YLD
Allegheny County Bar Association

Point of Law

The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Spring 2021

Chef Itha Cao Helps YLD Strike Out Hunger

By Amelia Goodrich

As with most things in life since March 2020, the YLD's annual Strike Out Hunger fundraiser to benefit Attorneys Against Hunger looked a little different this year. In the before times, as we might say, those looking to contribute to this wonderful cause would gather together at the bowling lanes in the hopes of rolling a turkey and winning some raffle prizes. While the in-person gathering was not able to take place, we were still able to remotely gather for a cooking class and quite literally strike out our own hunger while benefiting this worthy cause.

Chef Itha Cao of The Hungry Cao expertly guided the group of attendees through the preparation of Scallion Pancakes, Potato and Celery Stir Fry, and Black Bean Sauce. Chef Cao's classes focus on teaching traditional Chinese Cuisine with a side of history. As a well-seasoned chef, Chef Cao uses her personal family history – she is a first generation American, born to Chinese parents from Northeastern China – to influence the dishes she creates and teaches. The Hungry Cao's mission is to open minds to new flavors and start conversations about culture and diversity through the creation of delicious dishes. Attendees were treated to a creative cooking adventure that included information about the history of the dish and the region it come from, and to add in a dash of excitement, Chef Cao taught knife skills.

The ACBA Young Lawyers Division had an evening of culinary fun on March 16 with Chef Itha Cao from The Hungry Cao. Chef Cao taught the participants how to make scallion pancakes with a shredded potato and celery stir fry. She also shared her knowledge on Chinese cuisine and the history of the dishes. All registration proceeds benefitted the ACBF's Attorneys Against Hunger campaign.

Though we weren't able to gather together this year, Chef Cao's cooking class provided a fun way to learn some new skills and cook something new while contributing to a great cause. The format was different, but the event was still a success with all proceeds from the cooking class going to Attorneys Against Hunger. The YLD thanks everyone who participated in the

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Business, Interrupted: Summary Judgment Edition

By Thomas Cocchi

In the 2020 Summer Edition of Point of Law, I endeavored to provide a brief explanation of the initial onset of Business Interruption insurance coverage litigation that was, at that point, burgeoning onto the scene. Since that initial article, the litigation has continued apace, and recent developments, particularly within Allegheny County, have placed this type of litigation back in the limelight of COVID-19 legal news.

Despite the gradual re-opening of many businesses, and the burgeoning prevalence of work-from-home arrangements in nearly every industry, many businesses remain closed, or operating under significant limitations even a year after the initial shutdowns. Companies both large and small have seen their cash reserves depleted to cover overhead for long-shuttered storefronts. In seeking some way to stay afloat, some businesses sought to invoke a formerly inconspicuous type of insurance coverage for businesses, business interruption insurance.

Business interruption insurance is intended to replace business income lost in a disaster. Qualifying events could include, for example, a fire or a natural disaster. Business interruption insurance is not sold as a separate policy but is typically added to a more general property/casualty policy or included in a comprehensive package policy as an add-on or rider. While the coverage is intended to replace income lost by a qualifying event, it also covers losses that are less direct such as taxes, payroll, and other overhead expenses.

Businesses across the state and around the country have attempted to file claims with their insurers for losses suffered as a result of the shutdowns related to COVID-19. However, insurers have largely rejected such claims citing exclusions and limitations of the coverage contained in the applicable policies.

From the beginning of the COVID-19 pandemic, coverage litigation continued to be filed at a

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Proposed Update to Pennsylvania's Breach Notification Law

By Anokhy Desai

Over the last 15 years, K-12 schools have suffered over 1,300 data breaches. Sam Cook, *US Schools Leaked 24.5 Million Records in 1,327 Data Breaches Since 2005,* COMPARITECH (July 1, 2020). Researchers also found that public institutions have been affected at a higher rate than private schools. As home to 3,287 public schools, Pennsylvania has a lot at stake here. In fact, Pennsylvania ranks tenth in the country for having the most K-12 data breaches since 2005, and fourth for the most data breaches at the college level. With all this personally identifiable information (PII) improperly accessed annually, parents may wonder when and how the next breach may affect their child. The recent proposed amendment to Pennsylvania's breach notification rule may alleviate some of that anxiety.

Pennsylvania's Breach of Personal Information Notification Act, passed in 2005, requires public school districts to "provide notice of any [system security breach], following discovery of the breach, to any resident of [the] Commonwealth whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person." 73 Pa. C.S.A. § 2303. Additionally, The Department of Education requires colleges to report all breaches, regardless of the number of records lost. Key in the state rule's language is the timing requirement; breached institutions must provide notice "without unreasonable delay." For students and parents alike, this lack of specificity can mean falling victim to fraud well before getting notice from the district. Steve Bittenbender, *Sen. Laughlin Bill Aims to Improve Pennsylvania Agencies' Notifications of Data Breaches,* THE CENTER SQUARE (Feb. 10, 2020). In February, Senator Dan Laughlin brought Senate Bill 487, an update to the Pennsylvania breach law, before the state Senate Communications and Technology Committee. The bill, referred to the state House in late September, has bipartisan support and requires applicable entities like school districts to notify individuals whose PII has been compromised within seven business days of discovery. It also promotes creating and implementing stronger information security policies at the state and municipal level.

The change in language from "without unreasonable delay" to "within seven business days" is a big deal. First, while every state has a breach notification rule, not every state has a timing requirement explicitly stated, as most states use "unreasonable delay" or similar language. Second, almost all the states with a timing requirement mandate notification within anywhere from 20 to 60 days of discovery. Now, only Illinois and Iowa have stricter timelines than Pennsylvania, the latter with a five day notification requirement and the former with such a requirement if the identity of the actor is known. 815 ILL. COMP. STAT. 530/12 (2020); IOWA CODE § 715C.2. The increased pressure from this update to the breach notification law would encourage school districts to improve their internal cybersecurity policies and controls, leaving parents and students with less uncertainty about the safety of their data. ■

Anokhy Desai is a law student at the University of Pittsburgh and information security policy graduate student at Carnegie Mellon University. She focuses on data privacy and cybersecurity, and can be contacted at a.desai@pitt.edu.

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virtual cooking class and hopes to see everyone, hopefully in person, next year to raise money for the same great cause! ■

See more screenshots from the event on page 8.

Amelia Goodrich is an Assistant District Attorney with the Allegheny County Office of the District Attorney, in the Post-Conviction and Federal Habeas Unit. Her practice focuses on collateral appellate review of criminal convictions at the state and federal level.

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Business, Interrupted: Summary Judgment Edition

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rapidly increasing rate, reaching a high-water mark in early May of 2020, and then slowly decreasing in frequency to a lower, and more consistent rate which has continued since November of 2020. The largest portion of the coverage cases brought thus far have sought to enforce coverage under business interruption provisions. If you are interested in keeping abreast of the developing situation, the University of Pennsylvania's Law School has developed a helpful Covid Coverage Litigation Tracker to assist in monitoring the litigation surrounding coverage disputes, especially those related to business interruption coverage. The tracker can be accessed at *https://cclt.law.upenn.edu.*

Issues which have been important to this type of litigation include the specific policy exclusions and/or endorsements, in whose favor courts determine ambiguous policy language, and whether the shutdowns are interpreted to have been related to an actual or physical loss. In most cases previous to the pandemic, courts would require that a contaminant be present on the premises and that it render the property unusable/uninhabitable to find an actual or physical loss. Previously, various courts have held that government-ordered closures, are not sufficient to satisfy the physical damage/loss requirement.

Most insurance coverage litigation cases brought in federal courts, nearly 90%, have been either partially or fully dismissed. Cases brought in state courts, however, have had more of a mixed reception, with nearly half of all cases surviving motions to dismiss brought by insurers. One such case in Allegheny County recently and remarkably resolved in favor of the insured plaintiff.

Timothy Ungarean, DMD, a dentist with a practice located in Allegheny County brought a coverage action against his insurer in 2020 after his practice was denied coverage for loss of business income due to the COVID-19 shutdowns. *Ungarean et al. v. CAN et al, No. GD-20-6544 (Ct. Common Pleas Allegheny, 2021).* After the pleadings concluded, the Plaintiff-dentist and the insurer filed cross motions for summary judgment. The parties then also provided the court with various supplemental filings including notices of supplemental authorities that supported their arguments. Judge Christine Ward authored an opinion in late March of 2021 analyzing the insurance policy, the meaning of the language contained in the policy, and finally ruling in favor of the Plaintiff.

As noted by Judge Ward, Pennsylvania law provides that insureds seeking coverage under a policy of insurance must first establish that a claim falls within the terms of the policy's coverage provisions. The burden then shifts to the insurer to prove the applicability of an exclusion or limitation of coverage. Finally, ambiguities in the language of an insurance policy are interpreted in the insured's favor.

According to Judge Ward, the Plaintiff-dentist had met his threshold burden since the policy language stated, "direct physical loss of ***or*** damage to property" (emphasis added). As articulated by Judge Ward, the word "or" suggested that a physical loss had a separate and distinct meaning from "damage" and that it would be contrary to the language of the policy to interpret them to be co-extensive. Therefore, reasoned Judge Ward, the loss of the normal use of a business such as a dental practice, could fall under the physical loss requirement of the subject policy.

Judge Ward's opinion made reference to the dictionary definitions of words in the dentist's policy when definitions were not supplied by the policy language. The opinion held that the Plaintiff-dentist had met his burden with regard to the threshold issue. With regard to each of the exclusions and/or limitations claimed by the insurer, it held that reasonable minds could disagree, and due to Pennsylvania law with regard to ambiguous language in an insurance policy, the court resolved those disagreements in favor of the Plaintiff each time.

While the *Ungarean* case presents a relatively rare win for insureds in Business Interruption coverage matters, the case will almost certainly be appealed by the insurer, and it remains to be seen whether Pennsylvania appellate courts will analyze these cases more closely to federal courts or defer to the discretion of their trial court colleagues. Nevertheless, Judge Ward's order represents a significant development in this type of litigation and may provide a basis by which other trial courts in Pennsylvania and throughout the country can rule in favor of insureds in COVID-19 coverage disputes moving forward. ■

Thomas Cocchi is an Associate with Zimmer Kunz, PLLC. His practice focuses on insurance defense and toxic tort litigation. He can be contacted at cocchi@zklaw.com.

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New Decision Announces Important Practices for Civil Discovery

By Zachary N. Gordon

On March 30, 2021, Allegheny County Court of Common Pleas Judge Philip Ignelzi issued a landmark decision impacting discovery practice in Allegheny County. *I.L. v. Allegheny Health Network,* GD-18-011924 (Ct. Common Pleas Allegheny, 2021), Judge Ignelzi granted a motion seeking to reconvene a deposition of a doctor in a medical malpractice case. The opinion spans 35 pages and is a detailed overview of discovery practice, which indicates many expectations of counsel litigating in Allegheny County. This article reviews many of the discovery issues addressed in the opinion.

Judge Ignelzi first explained that counsel should meet and confer in substantially the same way as required by Rule 37 of the Federal Rules of Civil Procedure before bringing a discovery motion in civil division. *Id.* at 3, fns. 3, 4. Counsel should be prepared to explain how they met and conferred when presenting the Motion. Judge Ignelzi then provided a detailed history of Friday afternoon "Happy Hour" motions in Allegheny County, but explained that too often counsel have not attempted to resolve the issue before Motions Court leading to lengthy motion presentation, so the meet and confer rule is intended to reduce "Happy Hour" motions to "Happy Minute" motions.

After announcing these changes applicable to general discovery practice in Allegheny County, Judge Ignelzi turned his analysis to Plaintiff's challenges to the defendant-doctor's counsel's deposition objections. Judge Ignelzi started by reviewing the broad standard for discovery in Pennsylvania and reiterated that the party objecting to discovery generally bears the burden of establishing that information is not discoverable and that limits on discovery should be construed narrowly. *Id.* at 9 (citing *Howarth-Gadomski v. Henzes, M.D.,* 2019 WL 6354235, at *2-4 (Ct. Common Pleas. Lacka. Co. 2019).

As to the specific objections raised at the deposition, Judge Ignelzi overruled the defendant's objections and found that in medical malpractice cases a defendant-doctor may not object to providing his or her medical opinions. Prior practice in Allegheny County permitted a defendant-doctor to refuse to answer deposition questions about that doctor's medical opinion regarding issues in the case so long as the doctor stipulated at the deposition to not testify as an expert in his or her own defense at trial. Judge Ignelzi rejected this prior practice concluding, "an objection related to an expert providing an opinion in discovery is no longer viable." *Id.* at 15. Judge Ignelzi further held that even if a defendant-doctor would not testify as an expert at trial, that doctor's opinions were still discoverable. Defendant-doctors can therefore, "be asked opinion questions, including standards of care, and properly grounded hypothetical questions" during a deposition. *Id.* at 16. This broad scope of inquiry available at a deposition also includes questioning defendant-doctors about their opinions as to care provided to the Plaintiff by others, including treatment of the patient that the deponent-doctor did not directly participate in.

Even though the line of inquiry has been broadened during depositions, the opinion makes clear that defendants can still object as to the admissibility of deposition testimony at trial. A possible objection as to admissibility, however, is not a valid reason to instruct a deponent not to answer during the discovery deposition. The opinion notes that stipulating at the start of the deposition that all trial objections are

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preserved is an appropriate and efficient way to preserve those issues and alleviates the need to object to those issues during the deposition.

In addition to these specific points for medical malpractice cases, the opinion also analyzed other deposition objections. In general, the Court explained that an instruction not to answer should be limited to "a privilege or preclusion from a prior order of court." *Id.* at 26. The Court held it was improper to instruct a deponent-doctor not to answer questions about a medical record simply because the doctor was not a "records custodian." *Id.* The Court further explained that going forward, if counsel defending a deposition instructs a witness not to answer without a good faith basis, the objecting counsel could be at risk for sanctions.

The Court also adopted much of the analysis limiting deposition objections described in *Hall v. Clifton Precision,* 150 F.R.D. 525, 530 (E.D. Pa. 1993). The Court explained that for future depositions, "Any objection shall be stated concisely in a non-argumentative and non-suggestive manner" and "Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court." *Id.* at 33.

The Court also reviewed objections as to the form. Form objections remain permissible and include objecting to questions that are ambiguous, unintelligible, misstatements of evidence or testimony, argumentative, assuming facts not in evidence, and those questions for calling for speculation. *Id.* at 30. When making an objection the Court further added that "counsel making any objection during an oral deposition shall state the word 'objection,' and briefly state the legal basis for the objection without argument." *Id.* The Court, for instance, stated a proper form of objection would be to state, "Objection. Asked and answered," and then permit the witness to answer. *Id.* at 31. The Court continued explaining, "The proper procedure to follow when an objection is raised to a question propounded in a deposition is for the attorney who raises the objection to note his objection but to allow the question to be answered." *Id.* at 31. The Court cautioned that the objection should not suggest an answer to the witness.

The Court also clarified that follow-up questions that reasonably flow from a witness' answers are permissible. The Court authorized Plaintiff's counsel to question the deponent-doctor about reasonable follow-up questions that the deponent-doctor's counsel had previously objected to. *Id.* at 31. The Court, however, cautioned Plaintiff's counsel not to exceed that scope of those follow-up questions during the reconvening of the deposition.

The Court then strongly cautioned counsel against unilaterally terminating a deposition. The Court held that unilaterally terminating a deposition should only be done if the issue could not be addressed by placing an objection on the record or by submitting a prior motion for a protective order. The Court cautioned that if a deposition is terminated without a good faith factual or legal basis, then that termination would be sanctioned.

The Court's entire opinion is worth reading if one practices civil litigation in Allegheny County, as it offers in-depth insight on how the Special Motions Judge is likely to consider various discovery matters. The Court's final thought is probably the most important principle. Whether in depositions, responding to written discovery or requesting written discovery, counsel are at all times officers of the court and should assume the Court may review their actions and act accordingly. *Id.* at 34. ■

Zachary N. Gordon is an associate attorney at Del Sole Cavanaugh Stroyd LLC. His practice is focused on litigation, including commercial, personal injury, and appellate litigation. He also regularly counsels clients on the Right-to-Know-Law, FOIA, and First Amendment rights. His email is zgordon@dscslaw.com.

Submit an article for Point of Law

The YLD's ABA award-winning newsletter

YLD members are encouraged to write about the practice of law or any substantive legal issue of interest.

Additionally, writers are encouraged to write responses to any article appearing in this issue.

Featured authors will have their article – up to 1,000 words long – published along with a brief bio.

Articles and inquiries may be submitted to *YLDCommunications@gmail.com.*

Thought Crimes in an Age of Domestic Extremism

By James Baker

With the rise in cases of mass shootings and hate crimes, it is safe to say that one of the greatest challenges presently facing our country is that of domestic extremism. Many perpetrators become engrossed in ideologies that devalue human life or embrace one's supposed superiority, making it easier for them to act towards violent ends. Most dramatically, on January 6, 2021, our nation witnessed in real time as our national Capitol was stormed by Americans who were organized through targeted misinformation claiming the 2020 election was "stolen." However, our usual tool for dealing with violations of the law, namely the criminal justice system, may prove wholly inadequate to address the new challenges presented by modern radicalization.

Already, we are seeing some of the limitations of criminal prosecutions following the Capitol riot. Those who stormed the building cannot be held in pretrial detention without proof they engaged in violent actions. *"Capitol Riot Defendants Notch Win at Appeals Court,"* Politico, Mar. 26, 2021. Even though the rioting was thoroughly recorded, law enforcement agencies have had to work overtime to try to identify individual participants, several of whom may easily evade conviction or detection. It would be easy to view these as an unfortunate margin of error in the criminal justice system. But such thoughts ignore the simple fact that the system is working within intended constraints, demanding evidence of criminal activity and protecting the rights of the accused from the emotions of the moment.

The trappings of prosecution are little comfort to those who lost a loved one or who are suffering from the manifest trauma of being harassed or attacked by a mob of extremists. When dealing with domestic extremism, the question is how to prevent these horrific events from occurring in the first place. By the time a shot is fired or a mob has gathered, it may be too late to prevent the havoc already occurring. The furthest criminal law presently extends into preventing crimes of the mind are to ban the solicitation and attempt to commit a crime.

Hornbook criminal law requires that the accused take an "overt step" towards the crime before they can be convicted of an attempt. Yet, the modern reality of isolated domestic extremists may reveal little more than anonymous social media posts before someone engages in any action, thus potentially thwarting the use of arrests and the prosecutorial process. *"3 Mass Shooting Plots Stopped Around the Country in Separate Incidents, Police Say,"* USA Today, Aug. 19, 2019.

While it may be appealing to craft new laws to ban the organizing or planning of violent acts, these laws would quickly run into several issues. Even setting aside First Amendment concerns, it would be difficult to differentiate between vague threats or plans that were never meant to come to fruition and actual dangers. Given the hefty standard of proof beyond a reasonable doubt, this discourages law enforcement from taking proactive action in order to wait for sufficient evidence to begin a prosecution. Criminal laws necessarily are limited to avoid penalizing activities that go no further than the mind's eye out of concern over government patrolling the realm of an individual's freedom to think and believe – Minority Report-style.

We must look beyond prosecution and incarceration, even mental health commitments, as these tools clearly cannot preempt the growing specter of modern extremism. Rather, our efforts must focus on identifying those vulnerable to extremist radicalization and intervening before there is a wanton loss of life. Many who turn to extremist ideologies have fundamental, human

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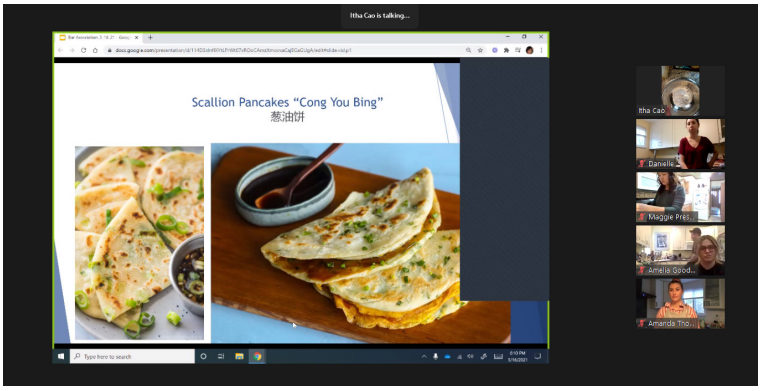
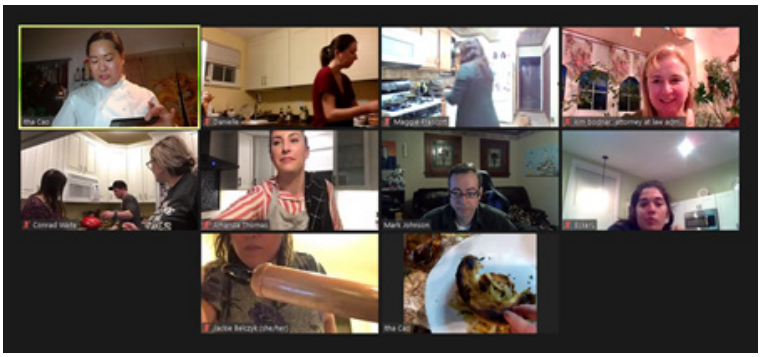
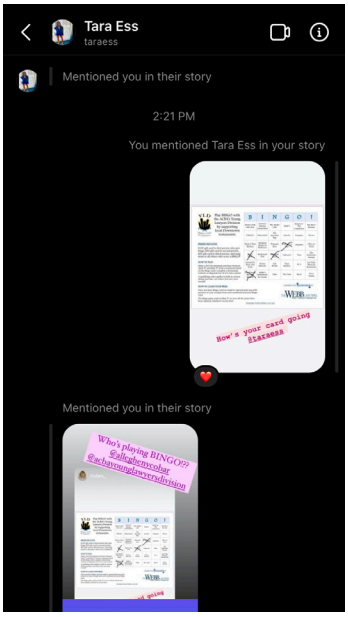
Recent YLD Events

Strike Out Hunger Event





Restaurant Bingo



Elizabeth Rubenstein shares her "YLD Restaurant Bingo" card with fellow attorney Tara Ess for a little friendly competition! Her bingo card is almost there, all while enjoying some drinks at the Warren Bar & Burrow during the "Lawyers Love Lunch: Restaurant Bingo" event througout the moth of April.

Thought Crimes in an Age of Domestic Extremism

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needs that are not being met. *"Violent Extremism in America,"* RAND Corp. Extremist groups tend to be attractive to those who are deprived of a sense of community and who lack personal support. This highlights the need for better funding of government services that provide for the health and well-being of our communities, especially in times of economic or societal stress.

Another factor in the radicalization of domestic extremists is how easily social media creates echo chambers where users can avoid challenging their beliefs. Radicalization is a time-consuming process, one that is difficult to reverse if left to itself. One advantage of developing tactics outside of prosecution and conviction would be that we can intervene in the radicalization process well before an individual begins to plan or prepare for violence. Instead of waiting until the final moments, preventing these incidents will require our communities to develop ties with these individuals and open lines of communication earlier, before they internalize violent, extremist beliefs.

A "wait and prosecute" approach to domestic extremism will only leave us one step away from the next shooting or episode of discriminatory harassment. The criminal justice system is not a reliable option to prevent these traumatic and devastating encounters, and so our society must focus on identifying the signs of domestic extremism early and intervening. At the same time, we have to understand the social inequities that breed extremism and work to stamp out their causes by funding and improving social programs meant to support and empower individuals. As we see the toll of domestic extremism rise, it is in all of our best interests to build a proactive system that provides a community to the downtrodden before they decide that violence and bigotry are the only values they have left. ■

James Baker is an Assistant Public Defender in Allegheny County and member of the YLD council.