

Preserving Arguments: Playing “Hide the Ball” Can Be Costly

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A state high court recently issued a stark reminder to litigants of their duty to clearly bring to the court’s attention the arguments and evidence upon which they rely in order to both survive summary judgment and preserve an issue for appeal. In *Bliss v. Minidoka Irrigation District*, 468 P.3d 271 (Idaho 2020), the Idaho Supreme Court affirmed the grant of summary judgment in favor of an irrigation district on claims by a landowner. Among other things, the landowner argued on appeal that summary judgment should not have been granted on his malicious prosecution claim because the requisite malice was established by evidence that the district’s secretary had wrongfully distributed police body camera footage of the landowner to district members on the eve of a vote. When the district responded that this argument had not been raised below, the landowner pointed to his paper opposing summary judgment that included citation to portions of the secretary’s deposition, which were attached to the filing. The court flatly rejected the landowner’s argument, noting that, although the deposition was attached to his response below, nothing in the memorandum itself hinted at the argument he was making on appeal. The high court reaffirmed that a trial court “is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court’s attention.” It is worth a reminder that the same is true for arguments presented in appellate briefs. As the Seventh Circuit once notoriously cautioned: “A skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim. ... Judges are not like pigs, hunting for truffles buried in briefs.” *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). The Eleventh Circuit has similarly explained that a party fails to adequately brief a claim where it is not “plainly and prominently” raised, for example, “by devoting a discrete section of his argument to those claims.” *Sapuppo v. Allstate Floridian Insurance Co.*, 739 F.3d 678, 681 (11th Cir. 2014). A party may also abandon an issue where only “passing references” to it are made in the statement of the case, summary of the argument, or as mere background to an argument. *Id.* at 681-82. Tips:

- In your briefing before the trial court and on appeal, present your arguments clearly and explain how your evidence supports those arguments. Passing references to an argument and bare citations to attached evidence are insufficient to properly raise and preserve those issues.

- To reduce the risk of abandoning or waiving your arguments, devote a discrete section of your argument to each issue, and use headings and subheadings where appropriate.

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