

## APPELLATE

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## ALERT

THIRD CIRCUIT AFFIRMS DISMISSAL WHERE POST-TRIAL  
MOVANT REFUSED TO RECREATE MISSING TRIAL RECORD*By David C. Dziengowski & Bruce P. Merenstein*

You litigate a case in federal court and get an adverse verdict. Believing this result unjust, you file a post-trial motion for judgment as a matter of law and in the alternative for a new trial. But there is a problem: two-thirds of the trial record is missing. What do you do?

In *Roberts v. Ferman*, a recent opinion issued by the U.S. Court of Appeals for the Third Circuit addressing this scenario, the plaintiff sought, and was granted, extraordinary relief from the district court in the form of an order that the court reporting company produce the entire trial transcript. *Roberts v. Ferman*, --- F.3d ---, No. 15-2909, 2016 U.S. App. LEXIS 10966 (3d Cir. June 17, 2016). The company did not comply with the district court's order. The district court, needing a complete record of trial to decide the plaintiff's post-trial motion, then ordered the parties to recreate the trial record in accordance with Federal Rule of Appellate Procedure 10(c). That rule provides that "[i]f 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." It also provides a procedure for the appellee to respond to the appellant's recreation of the record and for the district court to resolve any disputes over the record.

This time, it was the plaintiff who did not comply with the court's order. The plaintiff argued that

there is "no such court rule" permitting the court to order the recreation of the trial record and that, in any event, "neither side would agree [to] the other's recreation of the trial events[.]" Nine months later, having received no recreated record from the plaintiff, the district court dismissed his post-trial motion for failure to prosecute.

Plaintiff filed his appeal, and the Third Circuit affirmed. Finding no abuse of discretion, the Third Circuit held that "where a plaintiff's actions amount to the willful refusal to prosecute or blatant failure to comply with a district court's order, dismissal for failure to prosecute is appropriate." In so doing, the Third Circuit reminded litigants that the moving party ultimately shoulders the burden to prosecute his or her case. "[W]hen a plaintiff fails to provide the district court with the materials necessary to resolve the case," the Court opined, "dismissal for failure to prosecute is an appropriate exercise of the district court's discretion." In short, sitting on one's hands is not an option.

As for the appellant's argument that the district court lacked the authority to order the parties to recreate the record, the Third Circuit admonished the appellant for making this argument. "Roberts' counsel should take the time to read Rule 10(c). He would then discover 'such [a] court rule.'" The Third Circuit went on to cite a recent example from the District of New Jersey where a court applied

Rule 10(c) to authorize the parties to reconstruct a trial record. Unlike this case, there the parties worked together and submitted an agreed-upon recreated record.

Ultimately, the Third Circuit was cautious to not craft too broad a rule. It established an escape hatch for litigants who attempt to comply with a district court's Rule 10(c) order but are unable to do so. These litigants must "present specific reasons why [their] attempt to recreate the record was insufficient[,]” and they must "show that they were prejudiced by the loss of part or all of the record below.” Of note, the Third Circuit did not provide examples of what may constitute "specific reasons.” Nor did the Third Circuit outline a framework to test for prejudice in such a scenario. These issues will therefore need to be developed on a case-by-case basis.

In the meantime, litigants are on notice, if such notice was really required, that a district court may dismiss a post-trial motion where the movant refuses to recreate a missing trial record under Rule 10(c). The lesson from this recent appellate court decision is that counsel must be familiar with all the rules governing court practice and procedure and comply with court orders issued pursuant to those rules. ◆

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