

Litigant Beware: Ignore the Duty to Reconstruct the Record Under Rule 10(c) at Your Peril

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In *Roberts v. Ferman*, 826 F.3d 117 (3d Cir. 2016), the Third Circuit sought to clarify the circumstances in which a party forfeits arguments made in a post-trial motion by refusing to agree to reconstruct the record under Federal Rule of Appellate Procedure 10(c). That rule provides: "If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve

objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal." Fed. R. Civ. P. 10(c) While the rule applies to appellate proceedings, it is also guides the applicable standard when portions of the record are missing for use in the trial court. Specifically in *Roberts*, with post-trial motions pending, two-thirds of the trial transcript was missing. There were also issues with the court reporter not responding to requests and orders to complete the transcript. Thus, the district court ordered the parties to reconstruct the missing portions under Rule 10(c). After several months, rather than attempt this process, the plaintiff refused, contending that to do so would have been a fruitless endeavor because the defendants would never have agreed to plaintiff's attempted reconstruction. Plaintiff, however, ignored that Rule 10(c) addresses such disagreements by allowing both parties to weigh in and, eventually, for the district court to resolve reconstruction disagreements. **Preservation Issue(s):**

- Refusing to attempt to reconstruct missing portions of the trial transcript may result in waiver of arguments post-trial and on appeal under Fed. R. Civ. P. 10(c).

Tip(s): As *Roberts* shows, there are significant consequences if a party refuses to engage in the Rule

10(c) process. This includes dismissal for failure to prosecute: “[W]hen a plaintiff fails to provide the district court with the materials necessary to resolve the case, dismissal for failure to prosecute is an appropriate exercise of the district court’s discretion.” *Roberts*, 826 F.3d at 124 n.8. Just as significant, if the appellant failed to make a good-faith effort below to reconstruct the record, it is precluded on appeal from arguing that the missing portions would have demonstrated its entitlement to the relief requested in its post-trial motions. *Roberts*, 826 F.3d at 124-26. As the Third Circuit explained: “Such an appellant must comply with the dictates of Rule 10(c) and then present specific reasons why his or her attempt to recreate the record was insufficient. This would allow us on appeal (or the district court when considering a post-trial motion) to properly assess whether we could in fact grant meaningful review of the appellant’s claims without the actual trial transcript available to us.” *Roberts*, 826 F.3d at 125 (emphasis in original). Thus, if reconstruction becomes necessary under Rule 10(c), the movant/appellant should make a good-faith effort to reconstruct the missing portions of the record. Failure to do so might be fatal to otherwise promising post-trial motions and, later, favorable arguments on appeal.

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