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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1534**

MinnComm Utility Construction Co., et al.,  
Appellants,

vs.

City of La Crescent,  
Respondent.

**Filed June 6, 2011  
Affirmed  
Stoneburner, Judge**

Houston County District Court  
File No. 28CV10107

Marvin T. Fabyanske, Jesse R. Orman, Hannah R. Stein, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota (for appellants)

Larry D. Espel, Greene Espel, P.L.L.P., Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Schellhas, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellants, MinnComm Utility Construction Co. and its principals Daniel J. and Mary D. Weidner (collectively MinnComm), were guarantors of a payment and performance bond securing performance of a contract with respondent City of La Crescent (the city). The city discharged the construction company from the project and

made a claim under the performance bond. The surety brought a declaratory-judgment action in federal district court, asserting, in relevant part, that it was entitled to indemnity from appellants for “losses and costs which [surety] has incurred to date.” MinnComm cross-claimed against the city for breach of contract. The federal district court held that the city had breached the contract, and it awarded damages, including prejudgment interest, to MinnComm. MinnComm’s request for damages did not include recovery of any losses or costs it might incur by reason of surety’s indemnity claim. The federal district court did not address the surety’s indemnity claim.<sup>1</sup> The same day that judgment was entered in the federal court action, the surety demanded payment of its attorney fees and costs related to the federal court action from MinnComm. MinnComm paid without any objection to liability or the amount claimed and initiated this action to recover the amounts paid from the city as additional damages arising from the city’s breach of contract, under a “pass-through indemnity” theory. The district court granted summary judgment to the city, holding that MinnComm’s action is barred by the doctrine of res judicata. We affirm.

## **D E C I S I O N**

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[ ] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

When the facts are not in dispute, whether the doctrine of res judicata applies is reviewed

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<sup>1</sup> The surety asserted its indemnity claim against MinnComm in the federal action. Because MinnComm’s answer admitted the existence of the indemnity agreement, there was no controversy concerning the surety’s indemnity claim in the federal action.

de novo. *Erickson v. Comm'r of Dep't of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). If the doctrine is available, the district court's decision to apply it is reviewed for abuse of discretion. *Id.*

Res judicata is an equitable doctrine that prohibits parties from raising any matter in a subsequent suit that was, or could have been, litigated in the first suit. *Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 466, 124 N.W.2d 328, 340 (1963). Res judicata applies when “(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter.” *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007) (quotation omitted). “All four prongs must be met for res judicata to apply.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). Res judicata is not rigidly applied, and the central inquiry is whether its application would work an injustice on the party against whom it is asserted. *Id.* at 837.

It is undisputed that this claim involves the same parties. At issue is whether (1) the claims are factually the same as asserted in the prior action; (2) there was a full and fair opportunity to litigate the matter; and (3) there was a final judgment on the merits. If so, we must also determine whether the district court abused its discretion in applying the doctrine of res judicata in this case.

**I. The federal action involved the same set of factual circumstances involved in this action.**

The first prong of a res judicata analysis requires that the earlier claim involved the same set of factual circumstances. *Brown-Wilbert, Inc.*, 732 N.W.2d at 220. This prong is met if the same evidence sustains both actions. *McMenomy v. Ryden*, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967). The district court concluded that this prong is met because “[b]oth cases arise from the contract between the [c]ity and MinnComm,” and “both cases arose as a result of the [c]ity’s wrongful termination of MinnComm’s contract and claims against [the surety].”

MinnComm does not dispute that the current claim arises out of the city’s breach of contract but argues that its pass-through-indemnity claim against the city did not accrue until after the federal litigation was concluded, when the surety sought indemnity for attorney fees and costs from MinnComm. *See Metro. Prop. & Cas. Ins. Co. v. Metro. Transit Comm’n*, 538 N.W.2d 692, 695 (Minn. 1995) (quoting 54 C.J.S. *Limitation of Actions* § 207 (1987) for the proposition that “the right of indemnity does not accrue until the liability of the party seeking indemnity ‘has become finally fixed and ascertained’”). MinnComm relies on *Care Inst., Inc.-Roseville v. Cnty. of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000), to argue that the surety’s indemnity claim created a new claim by MinnComm against the city. In *Care Inst.*, a tax case, the issue was whether the doctrine of res judicata applied to preclude relitigation of the institute’s 1996 qualification as a public charity in subsequent tax years. *Id.* at 445–46. The supreme court held that the doctrine did not apply, noting that the actions were the same type of action, but not the

*same* action because “the characteristics relevant to status as a purely public charity may have changed.” *Id.* at 447. By contrast, MinnComm is seeking additional damages for the same breach of contract it pursued in the federal action.

Minn. R. Civ. P. 13, governing counterclaims and cross-claims, provides that “[a] cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.” Minn. R. Civ. P. 13.07. “Minnesota Rule 13.07 is significant in that [like Rule 14, governing third-party claims] it permits a party to assert claims that have not matured.” 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 13:10 (5th ed. 2009). Under rule 13, MinnComm could have included in its cross-claim against the city the claim for indemnity for any amounts recovered by the surety on its indemnity claim against MinnComm.

“A cross-claim is not compulsory.” *Id.* (citing *Coble v. Lacey*, 257 Minn. 352, 101 N.W.2d 594 (1960)). But, having chosen to assert its claim for breach of contract as a cross-claim, MinnComm acted at its own peril in choosing not to include as damages the indemnity claim asserted against it by the surety. “Although it is possible that a court will not apply the harsh rules of res judicata and collateral estoppel with respect to unpleaded cross-claims since they represent rules of policy rather than of law, the courts are likely to apply them unless application will result in injustice.” Herr & Haydock, *supra*, at § 13:10. Because MinnComm could have asserted the city’s liability for the surety’s indemnity claims as damages arising from the city’s breach of contract based on

the evidence submitted in the federal action, we conclude that the first prong of res judicata was met: the earlier claim involved the same factual circumstances.

**II. The prior action resulted in a final judgment on the merits.**

Res judicata cannot be applied unless the prior action resulted in a final judgment on the merits. *Fox v. Fox*, 154 Minn. 169, 172, 191 N.W. 420, 421 (1923). A final judgment on the merits “is an absolute bar to a subsequent action as to every matter offered, or which might have been offered.” *Id.*

The record does not support MinnComm’s assertion that the surety failed to bring its indemnity claim in the federal action. The record demonstrates that MinnComm admitted its agreement to indemnify the surety but did not assert that liability as part of its damages claim against the city. The federal district court awarded MinnComm the damages it sought for the city’s breach of contract. The judgment was not appealed. The judgment was final.

**III. MinnComm had a full and fair opportunity to litigate the claim that the surety’s indemnity claim against it was an aspect of breach-of-contract damages.**

The determination of whether a party had a full and fair opportunity to litigate focuses on “whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.” *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001) (quotation omitted). MinnComm does not claim that procedural limitations precluded litigation but asserts that it had no incentive to pursue the indemnity claim in the federal action. Plainly, MinnComm and the surety were

aligned in claiming that the city, not MinnComm, breached the construction contract. But MinnComm's alignment with the surety did not lessen MinnComm's incentive to assert the surety's indemnity claims as an aspect of breach-of-contract damages owed by the city. We conclude that MinnComm had a full and fair opportunity to raise and litigate a claim that the city was liable for the surety's indemnity claim against MinnComm.

**IV. The district court did not abuse its discretion by applying the doctrine of res judicata.**

Having concluded that the doctrine of res judicata was available based on the facts, we examine whether the district court abused its discretion in applying the doctrine in this case. The focus of an inquiry into whether the doctrine should be applied is whether application "would work an injustice on the party against whom the doctrines are urged." *Hauschildt*, 686 N.W.2d at 837. MinnComm focuses on the fact that the surety did not actually pursue the indemnity claim it raised in the federal litigation until after that litigation was concluded, "making it impossible for MinnComm to in turn assert the [indemnity claim] against the [c]ity in the [f]irst [a]ction." But, as discussed above, it was not impossible for MinnComm to assert this claim in the federal action. We conclude that MinnComm has not shown that application of the doctrine is unjust, and the district court did not abuse its discretion by applying res judicata to bar MinnComm's claims.

**Affirmed.**