

Code of Arbitration,¹ which the parties' agreement incorporated. The Code provided that a NASD administrator would select a three-arbitrator panel and designate one arbitrator as the panel chair. The Code also imposed the following duties on the arbitrators:

- (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:
 - (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
 - (2) Any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.
- (b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph (a) above.

NASD CODE OF ARBITRATION PROCEDURE § 10312(a)-(b).

The NASD administrator selected A. Bentley Nettles as the panel chair. The administrator then forwarded each party's witness list to the panel members, asking them to review the names and report any potential conflicts. Nettles reported that he had a social relationship with one of the Bossleys' witnesses, but no one objected. More important to this case, the Bossleys' witness list also included Laila M. Asmar as an expert witness. Nettles did not report any conflict with Asmar. The arbitration proceeded, and the panel ultimately decided the case in Mariner and Moore's favor.

About two months later, Asmar was reviewing files at her office when she found a deposition she

¹ The National Association of Securities Dealers, Inc., is now known as NASD Regulation, Inc., and the Code is now known as the NASDR Code of Arbitration Procedure. The Bossleys' agreement to submit to NASD arbitration was signed on November 16, 1995, and references to the NASD Code of Arbitration Procedure are to its contents on that date.

had given as an expert witness in a malpractice action against Nettles almost two and a half years before the arbitration. In that deposition, Asmar testified that Nettles committed malpractice in seven different ways. The suit was eventually settled, and the settlement documents were sealed. After discovering the transcript, Asmar immediately notified the Bossleys, who then petitioned to vacate the arbitration award against them. By affidavit, Asmar averred that she did not remember Nettles until she discovered the deposition transcript after the arbitration.

The Bossleys contended that Nettles's prior relationship with Asmar rendered him evidently partial, which is grounds for vacating an arbitration award under both federal and state law. 9 U.S.C. § 10(a)(2); TEX. CIV. PRAC. & REM. CODE § 171.088(a)(2)(A). Mariner and Moore responded by moving for summary judgment, seeking confirmation of the award and denial of the Bossleys' petition. The motion alleged that the Bossleys either had no legal basis for vacating the award or, alternatively, had waived any complaint by failing to object to Nettles's partiality until after the award. Hoping to bolster their claim that Nettles was partial, the Bossleys also filed a motion to compel production of the sealed settlement documents from Nettles's malpractice case.

The trial court denied the Bossleys' discovery motion and granted summary judgment for Mariner and Moore. The court of appeals reversed, holding that the pre-existing relationship between Nettles and Asmar, coupled with Nettles's failure to disclose it, raised a fact issue about Nettles's evident partiality. 11 S.W.3d at 352. The court further concluded that Mariner and Moore had not established as a matter of law that the Bossleys waived the right to now object to Nettles's selection by failing to object before the panel convened. *Id.* Finally, the court of appeals concluded that the settlement documents had no bearing on the evident partiality issue, and declined to rule on the Bossleys' discovery motion. *Id.*

II

Mariner and Moore argue that the court of appeals erred in reversing the trial court's summary judgment because there is no evidence that Nettles remembered or reasonably should have recalled Asmar

when the arbitration occurred and thus no basis to infer that the relationship influenced his decision. However, Mariner and Moore did not file a no-evidence summary judgment motion. *See* TEX. R. CIV. P. 166a(i). To prevail on their motion under Rule 166a(c), Mariner and Moore had to establish that Nettles was not evidently partial as a matter of law. *See* TEX. R. CIV. P. 166a(c). The Bossleys contend that Mariner and Moore did not and could not meet this burden because both this Court's decision in *Burlington Northern Railroad Corp. v. TUCO, Inc.*, 960 S.W.2d 629 (Tex. 1997), and the arbitration agreement itself obligated Nettles to disclose his relationship with Asmar.

In *TUCO*, an arbitration panel's neutral arbitrator accepted a business referral from a partisan arbitrator's law firm during the arbitration. *Id.* at 631. There was no dispute that the neutral arbitrator knew about the relationship; the only question was whether failure to disclose the relationship could establish evident partiality. *Id.* at 631-32. We determined that it could because "a neutral arbitrator . . . exhibits evident partiality . . . if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." *Id.* at 630. Under this objective test, the consequences for nondisclosure are directly tied to the materiality of the unrevealed information. *See id.* at 637 (stating a "neutral arbitrator need not disclose relationships or connections that are trivial."). The relationship in *TUCO* arose from a lucrative business referral to one of the arbitrators and thus was not trivial. *Id.* The undisclosed relationship was obviously known to the arbitrator, and we concluded that his failure to disclose the referral was a material fact that objectively created a reasonable impression of his partiality. *Id.*

The summary judgment record here, however, is silent about whether Nettles remembered Asmar or ever knew of her. Without some evidence of this, we cannot determine whether the undisclosed relationship is material to the issue of evident partiality. Clearly, the relationship could not have influenced Nettles's partiality if, in fact, he was unaware of it during the arbitration. Thus, the state of Nettles's knowledge about Asmar is a fact issue material to determining his partiality.

As an alternative ground, Mariner and Moore argue that the Bossleys waived any complaint about Nettles's partiality by not objecting to his participation before submission. But from the summary judgment evidence, we know that the Bossleys did not learn about the relationship between Asmar and Nettles until after the arbitration. Asmar did not reveal the relationship because she did not remember Nettles until two months after the arbitration, and even then only made the connection after discovering the deposition transcript while preparing to move offices. In her affidavit, Asmar explained that Nettles did not attend her deposition, and that she never met or saw Nettles before the arbitration. Asmar also testified that she had no further involvement with the malpractice case against Nettles after that deposition. We therefore agree with the court of appeals that the Bossleys could not waive an objection that is based on a prior adverse relationship between Nettles and Asmar that they knew nothing about.

Finally, Mariner and Moore argue that the Bossleys themselves had a duty to discover the relationship between Nettles and Asmar. But whether or not the Bossleys had such a duty, which we do not decide, we note that Mariner and Moore have not established that the Bossleys could have discovered the relationship any sooner than they did through a reasonable investigation. Summary judgment is therefore not appropriate on that basis.

III

The concurring justices suggest that it does not matter whether Nettles remembered Asmar because an arbitrator's failure to disclose an adverse relationship cannot as a matter of law constitute partiality when the complaining party had the means to discover the adverse relationship. The concurrence cites three cases from the Second Circuit Court of Appeals for support. These cases reason that the undisclosed relationship was waived either because it was well-known to the complaining party, easily discoverable or rendered trivial by the arbitrator's other disclosures. *See Cook Indus., Inc. v. C. Itoh & Co.*, 449 F.2d 106, 107 (2nd Cir. 1971) (party aware of undisclosed relationship); *see also Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 701, 702 (2nd Cir. 1978) (failure to disclose

trivial in light of relationship and other disclosures); *Garfield & Co. v. Wiest*, 432 F.2d 849, 853-54 (2nd Cir. 1970) (waiver). The summary judgment evidence, however, does not suggest what means the Bossleys had to discover this relationship, and thus these cases are no more controlling here than our decision in *TUCO*.

In *TUCO*, the complaining party did not know about the arbitrator's undisclosed relationship. Thus, the relationship was unknown in the sense that it was neither open, obvious, nor easily discoverable by the complaining party. *TUCO*, 960 S.W.2d at 631. In *Cook Industries*, on the other hand, the undisclosed relationship – that the arbitrator's employer had done substantial business with the winning party – was well-known because the employer was the largest United States company in a closely knit trading group and thus had done substantial business with both parties to the arbitration in the ordinary course of business, a fact the court concluded as a matter of law the complaining party knew. *Cook Indus.*, 449 F.2d at 108. *TUCO* and these “common knowledge” cases are thus on opposite ends of the evidentiary spectrum. Where this case falls along that spectrum we simply do not know based on the facts presented. The relationship that existed between Asmar and Nettles was not open and obvious, nor was it a matter of common knowledge. It did not arise from a community of business interests shared by all participants in the arbitration. But neither was it a relationship that could not have been discovered. Thus, neither *Cook*'s attribution of knowledge to the complaining party nor *TUCO*'s attribution of partiality to the arbitrator is appropriate on the limited facts presented here.

Although the record is silent about why Nettles did not disclose his relationship with Asmar, the concurring justices presume the missing facts. They presume that Nettles remembered Asmar but did not disclose the relationship because he reasonably believed that Asmar also remembered him and disclosed their history to the Bossleys. The concurrence posits no other reason for Nettles's silence, and is untroubled by the contrary summary judgment evidence. While we, too, could postulate reasons for Nettles's silence, our summary judgment standard simply does not permit such speculation. As the

Eleventh Circuit Court of Appeals has observed:

the “evident partiality” question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependent on the unique factual settings of each particular case. The black letter rules of law are sparse and analogous case law is difficult to locate.

Lifecare Int’l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995).

The concurrence strains to find a waiver under the Second Circuit Court of Appeals’ rationale in *Cook Industries* and *Garfield*, but that court has itself declined to extend those cases beyond their limited facts. *See Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260, 1265 (2nd Cir. 1973) (“Unlike the *Garfield* and *Cook* cases, the record in the present case, as it now stands, does not justify [the assumption that the undisclosed relationship was known to all parties].”). In *Sanko*, the trial court stated that it would forego an evidentiary hearing and accept Sanko’s version of contested facts regarding the arbitrator’s prior dealings with the opposing party. Nevertheless, the trial court made findings at variance with Sanko’s position and concluded that the arbitration award should not be vacated. The court of appeals reversed and remanded, concluding that an evidentiary hearing was necessary to determine the full extent and nature of the relationships at issue. *Id.* at 1263. The court distinguished *Garfield* and *Cook* because there was no conclusive evidence that Sanko either knew or should have known of the extent of the relationship in question. *Id.* at 1265.

Like the trial court did in *Sanko*, the concurrence here seeks to presume facts with no evidentiary basis. Acknowledging that it would not be reasonable to expect the Bossleys to research court records to determine whether Nettles had ever been sued and, if so, who had testified against him, the concurrence would nonetheless excuse Nettles’s nondisclosure on the ground that he could presume the Bossleys knew about the prior adverse relationship because Asmar should have remembered it. Thus, the concurrence would excuse even an arbitrator’s knowing concealment of a relationship evidencing partiality as long as there are facts from which the arbitrator can presume the complaining party knew it too. But the whole purpose of an arbitrator’s duty to disclose is to avoid this very type of speculative presumption and let the

parties to the arbitration make the call. It is well-established, and the concurring justices acknowledge, that “a neutral arbitrator has a duty to disclose dealings of which he or she is aware ‘that might create an impression of possible bias.’” ___ S.W.3d at ___ (*quoting Commonwealth Coatings Corp v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968)). The arbitration agreement here further incorporates the NASD Code, which provides not only that arbitrators should disclose relationships that “might reasonably create an appearance of partiality or bias,” but also that they should make a “reasonable effort” to inform themselves of such relationships. NASD CODE OF ARBITRATION PROCEDURE § 10312 (a)-(b). Thus, there is no justification for the concurrence to shift the burden of disclosure from the arbitrator to a party.

IV

We conclude that Mariner and Moore failed to establish as a matter of law that Nettles was not evidently partial. Although the Bossleys bear the ultimate burden of proving the arbitrator’s partiality, on summary judgment Mariner and Moore assumed the burden to prove that no fact issue exists. Because they did not meet this burden, we affirm the court of appeals’ judgment.

Harriet O’Neill
Justice

Opinion delivered: June 13, 2002