

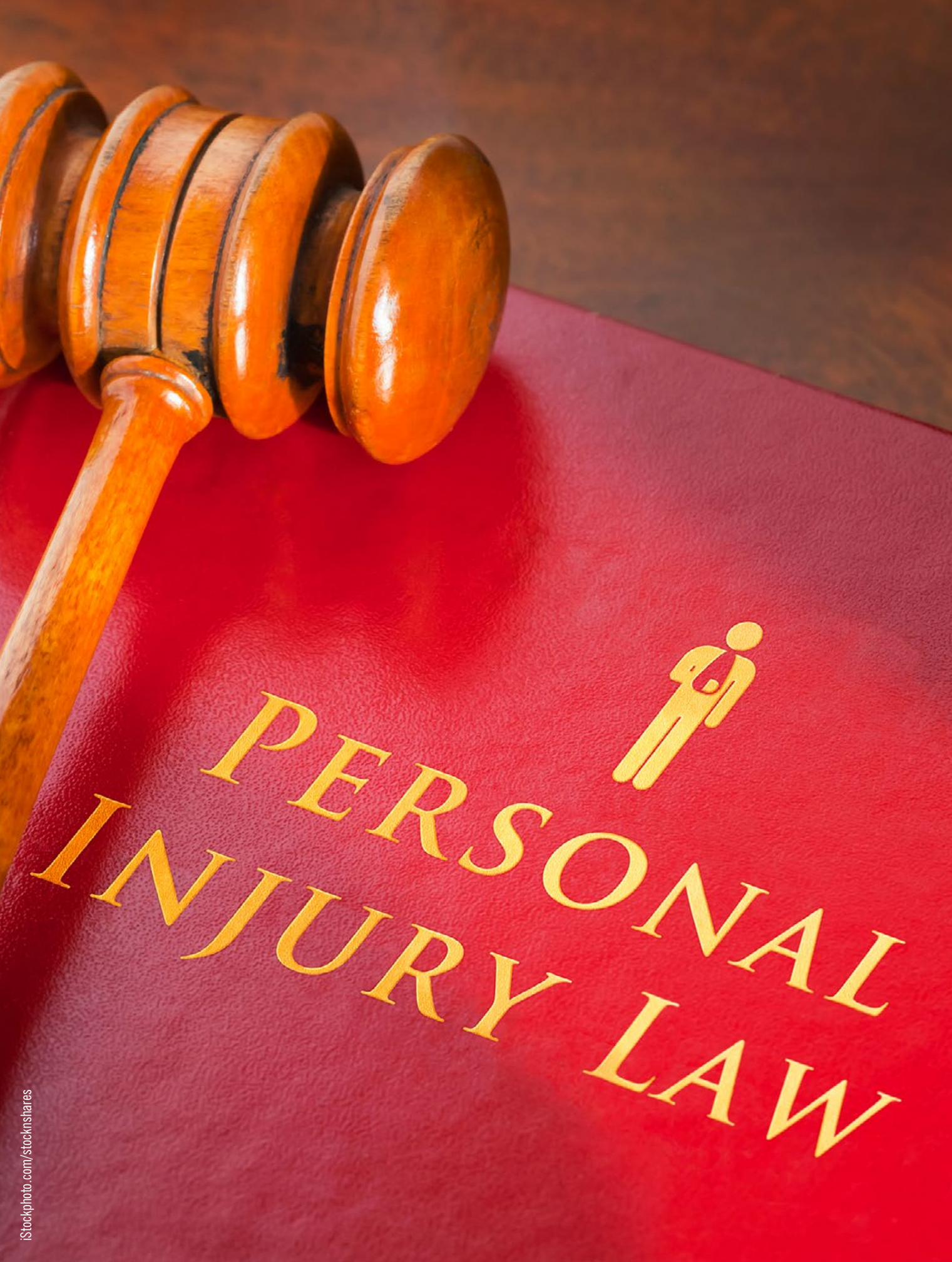


THE **CrossFit** JOURNAL

# CROSSFIT VICTORIOUS IN TEXAS

CrossFit RRG helps John McPherson set precedent by fighting off personal-injury rhabdomyolysis lawsuit.

BY RUSSELL BERGER



In September 2011, Adam Gottlieb walked into P3 CrossFit, John McPherson's affiliate in Houston, Texas. Under the supervision of one of P3's trainers, Gottlieb performed a free introductory workout that consisted of a 500-m row, 40 air squats, 30 sit-ups, 20 push-ups and 10 pull-ups. Gottlieb became nauseous during the session and vomited, but he finished the workout and went home.

Later that day, he was admitted to the hospital, and he was released four days later with a differential diagnosis that included "exertional rhabdomyolysis."

Almost a year later, Gottlieb filed a lawsuit claiming John McPherson of P3 CrossFit and CrossFit Inc. were guilty of gross negligence.

In many ways this is a simple story. A pair of personal-injury attorneys saw CrossFit as a ripe target, so they crafted a story of personal loss and hardship caused by a reckless and indifferent fitness company and its affiliate. They filed suit, the suit went to trial, and they lost.

But to anyone with a vested interest in the health of the CrossFit community, the story is much larger: This lawsuit was the first of its kind, and our anticipation of its arrival included setting up our [Risk Retention Group \(RRG\)](#) in 2009.

Commercial insurers might have cut costs by settling this claim rather than fighting it because they have no interest in defending the CrossFit name and program. They simply want to minimize losses, and settlements often cost less than going to trial. This approach would have set a dangerous precedent that would have opened affiliates up to attack from unscrupulous individuals who see easy money on the table.

CrossFit and the RRG were ready for the lawsuit and fought for a ruling that would preserve CrossFit's reputation and deter additional attacks. By responding immediately and vigorously, the RRG ensured the correct precedent was set for the future.

#### Prepared, Backed up and Insulated

McPherson, a former Army Special Forces soldier, was medically discharged after a parachute accident broke bones in both feet and one ankle. As a civilian, McPherson began his career as a CrossFit affiliate owner in 2007, pursuing education and improving the excellence of his services with the same focus that led to his becoming an elite soldier. While seeking to improve his skills as a trainer, he attended multiple CrossFit specialty courses and the original CrossFit Level 2 Certificate Course. He also earned the Certified CrossFit Level 3 Trainer credential. McPherson is now one of less than a hundred Certified CrossFit Level 4 coaches in the world.

As an affiliate owner, McPherson developed detailed systems and checklists for bringing new trainers on board, tracking client performance, and running free introductory training sessions. The liability waiver he had all prospective clients sign even included references to rhabdomyolysis. When I learned this, I recalled my own experience of throwing liability waivers into an unorganized mess in the corner of my gym. McPherson kept his records organized and easily produced Gottlieb's signed waiver when it mattered most.

What Gottlieb's lawyers wanted from McPherson was an illiterate ex-military grunt with little regard for his trainees' health and safety. What they got instead was one of the most qualified, organized and prepared trainers in the world. In short, McPherson didn't just prevail in this lawsuit because the claims against him were false; he prevailed because he did everything right.

McPherson didn't just prevail in this lawsuit because the claims against him were false; he prevailed because he did everything right.

#### Judge, Jury and Trainer

On the morning of March 7, we walked into the courtroom of the 127th District Court in downtown Houston, Texas. The presiding judge was Ravi K. Sandill, a relatively young judge with a sharp wit and a decent following on Twitter and Facebook. The morning consisted of the laborious process of deselecting potential jurors for bias. Our lead attorney, Steve Selbe, asked friendly questions about each juror's knowledge and feelings about CrossFit, exercise and injuries as his associate Andrew Scott and I took notes.

As I quickly learned, this step in the process is vital. Simply asking this question caused at least one hand to go up: "Has anyone here read anything in the news that has caused them to have a negative view of CrossFit?" On the other side, the plaintiff's attorneys worked to remove anyone from the jury pool who expressed a cynical view of personal-injury lawsuits in general.

With our jury chosen, the plaintiff's counsel took the floor for opening statements. This phase of the trial was particularly

important for understanding the arguments that side would make over the next few days. Gottlieb's attorneys presented their client as an unsuspecting victim of P3 CrossFit's trainers—trainers they claim failed to follow CrossFit's published guidelines on preventing exertional rhabdomyolysis. They claimed that as a "former athlete" Gottlieb fit the profile of someone at risk for developing rhabdomyolysis (based on the information published in the "CrossFit Level 1 Training Guide"). Gottlieb's attorneys also argued that P3 CrossFit failed to follow CrossFit's recommendations to gradually expose new athletes to high-intensity training.

Of note, Gottlieb's original complaint included the accusation that CrossFit was aware of an "extreme risk" associated with "poorly designed workouts" and acted in "indifference" to this knowledge. They claimed we chose to "maximize profits" instead of engaging in "basic supervision or auditing" of our affiliates. These arguments were almost completely absent from the trial as Gottlieb's attorneys focused on the supposed failure of P3 to meet CrossFit's published standards. It's my suspicion the plaintiffs realized the self-defeating nature of trying to argue CrossFit is indifferent to the risk of rhabdomyolysis while building a case that relied entirely on the published warnings and guidelines CrossFit has produced for its trainers.

**Gottlieb's medical records indicated that the rhabdomyolysis he experienced wasn't present until days after his workout and was likely caused by a viral infection.**

In our opening statements, Selbe laid out the framework of our defense of P3 CrossFit. First, Gottlieb had signed a release of liability that specifically mentioned rhabdomyolysis. Second, Selbe told the jury that he intended to show that the workout employed by P3 was completely safe and no reasonable person could have foreseen what happened to Gottlieb. Third, Selbe introduced a significant fact to the jury: Gottlieb's medical records indicated that the rhabdomyolysis he experienced wasn't present until days after his workout and was likely caused by a viral infection.

Over the next two days the plaintiff's attorneys called their



witnesses to the stand. The first was Gottlieb's personal physician, an older gentleman who claimed to have tested Gottlieb for a viral infection after he was released from the hospital and concluded that he did not have one at that time. Selbe's cross-examination of the physician revealed that this did not mean Gottlieb didn't have a virus in the days prior.

Next was Gottlieb himself, who gave his account to the jury. Gottlieb was careful to describe his athletic background in detail. Approximately 10 years prior to his introductory workout at P3 CrossFit, he attended a rowing camp. From that time onward, he played recreational lacrosse, and he admitted he did nothing to stay in shape for a little over a year prior to walking into P3. Gottlieb's attorneys wanted to establish for the jury that this fact made Gottlieb a "former athlete." They insisted this was the risk factor CrossFit had in mind when it published warnings against too quickly exposing those in generally good shape to CrossFit levels of intensity.

Of note, Gottlieb mentioned that he had received a phone call from McPherson while in the hospital. "It was awkward" Gottlieb said, "because at that point I wasn't sure if this might end up in a lawsuit or not."

As it turns out, Gottlieb, who never received a true diagnosis of exertional rhabdomyolysis, was searching for articles about CrossFit and exertional rhabdomyolysis from his hospital bed—and he was already considering suing McPherson.

"Mr. Gottlieb, you said you didn't speak to a lawyer until six months after your hospitalization, but that's not true, is it? Don't you see a lawyer every night?" Selbe asked during cross-examination.

"Yes," Gottlieb replied. "My wife is a lawyer."

Unfortunately for Gottlieb, his treating nephrologist, Dr. Michael Campbell, was not so quick to blame CrossFit for Gottlieb's kidney injury. The plaintiff's counsel read a handful of excerpts from Campbell's deposition, and then our attorneys read their own chosen excerpts. Campbell made it very clear that in his medical opinion Gottlieb's kidney injury had nothing to do with the stress of the introductory workout: He believed Gottlieb's condition was better explained by an underlying viral or bacterial infection.

As his medical records confirmed, Gottlieb presented at the hospital with fever, chills, no muscular pain and complaints of vomiting. He was treated with antibiotics and didn't show blood

**Dr. Campbell made it very clear that in his medical opinion Gottlieb's kidney injury had nothing to do with the stress of the workout.**

markers consistent with rhabdomyolysis until his third day after the workout.

Next, McPherson was called to the stand. While I have always enjoyed the stresses of defending the CrossFit brand under oath, McPherson was dealing with a different set of circumstances: The reputation of his business and his reputation in the CrossFit community as a whole were on the line. The plaintiff's counsel began questioning him, clearly trying to box him into a corner with his own words. In one line of questioning, their obvious goal was getting McPherson to agree that 15 to 20 minutes of working out would be "difficult," implying that he must agree it was enough to give someone rhabdomyolysis. McPherson wasn't going to let that happen. Every time they would reframe the question, McPherson would answer, "That depends—20 minutes of what?"

The Plaintiff's attorney tried again: "Mr. McPherson, what kind of activity done for 20 minutes would you say was long and difficult?"

"To be honest, listening to you ask me the same question over and over again for the past 20 minutes has been extremely difficult," McPherson responded bluntly.

The judge immediately intervened, ordering Selbe to instruct McPherson to remain respectful or risk having his entire testimony struck from the record. Selbe complied, and McPherson quickly straightened up.

It's a poor time to lose your temper when sitting on the witness stand while your reputation is on trial, but the crack in McPherson's otherwise-professional demeanor demonstrates the level of stress he was under throughout the entire lawsuit.

"It has worn me down," McPherson told me later. "I've had sleepless nights. I've second-guessed my gym's methods and efforts ... it has exhausted me."

He was angry, and rightfully so.

## CrossFit's Defense

By March 9, it was our turn to begin calling witnesses to the stand. While each of our witnesses played his part in our defense, two were particularly invaluable. First was Andy Petranek.

As a one of the first affiliate owners in the country, Petranek has a unique perspective and understanding of the CrossFit



Dave Re/CrossFit's Journal

**Andy Petranek, seen competing at the 2009 CrossFit Games, created the introductory workout Gottlieb performed at P3 CrossFit.**

methodology. He is also the author of the workout McPherson uses with his new clients. Our attorneys played a video recording of Petranek's deposition to the jury, who immediately began chuckling at his tics and no-BS answers.

Petranek confirmed that the workout was a gradual introduction to intensity and cited the thousands of athletes he had put through it without a single significant medical issue resulting. When asked if CrossFit had a "dirty little rhabdo secret"—referencing the 2013 blog post by a similar title—Petranek laughed uncontrollably.

"No one was talking about rhabdo before CrossFit," he said. "Anyone who says they are trying to hide something about rhabdo

has no idea what they are talking about."

Petranek's demeanor was disarming, the jury liked him, and it was clear nobody was paying him for his opinion.

We next called to the stand Holden MacRae, professor of sports medicine at Pepperdine University. Scott went over MacRae's academic accomplishments, degrees and awards, firmly establishing his remarkable credibility in the academic world of exercise science. I'm not sure if it was this credibility or MacRae's South

Selbe then produced a poster-board-sized copy of the portion of Dr. Campbell's testimony in which he indicated that something viral had caused Gottlieb's kidney injury.

African accent that the jury responded to, but we could see from their faces that they liked him.

MacRae testified that in his opinion the workout was perfectly reasonable for new clients and fit the bill for a safe first-time exposure to CrossFit training.

"I would be shocked if someone developed exertional rhabdo from completing this workout," MacRae said, furthering our argument that P3 could not have foreseen Gottlieb's injury and thus could not be guilty of negligence in his training.

In the plaintiff's closing argument, we heard much of the same. CrossFit Inc. was barely mentioned. The plaintiff's counsel had abandoned going after CrossFit directly and was leaning entirely on the narrative that P3 failed to heed CrossFit's recommendations for reducing the risk of rhabdomyolysis in new clients.

In our closing arguments, Selbe reminded the jury of the expert testimony that the introductory workout constituted a safe and reasonable first exposure to CrossFit levels of intensity and therefore could not have been the sole cause of Gottlieb's rhabdomyolysis. Selbe then produced a poster-board-sized copy of the portion of



Courtesy of Russell Berger

**John McPherson, Holden MacRae, Steven Selbe, Andrew Scott and Russell Berger (l-r) with a display copy of the waiver Gottlieb signed before working out at P3 CrossFit. Mention of rhabdomyolysis is highlighted.**



The CrossFit RRG exists to protect affiliates from lawsuits that would damage the brand. Affiliate owners are encouraged to educate themselves so they're prepared when threats arise.

Rob Wilson

Dr. Campbell's testimony in which he indicated that something viral had caused Gottlieb's kidney injury. He also produced an enormous copy of Gottlieb's signed liability waiver.

The jury was released to deliberate just before lunch. Scott, McPherson and I walked a few blocks to a local barbecue joint and ate. We were all mentally and physically exhausted and had no idea how long we would have to wait for a verdict.

Shortly after we returned to the courthouse, we had our answer. The judge called the jury into the room and read its verdict aloud. CrossFit P3 and CrossFit had prevailed against all claims.

Justice felt good, but I knew it must have felt even better for McPherson. I shook his hand and then our lawyers' hands. We then did what anyone in our position would have done: We took a group photo for Instagram.

#### Always Prepared

As stated earlier, the RRG was created with exactly this type of lawsuit in mind: The RRG exists to defend our affiliates from legal threats that commercial insurance companies have no financial motivation to defend. Commercial insurers often settle a case whenever the cost of defense exceeds the immediate cost of settlement. Such an insurer likely would have settled with Gottlieb.

If this had happened, personal-injury attorneys everywhere would smell blood in the water, and the precedent set by a settlement would likely lead to a barrage of similar lawsuits aimed at affiliates around the globe. In contrast, the RRG is willing to protect the CrossFit brand, and individual affiliates, even if it costs more in the short-term.

The Gottlieb lawsuit represents the first courtroom battle fought and won by the RRG in the defense of our community's reputation, and it's a big win for the CrossFit community as a whole.

It also represents the first time the CrossFit Level 1 credential has been challenged in open court. CrossFit training materials, instruction and methodology were put on trial, and we prevailed. CrossFit's critics have long claimed the CrossFit Level 1 Trainer Course fails to sufficiently prepare attendees for safe and responsible training, but the evidence against this claim was devastating to the plaintiff's position. Opposing counsel were forced to abandon their initial argument on the insufficient quality of the Level 1 credential, and they instead built their entire case against P3 CrossFit on the assumption that CrossFit clearly and effectively communicates its rhabdomyolysis-prevention standards to all Level 1 trainers. It was a losing position: McPherson was well aware of the risk of rhabdomyolysis and took all reasonable steps to prevent it, including mentioning the condition in his waiver and

selecting an appropriate introductory workout.

Though this case has set a powerful precedent for similar lawsuits, history often repeats itself. While this particular story is about McPherson and P3 CrossFit, it could have been a story about any one of our thousands of affiliates. Just as we drill our training partner for tips and advice after she completes the Open workout we are about to attempt, we should look to this case as an example of how to prevail in the face of a very real threat.

When Gottlieb's attorneys stepped up to swing at the CrossFit piñata, they didn't just miss—they were beaten with their own bat. Our affiliates need to know how we prevailed so we can continue to prevail when others seek to damage our community. ■

**About the Author** Raised in Atlanta, Georgia, Russell Berger spent four years in 1st Ranger Battalion. After leaving the military in 2008, he opened CrossFit Huntsville, where he spent three years as head trainer. He now works full time for CrossFit Inc.