

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -7 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                                     |   |                            |
|-------------------------------------|---|----------------------------|
| DONALD D. BAILEY,                   | ) | 2 CA-CV 2012-0098          |
|                                     | ) | DEPARTMENT A               |
| Plaintiff/Appellant,                | ) |                            |
|                                     | ) | <u>MEMORANDUM DECISION</u> |
| v.                                  | ) | Not for Publication        |
|                                     | ) | Rule 28, Rules of Civil    |
| GREGORY ROBINSON and JANE DOE       | ) | Appellate Procedure        |
| ROBINSON, husband and wife; FARLEY, | ) |                            |
| ROBINSON & LARSEN; GREGORY A.       | ) |                            |
| ROBINSON, P.C.; and LORI LAW,       | ) |                            |
|                                     | ) |                            |
| Defendants/Appellees.               | ) |                            |

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20098980

Honorable Kenneth Lee, Judge

AFFIRMED

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Donald D. Bailey

Tucson  
In Propria Persona

Humphrey & Petersen

By Ryan S. Andrus and Andrew J. Petersen

Tucson  
Attorneys for Defendants/Appellees

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HOWARD, Chief Judge.

¶1 Appellant Donald Bailey appeals from the trial court's grant of summary judgment against him and in favor of Gregory and Jane Doe Robinson; Farley, Robinson

& Larsen; Gregory A. Robinson, P.C.; and Lori Law (collectively “Robinson”) in his legal malpractice action. He claims the trial court erred by granting summary judgment in favor of Robinson on the ground of collateral estoppel and a material issue of fact existed in establishing malpractice. He further contends Robinson’s counsel and expert witness perjured themselves in the proceedings below. Because we find no error, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to Bailey, the party against whom summary judgment was granted, and construe all inferences in his favor. *See City of Sierra Vista v. Sierra Vista Wards Sys. Voting Project*, 229 Ariz. 519, ¶ 2, 278 P.3d 297, 298 (App. 2012). In 2000, Bailey pleaded guilty to filing a false tax return for the 1992 tax year. Then in 2005, he hired Robinson to represent him in his civil claim that he was entitled to a refund for the 1992 tax year. After a trial on the merits, the U.S. District Court rejected this claim, and Robinson withdrew from the representation. Bailey then alleged, in a motion the District Court construed as a motion for relief from judgment under Rule 60(b), Fed. R. Civ. P., that an Internal Revenue Service (“IRS”) agent who had testified at trial, Lori Hale, falsified documents and gave perjured testimony, and that his attorney had been negligent in failing to discover and present testimony about these defects. The court concluded Bailey had not “presented any reason for counsel’s failure to present the proposed testimony” and had failed to show “that Hale perjured herself or falsified any documents.”

¶3 In November 2009, Bailey sued Robinson and the expert witness Robinson had relied on at trial in state court, alleging both had committed malpractice.<sup>1</sup> After nearly 2.5 years of discovery and motion practice, the trial court granted Robinson’s motion for summary judgment and denied Bailey’s cross-motion for summary judgment. The court found Bailey’s claim was collaterally estopped based on the federal court’s ruling and he failed to establish causation. Bailey appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

### Summary Judgment

¶4 Bailey first argues the court erred when it granted summary judgment in Robinson’s favor. He appears to argue that a material issue of fact about whether Hale committed perjury and whether Robinson negligently failed to discover and expose it precluded summary judgment. Summary judgment is proper when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Ariz. R. Civ. P. 56(c)(1); Ariz. Sup. Ct. Order No. R-11-0034 (Aug. 30, 2012).<sup>2</sup> We review de novo whether any genuine issues of material fact exist and whether the

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<sup>1</sup>In two other appeals, Bailey attempted to appeal the trial court’s grant of summary judgment in favor of the expert witness and dismissal with prejudice of all counts against him. *Bailey v. Hermanson (Bailey I)*, No. 2 CA-CV 2011-0034 (memorandum decision filed Jan. 5, 2012); *Bailey v. Hermanson (Bailey II)*, No. 2 CA-CV 2011-0161 (memorandum decision filed May 10, 2012). We affirmed in the first appeal and dismissed for lack of jurisdiction in the second.

<sup>2</sup>Effective January 1, 2013, as part of a technical rather than substantive reorganization to make the text of the Arizona Rules of Civil Procedure more similar to their federal counterparts, Rule 56(c)(1) was renumbered as Rule 56(a). *See* Ariz. R. Civ. P. 56(h) cmt. We refer to the version of the rule in effect at the time Bailey commenced this action. *See* Ariz. R. Civ. P. 81.

trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶5 The doctrine of collateral estoppel, or issue preclusion, under certain circumstances, prevents a party from relitigating an issue that was essential to a final determination in a previous proceeding. See *Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, ¶ 9, 990 P.2d 1069, 1073 (App. 1999). The doctrine applies in a case where (1) the issue was actually litigated in the prior proceeding, (2) the parties have had a full and fair opportunity to litigate the issue, (3) the court entered a valid and final decision on the merits, (4) resolution of the issue was an essential component of the decision, and (5) common identity of the parties exists. *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, ¶ 9, 62 P.3d 966, 968 (App. 2003). A defendant may use the doctrine to prevent a plaintiff from re-arguing an issue the plaintiff previously litigated unsuccessfully against a different party; common identity of the parties is not required when the doctrine is used “defensively.” *Id.* ¶ 10. A party bound by the prior judgment cannot avoid application of the doctrine “by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him.” *Barassi v. Matison*, 134 Ariz. 338, 340-41, 656 P.2d 627, 629-30 (App. 1982).

¶6 In this case, Bailey fully litigated the issue of agent Hale’s alleged perjury in federal court, and the court there found Bailey had not shown Hale perjured herself or falsified any documents. The Ninth Circuit affirmed that decision. *Bailey v. United States*, 384 Fed. Appx. 670 (9th Cir. 2010). Although Bailey contends the decision is not final because he has continued to file renewed motions for relief from judgment, he may

not preclude finality by perpetually filing untimely and redundant motions—the federal court has ordered him not to file without permission. *See Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (federal judgments final for collateral estoppel purposes when prior adjudication “‘sufficiently firm’ to be accorded conclusive effect”), *quoting Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979).

¶7 The issue of whether Hale had committed perjury or falsified documents was essential to resolving Bailey’s malpractice claim because a contrary finding by the district court might have granted Bailey the relief he sought and undermined the original judgment. And, although the parties were not identical in the federal case, Robinson may assert the defense against Bailey because here Robinson is the defendant. *See Campbell*, 204 Ariz. 221, ¶ 10, 62 P.3d at 968. Accordingly, all the necessary elements of collateral estoppel have been met and Bailey may not relitigate Hale’s alleged perjury.

¶8 Bailey argues, however, that he presented new evidence below that should allow him to reopen the issue of Hale’s perjury. But he fails to identify any “‘compelling circumstances’” associated with this evidence that “‘could likely lead to a different result.’” *Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 211 Ariz. 485, ¶ 52, 123 P.3d 1122, 1130 (2005), *quoting* Restatement (Second) of Judgments § 29(8) & cmt. j (1982). Moreover, simply introducing new evidence without more is an insufficient basis to avoid precluding this issue from the present litigation. *See Barassi*, 134 Ariz. at 340-41, 656 P.2d at 629-30. We therefore reject his argument.

¶9 The court did not err in granting summary judgment in Robinson’s favor, as the inability to show Hale perjured herself renders Bailey unable to establish that Robinson negligently failed to discover perjury, leaving no issues of material fact for trial. *See* Ariz. R. Civ. P. 56(c)(1); *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986) (malpractice requires showing elements of negligence, including causation).

### Other Claims

¶10 Bailey also argues that Robinson’s counsel and expert witness committed perjury at several points before the grant of summary judgment. These issues were not presented to the trial court in the first instance, and we will therefore not consider them. *See Burns v. Davis*, 196 Ariz. 155, ¶¶ 40-41, 993 P.2d 1119, 1129 (App. 1999) (appellate court does not address issues trial court has not ruled on absent a record “so fully developed that the facts and inferences are perfectly clear”).

### Conclusion

¶11 For the foregoing reasons, we affirm the judgment of the trial court.

*/s/ Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Peter J. Eckerstrom*

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PETER J. ECKERSTROM, Presiding Judge

*/s/ Michael Miller*

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MICHAEL MILLER, Judge