(11) of TEX. CIV. PRAC & REM. CODE because, when viewed objectively from the standpoint of the Defendants at the time of its occurrence, each act and/or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and the Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Defendants' gross negligence was a proximate cause of the incident made the basis of this lawsuit.

X. DAMAGES

10.1 As a direct and proximate cause of Defendants' acts and/or omissions, Plaintiffs sustained severe injuries and damages and brings this suit for exemplary damages and the following actual damages which resulted from the occurrence in question:

- a. Past and future physical pain and suffering and mental anguish;
- b. Past and future physical impairment; and
- c. Past and future physical disfigurement.

10.2 Based on the above enumerated damages caused by Defendants' negligent, careless, reckless, and intentional acts and/or omissions, the amount of Plaintiffs' damages exceeds the jurisdictional minimums of this Court. The amount of damages that would reasonably and fairly compensate Plaintiffs for their injuries is to be properly determined by a jury after consideration of all the evidence presented at trial. Further, Plaintiffs invoke Section 41.008(c)(4) because Defendants' conduct was committed knowingly and intentionally as such, there is no limitations on the amount of recovery of exemplary damages. However, in satisfaction of the requirements of Rule 47(c), Plaintiffs state that they seek monetary relief over \$1,000,000.00 at this time. Plaintiffs make this damage calculation pursuant to Rule 47. This statement is made solely for the purpose of providing information on the nature of the case, does not affect Plaintiffs' substantive rights, and is made subject to Plaintiffs' right to amend.

XI. RULE 193.7 NOTICE

11.1 Pursuant to Rule 193.7 of the TEXAS RULES OF CIVIL PROCEDURE, Plaintiffs hereby give actual notice to the Defendants that any documents produced in response to written discovery will be used in pretrial proceedings and/or at trial without the necessity of authenticating the documents, unless the Defendants objects pursuant to Rule 193.7.

XII. PRAYER

12.1 For the reasons stated herein, Plaintiffs, Kacy Clemens and Conner Capel respectfully request Plaintiffs have judgement against Defendants for actual damages, exemplary damages, pre-judgment interest, post-judgment interest, costs of court, and any further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

**ABRAHAM, WATKINS, NICHOLS,
SORRELS, AGOSTO, AZIZ & STOGNER**

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was delivered to the following attorneys of record on January 13, 2021 in compliance with Rule 21a:

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