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JONES, ET AL V. FLETCHER

LAWYER: May it please the court. I believe that what we are faced with here today is nothing new to this court because it is in fact a continuing search for a deep pocket. And in this instance it is a search for the affirmance of a judgment by the respondents that impose liability on Edward D. Jones and Bo McKinney in connection with a transfer of stock and imposed liability on Bo McKinney and Lincoln National Life Insurance Co. with regard to the establishment and liquidation of an annuity.

The facts I think while we've stacked up a lot of paper and killed a lot of trees, the facts are relatively I believe simple. In Sept. 1989, Bo McKinney who is a securities representative for Edward D. Jones, was contacted by Carlton Annis. Carlton was the nephew of Ms. Bee Cairns. And he said that his aunt wished to transfer securities to him.

SPECTOR: Those securities were where? Were they being kept by the stock broker?

LAWYER: It changes your honor. At the time that Mr. McKinney witnessed the signatures, which was a part of transferring the securities, those securities were in the possession of Ms. Cairns at her house where Mr. McKinney went. Subsequent to that time...

SPECTOR: But before that time were they being held by Edward D. Jones in her name?

LAWYER: No ma'am. As a matter of fact I think all the record will reflect is that the first time you hear any reference to the location of those securities they were in the possession and control of Ms. Cairns at her house. There also was some testimony from Ms. Fletcher and others that at times those securities were in a safety deposit box in Ms. Cairns name in a bank. But these were not securities being held in a street name by Edward D. Jones, or in a custodial account by Edward D. Jones.

The evidence will show that Mr. Annis suggested to Mr. McKinney that he had a power of attorney and he would utilize the power of attorney to transfer the securities. Mr. McKinney indicated that he was uncomfortable with that and he preferred to visit with Ms. Cairns, the aunt. Sometime 2-3 days or sometime after that, an appointment was made where because she was in a wheelchair Mr. McKinney went to her home. The evidence in regard to what took place in that home visit is uncontroverted. There were only 2 people who testified who were present. That is Bo McKinney and Mrs. Annis, who was in an adjourning room, the wife of the nephew. And the testimony there is is that Mr. McKinney visited with Ms. Cairns. He talked to her about what her desires were. He visited with her about what the consequences of her transferring of these shares would be, that she would no longer be the owner of them, and that she would not receive the income from them. And that she on 2-3 occasions indicated she desired

to go through with the transaction.

Also there is testimony uncontroverted that a various times Mr. McKinney asked her if she wished to stop and resume at some other time. And basically I think her response as reflected in the record was: No, let's go on and complete it. This went on I believe the record will show from about 7-11:00, 7-10:30, but about 3-3½ hours. At the conclusion of that time, Mr. McKinney as a result of that had set up an account in her name, which was necessary in order to effectuate the securities transfer, she had signed the necessary stock powers, and he had witnessed or guaranteed her signature as is required by most transfer agents. He then took the securities back to his office, he similarly set up an account for Carlton Annis. These securities were then sent to Edward D. Jones in St. Louis where in accordance with standard practice after the transfer was recorded, the original certificates at some point are destroyed.

Now nothing happens with regard to the securities as far as the record shows, or with regard to any yowl yowl as far as Bo McKinney is concerned or Edward D. Jones until January of 1994, Mr. Anis comes in and says these dividends are eating him up on his taxes, and he wants to know what he might do to save on taxes.

Mr. McKinney is a service representative for a number of insurance companies. And he suggested to him that he could put it in an annuity with Lincoln National Life Ins. Co., and the earnings from that annuity would be tax free until Mr. Anis began to draw them down. Mr. Anis wanted to do that. Stocks were liquidated pursuant to that investment and the investment is made. There is another substantial stretch of time in January, 1990, when that was done. And then in Sept., 1990, there is an application made to appoint Ms. Weaver, a niece, as the temporary guardian.

Now as far as the record reflects Bo McKinney, Edward D. Jones and Lincoln have had no contact with anybody in this deal between January 1990 when the annuity is set up and Sept. 1990. In Sept. 1990, pursuant to that temporary guardianship, a constable of Milam county delivers a writ of sequestration and attachment to Bo McKinney in his offices in Taylor, Williamson County, Texas. It is uncontroverted the constable removed nothing physically from the premises. At a later point, he requested through Mr. McKinney's secretary, I believe the testimony was, a list of what it is that I seized. Whereupon a list is made up of the securities held by Edward D. Jones, and there is attached I believe to that response, on Lincoln National Life Ins. Co. letterhead a notation with regard to the annuity. Mr. McKinney then is called and testifies in a guardianship hearing. In the course of that testimony when he's talking about what Edward D. Jones holds he volunteers that there is other property, that being the annuity held by Lincoln National Life Ins. Co. and the contract being held by Mr. Anis.

On Oct. 14, 1990, Mr. Anis by overnight letter to Lincoln National Life requests surrender of the policy; and the policy is subsequently surrendered and Lincoln sends him the money, and Mr. Anis runs over to East Texas, Mr. Dwyer gives him the money, Mr. Dwyer puts it in his name in a Louisiana bank.

All of these transactions and transfers of property about which there was a complaint in this case, had been the subject of an earlier lawsuit, a will contest and a lawsuit against Carlton Anis. In that will contest a will dated Dec. 15, 1986, was declared to be a valid will of Ms. Cairns. That same order in connection with the imposition of a $1.7 million in liability on Mr. Anis, found that from Dec. 16, 1986 forward - 1 day later - Ms. Cairns was mentally incompetent. She was NCM(?).

GONZALEZ: I thought the consent decree said she was incompetent at the time of the stock transfers?

LAWYER: The consent decree said that she was incompetent I believe from 12/16, because it struck me that the judgment finds that she is competent and that her will dated 12/15/86 is admitted to probate, and yet 24 hours later she is incompetent, and in the course of this trial the judge lets that judgment in. At first under a cautionary instruction that it is not admitted for the truth of the matter stated. Subsequently on at least two occasions, he treats that judgment as though it is there for all purposes.

Now to get to the nub, we objected at the time this case was submitted to the jury, that there was no evidence to support a finding on the negligence issue or on the fiduciary duty issue. We also made those same objections to various of the other negligence findings. We objected on the basis that this issue that was submitted that said that Bo McKinney had lied to the court about the effect of the writ the court had issued that there was no cause of action, and we also said there was no duty of good faith and fair dealing in the context of this case.

Here's the problem we had at that stage. We were confident there was no evidence that would support a negligence submission with regard to anything that was a duty of Bo McKinney. We did not dispute that he had a duty as any agent would to carry out the instructions of Ms. Cairns, to carry them out reasonably promptly, and obviously not to be negligent and not do what Ms. Cairns had told him to do.

There is no evidence in this record if those were the only duties that he breached any of them. As a matter of fact if you look at the TC record in this case, all of the evidence in the TC was over what Bo McKinney didn't do such as called her doctor and asked whether she was competent; called her neighbors and asked whether she was competent; all of the things he didn't do and then some things that other people, psychologists and Mrs. Fletcher and others testified that he might have done. We objected on the basis that there was no evidence that would support a finding of negligence and necessarily we got into the duty question. Counsel for the respondents has been unable yet to cite a case in which an agent is required to determine the competence of his principal before carrying out a transfer.

ABBOTT: Have we had a chance to see the handout that they've provided us?

LAWYER: I got that this morning at the oral arguments, but I've read it.

ABBOTT: It basically is just a reiteration of some arguments made previously. What is your response to their comment that neither Edward B. Jones or McKinney's objections to the charge their motion for jnov, nor their motion for new trial raise an issue concerning the limits of any tort duty owed by a stockholder?

LAWYER: I don't believe that is accurate because I think that in the objection to fiduciary...there was a combination question of negligence and fiduciary duty, question 2, in that we specifically noted in that objection that there was no unlimited fiduciary duty. We had the problem as I was trying to explain awhile ago, we could not say either as to negligence or fiduciary duty because we were an agent, that under no circumstances would we have a duty. What we did clearly point out over the course of the trial in the motion for new trial and in the motion for judgment nov, is that there was no evidence to support a finding with regard to that issue.

ABBOTT: As I understand it you did make valid good objections with regard to the factual sufficiencies supporting those conclusions. But you did not challenge the legal bases of the submission.

LAWYER: I submit that we did your honor. We challenged it in the only way we could in the way the case was submitted. For example: Had we made an objection question No. 2 should not be submitted because Bo McKinney had no duty not to be negligent with regard to Ms. Cairns, I think most people would have laughed you out of the courtroom with that objection. What we had to say was is that the evidence these plaintiffs have adduced is not evidence of the breach of a duty and therefore negligence or not it couldn't support an answer to question No. 2.

ABBOTT: So you're claiming then that it was not incumbent upon you either at the charge stage, the jnov stage, or the new trial stage to argue that legally there is no duty?

LAWYER: I do not think it is incumbent under the circumstances in this case. And I think we would be entitled to prevail. I think you said we would challenge fact insufficiency. I think we challenge legal sufficiency because we've basically said there is no evidence that will support an affirmative answer to question No. 2, and all the other questions. There are other questions where we specifically said that there is no such duty. For example: the question of whether we lied to the court, or that Bo McKinney lied to the court about the effect of the court's writ. We said that. But in the contest of the questions being asked here, I believe what we raised was the proper way to raise it and to the extent they now try to say: Well look at all this evidence of what he didn't do, then my answer to that is all of that evidence relates to something that he had no duty to do. It all relates to the duty to investigate or accurately determine her mental competence.

CORNYN: Ms. Carins was obviously incompetent, at least to the point where a reasonable person in Mr. McKinney's position would have reason to suspect her of legal competence, would there be any duty under those circumstances to do anything further, or could they just go right ahead and sign

her up?

LAWYER: I have troubled over that a great deal. But I have decided that I believe what is appropriate under the concepts of duty that this courts _____ is that once you say that a laymen like Bo McKinney has to be able to make a determination that both doctors and lawyers argue about endlessly in trials about competence, incompetence what it means legally, it seems to me that to put that kind of a burden on an agent is going to substantially impede commerce. It does not mean that it's without remedy. Because the transaction can be set aside and to the extent that Bo McKinney or Edward D. Jones obtained any benefit from it they can be required to disgorge it. That's a risk I think you would run in dealing with somebody who might be obviously impaired. The cases that we've cited in our brief that deal with the securities instances are situations in which people had been found incompetent at various times. They were not under an existing adjudication of incompetence, and the courts in those instances found the broker had no duty with regards to it. And I think that's the proper rule.

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RESPONDENT

JACKSON: I represent Pat Fletcher, the respondent. I think that the questions that the court has in this case must be determined in the factual context of the case. And I would like to say that although the facts are not complicated in the case, that the 2 sides do disagree about what the facts were in the case. And in this particular case, the rule is clear, that with respect to the two no evidence questions should you reach them over the waiver problem, points of error 2 and 4, the two no evidence points that you have granted the writ on, the rule is that all of the evidence unfavorable to the jury findings in question must be disregarded. And further, that all reasonable inferences in support of those findings must be made if those inferences have more than a scintilla of support in the record.

ABBOTT: But that of course would not matter if we concluded that there was no duty?

JACKSON: That's correct your honor. You don't reach the no evidence points if you conclude that there's no legal duty. And I have a response to that, but I don't think you can determine whether there was a duty in a vacuum. I think that the question of duty in all of the cases that the court has decided: Grant v. Beard, 1993 to the most recent case, the Boy Scouts case had determined the question of duty in the factual context. Now those cases were summary judgment cases. And we have a different case here. In those cases, the court was not called upon to assess the credibility of any witness or to make any inferences and support of any findings. They didn't have to. The inferences were all the opposite direction.

OWEN: Let's assume that my mother has done business at a bank for a number of years and she's failing mentally; and she walks into her bank one day and talks to her banker and instructs him to empty out all of her accounts and give away all of her money to Wild Black, for example; and the bank

suspects that she's not mentally competent. What should they do at that point? Do they owe a duty to her children to pick up the phone and call them? What's the duty owed when someone that you deal with you suspect that they don't have their mental faculties?

JACKSON: I think the short answer to your question is to act like an ordinarily prudent person would act under the same or similar circumstances. And that was the definition of negligence submitted to the jury in this case; and the jury found that Mr. McKinney had not acted that way. The specific case that you posit is not before the court.

OWEN: Are you putting people who deal with the elderly in peril? Do they have to determine before they will deal with the elderly get some certificate or some I guess proof that the person they are dealing with is legally competent?

JACKSON: No. I do not believe that that is the duty...

OWEN: How can they protect themselves otherwise if they deal with the elderly?

JACKSON: I'll tell you how they do. They pay attention to what they see. They utilize the knowledge that they had as in the Boy Scouts case. There is no investigation required by the Golden Spread Council, but they do have to act reasonably given the knowledge that they have. And the evidence in this record properly construed is that Ms. Cairns, Aunt Bee, exhibited signs of incapacity that even a lay person would have recognized as signs of incapacity. It's undisputed at this point in the litigation, that Aunt Bee was legally incompetent on Sept. 28, 1989. That finding is not before you and it can't be before you. It is a fact as we stand here. And the evidence properly construed in this record of a judgment based upon a jury verdict is that Aunt Bee exhibited signs of her incompetence that a lay person would recognize. And so the duty is that if you see signs of incapacity that even a lay person would recognize as signs of incapacity, you should refrain from conducting business with that person because we protect people who are lacking capacity.

BAKER: Isn't the protection, the remedy of saying _____ transaction?

JACKSON: That is the situation with a will where you had the procedural safeguards of probating the will where before that document can take any effect before it has any impact on the person's estate, procedural safeguards must be employed that are designed to protect against the possibility this person might have been incompetent.

BAKER: But doesn't the guardian appointed to an MCM person have the right to bring such an action has the remedy to set aside a _____ can be made by incompetence?

JACKSON: Yes. But the crucial distinction here is that in transfers like these there is an

immediate effect on the person's estate. And the guardian may sue when she finds out later and the money may be gone just as in this case. But in the other situations that you're talking about...

BAKER: When you say the money was gone, but Edward Jones' company was still there solvent?

JACKSON: That's why we've sued them because the stockbroker was required for this transaction. Justice Spector asked where was the stock and that's the crucial question. If this stock were already in a brokerage account, in a street account, and it could be transacted over the telephone or by a facsimile we wouldn't have this case. But that stock was in Aunt Bee's safe deposit box.

CORNYN: Would you explain why? If these were instructions, if Aunt Bee called on the telephone, called Mr. McKinney and says: I want to transfer $300,000 worth of stock, why wouldn't you have a case?

JACKSON: He doesn't have any opportunity to observe her.

CORNYN: Is he under some duty to inquire or investigate?

JACKSON: Again, that case is not before you. I think in that case he might not be.

CORNYN: We're testing the breath and depth of your duty you're arguing for?

JACKSON: The narrow duty that I am arguing for is that when a man goes out and meets in person with a lady who is it's undisputed legally incompetent...

BAKER: Who said she was legally incompetent? What is this undisputed evidence you rely on of her incompetence on the date of the transaction?

JACKSON: The jury's finding in response to question No. 1, which has not been challenged since the TC.

BAKER: Well I understand the jury may find that, but you believe that uncontroverted evidence that she was incompetent. If it's uncontroverted then you don't submit that question to the jury is that right?

JACKSON: Yes. I didn't mean to say uncontroverted. I meant to say at this stage in the litigation it is undisputed, it cannot be disputed. It has to be taken as a given that she was incompetent.

BAKER: Why is that?

JACKSON: Because they haven't challenged the jury finding. And so when you ask for instance: Will this chill business with the elderly? My response to that is it should chill business with the incompetent elderly.

OWEN: What if a gentleman comes in again he's dealt with the bank for a number of years, and he has some signs that he might not be in possession of all his faculties, and he's entered into a large contract and he asks the bank to transfer funds to perform that contract. Now the banks kind of put between a rock and a hard place aren't they? If they don't make the transaction, would they be subject or could be sued for breach of the fiduciary duty interference, but if under your duty theory aren't they liable if they do make the transaction and he doesn't have his wits about him?

JACKSON: I think that would present a difficult case. But in this case, Mr. McKinney voluntarily undertook as in the Boy Scouts case where there was a voluntary undertaking that then created the duty of ordinary care at minimum, Mr. McKinney voluntarily undertook to do this transfer. He did not have to do it. She was not a customer of his. He hadn't even talked to her before he hit her doorstep at 7:00 p.m. And so all he had to do when he observed the signs of incapacity is just say no.

SPECTOR: How does that differ? Is there a difference between the stockbroker and I believe it was Fletcher who returned all of the financial records to Aunt Bee? Did Fletcher have a duty not to allow those records to go back _____?

JACKSON: I think that that's a question that we struggled with at trial. And my response to that is that first of all the jury found that she was not negligent in the way that she acted. And I think that the evidence in this record to support that finding, although it is not before you at this stage, but to the extent it's a concern of yours...

SPECTOR: Is there any difference between a stockbroker and a relative?

JACKSON: There is. This stock being in her safe deposit box could not be transferred except by Mr. McKinney going out to her house and performing the function of a transfer agent.

SPECTOR: I question that. That is the only way it can be transferred?

JACKSON: That's the only way that this stock could have been transferred under these circumstances where you've got a homebound person, it's not already in an account, the way that it had to be done was Mr. McKinney went out met with her...

SPECTOR: She signs the transfer?

JACKSON: She signs letters of authorization and the stock certificates.

SPECTOR: And then could her nephew have taken those down to a transfer agent and have them transferred?

JACKSON: No because her signature, and this is the crucial thing, under the Uniform Commercial Code a stockbroker performing the function of a transfer agent warrants the legal capacity of the transferor, and that is required. Without that warranty done by a person like Mr. McKinney or like a bank who has the legal authority and responsibility to do that, that stock cannot be negotiated. It cannot be transferred. It's not fungible. And so the big difference between Bo and Pat is that Bo had that authority and responsibility and Pat did not; and Bo had the knowledge in his 4 hour meeting with her that she didn't understand the transaction. She couldn't even read. She had glaucoma. He didn't read the stock transactions to her. She didn't read the documents. There were 20 plus documents. None of which she read. And she couldn't read them. And she was confused...

ENOCH: Would your rule apply to the notarized signature on the transfer or car title? Would it apply to a notary on any tax preparer's report to the IRS; would this duty go to anybody who attest to the signature of someone who appeared in front of them? I've got the duty to assess their competence to sign this document. If they are not compete to sign this document then I'm liable if somebody defrauds them.

JACKSON: I don't think that the same arguments can be made as strongly in the case of a notary, which I have considered and talked with my partner about, because he's a notary. And the difference is...

ENOCH: What's the difference, the amount of time? Would it be a breach of duty if I don't spend enough time with them to be able to assess them, or is it only a breach of duty if as a matter of fact I spent time with them and so I should have otherwise identified. Where does the breach occur?

JACKSON: I think the difference is in the nature of the duty. The notary's office does not involve a warranty of legal capacity. Bo McKinney's office in performing the function that he performed without which the stock could not have been transferred involves a warranty of legal capacity. And Roy Mower who is a practicing securities attorney, the defendant's expert witness, a former securities commissioner testified at trial that the broker must satisfy himself that his customer is competent or he is negligent. And Mr. McKinney admitted at trial.

ENOCH: Who is suing the broker for this breach of the legal capacity? Is it the person who received the stock and then lost the stock because she was declared incompetent, or is it the person who said she shouldn't have been allowed to transfer? It seems to me the warranty doesn't run to the person who signed the stock certificates. It runs to somebody else.

JACKSON: We haven't sued on a breach of warranty.

ENOCH: So how does that create some sort of...is this some sort of like a good faith and fair dealing that just sort of follows this contract, but goes the opposite direction from the warranty?

JACKSON: I think it's just one of the factors. And you asked what was the difference between the notary and the broker and I said that's one factor that I think clearly distinguishes the two. But I think the duty arises from 2 things with respect to the stock transfers. The first thing it arises from is from the voluntary undertaking, which he was obligated to perform using ordinary care. And given this record that he should have observed...

ENOCH: Voluntary undertaking was he volunteered to go to her house to be with her; is that the voluntary undertaking?

JACKSON: To perform the function of a transfer agent. That was a voluntary undertaking. He had no customer relationship, no contract, no account.

BAKER: Was Mr. McKinney the actual transfer agent?

JACKSON: Yes he was.

BAKER: He could have done it without sending it to Edward Jones?

JACKSON: He's the transfer agent and he works for Edward D. Jones. And so once he's transferred the stock and it gets deposited into an Edward D. Jones account, then Edward D. Jones or any other broker can deal with it just like a street account. That's the way that works. But the second reason that there's a duty about where the duty arises, is that in response to question No. 4, this jury also found that Mr. McKinney employed a fraudulent manipulative or deceptive device to find among other things as taking advantage of a person's lack of knowledge. That's straight out of the securities exchange act of 1934. And as Justice Cornyn's concurring opinion points out in one of the recent duty cases, when a person violates a statutory duty at least he is negligent. He may be negligent per se. When the statute was designed for the protection of the class of people to which the plaintiff belongs, and so that's where we fit. Aunt Bee is in the class of people that the securities exchange act was designed to protect. And it was designed to protect her at least the portion that the jury answered in the affirmative on against this very sort of conduct that took advantage of lack of knowledge. So the duty in this instance arises from the voluntary undertaking, and the violation of the statutory duty. The UCC warranty I think is important because it flatly refutes their argument that somehow that just wasn't a part of his job. It's clear that that was part of his job. It's in the statute. It's also clear from the Securities Exchange commissioner's testimony, the expert for the defendants, that that was part of his job. And Mr. McKinney admitted that it was part of his job. It's not part of the notary's job and that's why I wanted to distinguish between those two.

HECHT: The parties who briefed the case extensively and I assume thoroughly in footnote

7 of the petitioner's brief a number of cases are cited for the suggesting that in similar circumstances to these there is no responsibility or legal duty on the part of a broker. And your brief tries to distinguish those cases but cites no case to the contrary. Is there such a case in the country would hold a broker under these circumstances?

JACKSON: Yes, I think there are cases that would hold a broker under these circumstances. And I would be happy to cite those to the court at this time. The first is a federal case out of the Western District of Missouri: Kidder Peabody, 505 Fed. Supp. 1380; and it's in turn based upon a Missouri SC case that basically says there's a common law duty of ordinary care when you're on notice of suspicious circumstances, which is just common sense. I haven't cited those cases in the brief but I did find those. I also found a case, Litchenstein out of the Western District of Pennsylvania: 840 Fed. Supp. 374, where a husband and wife account, and the husband starts doing funny business with the wife's account. And the broker had knowledge from his dealings with the husband that should have alerted him to the funny business. And the court said: a common law ordinary care is required. And I think that's just common sense. The cases in footnote 7 on that page are suitability cases; and those cases involve investments. This was not an investment. Aunt Bee gave away virtually all of her net worth when she was incompetent, when she was exhibiting signs of that incompetence that the broker knew or should have known were signs of incompetence. And there was no investment. The suitability cases don't apply.

CORNYN: Assuming she could have done so over the telephone though, you're saying that absent some manifestation of her incompetency Mr. McKinney would have no liability; is that right?

JACKSON: I'm saying that on this record, that the court can without any pangs of conscience acknowledge the duty of ordinary care because of the knowledge he acquired in his 4 hour meeting.

CORNYN: But without that knowledge, then no liability? She can be just as incompetent, but without something putting him on notice of the inquiry he would be scott free?

JACKSON: Well that may be true. That case is not before you. I think that I would say that on this record, the duty that we are advocating it stops outside the case you posited. Because it was the knowledge that Mr. McKinney had in his 4 hour meeting with her together with the types of duties that he had as part of his job together with his voluntary undertaking and his violation of the statute that create the duty in this case. And I don't see any of those factors in the hypothetical that you are posting.

CORNYN: And the only evidence of Ms. Cairns' apparent incompetency during that meeting is from Mr. McKinney's testimony?

JACKSON: No, that's not true. Crotcher v. Crotcher is a Texas SC case. In that case the court held that evidence before and after the adjudication of incompetency is evidence of incompetency. It's a 1983 case.

CORNYN: So even if there were not manifestations of incompetency at the time, you're saying if she was incompetent before she must be incompetent after. That would be some evidence of her incompetency at the time that would create a duty on Mr. McKinney?

JACKSON: No, I am analogizing in that case that evidence that she exhibited signs of her incompetency before and after the meeting is some evidence that she exhibited them on that occasion together with the medical evidence that we had. We had medical records that say: 8 months before the stock transaction especially in the evenings she was disoriented and confused that she couldn't even understand simply instructions from her nurses about when to eat and when not to eat. We had the lay evidence from the relatives that throughout 1989 when they met with her for longer than 30 minutes she displayed confusion, forgetfulness, lack of knowledge, disorientation, and evidence that she was not with it. We had the evidence of the experts: 1 psychiatrist and 1 psychologist who both opined that because of her physical condition based upon their training and experience she would have exhibited signs of incapacity on Sept. 28, 1989, during a 4 hour meeting with a stockbroker about this kind of transaction. Especially given that it was a disruption of her normal routine. This meeting lasted for several hours past her bedtime. We have plenty of evidence in the record that on the occasion in question she did exhibit the signs. And this court I submit is required to indulge in that inference and that presumption in support of the jury findings unlike your other no duty cases which were summary dispositions.

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REBUTTAL

LAWYER: Justice Cornyn if I could follow-up on what you said. The evidence of what Bo McKinney saw on the night of the stock transfer is contained wholly in the testimony of Bo McKinney and Mrs. Annis. They were the only two people present who testified and they testified that she was bright, that she was alert, that she told Mr. McKinney when he came in she had been expecting him to be there, that she was asked several times during the course of the evening whether she wished to continue. She was asked a question whether this was what she wanted to do. In every one of those instances she responded affirmatively.

Counsel says: Well under Croutcher v. Croutcher though if I prove that she was incompetent beforehand, and I prove she was incompetent afterwards, then it is inferable from that that she would have demonstrated signs of incompetence in her meeting with Bo McKinney. I don't think that's what Croutcher holds. What Croutcher holds is that if you have evidence before an event, that a certain state exist, and evidence after the event that that same state exist, it's reasonable to infer that that state continued to exist in the interim. That's not the same question.

OWEN: On the duty issue, does UCC §803 create a duty on behalf of a stock transfer to determine legal including mental incapacity?

LAWYER: We've looked at that. I think there's one case. I think what capacity means there is that if I sign this as trustee of the Joe Jones trust, that that is in fact my capacity. What I am doing in the Uniform Commercial Code I believe is I am certifying to that signature in order to give the transferee of that security the confidence that they are acquiring title. Now the fact of the matter is I think when they are arguing this it seems strange to me that they would be arguing it because that warranty does not run to Aunt Bee Cairn. It doesn't run to her other heirs and _____. It runs to the transferee of the security. And what it says is is that if we're wrong on this and you lose the title you sue us on a breach of warranty. And we then must respond to you for your loss in that security. It has not anything to do with the question of whether he owed a duty to Ms. Bee Cairns.

ABBOTT: Do you think that McKinney could be liable in this dealing if it turned out that Aunt Bee was a mongoloid or Aunt Bee had other signs of serious mental incapacity, mental retardation?

LAWYER: I still believe that we've got a process for that in this state. If there is someone who is incompetent to handle their affairs, somebody in Ms. Fletcher's position or something else does what she finally did in 1990, although saying she thought she was out of her mind since 1986, you go into a court, you put on evidence before you deprive that person of the right to utilize their property as they see fit, and before you put all the people that deal with them at risk. I think that's the reason we have the procedures. And I know all of you have set in cases where the question of incompetence is battled back and forth between highly paid doctors, and they can't even agree. And lawyers don't agree on what the particular competence is in the transaction. And what they seek to do here is to say Bo McKinney should have known.

ABBOTT: But that aside let's just assume for whatever reason there's never been a legal determination of the competency _____ and McKinney is dealing with someone who is obviously mentally retarded. Should there be any reason why he should be held liable?

LAWYER: No sir I don't believe there is. Because I think this is the place where you've got to decide how you're going to cut it. He may be running the risk that he's going to expose himself to liability from a transferee and he may decide out of his own good business sense, I'm not going to do that deal; but I don't think that sort of decision is the same as saying: but you're also going to be liable to the person for whom you transferred. But I do believe in this instance you need a bright line and there are procedures available that will say this person is no longer capable of handling their own affairs.

I think there's some confusion here. Bo McKinney was not a transfer agent. Bo McKinney is acting like a commercial banker, a trust company, or a registered stockbroker in guaranteeing the signature of Bee Cairn on these stock certificates so they can be transferred. The transfer agent Justice Baker is located in St. Louis or wherever the company...most of them I think are located on the street in New York where there is a bank and they determine whether they have appropriate papers to transfer and whether they have the appropriate assurance of authenticity of signature and then they are transferred on the books

and records of the corporation. And most of them as a matter of fact I think now go through Seed & Company so _____ stock certificates or anything really never get transferred. It's just a matter of a check list of authenticity.

So Bo McKinney is not acting as a transfer agent. Any commercial banker in those counties could have been in this same position. Any officer of a trust company could be in this same position. I think the question that was asked: What's the difference with a notary? Or what is the difference with a witness to a will? Are they civilly liable if they miscall it? That's what we're talking about in this case. And counsel can say it's different with a stock broker. But let's go back to the question: What is the broker doing here? He is acting in standard agency position. And he owes his principal the duty to follow the principal's instruction.

BAKER: Based on your argument he is not a transfer agent. He was acting to guarantee the signature of Mrs. Cairn on the certificates. Are there definitions of who and what capacity they have to have to be a guarantor?

LAWYER: I believe that there are regulations. As a matter of fact I think the respondents cited them in their rejoinder to our reply or response. I think they've cited some CFR citations in there along with the UCC citations. I think all those say is that a transfer agent must accept those people's attestation. I think a transfer agent if they choose to do so they are free to honor the transfer whether it's done that way or not. If they do that however, I believe they are going to take on the liability if in fact there's something wrong with the signature as opposed to being able to look back down the chain to the guarantor.