Circuit Court for Baltimore
City Case #93194701

IN THE COURT OF APPEALS OF MARYLAND

No. 92

September Term, 1995

ON MOTION FOR RECONSIDERATION

ACandS, INC. et al.

v.

IDA SARA MASKET ASNER
et al.

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*Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Opinion by Rodowsky, J.

Filed: December 6, 1996

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A,

he also participated in the decision and the adoption of this opinion.

The plaintiffs have moved for reconsideration of Part I.B of this Court's opinion in which we held that the erroneous exclusion of TLV evidence by the trial court was prejudicial to the defendants. That ruling resulted in a remand for a new trial on the issue of liability for compensatory damages. In their motion plaintiffs submit that "additional evidence was admitted during the cross-claim portion of the trial, which, by any measure, satisfied the proffers of proof made by the defendants on [the issue of TLVs]." Appellees' Motion for Reconsideration at 3. We deny the motion because the evidence now relied upon by the plaintiffs in their motion was not referred to by the plaintiffs in their brief as appellees and also because a limiting instruction, to which no one objected, prevented the jury from considering that evidence on the claim of the plaintiffs against the defendants.

The additional evidence on which the plaintiffs now rely is found in the deposition testimony of Willis Hazard and of Dr. Garrit Schepers. Excerpts from the Hazard and the Schepers depositions were read to the jury on November 29, 1993, the twelfth day of trial, as part of the respective defendants' cases as cross-claimants against certain cross-claim defendants.

In their brief as appellees plaintiffs did not refer us to the Hazard or the Schepers depositions. That brief argued that, even if the trial court erred in its ruling granting the plaintiffs' motion *in limine* excluding TLV evidence that was proffered by the defendants, the error was not prejudicial because other evidence

which the jury could consider on the claim of the plaintiffs against the defendants substantially covered that which the defendants had proffered. That material came into evidence principally on the cross-examination of one or more plaintiffs' witnesses during plaintiffs' case in chief. We rejected this argument in our original opinion based on a comparison of the defendants' proffers to the evidence to which we were referred by the appellees' brief.

Neither deposition was made part of the five volume, 2,437 page, joint record extract. All references in Appellees' Motion for Reconsideration to testimony in the depositions are references to the original trial transcript.

Maryland Rule 8-501(c) requires that the record extract "contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal ...." Rule 8-504(a)(4), dealing with statements of facts in an appellant's and in an appellee's brief, provides that "[r]eference shall be made to the pages of the record extract supporting the assertions."

Two liberalizations were made in these longstanding requirements by the revision of Title 8 of the Maryland Rules that became effective July 1, 1988. One liberalization is the deferred record extract. Rule 8-501(l). A deferred record extract would have been of little assistance to the problem at hand. Inasmuch as references to the two depositions were not included in the appellees' brief, deferral of the preparation of the record extract

in order to include all that was included in a party's brief would not have picked up the two depositions in the instant matter.

The second liberalization is in Rule 8-501(c), dealing with contents of the record extract. That rule now includes the following concluding sentence: "The fact that a part of the record is not included in the record extract shall not preclude a party from relying on it or the appellate court from considering it."

Obviously, the new provision is not to be abused. *Compare Naughton v. Paul Jones & Co.*, 190 Md. 599, 604, 59 A.2d 496, 498 (1948) (disregard of Maryland rule requiring appendix to appellant's brief to contain all parts of the record party desires Court to read may result in dismissal of an appeal); *Butler v. Reed-Avery Co.*, 186 Md. 686, 689-90, 48 A.2d 436, 438 (1946) (rules requiring litigant's brief to contain an index which must include those parts of the record desired to be read by the Court are "plain, concise, and should be easily understood. They provide a means for each side to get before this [C]ourt all the evidence that it is desired to be read by the [C]ourt. When the appellant disregards or violates these rules his case may be dismissed on motion, or by this [C]ourt on its own motion."); *Condry v. Laurie*, 186 Md. 194, 197, 46 A.2d 196, 197 (1946) (when the appendix to a party's brief contains nothing other than the opinion and decree of the lower court the Court will look no further than the opinion and the decree to make its decision); *Strohecker v. Schumacher & Seiler*,

Inc., 185 Md. 144, 146-47, 43 A.2d 208, 209 (1945) ("[W]e do not intend to pass the one typewritten copy of the record from member to member of this Court so that each one may hunt up for himself what the appellant is discussing in his brief. ... [W]e do not intend to permit counsel to impose upon us the burden of work, which should have been done by them.").

The last sentence of Rule 8-501(c) is of no assistance to the plaintiffs on their Motion for Reconsideration. The provision does "not preclude a party from relying" *in that party's brief* on the matter omitted from the record extract. The liberalizing provision relating to record extracts in Rule 8-501(c) does not excuse the failure to furnish in the brief references to factual material in support of a party's argument as required by Rule 8-504(a)(4).[1] Nor does the liberalization in Rule 8-501(c) alter the fundamental rule of appellate practice under which the appellate court has no duty independently to search through the record for error. *See State Roads Comm'n v. Halle*, 228 Md. 24, 32, 178 A.2d 319, 323 (1962); *Van Meter v. State*, 30 Md. App. 406, 407-08, 352 A.2d 850, 851-52 (1976); *GAI Audio of New York, Inc. v. Columbia Broadcasting Sys., Inc.*, 27 Md. App. 172, 182-83, 340 A.2d 736, 743-44 (1975). Thus, the Court of Special Appeals has appropriately held that a party

[1]By way of contrast, in ACandS v. Godwin, 340 Md. 334, 667 A.2d 116 (1995), the factual material that formed the basis for the reconsideration had been referred to in the brief entitled, "Brief of Appellees on Consolidated General Issues and On Consolidated Punitive Damage Issues and Brief of Cross-Appellants."

may lose the right to appeal on an issue by failing to indicate in that party's brief the location in the record where the alleged error occurred. *Mitchell v. State*, 51 Md. App. 347, 357-58, 443 A.2d 651, 657, *cert. denied*, 459 U.S. 915, 103 S. Ct. 227, 74 L. Ed. 2d 180 (1982). The same principle applies to the alleged cure of an error.

The second reason for our denial of the Motion for Reconsideration is that, under the instructions of the trial court, the jury could not consider either of the depositions. Indeed, it may have been because of the limiting instruction that plaintiffs did not include reference to those depositions in their brief as appellees. We describe below how the instruction evolved.

On the eleventh trial day, November 24, 1993, after plaintiffs had introduced their case in chief, the defendants were producing evidence in support of their cross-claims. Counsel for the plaintiffs, referring specifically to the anticipated introduction by Porter Hayden Company, Inc. (PH) of excerpts from the deposition of Dr. Schepers in support of PH's cross-claim against Owens-Illinois, Inc. (O-I), pointed out to the court, out of the presence of the jury, that a number of passages designated from the deposition dealt with TLVs. Plaintiffs complained that they had presented their case in chief in reliance on the motion *in limine* ruling under which TLVs were not an issue, and plaintiffs submitted that injection into the case of TLV evidence "brings a whole new

ball game up ...." The court resolved the matter by saying: "I intend to tell the jury that that evidence is only as to the cross-claim and can only be considered as to the cross-claim; it can't be considered as to anything else." Plaintiffs reasserted their objections to the designations. After the jury was brought back into the courtroom, the trial court gave an instruction consistent with what it had indicated it would do. The text of the instruction is set forth in the margin.[2] Due to the intervening

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[2] "THE COURT: ...

"... [W]hen evidence is admitted in particular matters against particular individuals or companies, that evidence may only be considered as to that company and may not be considered for any other purpose.

"I have mentioned that to you before, but I wanted to remention that to you so that there is no crossover of your consideration of evidence against one party against another party.

"Do you understand that?

"THE JURY: Yes.

"THE COURT: Okay. Keep that in mind at all times during the course of the trial.

"At certain times, you have heard that the evidence is being offered against party A, for example.

"Well, that evidence that was admitted against party A can only be considered by you in your deliberations against party A.

"You have heard party A and B, for example, using just those generic designations say, 'we adopt,' or party B will say 'we adopt what party A is offering.'

"Then you may consider that evidence in favor of

(continued...)

Thanksgiving holiday the next trial day was Monday, November 29, when excerpts from the two depositions were read to the jury. At that time, and thereafter, any defendant adopting one or the other or both depositions as part of that defendant's case as a cross-claimant so stated to the jury, and the adopting defendant identified to the jury the specific cross-claim defendant against which the evidence was offered.

Under the limiting instruction the jury was not permitted to consider the depositions of Hazard and of Dr. Schepers as evidence bearing on the original claim of the plaintiffs against the defendants. Consequently, the deposition evidence did not render non-prejudicial to the defendants the erroneous ruling on the motion *in limine*.

For these reasons Appellees' Motion for Reconsideration is denied.

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[2](...continued)
both of those and against only the individuals or corporations that it is being offered against, and not for any other purpose.

"Is that clear?

"THE JURY: Yes."