



Burris v. Eddie's Liquor Store

2002 | Cited 0 times | California Court of Appeal | November 14, 2002

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INTRODUCTION

Plaintiff Kuryakin Burris was shot without provocation in broad daylight by an unknown assailant in the parking lot of Eddie's Liquor Store in Long Beach. Several individuals witnessed the shooting. The assailant was never apprehended. Plaintiff, who suffered serious injuries, sued the entities and individuals associated with the ownership and use of the store (defendants). Citing a history of prior criminal conduct both on the premises of the liquor store and in the neighborhood, plaintiff urged the attack was foreseeable so that defendants owed a duty to provide a security guard and that the failure to do so was the cause of his injuries, thereby rendering defendants liable to him. The trial court granted defendants' summary judgment motion, finding no triable issue of fact on duty or causation.

On this appeal, plaintiff primarily argues there are triable issues of fact on the question of duty. That approach misses the mark because causation is also in issue. We conclude there is no triable issue of material fact on the question of causation. In particular, we find the evidence proffered by plaintiff on causation--declarations by security experts that a security guard would have deterred the attack--is the type of speculative evidence which, in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*), the California Supreme Court held insufficient as a matter of law to defeat the grant of a summary judgment in a premises liability action where the plaintiff had been attacked by unknown assailants. Because causation is an element of the prima facie case upon which plaintiff bears the burden of proof, plaintiff's failure to show a triable issue of material fact compels affirmance of the judgment.

We also reject plaintiff's secondary contention that the trial court abused its discretion in denying his motion to compel the police to turn over a videotape showing the assailant's actions inside of the liquor store before he shot plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND



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The Shooting

During the late afternoon of April 27, 1999, plaintiff was driving in Long Beach. He made eye contact with Denise Gonzalez, a driver of another car. Gonzalez was accompanied by an adult friend (Melisa Viveros) and Viveros's son. When their respective vehicles stopped, plaintiff and Gonzalez began to speak but soon decided to pull over. Plaintiff pulled into the parking lot of Eddie's Liquor Store as did Gonzalez. It was daylight. Plaintiff was not accompanied by anyone. When plaintiff drove into the parking lot, he saw the man who would later shoot him walk out of the liquor store (the shooter). As plaintiff started to exit his car, Gonzalez approached him. They had not met before. According to plaintiff: "[S]he wrote down a number trying to talk to me and saying I have a nice car. I didn't know who she was." She told him he was a "[n]ice looking guy." At that point, one of plaintiff's friends, Aaron, drove into the parking lot. Plaintiff was still inside his car. He and Aaron spoke before Aaron went into the store.

The shooter then approached plaintiff. Gonzalez was still standing next to plaintiff's car. Plaintiff did not believe the shooter was dangerous and he was not afraid of him. There was no bulge in the shooter's clothing indicating a concealed weapon. The shooter asked plaintiff "if he could buy some weed." Plaintiff responded he did not sell drugs. The shooter walked away (about 10 steps), turned around, pulled a gun out of his waistband, pointed it at plaintiff, and told him to "[g]et out of the fuckin' car." Gonzalez screamed. Plaintiff attempted to accelerate the car whereupon the shooter shot him five times at close range. The shooter then turned his gun on Gonzalez, forced Viveros and Viveros's son from Gonzalez's car, and drove off in the car. The crimes were witnessed by several people who were in the parking lot. Within 10 minutes, the police arrived at the scene. The shooter was never apprehended.

Prior Criminal Activity

In the five years before plaintiff was shot, 296 calls had been placed to the police from Eddie's Liquor Store. Some of the calls were to report criminal activity; others were complaints about homeless individuals around the area. In the 12 years before the shooting, 82 crimes occurred on the premises, 20 of which involved a gun or a knife. Store employees had been assaulted and one of the owners had shot an armed robber.

The store has various security devices including a silent alarm, a bullet-proof screen at the counter, a video camera, iron bars on the windows and doors, and lights which illuminate the premises at nighttime. In addition, a gun is kept behind the cashier's stand. The owner (Michael Phu) had not considered the option of hiring a security guard.

Plaintiff's Expert Opinions

The nub of plaintiff's claim is that defendants' failure to hire a security guard was a breach of their



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duty to exercise due care to protect their customers from the criminal acts of third parties and this breach was the cause of his injuries. Plaintiff submitted three declarations, two from security consultants and one from a security guard. The declarations from the two security consultants each relied upon the extensive history of criminal activity at the store and in the neighborhood to conclude defendants should have hired a security guard and the failure to do so was the cause of plaintiff's injuries.

A declaration from Joseph De Carlo, owner of a property management business, averred, in pertinent part:

"28. It is also my professional opinion that the defendants should have hired a security guard to protect the premises and people coming on to the premises, located at 5281 Long Beach Blvd. The level of crimes occurring on that premises, including many violent crimes, supports this opinion. My opinion is also bolstered by the fact that this level of crime had been present at least since July 1, 1987, when defendants assumed ownership of the business known as Eddie's Liquor Store. Such responsibility also included responsibility for the parking lot, which was part of the premises.

"29. It is my opinion that the defendants could have and should have hired a security guard to patrol and protect the entire premises at 5281 Long Beach Blvd. Based upon my previous experience with the hiring and retention of security personnel, it is my opinion that the cost of hiring a security guard would range from \$7 per hour to \$12 per hour depending upon the level of skill and training of the security guard and whether the security guard is insured through an agency or not.

"30. Based upon the above rates for security guards, the annual cost to defendants of hiring security personnel would range from \$20,000 to \$34,000. It is further my opinion that a security presence would have operated as an effective deterrent to criminals and criminal activity in general. These observations and opinions are borne out by my many years in the business of retaining security personnel to patrol premises and monitoring the difference in crime and safety to the property owners and customers, residents and employees.

"31. It has also been my experience that a security presence frequently assists the property owner or manager in improving and increasing their business. This is due to the overall feeling of increased confidence individuals experience in coming on to the premises as well as the deterrent to criminals who are more likely to go to another property where there is no security presence.

".....

"33. It is also noteworthy that the area itself in which Eddie's Liquor is located has quite a high rate of crimes, involving violent crimes against the person and property. Indeed, the criminal reports are replete with references to gang activity on the premises directly. However, it is also apparent from studying the Calls to Service for businesses in that area that the criminal activity was far greater on



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defendants' premises than any other business nearby, including other liquor stores. Based upon this elevated level of crime on defendants' premises in particular it is my opinion that the liquor store and parking lot had become a haven for criminal activity, where the criminals felt no threat or obstacle to their presence or criminal intent.

"[¶] . . . [¶]

"k. The presence of a security officer may have been a substantial deterrent to the occurrence of this offense and in my opinion, in all probability the shooting of the plaintiff would not have occurred had such a security guard been present." (Italics and bold added.)

A declaration from Warren Cocke, owner of a consulting service which provides advice on security, averred, in pertinent part:

"33. Due to the significant history and pattern of violent crime and otherwise on defendants' premises, it is my opinion that the defendants could have and should have hired a security guard to patrol and protect the entire premises at 5281 Long Beach Blvd.

"34. It is further my opinion that defendants would have benefited from the services and protection afforded by an unarmed security guard and that it would not have imposed an undue burden on defendants, especially when the several benefits are considered.

"35. Based upon my experience in actually hiring and retaining security personnel for business premises the cost of hiring a security guard by defendants would range from \$7 per hour to \$12 per hour. Further, I believe that a security presence for this particular premises would be and would have been most effective from the afternoon hours to closing, when the majority of criminal activity occurred on the premises. Therefore, I believe that one security guard working one daily shift would have provided adequate security to defendants at minimal cost.

".....

"37. It is my professional opinion that if a security guard would have observed the assailant loitering on the premises on the day of the incident that he would have encouraged the assailant to leave. It is also my opinion that if a security guard had been present on defendants' premises the day plaintiff was shot it is probable that a guard's presence would have prevented the attempted purchase of marijuana and subsequent attempted carjacking, shooting and other carjacking.

"38. . . . Based upon my experience as a security consultant, I believe that a security guard with minimal qualifications and training would have been appropriate, effective and adequate for defendants' premises.



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".....

"f. Based upon the assaultive crimes and robberies, which have occurred at this location and other criminal activity resulting in the police being called, the defendants could have and should have provided a security presence in the form of a security guard.

"g. The type of business and the size of the defendants' premises make it reasonable and necessary to have a security guard patrolling the entire premises.

"h. The presence of a security officer would have been a substantial deterrent to the occurrence of this offense and in my opinion, in all probability the shooting of the plaintiff would not have occurred had such a security guard been present." (*Italics added.*)

A declaration from John Mixon, who worked as a security guard at a market two blocks from Eddie's Liquor Store, averred in pertinent part:

"7. Part of my duties as a security guard involves scanning the premises for suspicious activity and taking appropriate steps to prevent any crimes from occurring on the premises.

"8. If I observe an individual with a gun in his belt loitering in the store, I alert the authorities.

"9. If I observe individuals loitering in the parking lot I instruct them to leave the premises and alert the authorities if they refuse to leave.

"10. Since I have been employed at Best Foods Market there have been no violent crimes committed on the premises and the petty thefts and other property crimes have decreased substantially.

"11. It is my opinion as an unarmed security guard patrolling premises that are substantially similar to and in the same area as Eddie's Liquor Store that I do prevent and have prevented violent and non-violent crimes, for the past seven years."

Defendants' Expert Opinion

The defense proffered a declaration from its own security expert, Daniel Sullivan. The declaration averred, in pertinent part:

"5. It is my opinion that there were no reasonable security measures that would have prevented this incident. Further, it is my opinion that the carjacking and shooting of [plaintiff] was not foreseeable based on prior similar incidents and due to the circumstances of the incident, security measures were not a factor. This opinion is based on the following:



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"a. FBI crime statistics show that robberies and aggravated assaults have been on a steady and dramatic decline from 1992 through 1998 in all of the Los Angeles County area including Long Beach, CA.

"b. There are no records of any robberies or weapons crimes by strangers occurring at 5281 Long [B]each Blvd. for over a year prior to this incident.

"c. There is no pattern of activity that would reasonably necessitate deployment of an armed security guard at any time. No recognized security expert or law enforcement agency would recommend armed security guards at retail establishments.

"d. There is no pattern or activity that would reasonably necessitate deployment of an unarmed security guard during daytime hours.

"e. There is no evidence of any suspicious activity by the Suspect prior to his contact with Burris.

"f. Lighting was not a factor. The incident occurred during daylight hours.

"g. The suspect was not concerned with being identified. The carjacking occurred in a populated area directly across from a bank and in plain view of persons entering and leaving. Further, he had no concern that the female victim could identify him.

"h. The suspect clearly did not plan his crime in consideration of security measures. He had no way of knowing that Burris or anyone else would park in the lot and had actually left the store, walked away and then returned."

The Trial Court's Ruling

The trial court granted summary judgment to all defendants. Its order states, in part:

"1. The court finds that there is no special relationship between the plaintiff and the defendants which would impose any duty upon the defendants owed to the plaintiff in this matter[.]

"2. The court makes a finding that the cause in fact of plaintiff's injuries is not in any capacity the result of action or inaction on the part of the defendants but that plaintiff's injuries were solely caused in fact by the conduct of the unknown criminal assailant[.]

"3. The Motion for Summary Judgment is granted as to all defendants, named parties, moving parties and any other referenced persons in connection with the subject property including but not limited to all potential defendants and parties."



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DISCUSSION

A. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

Summary judgment law no longer requires the defense to conclusively negate an element of the plaintiff's cause of action. It is sufficient if the defense simply presents evidence that an essential element of the plaintiff's case cannot be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853-854; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.) Once the defense meets its initial burden of establishing an essential element--such as causation--cannot be shown, the burden shifts to the plaintiff to produce admissible evidence showing a triable issue of fact exists whether or not that element can be proven. (Code Civ. Proc., § 473c, subd. (o)(2).) If the plaintiff is unable to do so, the defense is entitled to summary judgment. (*Saelzler*, supra, 25 Cal.4th 763, 780-781.)

In this case, the dispositive issue is causation. That is, was defendants' possible breach of a duty a substantial factor in causing plaintiff to be shot by the unknown assailant? In moving for summary judgment, the defense essentially established the unknown assailant's shooting of plaintiff was a random act of unpredictable violence which could not have been reasonably prevented. Plaintiff's opposition relied upon the three declarations set forth above to argue there was a triable issue of fact about causation. Our analysis of this issue is governed by our Supreme Court's recent opinion in *Saelzler*, supra, 25 Cal.4th 763.

In *Saelzler*, the plaintiff was a Federal Express employee. While attempting to make an afternoon delivery at an apartment complex owned by the defendants, she was assaulted by three men. At the time, one of the security gates to the complex was propped open. The men were never identified nor apprehended. (*Id.* at p. 769.) The apartment complex had a long history of criminal acts, including the fact that one gang was headquartered there and conducted drug transactions from the premises. (*Id.* at p. 770.) The defendants had taken some measures to control the situation. They had hired security guards to patrol at night, imposed a nighttime curfew on juveniles, evicted tenants involved in criminal activity, forced trespassers to leave, and regularly checked gates for forced entry and broken locks. (*Ibid.*)

The defense summary judgment motion claimed the plaintiff was unable to establish any substantial causal link between their alleged failures to take additional security measures and the attack on the plaintiff.

The plaintiff's opposition to summary judgment included the declaration of a security expert. In his opinion, the attack would not have occurred had the defendants provided daytime security and kept the apartment gates repaired and closed. (*Id.* at p. 771.)

The trial court granted summary judgment.



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On appeal, the dispute centered on whether the declaration of plaintiff's expert created a triable issue of material fact on causation. The Supreme Court canvassed and approved of decisional law which had concluded "that the plaintiff must establish, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." (Id. at p. 774.) In particular, "expert opinion resting solely on speculation and surmise is inadequate to survive summary judgment because it fails to establish a "reasonably probable causal connection" between the defendant's negligence and the plaintiff's injury." (Id. at p. 775, quoting with approval from *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487.)

Applying that principle, the Supreme Court affirmed the grant of summary judgment. For purposes of analysis, it assumed the defendants had breached their duty to provide reasonable security by failing to keep all gates locked and functioning and by failing to provide security guards during the day. Nonetheless, the court concluded there was a lack of a causal connection between those breaches of duty and the plaintiff's injury. The assailants had never been apprehended. This failure to identify them meant it was unknown whether they were unauthorized trespassers or tenants of the complex. Consequently, the plaintiff was "unable to prove it was 'more probable than not' that additional security precautions [such as insuring the gates were locked to keep out nonresidents] would have prevented the attack. [Citations.]" (Id. at p. 776.) In regard to the plaintiff's claim that security guards should have been present during the daytime when she was attacked, the court reasoned: "Aside from the inordinate expense of providing such security for a 28-building apartment complex, the argument is entirely speculative, as assaults and other crimes can occur despite the maintenance of the highest level of security. [Citations.] . . . '[P]roof of causation cannot be based on . . . an expert's opinion based on inferences, speculation and conjecture.' [Citations.] Despite her expert's speculation, plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack." (Id. at p. 777; italics added.) The court squarely rejected the argument that the opinion of plaintiff's expert created a triable issue of fact. It explained: "Plaintiff's evidence is no less speculative because she offered a security expert's testimony. Because he was equally unaware of the assailants' identities, his opinion regarding causation is simply too tenuous to create a triable issue whether the absence of security guards or functioning gates was a substantial factor in plaintiff's assault." (Id. at p. 781.)

In reaching its conclusion, the Saelzler court cited with approval the analysis of *Leslie G. v. Perry & Associates*, supra, 43 Cal.App.4th 472 (Leslie G.) There, the plaintiff was raped in the garage of her apartment building which was characterized as a security building. The rapist was never arrested. She sued the owners of the building claiming their negligence in failing to repair a broken security gate was the cause of her injuries. In opposing a summary judgment motion, the plaintiff offered the deposition testimony of a security expert that the security gate to the garage was broken; that the broken gate allowed the rapist access; and that he had entered and waited to rape the plaintiff. The Court of Appeal concluded this testimony was not sufficient to create a triable issue on the question of causation. It reasoned: "Although proof of causation may be by direct or circumstantial evidence, it must be by 'substantial' evidence, and evidence 'which leaves the determination of these essential



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facts in the realm of mere speculation and conjecture is insufficient.' [Citations.]" (Id. at p. 484.) Consequently, a plaintiff must show "that it was more probable than not that, but for [defendants'] negligence, the assault would not have occurred. . . . [P]roof of causation cannot be based on . . . an expert's opinion based on inferences, speculation and conjecture." (Id. at p. 488.) The Leslie G. court concluded the testimony of plaintiff's expert was only speculation and conjecture and therefore insufficient to defeat summary judgment.

Plaintiff's showing in this case suffers from the same deficiency as that found in Saelzler and Leslie G. Given the facts of this case, his claim that the presence of a security guard would have prevented the attack is nothing more than speculation. The shooting occurred in broad daylight in a parking lot in the presence of several individuals. The shooter wore nothing to disguise his identity. These facts indicate the shooter was not concerned about being detected or apprehended. He and plaintiff had no pre-existing relationship. The shooter apparently randomly selected plaintiff as his victim. He first asked plaintiff to sell him marijuana. After plaintiff declined, he walked away but then for no apparent reason returned and shot plaintiff after plaintiff refused to surrender his car. The shooter then committed a carjacking and fled. He was never apprehended so the reason or trigger for his crime spree at that time and in that place cannot be known. As a result, one cannot infer with any reasonable certainty that the presence of a security guard would have deterred the shooter from so brazenly attacking plaintiff. As a result, the three declarations offered by plaintiff are nothing more than speculation. Plaintiff cannot show that a guard--who according to two of the declarations plaintiff submitted to the trial court as well as plaintiff's opening brief on appeal would have been unarmed--would have either encountered the shooter or, more importantly, prevented the attack. In other words, plaintiff cannot show that it was more probable than not that the presence of one security guard would have prevented this random and unpredictable act of violence.

Plaintiff attempts to distinguish Saelzler on the basis that there the assailants' identities as well as an explanation for their presence in the apartment complex were unknown whereas here "plaintiff established where the assailant came from, namely inside the liquor store and . . . what the [assailant] looked like and what he attempted to do prior to the shooting." Based upon these purported distinctions, plaintiff argues "there is no element of speculation" in the declarations averring "that a security guard would have observed this assailant and been able to deter and prevent the crime." This approach misses the mark. It is far too literal an interpretation of Saelzler. Knowing what the shooter looked like and what he did immediately prior to the shooting does not help plaintiff establish a causal connection between the failure to provide a security guard and plaintiff's injuries. In fact, the contrary is true. These circumstances (the shooter's presence in the store and his lack of effort to conceal his identity) only fortify the conclusion the shooting was an unpredictable act of violence which could not have been prevented by an unarmed security guard. Plaintiff "must do more than simply criticize, through the speculative testimony of supposed security 'experts,' the extent and worth of the defendant's security measures, and instead must show the injury was actually caused by the failure to provide greater measures. [Citation.]" (Saelzler, supra, 25 Cal.4th 763, 774.)



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Stated another way, plaintiff's showing in this case consists of nothing more than "establishing what could be described as abstract negligence, in the context that the [defendants'] security didn't comport with plaintiff[s] expert[] . . . but failing to prove any causal connection between that negligence and the injury." (Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal.App.3d 912, 918 [insufficient evidence to support a jury's verdict that the Dodgers negligently failed to protect plaintiffs from physical assault by third parties in the stadium parking lot]; see also Lopez v. McDonald's Corp. (1987) 193 Cal.App.3d 495, 513-517 [no causal connection between failure to provide an unarmed security guard and mass murder committed by one individual at McDonald's restaurant in San Ysidro]; Thai v. Stang (1989) 214 Cal.App.3d 1264, 1274-1276 [trial court did not abuse its discretion in finding an expert's declaration that presence of a security guard would have prevented a drive-by shooting was pure speculation]; and Nola M. v. University of Southern California (1993) 16 Cal.App.4th 421, 424 [jury verdict in favor of a plaintiff who was raped at USC reversed because evidence only showed "abstract negligence unconnected to an injury"].)

While defendants owed a duty to provide safe premises, "we find it difficult to say that [they] owed [plaintiff] a duty to protect [him] from criminal acts that not even the entire Los Angeles Police Department can prevent." (Leslie G., supra, 43 Cal.App.4th 472, 488.) "In this day of an inordinate volume of criminal activity, there are a myriad of 'security devices' available to the public, including the hiring of armed guards. No one really knows why people commit crime, hence no one really knows what is 'adequate' deterrence in any given situation. While bright lights may deter some, they will not deter all. Some persons cannot be deterred by anything short of impenetrable walls and armed guards." (7735 Hollywood Blvd. Venture v. Superior Court (1981) 116 Cal.App.3d 901, 905.)

In sum, the trial court properly granted summary judgment because the defense showed "plaintiff has not established, and cannot reasonably expect to establish, a prima facie case of causation." (Saelzler, supra, 25 Cal.4th 763, 769.) Consequently, there is no need for us to discuss, as requested by plaintiff, whether the trial court properly found no triable issue of fact on the question of duty or whether the trial court correctly applied Rowland v. Christian (1968) 69 Cal.2d 108 in determining duty. (See, e.g., Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal.App.4th 332, 335-336 [appellate review of summary judgment is de novo and trial court's ruling will be upheld on any legally correct theory].)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S DISCOVERY REQUEST

Factual Background

Twelve days before the summary judgment motion was to be heard, plaintiff moved for an order to compel the Long Beach Police Department to turn over to him the liquor store's videotape depicting the assailant's actions inside of the store before he left the store and first accosted and then shot plaintiff. Plaintiff alleged he had properly subpoenaed this item but that the police refused to give it



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to him. In the most general fashion, plaintiff alleged the videotape was relevant on the issues of duty and breach.

The defense opposed the request, arguing: "[P]laintiff fails to demonstrate what information he hopes to discover and how that information will impact the issues in this case." The defense also argued the motion was untimely because plaintiff had known for four months that the police were not willing to turn over the videotape.

After conducting a hearing, the court denied the motion. It ruled: "[The] videotape of the incident had no probative value whatsoever."

Discussion

Plaintiff now argues: "It is clear that the tape may have had significant probative value to show that the assailant was armed and could have been seen by a security guard who could have intervened or alerted the police. Indeed, the same measures could have been used by [defendants'] employees who had an alarm button under the counter. The denial of use of this tape was prejudicial error. "

Putting aside the fact that plaintiff's failure to advance this fact-specific theory to the trial court should preclude him from now making the argument, the argument is contradicted by plaintiff's own deposition testimony. He testified he did not see anything (e.g., a gun) concealed on the shooter's person and he was not afraid of the shooter. On this record, the trial court's order was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

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We concur:

HASTINGS, J.

CURRY, J.

