Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **20th day of October, 2023** are as follows:

BY Weimer, C.J.:

2023-C-00027 *ORIS LATOUR AND VIRGIE LATOUR VS. STEAMBOATS, LLC (Parish of Calcasieu)*

REVERSED IN PART AND RENDERED. SEE OPINION.

SUPREME COURT OF LOUISIANA

No. 2023-C-00027

ORIS LATOUR AND VIRGIE LATOUR

VS.

STEAMBOATS, LLC

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

WEIMER, Chief Justice

Plaintiff, Oris Latour, was injured after he tripped and fell at Steamboat Bill's restaurant ("Steamboat") in Lake Charles, Louisiana. Mr. Latour alleged he tripped on a concrete ledge that ran perpendicular to the end of a row of dining tables. Contending the ledge was disguised and dangerous, he filed a negligence suit against the restaurant owner.

A jury returned a verdict in favor of Mr. Latour, finding Steamboat 80 percent at fault and awarding Mr. Latour damages totaling $675,053. On appeal, the court found the district court committed reversible error related to two pretrial evidentiary rulings which affected the outcome of the case. Thus, the court of appeal conducted a de novo review of the entire record and found Mr. Latour met his burden of proving negligence under La. R.S. 9:2800.6. The appellate court then assessed Steamboat with 85 percent of the fault and Mr. Latour with 15 percent fault.

Certiorari was granted in the case to determine (1) whether the court of appeal erred in finding Mr. Latour met his burden of proving Steamboat was negligent

pursuant to La. R.S. 9:2800.6; and (2) whether, after finding prejudicial error, the court of appeal erred in increasing Steamboat's percentage of fault on de novo review, although Mr. Latour did not appeal or answer the appeal. After conducting a de novo review of the entire record, this court finds Mr. Latour met his burden of proof under La. R.S. 9:2800.6. This court also finds, consistent with statutory law and secondarily, jurisprudence, Steamboat cannot be assessed with a greater percentage of fault than the 80 percent assigned by the jury. Because Mr. Latour did not appeal or answer the appeal, the 20 percent of fault allocated to him cannot be reduced.[1] On de novo review, this court allocates fault at 80 percent to Steamboat and 20 percent to Mr. Latour.

FACTS AND PROCEDURAL HISTORY

On March 18, 2018, Oris Latour, his wife Virgie, son, daughter-in-law, and grandchildren, dined at Steamboat Bill's restaurant in Lake Charles. The restaurant was busy and Ms. Latour and the grandchildren proceeded to sit at the only apparent open table, while the other members of their party went to the counter to place their orders. After ordering, Mr. Latour joined his family at the table. In that area of the restaurant, several long dining tables were arranged side by side, with the dining

[1] See La. C.C.P. art. 2133; **Polizzi v. Lotz**, 125 So.2d 146, 150 (La. 1960); **Succession of Babin**, 35 So.2d. 864, 866 (La. 1948); **Matthews v. Consolidated Companies, Inc.**, 95-1925 (La. 12/8/95), 664 So.2d 1191, discussed *infra*.

chairs for each table arranged back to back.[2] Mr. Latour intended to take the seat across from Ms. Latour, who was seated at the far end of the table; however, a group of diners at the adjacent table were socializing with their chairs pushed back from the table and were blocking that aisle. Rather than disturb the group, Mr. Latour decided to traverse down the aisle on the same side of the table as Ms. Latour, with the intent to go around the far end of the table to sit opposite of her. The aisle was narrowed by diners sitting at the tables and Mr. Latour had to turn sideways to negotiate his way down the aisle. As Mr. Latour reached his wife and was moving behind her, his foot unexpectedly hit something and he fell sideways toward the end of the table, resulting in a serious lumbar injury. After the fall, Mr. Latour realized he had tripped on a ledge of concrete. He reported the accident to a waiter and then spoke to a manager as he was leaving the restaurant.

The ledge of concrete was twenty-eight feet long by two feet wide and three and one-half inches high, and was stained the same dark brown color as the surrounding floor of the restaurant. The ledge was surrounded on three sides by a picket fence. On the fourth side, dining tables were situated perpendicular to the ledge, with the legs of the tables abutting the ledge. The table tops overhung the ledge by about four inches and there was approximately two feet of space between the tops of the tables and the fence on the opposite side of the ledge.

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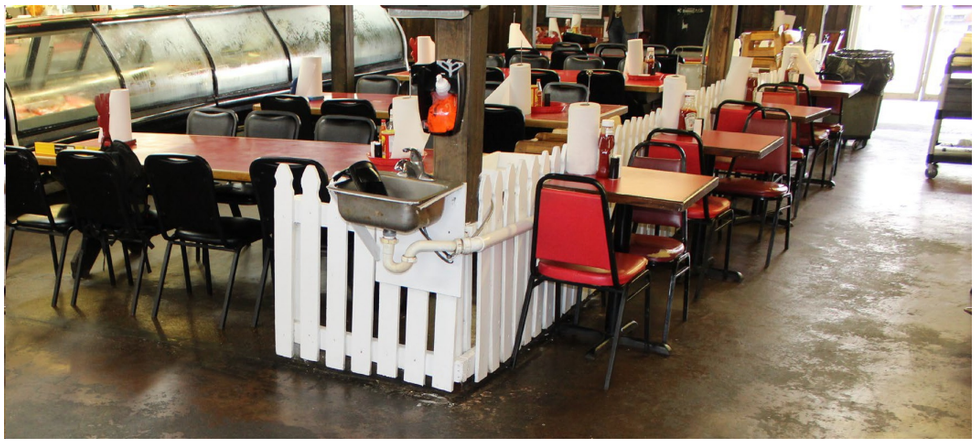
[2] The photographs in evidence (and embedded into this opinion) were taken subsequent to Mr. Latour's accident and do not reflect the exact conditions of the restaurant at the time of the accident, specifically as to the number of customers present. Testimony in the record establishes that at the time of the accident the restaurant was busy, and the seating around these tables full.



Mr. Latour filed a negligence suit against Steamboat's Seafood Warehouse, Inc. d/b/a Steamboat Bill's and its insurer, Nautilus Insurance Company, alleging the

ledge was disguised and unsafe.[3] Prior to trial, the district court granted plaintiffs' motion in limine preventing Steamboat from introducing evidence regarding the absence of prior trip and fall accidents caused by the ledge, and excluding testimony from Steamboat's owner, Jason Felice, that he had personally never witnessed a trip and fall accident on the ledge. The district court also granted plaintiffs' motion for an adverse presumption because Steamboat failed to preserve surveillance video of the accident, and the court issued a standard adverse presumption jury instruction.[4]

Following trial, the jury assessed Steamboat with 80 percent of the fault, Mr. Latour with 20 percent, and awarded Mr. Latour damages totaling $675,053.[5] The district court signed a judgment in accordance with the jury's verdict. Steamboat appealed. See **Latour v. Steamboats, LLC**, 22-162 (La.App. 3 Cir. 12/7/22), 354 So.3d 181. The appellate court found the district erred in disallowing testimony from Mr. Felice that, during his time as owner of Steamboat, he was personally unaware of any accidents caused by or attributed to the ledge. The court reasoned the history of prior accidents is a factor to be considered by the fact-finder when determining whether the ledge constituted an unreasonable risk of harm. **Latour**, 22-162 at 5, 354 So.3d at 187 (citing **Reed v. Wal-Mart Stores, Inc**., 97-1174 (La. 3/4/98), 708 So.2d 362; **Boyle v. Bd. of Sup'rs, Louisiana State Univ**., 96-1158 (La. 1/14/97), 685 So.2d 1080). The appellate court also found the district court erred in issuing an adverse presumption. The court reasoned that Steamboat had no notice it needed to preserve the video recording of the accident until the Latours filed suit three months after the accident, by which time the video had already been overwritten. Thus, there

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[3] Virgie Latour also asserted a claim for loss of consortium damages and was awarded $83,060 by the jury. This award was affirmed by the court of appeal and is not at issue in this court.

[4] The court instructed: "The failure of a party to produce evidence within his control raises a presumption that the evidence would have been detrimental to his case."

[5] Steamboat did not challenge the award of damages to Mr. Latour on appeal, and the award is not at issue in this court.

was no evidence Steamboat intentionally failed to preserve video of the accident. ***Id.***, 22-162 at 8-9, 354 So.3d at 188.

Finding these errors "substantially affected the outcome of the case and constitute reversible error," the court of appeal conducted a de novo review of the entire record, including the excluded evidence, as to the liability issue. ***Id.***, 22-162 at 9, 354 So.3d at 189. The court found Mr. Latour met his burden of proving negligence under La. R.S. 9:2800.6, and specifically found Mr. Latour proved the ledge created an unreasonable risk of harm. ***Id.***, 22-162 at 17-18, 354 So.3d at 192. After applying the factors set forth by this court in **Watson v. State Farm Fire & Casualty Insurance Co.**, 469 So.2d 967 (La. 1985), the court of appeal assessed Steamboat with 85 percent of the fault and Mr. Latour with 15 percent. **Latour**, 22-162 at 19, 354 So.3d at 193.

Upon Steamboat's application, certiorari was granted to review the correctness of the rulings below. **Latour v. Steamboats, LLC**, 23-00027 (La. 4/4/23), 358 So.3d 855.

DISCUSSION

This writ application was granted to examine two primary issues: (1) whether Mr. Latour met his burden of proof under La. R.S. 9:2800.6; and (2) whether Steamboat was improperly cast with a higher percentage of fault on de novo review. After determining the district court erred in evidentiary rulings pertaining to Steamboat's liability, the court of appeal conducted a de novo review of the record as to the liability issue. Such action was in line with this court's instruction that "[w]here one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable and, if the record is otherwise complete, the appellate court should make its own independent de novo review of the record and determine which party should prevail by a preponderance of the

evidence." **Landry v. Bellanger**, 02-1443, p. 15 (La. 5/20/03), 851 So.2d 943, 954 (citing **Ferrell v. Fireman's Fund Ins. Co.**, 94-1252 (La. 2/20/95), 650 So.2d 742, 747; **McLean v. Hunter**, 495 So.2d 1298, 1304 (La.1986)). Unlike a jury or trial judge's findings of fact, an appellate court's factual findings on de novo review are not based on a review of live testimony. Ordinarily, the factual determinations of the trier of fact regarding the credibility of witnesses are entitled to great deference, and a manifest error standard of review would be applied. **Ferrell**, 94-1252 at 4-5, 650 So.2d at 745-46. Such deference is demanded because "only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). However, when the court of appeal is conducting de novo review, it is reviewing a cold record. Therefore this court, which is equally equipped to review a cold record, does not give deference to the court of appeal's findings. Under these circumstances, this court applies a de novo standard of review. See, e.g., **Wallmuth v. Rapides Parish School Bd.**, 01-1779, 01-1780, p. 7 (La. 4/3/02), 813 So.2d 341, 346 n.2.[6]

Steamboat's liability is governed by La. R.S. 9:2800.6, which sets forth the relevant duty and burden of proof in negligence claims against merchants. The statute provides:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
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> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in

[6] Additionally, this court has appellate jurisdiction of both law and facts in civil matters, may perform an independent review, and may render judgment on the merits. See La. Const. art. 5, § 5(C); **Wooley v. Lucksinger**, 09-0571, p. 130 (La. 4/1/11), 61 So.3d 507, 605.

> or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
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> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
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> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.
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> C. Definitions:
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> (1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.
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> (2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.
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> D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

Thus, generally, Mr. Latour had the burden to prove the ledge presented an unreasonable risk of harm that was reasonably foreseeable, that Steamboat either created or had actual or constructive notice of the alleged dangerous condition, and that Steamboat failed to use reasonable care.

Determining whether the ledge created an unreasonable risk of harm requires balancing the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair. **Reed**, 97-1174 at 5, 708 So.2d at 365. "Simply put: [t]he trier of fact must decide whether the social

value and utility of the hazard outweigh, and thus justify, its potential harm to others[.]" ***Id.*** Courts have adopted a risk-utility balancing test to determine whether a condition is unreasonably dangerous, most recently discussed by this court in **Farrell v. Circle K Stores, Inc.**, 22-00849 (La. 3/17/23), 359 So.3d 467. The test consists of four relevant factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition;[7] (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of social utility or whether the activities were dangerous by nature. **Farrell**, 22-00849 at 6-7, 359 So.3d at 474.

Regarding the first factor, it is virtually undisputed that the ledge serves no utility. Mr. Felice, owner of Steamboat since 2015, testified the ledge existed at the time he took over the restaurant. Mr. Felice's understanding was that it was formerly topped by a seafood counter or grocery display. However, he admitted the ledge no longer served a purpose: "It's just there." Mr. Latour's expert, Todd English, was accepted by the court as an expert in safety engineering. Mr. English testified the ledge served no utility. Michael Bellard, Steamboat's expert, was accepted by the court as an expert in construction matters. When pressed regarding the current purpose of the ledge, Mr. Bellard suggested it was used as a highchair storage aisle. Considering the evidence in the record, and considering the ledge was clearly not necessary to store highchairs, this court finds no utility for the raised ledge in the middle of the dining room.

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[7] In **Farrell**, this court clarified proper application of the so-called "open and obvious doctrine": "[W]hether a condition is open and obvious is embraced within the breach of the duty element of the duty/risk analysis and is not a jurisprudential doctrine barring recovery, but only a factor of the risk/utility balancing test. Specifically, it falls within the ambit of the second factor of the risk/utility balancing test, which considers the likelihood and magnitude of the harm, and it is not a consideration for determining the legal question of the existence of a duty. Thus, although this Court has so stated before, it is inaccurate to profess that a defendant generally does not have a duty to protect against an open and obvious condition." **Farrell**, 22-00849 at 12-13, 359 So.3d at 478.

In evaluating the likelihood and magnitude of harm, including the obviousness and apparentness of the condition, relevant considerations include the size, context, and location of the condition, as well as the accident history. See, e.g., **Farrell**, 22-00849 at 7-8, 359 So.3d at 474-75; **Broussard v. State ex. rel. Office of State Bldgs**., 12-1238, p. 16 (La. 4/5/13), 113 So.3d 175, 187; **Reed**, 97-1174 at 5-6, 708 So.2d at 365-66. Mr. English opined the ledge was unreasonably dangerous, testifying as to best practices set forth in various code regulations as well as general principles of safety engineering that should be applied to identify and eliminate hazards. Mr. English testified the ledge was relatively hidden to someone approaching the tables. He explained that due to the spacing of the tables and chairs, and considering customers would be sitting in the chairs distanced from the table, there was only approximately nine inches of space for someone to walk down the aisle between the tables. Thus, one's vision down towards the floor would be relatively blocked. Moreover, Mr. English explained the ends of the tables were not flush against the fence and there was at least a two-foot space between the ends of the tables and the fence. Mr. English testified there was no reason a customer would think the walkway ended at the ends of the tables, and the space was a foreseeable path for someone to get from one side of the table to the other. Mr. English further explained that because the legs of the tables were pushed up against the ledge, but the table tops overhung the ledge by about four inches, the ledge was hidden from view even if someone was looking down. Mr. English testified the ledge and the surrounding floor were both stained a dark color, making them less reflective of light. He opined the ledge was essentially camouflaged, and stated it could have been painted a different color to make it stand out.

By contrast, Mr. Bellard opined the area where Mr. Latour tripped was not unreasonably dangerous. He focused on compliance with the fire code, explaining

that Steamboat would have been issued a citation by the fire marshal if it was not within code compliance. Mr. Bellard explained the fire code regulations apply to means of egress and walkways, and the ledge did not fall into these categories. The designated walkways run in between each of the tables for table access. Although he admitted the ledge was not visible when someone walks into the restaurant, Mr. Bellard testified the ledge was open and obvious from the fourth side, and the fence makes it obvious something is being protected.

Mr. Felice testified regarding the absence of prior accidents caused by the ledge. Specifically, Mr. Felice testified he had never personally witnessed someone trip and fall on the ledge and that he did not know of anyone else tripping and falling on the ledge.[8] Additionally, Mr. Felice testified the same table configuration existed at the time he took over the restaurant in 2015. No renovations were made in the building prior to Mr. Latour's fall. He agreed the ledge is not visible when a customer walks into the restaurant. Mr. Felice testified it was Steamboat's policy that if a customer reports a fall to an employee, the employee should get a manager to prepare an incident report. Mr. Felice also testified an incident report was not prepared in this case. Mr. Felice testified he has observed customers on top of the ledge, although it was a rare occurrence. Steamboat also stores highchairs on the ledge and Mr. Felice explained that a customer could reach over and grab a high chair without the necessity of stepping onto the ledge. Despite having observed customers walk up onto the ledge, Mr. Felice never took precautions to prevent customers from accessing the ledge because he never considered it unreasonably dangerous.

Having reviewed the record, the weight of the evidence supports a finding that the likelihood and magnitude of harm was high. The configuration of the tables,

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[8] This testimony was proffered at trial in light of the district court's grant of plaintiffs' motion in limine. Because that ruling was found to be reversible error by the court of appeal, the testimony is now part of the record and properly considered on de novo review.

chairs, and fence serve to camouflage the ledge. The ledge is hidden from a customer entering the restaurant by the existence of the fence surrounding three sides. The fence does not sit atop the ledge, but extends below it to the surrounding floor, thus blocking any view of the ledge. When customers approach the tables on the fourth "open" side of the ledge, their view of the ledge is diminished due to the spacing of tables and chairs, which is minimized when customers are sitting in the chairs. Additionally, the coloring of the ledge is the same as the surrounding floor area, further camouflaging the ledge from a customer's view. Moreover, the edges of the tables are not flush against the fence. As explained by Mr. English, the edges of the tables overhang the ledge by four inches, and there is an approximate two-foot space between the edges of the table tops and the fence, suggesting to customers an available path to maneuver around the tables. The fact that there is no evidence of prior trip and fall accidents on the ledge does not alter this court's finding. As recognized in **Broussard**, although the absence of prior accidents is a factor to consider, it is not a bar to recovery. **Broussard**, 12-1238 at 16, 113 So.3d at 187. It is also notable that no incident report exists in this case, despite Steamboat's policy necessitating such a report under the facts of this case. Thus, although Mr. Felice's testimony that he was unaware of any prior accidents may be accurate, it is possible other customers have tripped or nearly tripped on the ledge without the incident being reported to management or without a report being completed.

There is also no real dispute that the cost to prevent the harm would have been minimal. Mr. English testified regarding three feasible safety measures Steamboat could have taken to prevent the harm, all of which were relatively inexpensive. The best choice would be to remove the ledge with a jackhammer. Mr. English also noted this option would give Steamboat more area for seating. The second option would be to barricade the area. This would require Steamboat to erect a fence around the

fourth side of the ledge. The last option would be to make the ledge more readily apparent by painting it yellow. Mr. Bellard was questioned regarding the costs of these measures. He testified it would have taken only a week to do the work required to jackhammer out the ledge at a cost of $5000; it would cost $500 to add fencing around the fourth side of the ledge; and it would cost $200 to paint the ledge yellow.

The last factor of the risk-utility analysis requires consideration of the nature of Mr. Latour's activities in terms of social utility or whether the activities were dangerous by nature. Mr. Latour went to Steamboat to have dinner with his family. The accident happened as he maneuvered around a full dining table to take a seat across from his wife. There is certainly social utility to having dinner with your family and patronizing a local restaurant. Moreover, there is nothing inherently dangerous about maneuvering to a seat at a dining table in a crowded restaurant. Mr. Latour's decision to go around the end of the table to access his seat was reasonable under the circumstances.

In light of the above analysis of the risk-utility factors, this court finds the ledge created an unreasonable risk of harm to Mr. Latour, and the risk of harm was reasonably foreseeable.

Under La. R.S. 9:2800.6, Mr. Latour was also required to prove Steamboat created or had actual or constructive notice of the condition which caused the damage. According to the record, the ledge existed at the time Mr. Felice took over as owner of Steamboat in 2015. Mr. Felice understood the ledge previously served a purpose, but also recognized that purpose no longer existed. Steamboat maintained the restaurant configuration around the ledge, which included barricading the ledge on three sides by a fence and pushing the table legs against the ledge on the fourth side. These actions were aimed at preventing customer access to the ledge and indicate an awareness of the dangerous nature of a raised concrete ledge in the middle

of a restaurant. The record supports a finding that Steamboat had actual or constructive knowledge of the dangerous condition of the ledge.

Finally, Mr. Latour was required to prove Steamboat failed to use reasonable care. Although Steamboat had some measures in place to block customer access to the ledge, and may not have intended the ledge to be accessed as a walkway or pathway, those measures were insufficient. Steamboat maintained the previous configuration of the restaurant when Mr. Felice took over the business in 2015, but made no additional efforts to prevent customers from purposefully or accidentally encountering the ledge. In fact, Steamboat placed high chairs on the ledge, with the understanding that customers would take the chairs from that location, thus, increasing the likelihood that certain customers would encounter the ledge. Mr. Felice admitted he had observed customers on the ledge previously, yet he failed to take further action to prevent recurrent access. Considering the evidence in the record, this court finds Steamboat failed to use reasonable care to remove the ledge, fully barricade the ledge, or sufficiently draw customers' attention to the ledge.

Having found Mr. Latour met his burden of proving all necessary elements pursuant to La. R.S. 9:2800.6, proper allocation of fault must be considered. Preliminarily, this court finds the court of appeal legally erred in assessing Steamboat with a higher percentage of fault than the 80 percent assigned by the jury. By increasing Steamboat's fault by 5 percent, the court of appeal lowered the percentage of fault assigned to the non-appealing party, Mr. Latour. Jurisprudence has long held that appellate courts cannot amend a judgment in favor of a party who failed to appeal. See, e.g., **Polizzi v. Lotz**, 125 So.2d 146, 150 (La. 1960) ("[H]aving failed to appeal or answer the appeal, [defendant] is not entitled to prevail since under the well settled jurisprudence this Court, in reviewing a judgment of a lower court at the instance of one party, will not amend the judgment to appellant's prejudice and to the

advantage of a party who has sought no remedy[.]"); **Succession of Babin**, 35 So.2d. 864, 866 (La. 1948) ("It is well settled that an appellate court cannot amend a judgment in favor of a party who has neither appealed nor complained by way of an answer to the appeal."). This court expounded further on this principle in **Matthews v. Consolidated Companies, Inc**., 95-1925 (La. 12/8/95), 664 So.2d 1191. **Matthews** involved a personal injury action in which the jury awarded plaintiff certain medical expenses, future lost wages, and general damages. Plaintiff appealed, but defendant did not appeal nor answer plaintiff's appeal. The appellate court found the jury's award of damages was internally inconsistent, reviewed the record de novo, and awarded damages in a lesser amount than the jury. In finding the court of appeal erred in reducing the damages to an amount less than the trial court's judgment, this court explained:

> Since only plaintiff appealed, and defendants did not appeal or answer plaintiff's appeal, the total amount of damages awarded by the jury to plaintiff cannot be reduced by the appellate court because to so do would result in a modification in favor of the non-appealing defendant, contrary to Louisiana law. While a defendant who has not appealed or answered the appeal and who did not seek modification, revision or reversal of that judgment may assert in support of that judgment any argument supported by the record under La. C.C.P. art. 2133, he may not obtain a modification of the judgment without appealing or answering the appeal.

Matthews, 95-1925 at 1-2, 664 So.2d at 1191-92 (internal citations removed).[9] The same conclusion must be reached here. Mr. Latour did not appeal nor answer

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[9] The reasoning is rooted in La. C.C.P. art. 2133, governing when answers to appeals are necessary. That article provides in relevant part:

> A. An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. ... The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer ....
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> B. A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs.

Steamboat's appeal. Therefore, the appellate court was without power to modify the judgment to decrease his allocated fault. This court is likewise limited in its de novo allocation of fault.

Determining percentages of fault requires consideration of the nature of each party's conduct and the extent of the causal relationship between that conduct and the damages claimed. **Tisdale v. Hedrick**, 22-01072, p. 8 (La. 3/17/23), 359 So. 3d 484, 490 (citing **Watson**, 469 So.2d at 974). Consideration of several factors ("Watson factors") aids in the determination of a proper degree of fault: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. ***Id***.

After de novo application of the **Watson** factors, this court finds Steamboat bears the majority of fault for Mr. Latour's accident. Steamboat had notice of the ledge and the potential for hazard; Steamboat's failure to use reasonable care to remove the ledge, or completely block access to the ledge, created a risk that a customer would intentionally or inadvertently encounter the ledge; Steamboat was in a superior position to prevent customers from encountering the ledge; and Steamboat could have easily taken measures to eliminate or reduce the danger of the ledge. On the other hand, Mr. Latour was simply maneuvering around a dining table in the crowded restaurant to sit across from his wife when the accident happened; Mr. Latour was not engaged in risky behavior; Mr. Latour was unaware of the ledge, and the spacing of the tables, chairs, and other customers blocked his potential view of the ledge. Although Mr. Latour could have accessed his seat by asking other patrons to move and make room for him to pass down the same side aisle, it was not

unreasonable for Mr. Latour to believe there was space and a path for him to maneuver around the end of the table to access his seat more easily.

While this court cannot assess Steamboat with greater than the 80 percent fault assigned by the jury, our de novo review of the record supports a finding of at least 80 percent fault attributable to Steamboat. In assessing fault, this court rejects Steamboat's argument that the finding of consequential error due to the exclusion of Mr. Felice's testimony regarding the absence of prior accidents and the imposition of an adverse presumption *mandates* a more favorable outcome. When the jury's verdict is tainted by a trial court's erroneous exclusion of evidence, the result is that the verdict is simply not entitled to a presumption of regularity, and not entitled to the appellate court's deference under a clearly wrong or manifestly erroneous standard. **Buckbee v. United Gas Pipe Line Co. Inc**., 561 So.2d 76, 86-87 (1990); **McLean**, 495 So.2d at 1304. The court of appeal must then redetermine the facts de novo from the entire record (including the proffered testimony) and decide the merits of the case. **Ferrell**, 94-1252 at 4, 650 So.2d at 745. De novo review entails an independent determination of which party should prevail, **McLean**, 495 So.2d at 1304, but there is no requirement that a de novo review yield a result more favorable to Steamboat. Considering the excluded testimony from Mr. Felice does not change the ultimate result. As explained *supra*, the absence of prior accidents is only one factor for consideration. Likewise, elimination of the adverse presumption does not change this court's conclusions, which are based on a de novo review of all of the evidence in the record.[10]

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[10] Steamboat also asserts error because the lower courts taxed it with all costs. There is no requirement that a district or appellate court tax costs equivalent to percentages of fault. A court can tax costs against any party in any manner it considers equitable. See La. C.C.P. arts. 1920, 2164. Considering the specific facts of this case, and the legal limitation on the percentage of fault that can be allocated to Steamboat, this court declines to modify the award of costs.

CONCLUSION

For the foregoing reasons, after conducting a de novo review of the record, this court finds Mr. Latour met his burden of proof that Steamboat is negligent pursuant to La. R.S. 9:2800.6. Fault is allocated at 80 percent to Steamboat and 20 percent to Mr. Latour.

DECREE

REVERSED IN PART AND RENDERED.