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SJC-13030

KEVIN HORNIBROOK, personal representative,<sup>1</sup> vs. CHERILYN  
RICHARD & another.<sup>2</sup>

Suffolk. February 5, 2021. - August 2, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Conservator. Judicial Immunity. Fiduciary. Conversion.  
Practice, Civil, Discovery, Motion to dismiss.

Complaint in equity filed in the Norfolk Division of the Probate and Family Court Department on February 5, 2018.

Following transfer to the Superior Court Department, a motion to dismiss was heard by Anthony M. Campo, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Kristyn M. Kelley for Cherilyn Richard.

Ethan C. Stiles for the plaintiff.

Adam Hornstine, Assistant Attorney General, for Attorney General, amicus curiae, submitted a brief.

Patricia Keane Martin, for Massachusetts Chapter of the National Academy of Elder Law Attorneys, amicus curiae, submitted a brief.

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<sup>1</sup> Of the estate of Kathleen Hornibrook.

<sup>2</sup> NGM Insurance Company.

CYPHER, J. This case concerns whether a conservator appointed by the Probate and Family Court (probate court) and acting pursuant to judicial approval is a quasi judicial officer, entitled to absolute immunity.<sup>3</sup> We conclude that a conservator acting pursuant to judicial approval is a quasi judicial officer and is entitled to absolute immunity for conduct that is authorized or approved by the probate court.

The plaintiff, Kevin Hornibrook, acting as guardian and next of friend for his mother, Kathleen Hornibrook, filed a complaint against the defendant conservator, Cherilyn Richard, alleging (1) breach of fiduciary duty, (2) malpractice, (3) conversion, and (4) fraud. The defendant moved to dismiss the complaint. A Superior Court judge allowed the motion as to the counts of malpractice and fraud but denied the motion as to the counts of breach of fiduciary duty and conversion. We conclude that the plaintiff did not allege in his complaint that the defendant acted outside the authorized scope of her duties as conservator. Accordingly, we reverse the judge's order denying

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<sup>3</sup> As discussed in more detail infra, "'quasi judicial' officers . . . are involved in an integral part of the judicial process and thus must be able to act freely without the threat of a law suit. When acting at a judge's direction, these 'quasi judicial' officers enjoy . . . absolute immunity for their conduct (citations omitted)." LaLonde v. Eissner, 405 Mass. 207, 211 (1989).

the defendant's motion to dismiss the remaining counts of breach of fiduciary duty and conversion.<sup>4</sup>

Background. We set forth the basic facts and the procedural background of the case.<sup>5</sup>

1. Care of Kathleen. In 2013, Kathleen, then in her mid-eighties and suffering from progressive dementia due to Alzheimer's disease, lived in her three-family home with her son Francis Hornibrook, who also was her purported caretaker. In December 2013, Ethos Elder Services (Ethos) learned that Francis was neglecting and financially exploiting Kathleen. In 2014, due to Francis's violent behavior toward home care aides, Ethos filed an emergency G. L. c. 19A protective services petition in the Suffolk Division of the Probate and Family Court Department and removed Kathleen to a nursing home. In December 2014, a judge in the probate court appointed the defendant, a Massachusetts licensed attorney, as Kathleen's permanent conservator. The judge appointed the plaintiff, Kathleen's other son, as her permanent guardian.<sup>6</sup>

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<sup>4</sup> We acknowledge the amicus briefs submitted by the Attorney General and the Massachusetts Chapter of the National Academy of Elder Law Attorneys.

<sup>5</sup> Except where indicated, we rely on the amended complaint for the facts.

<sup>6</sup> The plaintiff had been serving as Kathleen's temporary conservator and guardian, but Francis objected to the plaintiff's appointment as permanent conservator. The defendant

At an unspecified point in time, the plaintiff learned that Kathleen was eligible for twenty-four hour, in-home care from MassHealth and Medicaid.<sup>7</sup> He and Ethos formed a plan to rent out the second- and third-floor units of Kathleen's home, move Kathleen into the first-floor unit, and use the rental income to cover her expenses. Francis had to be removed from the home before Kathleen could return, given the threat that he posed to Kathleen and her property. After her appointment as conservator, the defendant agreed to pursue the plaintiff's plan and took primary responsibility for evicting Francis. In December 2014, the defendant made one failed attempt to change the locks and evict Francis. Throughout 2015, the defendant repeatedly assured the plaintiff that she would take action in response to his numerous inquiries about the status of the eviction proceedings. Nonetheless, there is only one record of the defendant contacting the probate court regarding an eviction process or protective order against Francis on behalf of

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was appointed from a list of attorneys qualified to accept fee-generating appointments from the probate court.

<sup>7</sup> MassHealth, the State-administered Medicaid program in Massachusetts, is a joint State and Federal program designed to pay the cost of medical care for those who are otherwise unable to afford it. See G. L. c. 118E, § 9, inserted by St. 1933, c. 161, § 17.

Kathleen. Francis continued to reside in the newly renovated home and caused substantial damage therein.<sup>8</sup>

2. Sale of Kathleen's house. Kathleen had a reverse mortgage on her house, and in late 2015, the lender issued a notice of foreclosure on the house, as Kathleen's twelve-month absence from the home violated the terms of her mortgage and the underlying Federal reverse mortgage rules. In January 2016, the plaintiff learned about the foreclosure action and subsequently informed the defendant. The defendant retained counsel to bring an equity action to enjoin the foreclosure proceedings temporarily. The action was successful. The defendant first notified the plaintiff in January 2016 that she was preparing the house for sale.

On March 2, 2016, the defendant filed a motion in the probate court seeking permission to enter the property to remove trash and debris from the house, take photographs of the property, show the property for sale on a specified date, and periodically enter the property on specified dates until it was sold. The motion was granted. On March 25, 2016, the defendant and other counsel successfully evicted Francis and obtained an execution for possession of the property from the probate court.

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<sup>8</sup> During one exchange in January 2016, the defendant informed the plaintiff that her role as conservator was a strictly financial one, and that the plaintiff, as his mother's guardian, had the power to move his mother back home.

In May 2016, the defendant hired a real estate company and listed the property for sale. She also hired a cleaning company to clean and remove personal items from the home. In August 2016, the defendant applied to the probate court for a license to sell the property for \$1.12 million. In November 2016, the court issued a license to sell, and the plaintiff did not object. The property sold for \$1.285 million.<sup>9</sup> The defendant paid the real estate agent \$32,500 in commission, \$775 for unspecified reasons, and \$2,185 for changing the locks on the property. Kathleen never returned home and resided in a nursing facility until her death in January 2019. Following her death, Kathleen's estate was required to reimburse Medicaid for her stay in the nursing facility.

3. Prior proceedings. In January 2018, the plaintiff, acting as guardian and next friend of his mother, Kathleen, filed a complaint against the defendant and her bond issuer in the Norfolk Division of the Probate and Family Court Department. The complaint alleged (1) breach of fiduciary duty, (2)

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<sup>9</sup> The original buyer was willing to pay \$1.12 million for the property. The plaintiff, however, found another buyer who offered \$1.22 million. When the defendant refused to consider the higher offer, the plaintiff filed an objection to the defendant's previously allowed motion for a license to sell the property. The original buyer then raised its offer to \$1.285 million.

malpractice, (3) conversion, and (4) fraud.<sup>10,11</sup> The defendant filed a motion to dismiss based on lack of subject matter jurisdiction and immunity from suit. A judge agreed that the probate court lacked subject matter jurisdiction over the matter and ordered it transferred to the Superior Court.

The defendant filed a motion to dismiss in the Superior Court, arguing that the plaintiff failed to state a claim under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and that she was entitled to quasi judicial immunity. A judge allowed the motion. The plaintiff moved for relief from judgment pursuant to Mass. R. Civ. P. 60, 365 Mass. 828 (1974), and the judge denied the motion without prejudice.

The plaintiff was thereafter appointed the personal representative of Kathleen's estate and filed a renewed motion for relief from judgment. The renewed motion also opposed the motion to dismiss and sought to amend the original complaint by substituting parties. After a hearing, the judge granted the

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<sup>10</sup> The plaintiff's complaint also included one count of surety liability against NGM Insurance Company (NGM). The Superior Court judge severed and stayed proceedings against NGM pending resolution of the claims against the defendant. Because we conclude that the defendant is not liable to the plaintiff, we also conclude that NGM Insurance is not liable to the plaintiff.

<sup>11</sup> On October 20, 2016, the plaintiff also attempted to have the defendant removed as conservator on grounds similar to those that he advances in this case. A judge in the Suffolk Division of the Probate and Family Court Department denied his motion.

plaintiff's renewed motion for relief from judgment and substitution of the parties but did not rule on the motion to dismiss.

After another hearing, the judge dismissed the legal malpractice and fraud counts for failure to state a claim on which relief could be granted; denied the motion to dismiss on the breach of fiduciary duty and conversion counts, noting that the claims alleged were "paper-thin"; and ruled that a conservator enjoys quasi judicial immunity when acting within the scope of his or her duties. The parties were ordered to conduct and complete discovery to show whether the defendant was acting outside the scope of her duties in relation to the plaintiff's claims for breach of fiduciary duty and conversion. The defendant appealed from the Superior Court judge's denial of the motion to dismiss on the breach of fiduciary duty and conversion counts. We transferred the case to this court on our own motion.

Discussion. 1. Standard of review. We review the denial of a motion to dismiss under Mass. R. Civ. P. 12 (b) (6) de novo. Drake v. Leicester, 484 Mass. 198, 199 (2020). "We accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff." Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist., 461 Mass. 366, 374 (2012). To survive a motion to dismiss for



failure to state a claim, the claimant must plausibly allege an entitlement to relief above the speculative level. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

2. Quasi judicial immunity. Judicial immunity is a well-settled principle under common law. Allard v. Estes, 292 Mass. 187, 189-190 (1935). A judge is entitled to judicial immunity and therefore is "exempt from liability to an action for any judgment or decision rendered in the exercise of jurisdiction vested in him [or her] by law." LaLonde v. Eissner, 405 Mass. 207, 210 (1989), quoting Allard, supra. See Stump v. Sparkman, 435 U.S. 349, 356-357 (1978) (judge will be deprived of immunity only when he or she has acted in "clear absence of all jurisdiction" [citation omitted]). We do not limit such immunity to judges. Comins v. Sharkansky, 38 Mass. App. Ct. 37, 39 (1995). Rather, we have extended the protections afforded by judicial immunity to persons who perform quasi judicial functions. See LaLonde, supra at 210-211, 212 (court-appointed psychiatrist); Temple v. Marlborough Div. of the Dist. Court Dep't, 395 Mass. 117, 133 (1985) (court clerks); Sarkisian v. Benjamin, 62 Mass. App. Ct. 741, 745 (2005) (guardian ad litem); Farber vs. Sherman, Mass. App. Div., No. 17-ADCV-44SO (Dist. Ct. Mar. 15, 2018) (personal representative of estate).

Massachusetts uses a functional analysis when determining whether an individual performs a quasi judicial function and is

therefore entitled to absolute immunity. LaLonde, 405 Mass. at 212. Using this functional approach, courts look at the "nature of the duties performed, and whether they are 'closely associated with the judicial process.'" Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989), quoting Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). See LaLonde, supra (defendant entitled to quasi judicial immunity because he rendered expert opinion to judge, which was essential judicial function). We recognize as a matter of public policy that when officers are deemed to be integral to the judicial process, they "must be able to act freely without the threat of a law suit." LaLonde, supra at 211. As such, we have found that individuals appointed to perform essential judicial functions are entitled to absolute immunity in the performance of those quasi judicial services. Id. at 213. Conversely, absolute immunity does not attach when such persons perform acts that are outside the scope of their authority. Cok, supra.

The plaintiff contends that court-appointed conservators ordinarily are not entitled to quasi judicial immunity because they do not perform essential judicial functions. We have not yet addressed whether the immunity afforded to individuals appointed by the court extends to court-appointed conservators.<sup>12</sup>

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<sup>12</sup> A conservator's role is to manage the property of a protected person. A conservator takes title to the protected

However, the ruling of the United States Court of Appeals for the First Circuit in Cok, 876 F.2d at 3, provides guidance on this issue. In Cok, the First Circuit determined that a conservator of assets was a nonjudicial person fulfilling quasi judicial functions, because a conservator performs functions that aid and inform the family court. Id. As such, the conservator was involved in the adjudicative process and shared in the family court judge's absolute immunity. Id. The First Circuit held that the conservator had "absolute quasi-judicial immunity for those activities intimately related to the judicial process." Id.

Whether an individual is entitled to immunity as a quasi judicial officer depends on the functions he or she performs. See LaLonde, 405 Mass. at 212. When acting as directed or authorized by a judge, a court-appointed attorney functions "as an arm of the court." Sarkisian, 62 Mass. App. Ct. at 745. We conclude that a court-appointed conservator similarly functions as an arm of the court and has absolute immunity for activities that are integrally related to the judicial process. See Cok, 876 F.2d at 3.

A conservator is a nonjudicial person fulfilling quasi judicial functions. See id. Under G. L. c. 190B, § 1-201, a

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person's property as fiduciary for the protected person. See G. L. c. 190B, § 5-419.

conservator is defined as "a person who is appointed by a court to manage the estate of a protected person." Typically, a conservator manages properties and pays bills for any work done. See G. L. c. 190B, § 5-423. See also Cok, 876 F.2d at 3. When these duties performed are closely associated with the judicial process, the conservator shares in the judge's absolute immunity. See Gross v. Rell, 304 Conn. 234, 251-252 (2012) (conservators entitled to quasi judicial immunity for acts authorized or approved by probate court). See also Myers v. Morris, 810 F.2d 1437, 1466-1467 (8th Cir.), cert. denied, 484 U.S. 828 (1987) (once court finds that nonjudicial persons fulfill quasi judicial functions intimately related to judicial process, they have absolute immunity for damages claims arising from their performance of delegated functions). "[W]hen the conservator has obtained the authorization or approval of the Probate Court for his or her actions on behalf of the conservatee's estate, the conservator cannot be held personally liable." Gross, supra. In this capacity, the conservator is not acting on behalf of the conservatee, but rather as an agent of the probate court. See id. at 251.

Indeed, "imposing liability on a conservator for acts authorized or approved by the Probate Court would chill that court's ability to make and carry out fearless and principled decisions regarding the conservatee's care and the management of

his or her estate." Gross, 304 Conn. at 252. See Sarkisian, 62 Mass. App. Ct. at 745 (immunity is defense against personal liability). Cf. Chicopee Lions Club v. District Attorney for the Hampden Dist., 396 Mass. 244, 252 (1985) ("to protect prosecutors from the debilitating task of defending themselves in civil lawsuits for their official acts, absolute immunity must at the same time shelter both the scrupulous and the errant public official"); Temple, 395 Mass. at 133 ("Court clerks enjoy qualified immunity from suit and are absolutely immune for their conduct when acting at a judge's direction"). However, when a conservator's acts are not authorized by the probate court, the conservator is treated as a fiduciary of the conservatee and may be held personally liable. See Gross, supra at 254.

3. Claims at issue. Having determined that conservators possess quasi judicial immunity for judicially approved acts, we consider whether the plaintiff's remaining claims arise from the defendant's judicially authorized functions. The plaintiff argues that the claims for breach of fiduciary duty and conversion are analogous to accounting and indemnification claims, which are to be permitted against a conservator under G. L. c. 190B, § 5-428. The defendant argues that her actions, which include selling Kathleen's house, evicting Francis, and cleaning and preparing the home for sale, are not outside the scope of the probate court judge's approval. Rather, she

argues, the allegations both relate to actions expressly authorized by the probate court and within the defendant's statutorily delegated capacity as a conservator. For the reasons discussed infra, we conclude that the plaintiff's pleadings failed to suggest plausibly that the defendant acted outside the scope of her function as conservator and the express authority granted by the probate court, and therefore the judge erred in denying the motion to dismiss the breach of fiduciary duty and conversion claims. See Iannacchino, 451 Mass. at 636.

a. Breach of fiduciary duty. The plaintiff alleges that the defendant failed to preserve Kathleen's property and estate in breach of her fiduciary duty. Specifically, the plaintiff alleges that the defendant depleted the estate's assets through multiple failed attempts to evict Francis from the house in breach of her fiduciary duty. "To establish a breach of fiduciary duty, there must be a duty owed to the plaintiff by the defendant and injury to the plaintiff proximately caused by the breach." Estate of Moulton v. Puopolo, 467 Mass. 478, 492 (2014).

The plaintiff contends that his arguments find support in the probate code, G. L. c. 190B, § 5-428 (b) and (d). The statute allows for a conservator to be found personally liable in certain circumstances, including from "obligations arising from ownership or control of property of the estate," or "torts

committed in the course of administration of the estate." G. L. c. 190B, § 5-428 (b). Under G. L. c. 190B, § 5-428 (d), "[a]ny question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action."

While the plaintiff recognizes that immunities are a defense from the personal liability set out in the statute, he argues that the defendant's duties were not performed as "an arm of the court," and therefore, she is not entitled to quasi judicial immunity. Sarkisian, 62 Mass. App. Ct. at 745. The plaintiff specifically contends that the probate court implicitly recognized a distinction between the necessity to sell the house and the actions leading up to the sale in its authorization to sell the home. Therefore, the plaintiff argues, the defendant's role in necessitating the sale was not judicially sanctioned and is actionable. We disagree.

The defendant moved for authorization to sell the home. After the plaintiff objected on the ground that the sale price was inadequate, the defendant amended the motion to reflect the increased price of the sale. The defendant included in her motion facts surrounding Francis's continued and unauthorized

residence in the home.<sup>13</sup> The plaintiff filed no further objection. The probate court issued to the defendant the license to sell. When viewed in the context of the defendant's request outlining the need to evict Francis before the sale could become effectuated, the judge's authorization inherently encompassed evicting Francis from the home to prepare it for sale. Because the judge's authorization extended to evicting Francis, the defendant is protected under quasi judicial immunity from any claim relating to her efforts to evict Francis.

The plaintiff further alleges that the defendant committed a breach of her fiduciary duty through her failure to follow the care plan established by the plaintiff, leading to Kathleen's unnecessarily expensive, prolonged stay in the skilled nursing facility. The defendant, as conservator of Kathleen's estate, had responsibility over the estate's assets. The plaintiff, as Kathleen's guardian, ultimately had control over determining

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<sup>13</sup> In her March 2, 2016, motion to the probate court, the defendant noted, "Mr. Francis Hornibrook has remained in the first floor unit without permission of Ms. Hornibrook's conservator. Shawn O'Rourke, Esq was hired to evict Mr. Hornibrook. He has been served with notice to quit on January 22, 2016. . . . All attempts to reason with Mr. Hornibrook were met with threats and a refusal to cooperate. He then threatened to call the police. . . . The property is riddled with trash and debris. . . . I sent a letter to Mr. Hornibrook requesting access to the property and have not heard back from him regarding the request."



Kathleen's residence and care plan.<sup>14</sup> Moreover, there is no indication in the plaintiff's complaint that he ever asked the probate court to approve or implement this plan. When the court issued the defendant a license to sell the property in November 2016, the plaintiff did not object. As the defendant points out, the plaintiff's purported care plan would not have been possible if the house were sold, suggesting, at the very least, that this care plan was not fully developed. In any event, the defendant was acting under the authority of the court in effectuating the sale of the house. The plaintiff does not plausibly suggest otherwise in his complaint. That the sale of the house prevented the plaintiff from implementing his alleged care plan does not render the defendant's action unprotected by quasi judicial immunity.

b. Conversion. The plaintiff alleges that the defendant converted Kathleen's house, the personal property in the house, and the monetary proceeds from the sale of the house. To state a plausible claim of conversion, a plaintiff must allege that the defendant wrongfully exercised dominion or control over the personal property of the plaintiff. Weiler v. PortfolioScope,

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<sup>14</sup> "[A] guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care, education, health and welfare, but a guardian is not personally liable for the incapacitated person's expenses." G. L. c. 190B, § 5-309 (a).

Inc., 469 Mass. 75, 87 (2014). The plaintiff does not dispute that the probate court judge gave the defendant authority to clean out the house. Rather, the plaintiff's allegations all relate to actions that the defendant undertook in clear exercise of the authority granted to her by the probate court judge. Nowhere in his complaint does the plaintiff allege theft or misappropriation. The sale of the home was done pursuant to an order of the probate court, and therefore the conservator is immune from the claims as alleged. The plaintiff's amended complaint fails to plausibly allege that the defendant exceeded the probate court judge's orders. See Iannacchino, 451 Mass. at 636. See also Cok, 876 F.2d at 3 (selling of real estate quasi judicial function in context of court-appointed conservator of assets). Accordingly, the allegations in the complaint are not sufficient to defeat a motion to dismiss.

c. Discovery. We briefly address the Superior Court judge's ruling ordering "narrowly tailored discovery" to aid the court in determining whether the complaint alleged conduct that falls outside the quasi judicial immunity afforded to the defendant. We agree with the plaintiff that the question whether a defendant is entitled to absolute immunity is not one that should be determined through "narrowly tailored discovery" based on what the judge described as "paper-thin" allegations in the complaint. Rather, it is incumbent on the plaintiff to set

forth factual allegations plausibly suggesting that the defendant acted outside her jurisdiction. See Cok, 876 F.2d at 4 (claims against conservator dismissed where there were "no allegations of theft or personal profiteering, or that any of the[] acts were taken without the sanction of the family court"); Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976) ("burden of pleading and of showing the absence of privilege falls on the plaintiff"). The plaintiff has failed to do so here.

4. Personal liability of conservators. The applicability of the common-law rule of quasi judicial immunity to conservators for claims arising out of specifically delegated judicial functions does not mean that conservators are entitled to absolute immunity in all circumstances. See G. L. c. 190B, § 5-428.<sup>15</sup> The defendant's quasi judicial status entitles her to absolute immunity when acting within the scope of express judicial approval. However, when a conservator's acts are not authorized or approved by the probate court, the conservator is no longer acting as an agent of the court, and as such may be held personally liable. See Gross, 304 Conn. at 253-254.

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<sup>15</sup> As previously stated, an estate may seek personal recovery from a conservator through "accounting, surcharge, or indemnification, or other appropriate proceeding or action" pursuant to G. L. c. 190B, § 5-428 (d). Moreover, conservators may be liable for some "torts committed in the course of administration of the estate." G. L. c. 190B, § 5-428 (b).

Because the plaintiff here does not allege that the defendant was acting outside the express authorization of the probate court, we do not address the extent to which a conservator may be held liable personally when acting within his or her statutory authority but without express authorization or approval of the probate court.

Conclusion. The order of the Superior Court denying the defendant's motion to dismiss is reversed. The case is remanded to the Superior Court for entry of an order allowing the motion to dismiss.

So ordered.