NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 0110

REUBEN ELLIS AND LASUNDA ELLIS

VERSUS

QUINCY T. QUIETT, BELLA NOCHE, GOOD LIFE PRODUCTIONS, XYZ INSURANCE CO., PLAZA HOLDINGS, AND ABC SECURITY CO.

Judgment Rendered: NOV 1 4 2018

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C644674

Honorable Janice Clark, Judge Presiding

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BEFORE: WHIPPLE, C.J., PETTIGREW, McDONALD, McCLENDON AND HIGGINBOTHAM, JJ.

McDonald, J. dissents for reasons assigned

McClendon, J. dissents for reasons assigned

Higginbotham, J. Concurs.

WHIPPLE, C.J.

Plaintiff appeals the trial court's judgment granting the motion for summary judgment filed by the defendant owner/lessor of a shopping center and dismissing plaintiff's claims against the owner/lessor for injuries sustained from a gunshot wound plaintiff suffered in the parking lot of the owner/lessor's property after patronizing a nightclub on the property that was operated by the owner/lessor's lessee. For the following reasons, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Reuben Ellis and Lashunda Ellis, filed suit for damages for the injuries sustained by Reuben as a result of a gunshot wound.[1] According to the original and amended petitions, on July 27, 2015, Reuben patronized an establishment called Bella Noche to celebrate a friend's wedding reception, and as he was leaving the establishment at approximately 1:30 a.m. to 2:00 a.m., he was shot in the neck by an unknown assailant when gunfire erupted in the parking lot of the establishment. Plaintiffs named as defendants, among others, Plaza Holdings, LLC ("Plaza Holdings"), the owner of the building and premises where Bella Noche was operated.[2]

On July 13, 2016, Plaza Holdings filed a motion for summary judgment, seeking dismissal of plaintiffs' claims against it on the basis that it

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[1]Although named as "Lasunda Ellis" in the caption of the petitions, the body of the petitions and other pleadings filed by plaintiffs refer to this plaintiff as "Lashunda Ellis." Thus, we will refer to her as Lashunda. The petitions do not specifically allege Lashunda's relationship to Reuben, but Lashunda asserted claims for loss of love and affection, mental anguish and distress, loss of companionship, loss of income, and loss of financial support.

[2]Although named as "Plaza Holdings" in plaintiffs' petitions, this defendant averred in its answers that its proper name is "Plaza Holding, LLC." We note, however, that in its motions for summary judgment and in the lease agreement at issue herein, this party is referred to as "Plaza Holdings, LLC." For ease of reference, we will refer to this party as "Plaza Holdings."

owed no duty to plaintiffs herein. Plaza Holdings averred that, as a matter of law, in the absence of an assumed duty, a landowner/lessor owes no duty to guests or invitees of its lessee to protect them against misconduct of third persons. It further contended that under the clear and unambiguous terms of the lease agreement affecting the property at issue, it had not assumed any such duty to provide security and that, in fact, the lessee had agreed to provide security.

In support of its motion, Plaza Holdings submitted a copy of the lease agreement it had entered into with Good Life Productions, LLC ("Good Life Productions"), for the lease of building space in the Plank Plaza Shopping Center on Plank Road in Baton Rouge, Louisiana, for the operation of a nightclub called Bella Noche. Plaza Holdings relied upon Section 4.5 of the lease agreement, in which Good Life Productions agreed to provide "competent licensed security."[3]

A hearing on the motion was conducted on September 5, 2017, and by judgment dated November 13, 2017, the trial court granted the motion for summary judgment and dismissed the claims against Plaza Holdings. From this judgment, plaintiff Reuben appeals, contending that the trial court erred in: (1) concluding that the evidence presented was sufficient to grant summary judgment; (2) concluding that there was no assumed duty by Plaza Holdings to provide security in the "Common Area" of the shopping center; and (3) failing to conclude that Plaza Holdings owed a contractual duty to

[3]We note that the lease agreement contains two separate paragraphs labeled as Section 4.5. The one relied upon by Plaza Holdings is the second paragraph designated as Section 4.5.

provide security in the "Common Area" of the shopping center.[4]

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Jones v. Anderson, 2016-1361 (La. App. 1st Cir. 6/29/17), 224 So. 3d 413, 417. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA–C.C.P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions.[5] LSA–C.C.P. art. 966(A)(4).

The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is then on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of

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[4]While oppositions to Plaza Holdings's motion for summary judgment were filed on behalf of both Reuben and Lashunda, at the hearing on the motion, plaintiffs' counsel represented that she was present on behalf of Reuben. Moreover, the motion and order for devolutive appeal list only Reuben Ellis as appellant. Thus, because she failed to timely appeal, the judgment dismissing the claims against Plaza Holdings is final and definitive as to Lashunda Ellis. See Trahan v. Rally's Hamburgers, Inc., 96-1837 (La. App. 1st Cir. 6/20/97), 696 So. 2d 637, 640 n.2.

[5]Nevertheless, the court shall consider any documents filed in support of or in opposition to the motion for summary judgment to which no objection is made. LSA-C.C.P. art. 966(D)(2).

material fact or that the mover is not entitled to judgment as a matter of law. LSA–C.C.P. art. 966(D)(1).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Crosstex Energy Services, LP v. Texas Brine Company, LLC, 2017-0895 (La. App. 1st Cir. 12/21/17), 240 So. 3d 932, 936, writ denied, 2018-0145 (La. 3/23/18), 238 So. 3d 963. Thus, appellate courts ask the same questions: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. Crosstex Energy Services, LP, 240 So. 3d at 936. Because it is the applicable substantive law that determines materiality, whether a particular issue in dispute is material can be seen only in light of the substantive law applicable to the case. Jones, 224 So. 3d at 417.

DISCUSSION

In determining whether to impose liability under LSA-C.C. art. 2315, courts apply the duty-risk analysis. Under the duty-risk analysis, a plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, that the defendant owed a duty of care to the plaintiff, that the requisite duty was breached by the defendant, and that the risk of harm was within the scope of protection afforded by the duty breached. Pinsonneault v. Merchants & Farmers Bank & Trust Co., 2001-2217 (La. 4/3/02), 816 So. 2d 270, 275-276; Posecai v. Wal-Mart Stores, Inc., 99-1222 (La. 11/30/99), 752 So. 2d 762, 765.

As the party that would not bear the burden of proof at trial, Plaza Holdings, in support of its motion for summary judgment, averred that plaintiffs could not establish an essential element of their claim, i.e., that Plaza Holdings had a legal duty to protect Reuben, an invitee of its lessee,

against the criminal conduct of third persons or that it had assumed such a duty. In opposition to the motion for summary judgment below, Reuben contended, among other things, that, pursuant to the terms of Section 4.5 of its lease agreement with its lessee, Plaza Holdings had assumed a duty of protection, together with its lessee, with regard to the common areas of the shopping mall.[6] He likewise avers on appeal that the trial court erred in granting Plaza Holdings's motion for summary judgment on this basis.

Whether a duty is owed is a question of law. Generally, there is no duty to protect others from the criminal activities of third persons. However, while business owners are not the insurers of their patrons' safety, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable. Pinsonneault, 816 So. 2d at 276; Posecai, 752 So. 2d at 766. This duty arises under limited circumstances, when the criminal act in question was reasonably foreseeable to the owner of the business. Posecai, 752 So. 2d at 766.

On the other hand, the appellate courts have been hesitant to extend to an owner/lessor of the property on which a business is located, the duty to protect a lessee's invitees from reasonably foreseeable criminal acts of third persons. See Patterson v. DeMatteo, 2009-326 (La. App. 5th Cir. 10/27/09), 21 So. 3d 1094, 1097, writ denied, 2009-2720 (La. 2/26/10), 28 So. 3d 274 (holding that the relationship between a lessor and lessee does not render the lessor liable for the negligence of the lessee in the conduct of its business and that owners of the premises leased to the business owner who have no ownership or control of the business operating on the property and are not involved in any aspect of the business owe no duty to protect the patrons of

[6]Notably, Reuben relies upon the first of the two paragraphs designated as "Section 4.5" in opposing the motion for summary judgment. See footnote 3 *supra*.

the business from the criminal acts of unknown third parties); Straughter v. Hodnett, 42,827 (La. App. 2nd Cir. 1/9/08), 975 So. 2d 81, 91-92, writ denied, 2008-0573 (La. 5/2/08), 979 So. 2d 1286 (the duty of lessors to third persons is usually found in the ambit of premises defects, and while a business operator may have a duty to guard against the predictable risk of assaults, no jurisprudence had extended that duty to lessors); Hodge v. Liquid Ventures, 93-902 (La. App. 3rd Cir. 3/2/94), 634 So. 2d 1337, 1339 (as a matter of law, a landowner/lessor owes no duty to guests or invitees of its lessee, to protect them against misconduct of third persons in the absence of an assumed duty by the owner/lessor to provide security); and Brent v. Williams, 524 So. 2d 158, 159 (La. App. 4th Cir. 1988) (owner/lessor owes no legal duty to his lessee's guests to protect them from the tortious acts of third persons). But see Patton v. Strogen, 39,829 (La. App. 2nd Cir. 8/17/05), 908 So. 2d 1282, 1288-1289, writ denied, 2005-2397 (La. 3/17/06), 925 So. 2d 548 (wherein the Second Circuit, stating that it had previously applied the Posecai/Pinsonneault standard to landowners/lessors, determined that a genuine issue of material fact existed as to whether a shooting in the parking lot of leased premises occupied by a night club was reasonably foreseeable, thus precluding summary judgment in favor of the landowner/lessor of the property).

Nevertheless, a lessor may assume the duty of protection. See Hookfin v. Scottsdale Insurance Company, 98-2076 (La. App. 1st Cir. 11/5/99), 745 So. 2d 200, 203 (citing Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364, 1369 (La. 1984)); and Patrick v. Employers Mutual Casualty Company, 99-94 (La. App. 3rd Cir. 8/11/99), 745 So. 2d 641, 649, writ denied, 99-2661 (La. 11/24/99), 750 So. 2d 987. Where a duty of protection has been assumed, that duty must be performed with due care.

Mundy v. Department of Health and Human Resources, 620 So. 2d 811, 813 (La. 1993); Hookfin, 745 So. 2d at 203. Due care includes taking necessary steps to guard against any predictable risks of criminal activity. Patrick, 745 So. 2d at 649.

In Hookfin, the owner of the premises leased the building to a business that promoted concerts. A patron of the lessee was attacked on the premises while attending a concert, and his injuries allegedly led to his death. His father then filed suit against the lessee, the owner/lessor, and others. Hookfin, 745 So. 2d at 201-202.

In determining whether the trial court had properly granted the owner/lessor's motion for summary judgment, this court noted that in the lease, the lessee assumed "full responsibility for the character, acts and conduct of all persons admitted to" the building. However, this court further observed that in the same lease, the owner/lessor retained control over the building and various aspects of security, such as by providing that the leased premises would be under the "charge and control" of its representative, requiring a minimum number of firemen and policemen or more if requested by its representative, and reserving the right to eject any objectionable person from the building. Hookfin, 745 So. 2d at 201-202.

Noting that a business proprietor or owner owes a duty to provide patrons with reasonably safe premises, including reasonable protection from the risk of foreseeable assaults, and that a duty of protection may be assumed, this court concluded that in its attempt to retain some control over the building and security, the lessor may have retained or assumed some type of duty to the lessee's patron as well. Accordingly, this court determined that the owner/lessor had not established that it owed no duty to

the lessee's patron and, thus, had not established its entitlement to summary judgment as a matter of law. Hookfin, 745 So. 2d at 203.

In Patrick, the owner of a shopping center leased a portion of the premises to a corporate tenant for the operation of a bar. While participating in a physical altercation in the parking lot of the bar, a prospective patron of the bar was shot in the head, resulting in his death. His parents later filed suit against the owner/lessor of the shopping center. Following a jury trial, a judgment was rendered in accordance with the jury's verdict, finding the owner/lessor liable and awarding damages. Patrick, 745 So. 2d at 643-644, 646-648.

On appeal, the Third Circuit held that although a lessor generally owes no legal duty to guests or invitees of a lessee to protect them against misconduct of third persons, the lessor may assume the duty to provide security. Patrick, 745 So. 2d at 649. The court noted that, under the terms of the lease, the lessee leased only the space within the shopping center building, whereas the parking lots and common areas remained "subject to the exclusive control and management" of the owner/lessor, with the owner/lessor reserving the right "to establish, modify and enforce reasonable rules and regulations" with respect to those areas.[7] Patrick, 745 So. 2d at 645. Considering the language of the lease, the court concluded that while the lease agreement did not specifically state that the owner/lessor assumed the duty to provide security outside the bar itself, "it so limit[ed] [the

[7]The court also noted that while the owner/lessor did reserve the right in the lease agreement to require the lessee to provide professional security during its operations to prevent vandalism of the property, the owner/lessor never invoked that provision. Patrick, 745 So. 2d at 645.

lessee's] control over the parking lot and common areas that it amount[ed] to an assumption of that duty."[8] Patrick, 745 So. 2d at 649.

In the instant case, the section of the lease agreement between Plaza Holdings and Good Life Productions upon which Plaza Holdings relied in support of its motion for summary judgment, i.e., the second Section 4.5, provides as follows: "Lessor and Lessee acknowledge that the nature of Lessee's business, customers, or activities and special events conducted by Lessee requires security, and Lessee agrees to provide competent licensed security. Failure of Lessee to provide security shall constitute a material default as defined below at 23.2." However, the first Section 4.5 of the lease agreement, upon which Reuben relies, provides, in pertinent part, as follows:

> In each lease year, Lessee will pay Lessor, in addition to the rental specified herein as additional rent, Lessee's proportionate share of Common Facilities Costs .... "Common Facilities Costs" shall mean, for each calendar year (or portion thereof) during the Term of this Lease, the aggregate of all costs, expenses and liabilities of every kind or nature paid or incurred by Lessor (to the extent that Lessor, in its good faith judgment, regards it as reasonably necessary or appropriate to provide the services and materials hereafter referred to and to pay and incur the costs, expenses and liabilities hereafter referred to) in connection with: ... lighting the Common Area (including replacement of bulbs and ballasts and painting, repairing and maintaining of light standards); ... providing signs and/or personnel for assisting in traffic control and management at the Common Area; ... **providing security services with respect to the Common Area**; ... providing public liability and property damage insurance with respect to the Common Area .... [Emphasis added.]

"'Common facilities' or 'Common Area'" is defined in Section 4.1 of the lease agreement as follows:

> [A]ll areas, space, equipment and special services provided by Lessor for common or joint use and benefit of Lessor and the

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[8]The Third Circuit further observed that the owner/lessor had failed to object to a jury instruction that, under the terms of the lease agreement, the owner/lessor had assumed the duty of providing security for the premises. Patrick, 745 So. 2d at 649. The court ultimately affirmed the judgment in favor of the decedent's parents, finding no manifest error in the jury's finding of breach of that assumed duty or merit to any of the remaining assignments of error. Patrick, 745 So. 2d at 649-653.

> occupants of the Shopping Center, their employees and customers, including if such are provided, but not limited to, **parking areas**, service roads, loading facilities, employee parking areas, exits, entrances, approaches, access roads, driveways, pedestrian malls, court, stairs, ramps, sidewalks, comfort and first aid stations, wash rooms and parcel pickup stations. [Emphasis added.]

Moreover, while the same section of the lease agreement defining "'Common facilities' or 'Common Area'" also provides that Good Life Productions was granted non-exclusive right to use the common facilities, it clearly states that these common facilities "shall at all times be subject to the **exclusive control, supervision and management of [Plaza Holdings as] Lessor**."

Thus, through these provisions of the lease agreement in the instant case, similar to the provisions of the lease agreement in Patrick, Plaza Holdings maintained exclusive control, supervision and management over the parking areas. Furthermore, and of even greater import, Plaza Holdings collected an additional rental fee from its lessee Good Life Productions representing Good Life Productions's "proportionate share" of the Common Facilities Costs, which included costs for providing security services for the parking areas of the shopping center, if, in its good faith judgment, Plaza Holdings deemed security to be reasonably necessary or appropriate. Thus, Plaza Holdings clearly retained the power to determine whether security in the parking areas was necessary or appropriate and to then collect from its lessee Good Life Productions a proportionate share of whatever costs it, in its exclusive control, supervision and management of the parking areas, incurred for such security.

While the lease agreement specifically states that Good Life Productions was to provide "competent licensed security," we note that the premises actually leased by Good Life Productions was one 10,000 square-

foot parcel within the shopping center. Moreover, the section of the lease agreement that obligated Good Life Productions to provide "competent licensed security" does not clearly or specifically provide that, in addition to providing security for the leased premises, Good Life Productions was also to provide security for the parking areas, which were under Plaza Holdings's exclusive control.

We further recognize that the same Section 4.5 of the lease agreement specifying Plaza Holdings's exclusive control over the Common Area and delineating its rights to determine the need for security in the Common Area and to proportionately recoup any security costs it incurred for the Common Area also provides as follows: "Notwithstanding anything to the contrary contained in this section or elsewhere in this Lease, even though a portion of the Common Facilities Costs will be used to provide security services with respect to the Common Areas, Lessor does not assume any responsibility for security."[9] However, such a disclaimer of responsibility appears to conflict with the above-outlined provisions of the lease agreement.

Indeed, the mere fact that Plaza Holdings inserted this disclaimer language in the lease agreement does not negate the fact that, through the specific language of the lease agreement, Plaza Holdings retained exclusive control, supervision and management of the Common Area, including the parking areas, and reserved unto itself the right to determine, in its good faith judgment, whether security in the Common Area was reasonably necessary or appropriate and the corresponding right to then pass on to its lessee a proportionate share of any expenses it incurred for such security services. Thus, despite this general disclaimer language, the provisions of

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[9]That section of the lease agreement further provides that "Lessor also does not represent and warrant that the Premises or the Common Areas are free from independent criminal acts."

the lease agreement, when read as a whole, while clearly obligating Good Life Productions as lessee to provide competent licensed security at least as to the leased parcel itself, so limited Good Life Productions's control over the Common Area including the parking areas, that it may have also amounted to a retention or assumption by Plaza Holdings of some duty to Good Life Productions's invitees to provide security in the Common Area, outside of Bella Noche proper. See Patrick, 745 So. 2d at 649, and Hookfin, 745 So. 2d at 203.

Accordingly, in light of the language of the lease agreement, it is not clear that Plaza Holdings owed no duty to Reuben, as its lessee's patron, to protect him from foreseeable criminal acts of third persons. See Hookfin, 745 So. 2d at 203. Because Plaza Holdings failed to establish the absence of factual support for an essential element of Reuben's claim, i.e., that Plaza Holdings retained or assumed a duty herein, the burden never shifted to Reuben to produce factual support sufficient to establish the existence of a genuine issue of material fact or that Plaza Holdings was not entitled to judgment as a matter of law.[10] See LSA-C.C.P. art. 966(D)(1). On the record before us, Plaza Holdings failed to establish its entitlement to summary judgment as a matter of law.

[10]In its appellee brief, Plaza Holdings complains that plaintiffs attempted to attach Baton Rouge Police Department dispatch reports to their supplemental memorandum in opposition to Plaza Holdings's motion for summary judgment, which was not filed until the day of the hearing on the motion. At the hearing, Plaza Holdings objected to the late filing, but the trial court overruled the objection. However, we note that the question of whether the shooting at issue was foreseeable was not an issue raised by Plaza Holdings in its motion for summary judgment and, thus, was likewise not pertinent to our determination herein. See LSA-C.C.P. art. 966(F) ("A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time").

CONCLUSION

For the above and foregoing reasons, the trial court's November 13, 2017 judgment, granting the motion for summary judgment filed by Plaza Holdings, LLC, is reversed only insofar as it dismissed Reuben Ellis's claims against Plaza Holdings, LLC. To the extent the judgment dismissed other claims against Plaza Holdings, LLC, the judgment is affirmed. This matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against Plaza Holdings, LLC.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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McClendon, J., dissenting.

I find the two cases relied on by the majority to be distinguishable. **Patrick v. Employers Mut. Cas. Co.**, 00-04 (La.App. 3 Cir. 8/11/99), 745 So. 2d 641, writ denied, 99-2661 (La. 11/24/99), 750 So. 2d 987, involved a jury trial, wherein the jury was instructed, without objection, that the owner/lessor had assumed the duty of providing security for the premises. Additionally, in **Hookfin v. Scottsdale Ins. Co.**, 98-2076 (La.App. 1 Cir. 11/5/99), 745 So.2d 200, there was a much greater level of control exercised by the lessor than in the present case. In **Hoofkin** the lessor retained control over the leased building and various aspects of security, including the right to choose and require certain levels of security. Particularly, the lessor had the right to require a minimum number of firemen and policemen on the premises under the lease and admitted that on the night of the incident its representative "was on site at the event to ensure that the terms of the [lease] were fulfilled." **Hoofkin**, 745 So.2d at 201-02.[1]

The case before us is clearly more akin to **Posecai v. Wal-Mart Stores, Inc.**, 99-1222 (La. 11/30/99), 752 So.2d 762, wherein the Louisiana Supreme Court cautioned that a business does not assume a duty to protect its customers from the criminal attacks of third persons merely by undertaking some security measures.

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[1] See also **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217 (La. 4/3/02), 816 So.2d 270, 278 n.4, wherein the supreme court determined that a defendant bank had a duty to implement reasonable security measures because the bank, rather than undertaking *some* security measures, adopted a comprehensive security plan, a portion of which was clearly directed at providing security to customers.

Posecai, 752 So.2d at 769 n. 7. In **Posecai**, the supreme court rejected the appellate court's finding that the lessor assumed a duty to protect its patrons from crime when it hired a security officer to guard its cash office.

Moreover, with regard to the lease, in the second paragraph numbered 4.5, the parties acknowledge that "the nature of Lessee's business, customers, or activities and special events conducted by Lessee requires security and Lessee agrees to provide competent licensed security." Significantly, this paragraph is found in the Common Facilities section of the lease, such that these duties imposed on the lessee would not necessarily be confined to the leased premises.

Finally, I point out that while the majority correctly states the summary judgment law, I believe that the wrong burden of proof is applied.

Therefore, I respectfully dissent, finding that summary judgment was appropriate.