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Supreme Court of Texas.
MARINER FINANCIAL GROUP, INC. and Joe F. Moore, Jr., Petitioners,
v.
H.G. BOSSLEY and Carole P. Bossley, Respondents.
No. 00-0325.

February 7, 2001.

Appearances:
James M. McGraw, Looper Reed Mark & McGraw, Houston, TX, for Petitioner.
Don K. Leufven, Alonso, Cersonsky, Leuven & Suarez, Houston, TX, for Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla R. Owen, Justice H arriet O'Neil, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Deborah Hankinson, Justice James A. Baker, Justice Craig Enoch, Justice Xavier Rodriguez.

CONTENTS
ORAL ARGUMENT OF JAMES M. MCGRAW ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF DON K. LEUFVEN ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JAMES M. MCGRAW ON BEHALF OF THE PETITIONER

CHIEF JUSTICE PHILLIPS: We are ready to hear from petitioners in Mariner v. Bossley.
SPEAKER: May it please the Court. Mr. McGraw will present argument for the petitioners. The petitioners reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES M. MCGRAW ON BEHALF OF THE PETITIONER

MR. MCGRAW: May it please this honorable Court. My name is Jim McGraw. And I'm the attorney for the petitioners in this case whom I will refer to as Moore. It is Joe Moore and Mariner Financial Company. I will also refer to our side as "we" from time to time. And I reserved five minutes with the clerk for rebuttal. This case is a -- is an arbitrator bias case. It arises out of arbitration, conducted under the rules of the National Association of Security Leaders, the NASD. My clients were the defendants in the case. The Bossleys were the plaintiffs in the case. The case was heard by a three-arbitrator tribunal appointed by the NASD. And these were all neutral arbitrators. A public chairperson arbitrator, Bentley Nettles, and two other neutral arbitrators: one an industry expert and the other another neutral public arbitrator. The unanimous verdict and -- and ruling of that

arbitration panel was that the Bossleys take nothing. The Bossleys then filed a petition to vacate that ruling, that arbitration award with the district court in Houston. And the district court granted a judgment confirming the arbitration award and denying the motion to vacate. The Bossleys appealed the case. And the Houston First Court of Appeals in a split decision rendered judgment, reversing the case on the grounds of the evident partiality of the neutral arbitrator to wit, Bentley Nettles. We ask the Court here to reverse and render that case. Reverse the --

JUSTICE HANKINSON: Mr. McGraw, let me ask you. Is -- Is it your position that because the relationship at issue in this case involves a relationship between the arbitrator and the witness that, in fact, the rules like TUCO, should not apply in the arbitration context?

MR. MCGRAW: No, Justice Hankinson. That's not our contention. We do not --

JUSTICE HANKINSON: 'Cause I -- I sensed on your brief that you were saying that that was a distinction that made a difference in whether or not TUCO should apply. And would you please explain whether I have misunderstood and we should just treat this as we would in any other context, looking at potential conflicts with -- that affect an arbitrator? Or whether there is some special consideration to be given, because this is an arbitrator and a witness.

MR. MCGRAW: Your Honor. It is a distinction that makes a difference in the way that TUCO is applied. And that is this: The TUCO opinion acknowledged that waiver is an issue in the evident partiality cases. It -- In this particular case, the twist in this case, is not only is the relationship with a witness, but the relationship is with a witness for the complaining side.

JUSTICE: Okay. So, your -- your point goes to the waiver argument. It does not go to the underlying evident partiality question. Is that -- is that right?

MR. MCGRAW: Well, it goes to the waiver issue. But further, it goes to the access to information.

JUSTICE: No but, tell me -- tell me --

JUSTICE: [inaudible] entirely different between the two sides. Let's suppose, I'm an arbitrator. And one side has given me a campaign contribution. That's for whatever reason we don't have open report existence. We'll pass by that, whether it buys access. But they've done this favor for me. It's not well-known. I have no duty to disclose it to them. But I have a duty to disclose it to the other side. Is that your position?

MR. MCGRAW: The rule, your Honor, would be that you have -- that the arbitrator has a duty to disclose, period. The duty to disclose any, according to the TUCO case, as adapting the standard as set forth in Commonwealth Coatings, any relationship, which to an objective third party could give the impression of partiality.

JUSTICE: So you got a -- your duty has to be disclose to all interested sides in the arbitration anything that is going to affect you based on an objective standpoint.

MR. MCGRAW: That is correct. That is correct.

JUSTICE: Well but -- but I'm not so sure how I understand what difference it makes, with respect to the underlying issue about disclosure and the evident partiality rule, with respect to the fact that this is a relationship between an arbitrator and a witness as opposed to an arbitrator and a party or a party's attorney.

MR. MCGRAW: For -- From my standpoint, it makes no ... that makes no difference --

JUSTICE: Okay, that was my -- that was my initial question what I had understood from your brief that you view that as a different circumstance that should give rise to different rules under these circumstances because there were different policy consideration, implicated. So apparently, I misunderstood. We should in fact evaluate from the front, in terms of the evident partiality witness the same as we would, if in fact, the relationship were between -- we got the arbitrator and witness, as compared to arbitrator and party or party's attorney.

MR. MCGRAW: That's correct, your Honor.

JUSTICE: Okay. Thank you.

MR. MCGRAW: The reason that my brief pointed that out is simply that the appellate court had seemed to key on that issue that we're not talking about party here. We're talking about the witness.

JUSTICE: Okay. Thank you for clearing that up for me.

JUSTICE: As long as we're -- we're talking about side issues. Let me see the relevance you attribute to ... a significant amount of time is put in the briefing as to who might have been in the better position, either Ms. Asmar or Mr. Nettles to reveal the conflict of evident partiality. Is that really important in our determination if we're looking at an objective standard?

MR. MCGRAW: Well, if you're looking at -- if you're looking at the objective standard, before you get the objective standard -- the objective standard is whether this fact, this relationship, would indicate possible bias.

JUSTICE: Okay. But then do you agree that it might reasonably create an appearance of partiality to an objective observer?

MR. MCGRAW: Only if -- only under the standard that the arbitrator knew or reasonably should have known of the -- of the conflict.

JUSTICE: But then again, doesn't that get you to a subjective inquiry and you're balancing, who should've known what, as opposed to measuring it by what an objective observer would think?

MR. MCGRAW: Well, that's correct. But the disclosure requirement -- and again, the disclosure requirement is a balance between trying to facilitate the efficiency of the arbitration proceeding with its fairness in light of the limited review and the like. And that the -- the balance, yes, you could take the bright-line approach that the appeals court took. And you could throw out every arbitration where someone can point to anything that if any relationship that exists, you could throw out those arbitrations. But it is our contention before this Court that that skews that balance. So --

JUSTICE: Well, but you have not -- you have not contested that particular relationship here, is one that would pass objective muster. I mean objectively, someone would ... we must find that objectively, it could -- it would create the appearance of partiality that Ms. Asmar was a witness again to this arbitration. You're not contesting that?

MR. MCGRAW: On this appeal, I'm certainly not contesting that that the fact of the relationship, I think there's no fact issue there. I think that the relationship occurred. And I think that a reasonable objective third party could look at that relationship and say, yes, Mr. Nettles had a reason to dislike this person.

JUSTICE: Okay. And so, once we have that piece, where do we go from there is my question to you, in terms of weighing who knew what when and who had -- it seems to me that if there's an objective standard, once you've answered that question, that's the end of the inquiry. Where would you go from there?

MR. MCGRAW: Well, in order to ... but before you get the objective

standard, we would have the Court do what a number of other courts had done. And that is apply ... first of all, in order -- we have a disclosure test. And that is the test... The TUCO test is a disclosure test. And that was the test that was arrived at by analyzing the two lines of cases evolving from Commonwealth Coatings, one being the actual bias test, conclusion of bias, and the other being impression of bias. This Court chose the impression of bias, the disclosure. And if the disclosure itself, if not made with the objective look back that establishes the bias. But the term disclosure, in and of itself implies that the discloser, the person bound to disclose, must have some knowledge of what it is he is bound to disclose. And the TUCO case did not address that because it wasn't part of that case. It was clear from that case that the --

JUSTICE: I'm sorry, Mr. McGraw. Maybe I misunderstood. I thought you said that you agreed that Mr. Nettles had a duty to disclose his relationship with the witness -- that what your issue was waiver, of waiver by the Bossleys to now complain about that failure to disclose. Am I wrong?

MR. MCGRAW: Well, I misspoke or spoken completely. Because what I intended to say, what our position is, is yes, he had a duty to disclose this type of a relationship, which falls within the ambit of those, which could cause an impression of bias but only within a standard that makes some sense, in the real world. And that is: He has to disclose that which he knew or knew -- I'm sorry.

JUSTICE: The witness was disclosed on the witness list. And so, how can you argue, I mean, there's actual knowledge by ... I mean, he may not looked at the witness list. But from the record, there's actually knowledge that he is aware of this witness. So ...

MR. MCGRAW: There was actual knowledge that he is aware of the witness. There is no evidence that he is aware of the relationship. And it is the relationship that must be disclosed. And -- and what our contention is --

JUSTICE: So, Mariner brought forth evidence in his statement that he did not -- did not know that this was a witness against him in the malpractice case?

MR. MCGRAW: No, you Honor. The other is the Bossleys brought forth no evidence that he knew or reasonably should have known of the relationship so that the nondisclosure would violate the TUCO standard.

JUSTICE: But if that's the case and if we were to agree with your perspective on how this rule should be applied, this case is before us on summary judgment. The burden would not shift to the other side even under your test until you had actually offered proof that he didn't know. I mean, if there's nothing in the record, except for the fact that he was given the witness list as part -- and then he signed something and send it back to the NASD, about what his -- what his conflicts were. It did not include any disclosure about this witness. Even under your test, even if we were to agree with it, how did you meet your burden on summary judgment? There would be no burden for them to come forth with evidence, until you prove -- until you put on the evidence that you didn't know.

MR. MCGRAW: Well -- and I'm going to answer that by saying with an aside that there are some appellate cases which would speak in terms of the standard for confirming an arbitration award on the one hand, and that when you do it in terms of a summary judgment procedure that there is something referred to as it is, quote, filtered, end quote, through the summary judgment procedure. I -- I don't understand what is -- what is meant by that --

JUSTICE: But it doesn't change what Texas law requires in terms of a movant needing a burden to show entitlement to summary judgment.

MR. MCGRAW: Well, the movant in this case was ... all the movant has to do in an arbitration case is file the motion. And the reason for that is, that under both the Texas and the federal statutes, the -- the arbitration award must be confirmed unless the loser comes forward, and -- and pleads, and proves that there is some impediment to the confirmation of the award.

JUSTICE: Okay. So if they have pled that there is an impediment to confirmation and there's evidence of partiality, so they have put that at issue by the pleadings in this proceeding to vacate the arbitration award --

MR. MCGRAW: That's correct.

JUSTICE: -- your position then is on summary judgment, you have no absolutely no burden to go forward with the evidence, and establish as a matter of law, no evident partiality, no evident partiality?

MR. MCGRAW: Yes, your Honor. Because they came forward with --

JUSTICE: Is this is a no-evidence motion?

MR. MCGRAW: Yes. The -- the inescapable implication from the papers is that it was a no-evidence motion --

JUSTICE: Then, why is it ... you're saying an inescapable implication. Was it a no-evidence motion? Did you put the other side on notice that this was a no-evidence motion under the Rules? Or was this a preno-evidence summary judgment motion or a preamendment of the rule?

MR. MCGRAW: Well, it -- it was barely postamendment. And --

JUSTICE: -- So did you put [inaudible] I looked at the motion cause it's not, in your appendix. Did you put the other side on notice as required under the rule, that this was a no-evidence summary judgment motion?

MR. MCGRAW: In those -- In those terms, no. In terms of contesting that there was no evidence to support their case, then the answer, it is yes. They were put on notice.

JUSTICE: Okay. So you did not --

JUSTICE: But did you file -- they filed a challenge and asserted evident partiality. But what did you respond? What did you do in opposition to that? Did you file a motion for summary judgment? Or did you respond to their ... you filed a motion to confirm. They responded evident partiality. Then what did you do?

MR. MCGRAW: Well, technically, your Honor, the -- the Bossleys filed a motion to vacate on the basis of evident partiality. Another defendant in this case, who has since gone in settlement, filed an answer and a counterclaim to confirm. My clients, in the trial court, filed a general denial but joined in the motion for summary judgment. And -- and then summary judgment was rendered on that -- on that.

JUSTICE: On the record, it didn't have any evidence ... the movants did not put on any evidence.

MR. MCGRAW: Well, the movants were not ... that's correct --

JUSTICE: The movants put on no evidence. And you relied upon the other side to -- to raise evidence.

MR. MCGRAW: Okay. Allow me to restate that. The movants offered evidence in the form of the arbitration award.

JUSTICE: Anything else?

MR. MCGRAW: No. But the arbitration award, according to both the state and the federal statute, must be confirmed, unless there is pleading and proof of an impediment.

JUSTICE: Well, but that put the trial on the matter. The question is: How does summary judgment procedure overlie on the ... when you try

to dispose of a case at this point and time?

MR. MCGRAW: Well, and I cannot answer that --

JUSTICE: I mean, are there any other Texas cases, in the context of the procedural posture of this case that say that we handle a summary judgment motion any differently than we would in any other case?

MR. MCGRAW: No your Honor. They say that something about the filtering, at which, as I say, I did not understand that, except to say that we're supposed to have a summary proceeding in the first place to confirm the arbitration rule. And if you could just file the papers, your Honor, spoke at the -- at the trial, in federal court at least, it's clear that the -- that the confirmation of the arbitration award is handled by the papers. If they could've filed the papers --

JUSTICE: But let me ask you this. If there are back issues related to evident partiality, you wouldn't try that?

MR. MCGRAW: That -- those will have to be determined by the fact finder. But in federal court, they'll be determined by the court.

JUSTICE: Let me get back to my -- my question. I don't understand what fact finding would be. My understanding is: You can see that there is evident partiality here under the objective standard, the rule that we're talking about, subpart B. I think you've agreed that this was something that had to be revealed. And the question I believe, you're going to second is: Did the arbitrator to know about it? If they didn't know about it, they don't have to reveal it. Is that -- Is that the summary judgment proof we're talking about here?

MR. MCGRAW: The summary judgment proof is that there was no disclosure in this case because he didn't -- there is no evidence in this record that he either knew or in the exercise of reasonable diligence, should've known.

JUSTICE: Where is the new or should've known standard contained in NSAD Rule 10312 which covers this agreement?

MR. MCGRAW: It is -- It is contained in the statement that the arbitrator should use -- should make reasonable efforts. I believe it --

JUSTICE: I don't see that in here. What I'm looking at, which I believe is in the party's contract, says each arbitrator shall be required to disclose any circumstances that might preclude the arbitrator from rendering an objective and impartial determination.

MR. MCGRAW: Yes. But the contract references these other rules and regulations of -- that govern NSAD arbitrations, which were mentioned in the papers.

JUSTICE: Okay. Can you point to me in the papers where it says reasonably should've been about? I mean, this seems to me to be an absolute standard that -- that if there ... it creates an appearance of partiality, which you've conceded on an objective basis, then it seems to me they have to disclose it whether they knew about it or not. There's a duty to disclose. And it's not a subjective ... did they really know about it or not. It's one that has to be disclosed or it taints the process.

MR. MCGRAW: Well, your Honor, I -- I will simply say that in my searching, there is no court in the United States that has held to -- to a strict liability standard in that regard. The only cases that I had been able to [inaudible] admittedly, there are a dearth of those case, they have -- the courts have assigned a constructive notice standard. In other words, the arbitrator is bound to disclose, whether they knew or should've known. Of course under the actual bias standard, they're never gonna have that because they're gonna have to go and show

actual bias anyway. But under our disclosure standard, the cases that have addressed this issue are knew or should've known, such as the Schmidts v. Betty case out of the Ninth Circuit. And I might add up another case here in this law library yesterday interpreting that case, which I would provide to the clerk. And I have it here with me. The case is very harsh.

JUSTICE: All right. So, let me get back to the Chief Justice's example. If one of the witnesses or parties for that matter have given a campaign contribution to one of the arbitrators and it just has not come to the arbitrator's attention that that's happened at the time of the arbitration, that comes out later under your analysis 'cause he didn't actually known about it at the time of the arbitration, it's ok.

MR. MCGRAW: If he didn't ... if there is no evidence that he actually knew about it and further no evidence that in conducting what would be a reasonable investigation as an arbitrator to determine potential conflict, he would not have found it. If those two facts were present, then -- then that case should not be vacated and that I contend is the case that we have before this Court now.

JUSTICE: But then don't you have to have a jury trial on that standard and every single case there has to be a fact finding whether they knew or should've known --

MR. MCGRAW: Well --

JUSTICE: -- undermine the purpose of arbitration?

MR. MCGRAW: In some of the cases there ... in one of the cases, the person had been ... the arbitrator had been sued. He'd been in litigation with the insurance companies on the other side. Well, you know, we need a jury trial there. And inexplicably, the man apparently testified --

JUSTICE: -- Hold on a minute. In this case, you need a jury trial with the fact finding on knew or should've known?

MR. MCGRAW: Well, at -- at this point before this Court, there is no evidence to submit to a jury because all you have on this record is the inference that the Bossleys asked the court to draw. And that inference is: That because this relationship existed, he knew or should have known about it. And on that inference alone, that inference is no evidence because he reasonably may not have known about it.

JUSTICE: Other than these cases, is there a difference between something that, I mean, it's throughout your brief, if the party or their witness, has equal or better access, that should reduce the duty on the arbitrator to disclose. But you haven't articulated that today. How about ... my opinion of the calculus.

MR. MCGRAW: The access that this Court in defining the disclosure requirement, what is disclosure? This Court said it was equal ... It was that the parties at the outset has access to all of the information that may bear on it the bias of prejudice of the arbitrator in order to make a decision at the outset. In this particular case, the parties, the Bossleys had access to the information. The -- The information was in the head of their expert witness.

JUSTICE: Does Bossley ... are you asserting that the Bossleys had a duty to investigate whether or not the witnesses they're hiring have a conflict with the neutral hearing officer?

MR. MCGRAW: Yes, your Honor. I believe that that's a prudent practice --

JUSTICE: But in this case, you're saying Nettles does not have a duty to investigate whether or not the witnesses being used in the case, he might have a bias against it.

MR. MCGRAW: No, your Honor. I believe that Mr. Nettles did have

that duty. But on this record, there is no evidence that there ... as to what it is. Well, first of all, there is no evidence that he knew it, other than inference that it is like the sun on the horizon, to go back to a recent opinion of this Court. There's no evidence, other than that -- that inference. And there's no evidence of what it was that this Court should tell the arbitrators that they should do that would have disclosed this conflict.

JUSTICE: It sounds like that in this balancing thing that you want us to do, you're prepared to have us say that the Bossleys should've known. But the arbitrator shouldn't have. Even though there's also no evidence that the Bossley's witness actually knew until after the arbitration award had been entered. I mean, isn't it that kind of ... when you look at this particular case, you're saying, we should attribute that they should've known. But we wouldn't attribute should've known to the arbitrator.

MR. MCGRAW: I -- I would say that that argument assumes that the court finds that what is in the ... what could possibly be in the arbitrator's head. And -- and with the knowledge... If that's the standard, then that standard should be imposed on the other side as well, in determining what the access was to the information, whether disclosure is made.

JUSTICE: Well, and so, what does ... there's a greater possibility of access to the Bossleys because a witness of theirs knew? I mean, is that ... I mean, today it sounds like, when you put this on the table and you want to charge the Bossleys with should have known because their witness, whose affidavit says, I didn't recall until I saw the file some period of time after the arbitration award had been entered, that we should attribute that to the institution to weigh their claim of evident partiality and their right to challenge the arbitration award. But the very man who was the party to the legal malpractice suit that she testified against, we wouldn't in any way say that he should have known. I mean, how does your balancing test work under those circumstances?

MR. MCGRAW: If as the appellant court said that the label should be defined as no had reason to know and if that is going to be applied strictly to Mr. Bossley, whether he remembered it or not, whether he ever knew it or not, that the circumstances indicate that he had -- that he knew or had a reason to know -- if that standard is going to be applied, then we urged that that standard be applied to the other side as well.

JUSTICE: But why did they lose, if we apply for the standard to each side? I mean, even under your scenario, we were to agree as best as the law should be, why would they lose under those circumstances?

JUSTICE: Let me -- let me phrase it this way. I think this is the answer. That is, each side has equal access to the information. There is no obligation of the court or the arbitrator to disclose it.

MR. MCGRAW: Put -- and the only way that I would change that is, I would say that if the equal access is -- is there, the disclosure court requirement has been satisfied. That he has the duty. But if -- if they have the equal access and I'm not talking about ... there's some other cases refer to, what one party has constructive notice. And the other party has actual knowledge. Well, that's not equal access. I'm talking about getting down to the -- the record or something like that. In this case -- on the twist of this case, and that is it's a grudge case and some other kind of case, the equal access would equal the disclosure.

JUSTICE: Did Mr. Nettles have an actual knowledge in this case?

MR. MCGRAW: I'm sorry?

JUSTICE: Did Mr. Nettles have actual knowledge in this case?

MR. MCGRAW: I do not know that. On this record --

JUSTICE: -- I understand that you didn't put on any evidence, one way or the other: But my question is: Did he know?

MR. MCGRAW: I -- I do not... honestly, I have never, to my knowledge, spoken with Mr. Nettles --

JUSTICE: Never asked him?

MR. MCGRAW: Pardon?

JUSTICE: No one has ever asked him?

MR. MCGRAW: That is correct. And to me, that is ... to satisfy a simple the requirement, that the Supreme Court of the United States has spoke about, the least somebody should do in this situation is ask the people on their own team: Is there any reason... here are these folks up here. They're gonna be deciding our case. I can hire you or not for my expert witness. Is there any reason that one of these folks might not like you? That -- that is very simple.

JUSTICE: How do we know this is an equal opportunity case? This is not [inaudible] of public disclosure. This is based on what Asmar knew based on what she says in the affidavit I guess. He has been on this trial after losing the arbitration. And Nettles has not testified yet on this. So, Judge [inaudible] has an appealing suggestion about equal access. But on this record, how do we even know if this is such the case.

MR. MCGRAW: Well, on this record, and again, assuming that the burden of proof --

JUSTICE: You're going back to burden of proof?

MR. MCGRAW: Yes. Some as the burden of proof is on the Bossleys, which I believe is what the statutes -- both statues, federal state require, then there's no evidence that he knew it. And there's no standard for determining whether he should have known. And I would agree with Ms. -- with Ms. Asmar --

JUSTICE: But you argued that there's no evidence to that. Nobody could prove that somebody else knew something. All you can do is by circumstantial evidence. And you're argument requires us to believe that if Nettles had been sued for a professional malpractice claim and that an individual had appeared as the adverse witness to them on the expertise that that is not some evidence that would support a finding that Nettles knew about the relationship of that witness to himself. You're asking the Court to say that that is no evidence that Nettles knew about that relationship.

MR. MCGRAW: On the facts of this record, where, he was not at the deposition, we never saw each other --

JUSTICE: But I've just recited the facts of this record. Nettles was sued for professional malpractice. And Aswar was the opposition witness to him on his expertise. And you're saying that is not evidence that Nettles knew about Asmar's relationship to Nettles.

MR. MCGRAW: Yes. One could draw that the reasonable inference that one could equally dwell draw the opposite inference. And that is that he did not know. And certainly, that is no evidence.

JUSTICE: Any other questions? Thank you, Counsel. The Court is ready to hear argument from respondent.

JUSTICE: The Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Leufven will present argument for the respondents.

JUSTICE: TUCO was a case where each side has its own arbitrator. And there was only one neutral. And that neutral's conduct was in question. Here's there's supposedly three neutrals and the locals three

do not. Isn't that a different situation?

ORAL ARGUMENT OF DON K. LEUFVEN ON BEHALF OF THE RESPONDENT

MR. LEUFVEN: That's different. But I can -- the point is that the evident partiality changed the terms of the party's contract dramatically. It started out under a Securities Arbitration Agreement and format where there are two public and one securities industry arbitrator. So, it would be two to one public neutral. It ended up instead of under the contract term of two public and one industry, one industry, one public, and one partial.

JUSTICE: But you still lost three to none.

MR. LEUFVEN: Two to one.

JUSTICE: I'm -- I'm -- if it had been a two to one vote, it seemed to me that just under our normal rules of what you've prove that if it had been two to one that would be an easier burden than if you'd lost three to none.

MR. LEUFVEN: I guess it would be. But we ended up -- I guess we're talking practicalities here. But there's rarely a dissent. Generally, there's a consensus. And here there's a consensus between an evidently partial arbitrator and an industry arbitrator. No one will want to come before this arbitrator. The facts couldn't get any worse in this case. This is not an arbitrator whose partner in a big law firm represented another company in a lawsuit ten years ago and left the firm. And then all of the other stuff of some of the cases. It did -- the facts don't get any worse than this if TUCO is to be applied and not changed. The point that I would like to make is that there -- and the Court may already realize that there are two contracts here in conflict. There is a contract that the arbitrator signed not to disclose that he settled a malpractice case for a large sum of money recently right after the Asmar deposition. That is in a sealed envelope in the vault of this Court. There is also an -- there's also an arbitration agreement signed by the parties and an oath of the arbitrator signed by the arbitrators that incorporates rules that required disclosure both using almost identical terms as TUCO and going further. Those -- the arbitrator complied with this signed agreement not to disclose. He did not comply --

JUSTICE: To disclose what?

MR. LEUFVEN: Not to disclose any [inaudible]

JUSTICE: And then he had a public proceeding of what you'd testified against it?

MR. LEUFVEN: He didn't disclose anything about the settlement.

JUSTICE: What's that got to do with the fact that she testified against him?

MR. LEUFVEN: Well, that she testified against him in the settlement as it would be shown by the documents.

JUSTICE: So, you'd give up if you settle it for $10?

MR. LEUFVEN: I'd give up.

JUSTICE: But if you settle it for a $1,000 you have [inaudible]

MR. LEUFVEN: $10,000 I'd give up. The numbers are in the vault.

JUSTICE: But we don't know that. Nobody knows that [inaudible]

MR. LEUFVEN: I don't know -- I don't know it. But I have an idea. I mean --

JUSTICE: It seems to me that works against you because the defense

is it's a trivial matter to disclose and since they've hidden all the information [inaudible] and could be all are not. It seems to me your argument that you face is either you had a duty to disclose this or he didn't. If he had a duty to disclose and fail to do so then you win. It seems to me that's one of the [inaudible] of this case is because you cannot rely on the triviality of the plaintiff to disclose because he objected to any evidence about the significance of Aswar's testimony, right?

MR. LEUFVEN: I think that's correct.

JUSTICE: So, let's go to the equal access of information argument for just a minute. The -- we have two people who knew about -- to extent Nettles knew about Asmar. Asmar certainly knew about Nettles. I mean, Asmar was to testify. Nettles was a party. So to argue that one of the other did not know is an argument that cuts just for Nettles [inaudible]

MR. LEUFVEN: I -- I don't agree with that, your Honor.

JUSTICE: Well, it seems to me it does -- some advice. So, the question is: Why isn't this equal access? What keeps this from being equal access?

MR. LEUFVEN: That's -- exactly. Obviously, if -- so if we knew there was the issue of waiver. I mean if I want to -- I certainly don't wanna leave without addressing that even though it's beside the point. The arbitrator knew that he settled for a large sum right after within a month, two months, three months to prepare the agreement after the Asmar deposition. That's what your documents will show.

JUSTICE: But the documents don't show he knew that Asmar gave the deposition.

MR. LEUFVEN: No, the documents, I doubt, say that.

JUSTICE: Okay so -- so, he was as much in the dark as was Asmar?

MR. LEUFVEN: I can't agree with that, your Honor.

JUSTICE: Well, what evidence in the record contradicts that statement?

MR. LEUFVEN: There isn't. There isn't any. And that's the genius of -- I think the TUCO decision is if we don't sue the arbitrator. We don't go into his mind.

JUSTICE: Well, just for clarification purposes then, Nettles and Asmar had the exact same knowledge.

MR. LEUFVEN: No, that -- I disagree strongly.

JUSTICE: Why doesn't Asmar remain, if this was such a big deal?

MR. LEUFVEN: That's -- that's the next point, your Honor.

JUSTICE: Okay.

MR. LEUFVEN: There is some indication like I did not even -- he did not even tell her what -- who the arbitrators were. She didn't know who they were is: She knew the names. Of course, I would let my expert know the names and what she knew about them. She did not identify that he was a defendant until 67 days after the arbitration.

JUSTICE: So, why would he know? That' the question? If she didn't why would he?

MR. LEUFVEN: Okay. He would know because she testified as to some areas of malpractice which in the deposition and I which I could list are very embarrassing to a good lawyer and very antagonizing to bad lawyer.

JUSTICE: But what difference does it make who knew what, when? I can't get over that point. If it's an objective standard, getting the purpose of the objective standard to avoid this sort of who knew what when analysis and why not we just look what is required to disclose, whether the win or whether he might know?

MR. LEUFVEN: I agree, your Honor, with that position --

JUSTICE: If you're bound by the NASD rules, Rule 10312B says that: The arbitrator has to make a reasonable effort to inform himself of any conflict of interest. What did you plea that show he didn't get actual knowledge or that he did not make reasonable effort to inform himself? What did you put in your -- you're trying to set aside in where you got a pretty heavy burden? What did you put in your pleadings that will get you over that rule?

MR. LEUFVEN: I -- I believe that where you have a party or an arbitrator who has entered to a confidential agreement including a large payment, he would know why he settled. And it was because of the deposition that was given shortly before [inaudible]

JUSTICE: But you don't have the evidence of that he alleges

MR. LEUFVEN: Well, I -- I think I did argue that.

JUSTICE: What, did you take his deposition?

MR. LEUFVEN: No.

JUSTICE: Did you make any effort to put on proof that would satisfy this ruling that would -- that either may or he did not made a reasonable effort to --

MR. LEUFVEN: No, because I didn't file a cross motion. I would do that if necessary in a cross motion for summary judgment.

JUSTICE: Was there a motion for -- was it styled a motion for summary judgment?

MR. LEUFVEN: There was a motion for summary judgment against --

JUSTICE: -- that to-defendants -- when you filed a motion to vacate --

MR. LEUFVEN: Yes.

JUSTICE: You filed a motion to vacate first?

MR. LEUFVEN: Yes.

JUSTICE: They filed a motion to confirm and attached to it a summary judgment.

MR. LEUFVEN: Shortly after that they filed a motion for summary judgment. I did not file a cross motion because I was denied evidence that's in the vault of this Court in which I contend is abuse of discretion in denying discovery that's very relevant to -- to the points of his knowledge.

JUSTICE: But procedurally, I'm not sure I need to ask questions on his style of procedure. You filed a motion to vacate. What do you say you should do? What's your burden beyond just filing a motion to vacate? Procedurally, how is that resolved?

MR. LEUFVEN: I have to prove that there was evident partiality.

JUSTICE: And you -- and let's say, we -- we say that we're gonna follow the rules. And you have to prove either he had actual knowledge or he failed to make a reasonable effort. Now, what did you allege and what proof did you offer that that occurred?

MR. LEUFVEN: I haven't proven it yet.

JUSTICE: And are you continually denied discovery other than the settlement agreement. It didn't [inaudible]. Were you denied the opportunity to take a deposition? What other facts would you need to make your case that this should be [inaudible]

MR. LEUFVEN: Well, I believe in burden -- once it's established that there is the nondisclosure that is not trivial, I believe that that says by the burden or at least that it should the burden.

JUSTICE: But you disagree that rule 10312B controlled?

MR. LEUFVEN: I don't think that's necessarily controlling. I think that you're -- well, you got a fact question. That's all you got is a fact question. You don't have a summary judgment question if we go to

that. If we have to go, that's a fact question. And I don't -- I believe that would be a fairly easy fact question.

JUSTICE: I guess what she's asking is it seems as though you have no pleadings or facts raised by you that raises a fact question. And she's trying to get out of you any hint that you make have raised a fact issue. And apparently we haven't been able to hear that you have.

MR. LEUFVEN: All right. First, it's pled generally. I think to get notice of any of those issues, my response to the summary judgment is that the evidence particularly that involves this Court is sufficient for anyone to infer that he knew. And it wouldn't require of any reasonable effort on his part because he knew. Now, he may have known so before he got to the arbitration. And he found the parties from out of town and witnesses from out of town there. And it would be embarrassing to then reveal a conflict and send everyone home. But he knew. I think that is a reasonable inference that I would have no problem taking to a finder of fact.

JUSTICE: Is it fair to say that in every case you handled with your clients that your clients knew who all the witnesses are? You know who they are. But do your clients always know who all the witnesses are?

MR. LEUFVEN: Certainly, I asked them about it. I admit I don't understand.

JUSTICE: The point is that in that case the client -- in the underlying case, the client was Nettles. And he may not have known who all the opposing witnesses were. And I know for a fact in previous litigation clients don't know the names of all the expert witnesses' names who may be called to testify --

MR. LEUFVEN: All right but --

JUSTICE ABBOTT: So the point being very simply that Nettles may not have known the name of the person who was giving expert testimony against him. And there hasn't been any effort on your part to raise a fact issue that in fact may be he did them.

MR. LEUFVEN: Justice Abbot, that doesn't apply in this case because he did know. He was sent a letter by-- not only -- not only __ but a letter with the list of the parties before the arbitration with this name on the first page.

JUSTICE ABBOTT: What -- in the arbitration, this name was on the page. But what I'm saying is in the underlying case, the one that Nettles settled, there was no identification to them. There's no evidence that there was any identification to him that Asmar was a witness in that case.

MR. LEUFVEN: Right. I couldn't get into that because I was denied of it. It was all sealed. It was sealed. And I was not permitted to go into those facts.

JUSTICE: But you didn't try to propose or ask them did he know, wouldn't he know?

MR. LEUFVEN: No, after I was denied even the amount of the settlement or the -- or the settlement agreement itself, I did not ask the judge to deny me that right, too.

JUSTICE: But are you complaining about those rules [inaudible]

MR. LEUFVEN: Yes and --

JUSTICE: That's in another -- that's somewhere else?

MR. LEUFVEN: That is an infinite grounds for affirmance and remanding.

JUSTICE: In this case?

MR. LEUFVEN: In this case.

JUSTICE: I think -- are those documents lost?

MR. LEUFVEN: They're not lost. They're in the vault of this Court.

JUSTICE: Then the court of appeals is wrong as you said?

MR. LEUFVEN: The court of appeals thought they were lost. They've been sent here by the clerk of the court of appeals. I had requested to ask that notice have been given to the court, the other side. And she said, all I do is send it with a note. And that's notice.

JUSTICE: You told us in the brief they were lost. Have you notified since they're available?

MR. LEUFVEN: No, I didn't because I was told by the clerk that -- that's how notice is given with the Supreme Court that they're filed. And the Supreme is given notice by the clerk of the court of appeals. And that's the way the notice is given, and not by the attorneys.

JUSTICE: In TUCO, we have an information about this reveals context that had would not have been known by either parties or certainly would not have been known by the losing party. Let me put it that way. It would not have been known by the losing party or any of their witnesses. What is the legal effect of that distinction where this -- without getting into the fact whether it's equal knowledge or not, there is knowledge on the part of the losing party. But what -- duty does that put on you, or does it lessen the duty of --

MR. LEUFVEN: It's not. I don't think it lessens the duty. I think that if there is proof of actual knowledge, there is waiver, pure and simple. I'm not gonna try to get -- I mean, that's waiver.

JUSTICE: But see --

MR. LEUFVEN: -- with a note and that's notice.

JUSTICE: You told us in the brief they were lost. Have you notified anybody since then?

MR. LEUFVEN: No, I didn't because I was told by the clerk that that's how notice was given to the Supreme Court that they're filed. And the Supreme Court is given notice by the clerk of the court of appeals. And that's the way the notice is given and not by the attorneys.

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MR. LEUFVEN: It's not. I don't think it lessen the duty. I think that if there is proof of actual knowledge, there is waiver, pure and simple. I'm not gonna try to get an amicus waiver.

JUSTICE: But see, your argument then -- the argument of inference would be that how is it that she couldn't possibly remember that she testified about against the guy that's sitting right in front of her that he had committed malpractice and what you say are seven embarrassing lines.

JUSTICE: Well, we have her affidavit. And unless you can make an inference that she is lying or an inference against the nonmoving party, her affidavit is -- and it's believable in my opinion -- that she thought that she knew the arbitrator because she was also an NASD arbitrator and that she had seen the name at NASD training conferences or had been assigned to a panel on which one of them had been struck by appropriate challenge.

JUSTICE: And if I'm inclined to agree with you on that, why isn't it unequally likely that he don't remember?

MR. LEUFVEN: Oh, well, because of the documents that I was denied that this Court has. He settled his malpractice suit for a large amount of money --

JUSTICE: But look. I'm a little concerned. Since we have the documents, I guess we can find them and look at them.

MR. LEUFVEN: And I'm at this time --

JUSTICE: And then we're gonna have to make a decision based on what you argued today whether the settlement was trivial or not.

MR. LEUFVEN: Right.

JUSTICE: And by deciding that, that's how we decide this case?

MR. LEUFVEN: I think that goes a long way.

JUSTICE: How can we do that? I didn't think we had the power to make factual decisions.

MR. LEUFVEN: Well, triviality --

JUSTICE: Well, you've already said $10 would be trivial even $10,000 would be trivial for --

MR. LEUFVEN: Well, it probably wouldn't be. But I said I would give it up for $10,000.

JUSTICE: Oh, you mean --

MR. LEUFVEN: If the Court will look at them, I don't think there would be any question. I don't know the exact amount. They are confidential. I do have some idea --

JUSTICE: Well, I think that's clear from you said. You have no idea. And we don't either until we open those documents. But even if we open them, so what? We can't decide based on what we see whether we agree or disagree with each because we can't make a factual decision.

MR. LEUFVEN: It seems that at some point, triviality --

JUSTICE: It's your best argument, the court of appeals said we think there's a fact question. You go back and try this case or do something more and that that's what we ought to do here because they've decided incorrectly.

MR. LEUFVEN: I think that's the only thing that could be done even if I said the Court at some point does have the power as a matter of law to decide triviality, the dollar, or whatever. I think --

JUSTICE: Mr. Leufven, if the TUCO evidentiary -- the TUCO evident partiality standard is applied here and we've heard from your opponent that he believes that he's not contesting the fact of the relationship and that that amounts to evident partiality, how does that particular determination interplay with the NASD rules? There is the mandatory disclosure on the part of the arbitrator, a relationship such as this. But underneath it, there is the duty to make reasonable inquiry by the arbitrator. In legally setting up the framework for this, how does the arbitration rules of the NASD that were incorporated in the party's contract interplay with the TUCO evident partiality standard and the application of it?

MR. LEUFVEN: All right. I think TUCO avoids having to perhaps even depose the arbitrator's objective. Was there no disclosure of something that was not trivial that creates the impression of evident partiality? You don't have to sue. You don't have to depose him. If the contract interplays and that is a defense, then it creates a fact issue that would require that he come in and show that he made a reasonable effort and not to know who testified against him to cause the loss in the payment he made.

JUSTICE: So, basically, the terms of the party's agreement could -- could actually override the TUCO evident -- evident partiality standard? Is that ultimately how it plays out?

MR. LEUFVEN: It's possible to create a fact issue.

JUSTICE: Okay.

JUSTICE: And you said you wanted to discuss waiver in the other side's issue. Do you think you've adequately discussed it?

MR. LEUFVEN: I think the only thing that I -- I didn't say was that -- yes, I did not mention one thing. And that is that to waive, unless there's proof by the moving party that there's actual knowledge and that -- that my witness is lying. The statute is right. The statute does says that the party does not have to catch the arbitrator's nondisclosure, that the witness does not have to catch the arbitrator's nondisclosure until three months after the award. And then it's barred, caught or not caught, only three months. It was caught in this case because she was moving her office and found the Wilkin's file not the Nettles file but the Wilkin's file that contained the Nettles deposition. And she caught it within 67 days after the award. I think that statute determines to a large degree of the issue of waiver and then the facts -- the fact issues, they want to be proven by the other side would determine the rest of any issue of waiver. In both cases, it should be remanded for either summary judgment motion in accordance of the instructions of this Court or for fact finding.

JUSTICE: Any other questions? Thank you, Counsel.

MR. LEUFVEN: Thank you.

REBUTTAL ARGUMENT OF JAMES M. MCGRAW ON BEHALF OF THE PETITIONER

JUSTICE: Mr. McGraw, are you aware of any case law that would support your position that waiver can be based on a should have known standard on the part of the party to the arbitration as opposed to an actual knowledge standard?

MR. MCGRAW: Well, you Honor, I would cite to the appellate court case and this case. That's would be the --

JUSTICE: Okay. It's separate apart from the case that we're reviewing here. Looking at for example the federal jurisprudence, my understanding is that the federal jurisprudence looking at this issue has required actual knowledge before there's a waiver and that there's no support for your position that he should've known standard should be applied to recognizing waiver on the part of the party litigant to an arbitration proceeding. Is that your understanding of the law?

MR. MCGRAW: Yes, your Honor. However, I would say that in this case that's the cause of the --

JUSTICE: Okay. The answer -- the answer is there is no support that you're aware of outside of what was said in this particular case that would support your position to apply a should've known standard for waiver purposes as opposed to an actual knowledge standard.

MR. MCGRAW: That is correct. And I -- but I would --

JUSTICE: You're asking us to break some new ground here?

MR. MCGRAW: Well, no. I would -- if the Court cannot get there on the waiver issue, the equal access --

JUSTICE: On the waiver issue. I am stuck on the waiver issue. We'd be the first ones to go down that road.

MR. MCGRAW: Well, the second I guess because the appellate court said that. But I [inaudible]

JUSTICE: I understand. But -- that's this case. So, as opposed to this case, we'd be the first -- the first Court to do that here an all.

MR. MCGRAW: To my knowledge, yes.

JUSTICE: Okay.

MR. MCGRAW: And again, I'm relying more on the equal access --

JUSTICE: Why -- why should we do that? Why should we step out and be the first Court of last resort to say that?

MR. MCGRAW: Because the TUCO case speaks in terms of equal access. And -- and in this case, we are saying that the parties had equal access. And -- and I would urge the Court to disregard the term "waiver," as that term is known at law in looking at this issue because it is --

JUSTICE: How would you define waiver as it's being argued in this case if you want us to ignore the existing law on how waiver is defined?

MR. MCGRAW: I would say as if -- in the context of evident partiality, if there is equal access on the parts of the parties in the beginning then the disclosure requirement has been satisfied. And another way to say that is: If the other party goes forward with that access and without accessing that access, they've waived it.

JUSTICE: And you would agree that -- is it your -- is it correct that this record reviewing what I've seen of it, this record has no evidence of actual knowledge on the part of Bossleys or their witness until after the award was entered. And in fact it shows -- the fact it establishes no actual knowledge.

MR. MCGRAW: That's correct. That would have to accept that Ms. Asmar affidavit as being true.

JUSTICE: But you've also argue too that Mr. Nettles had no actual knowledge. So we have a case that nobody knew nothin' until --

MR. MCGRAW: No, I've already --

JUSTICE: -- two days before the [inaudible]

MR. MCGRAW: I've argued there is no evidence in this record about Mr. Nettles' actual knowledge. I would say, Justice O'Neil, that the objective standard refers to the subject matter of what is to be determined to the evidence of partiality. That -- the objective standard raised on that. But what we're dealing with here is how this would be disclosed. And again, the documents are a red herring. The documents will [inaudible] nor retract anything from this case --

JUSTICE: Can I ask you a question? Mr. McGraw. I'm concerned on this issue. The evidence in this case and I think it's probably undisputed that Nettles was named party in a malpractice case as far it was the expert witness against Nettles in that case. Nettles had a letter that showed that Asmar was gonna be a witness in this case. And your argument is that based on that evidence, that is no evidence that Nettles knew about Asmar, that did not know about the relationship with Asmar?

MR. MCGRAW: That is correct.

JUSTICE: But when Bossley went to court to get the underlying documentation in that lawsuit in an effort to come up with what was this testimony, what was this settlement, you objected.

MR. MCGRAW: No, your Honor. I -- we did not object. Frankly, I don't know that the -- that the lawyer who was subpoenaed who ironically was the plaintiff's lawyer in the malpractice case I believe Mr. Solon, was subpoenaed to turn the documents over. He turned them over but said they're supposed to be kept confidential, Judge, so I'm turning them over, you know, objecting --

JUSTICE: And the judge refused to --

MR. MCGRAW: For some reason unbeknowest to --

JUSTICE: And you didn't ask the judge -- you didn't ask the judge to disclose them. I mean -- I mean, the party had an obligation under a

settlement agreement to maintain the confidentiality. The [inaudible] court has the same judge. I can't turn it over. Here it is. Was it your position then during the underlying lawsuit that it should have been disclosed to the Bossleys? Or did you take the position with the judge that it should not be disclosed?

MR. MCGRAW: We took no position.

JUSTICE: Thank you, Counsel. That concludes the argument from the first case.

SPEAKER: All rise.

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