

Appeal it All! Guarding Against Multiple, Independent Grounds

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You've identified a killer issue for appeal, no doubt a winner. Congratulations! You still lose. How can that be? In *Novum Structures, LLC v. Choate Construction Company, Inc.*, 698 Fed. Appx. 608 (11th Cir. 2017), the Eleventh Circuit reiterated the rule that where a district court judgment is based on multiple, independent grounds, an appellant must convince the appellate court that every stated ground for the adverse

judgment is incorrect. There, a general contractor sought indemnification from a subcontractor for broken window panes and, after arbitration, was awarded damages. After learning about more broken window panes, the general contractor demanded more damages, and the sub filed a declaratory judgment action in district court, arguing the claims were barred by *res judicata*. The general contractor counterclaimed. On cross-motions for summary judgment, the district court denied the subcontractor's motion based on *res judicata*, but also granted the general contractor's motion based on breach of contract and indemnification. The subcontractor *only* appealed the denial of its motion based on *res judicata*, and its initial brief only addressed that issue. Not until its reply brief did the subcontractor argue that the arbitration award had preclusive effect for "every type of claim." The Eleventh Circuit affirmed, holding that the subcontractor had abandoned any challenge to the grant of summary judgment based on breach of contract, and had waived its argument regarding the preclusive effect of the arbitration award on the breach claim by failing to raise it in the initial brief. **Tip** Don't miss the forest for the trees. Some rulings are undoubtedly the critical ones for purposes of appeal. However, appellate courts will examine all of the stated grounds for that ruling in deciding the case. As such, it behooves appellate counsel to demonstrate how none of the stated grounds for a ruling supports affirmance. Otherwise, you could end up losing, despite being absolutely correct on all the issues raised in the initial brief.

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