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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1328**

Michelle Kirchner, et al.,  
Appellants,

vs.

Patricia Jernell,  
Respondent,

Cassandra Volk, et al.,  
Respondents,

Turpen Realty,  
Defendant.

**Filed May 13, 2013  
Reversed and remanded  
Rodenberg, Judge**

Anoka County District Court  
File No. 02-CV-10-4550

Scott A. Johnson, Todd M. Johnson, Johnson Law Group, Minnetonka, Minnesota (for appellants)

Anthony C. Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and  
Rodenberg, Judge.

## UNPUBLISHED OPINION

**RODENBERG, Judge**

Appellants challenge the district court's summary-judgment dismissal of their claim against respondents for malicious prosecution, arguing that the district court erred in determining that their claim is barred by the collateral estoppel effect of a probable cause finding in the prior criminal proceeding. Because we conclude that there was no final judgment on the merits in the criminal case, and the district court erred when it granted respondents' motion for summary judgment based on collateral estoppel principles, we reverse and remand for further proceedings.

### FACTS

Appellants were arrested on March 8, 2007, and appellant was later charged with a felony.<sup>1</sup> At a contested omnibus hearing, appellant challenged the probable cause underlying the criminal complaint. The district court denied appellant's motion to dismiss for want of probable cause.

Shortly before trial, appellant learned that the state had failed to disclose material evidence. The state later dismissed its case against appellant in the interests of justice. Appellant subsequently obtained expungement of the criminal file.

On July 12, 2012, appellants sued respondents, alleging malicious prosecution, among other claims. In the complaint, appellants alleged, among other things, that respondent Patricia Jernell's complaint was motivated by animus resulting from a prior

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<sup>1</sup> Appellant Michelle Kirchner is referred to hereinafter as "appellant." Appellants Michelle Kirchner and Jeffrey Kirchner are referred to as "appellants."

dispute. The district court granted respondents' motion for summary judgment on appellants' malicious prosecution claim, concluding that collateral estoppel barred appellants from litigating whether the criminal complaint against appellant was brought without probable cause, an essential element of their malicious prosecution claim.<sup>2</sup> This appeal followed.

## DECISION

Appellants argue that the district court erred in dismissing their malicious prosecution claim by summary judgment. To state a claim for malicious prosecution, a party must show that (1) the criminal action was brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action was instituted and prosecuted with malicious intent; and (3) the action terminated in favor of the party asserting the claim. *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). The district court concluded that collateral estoppel precluded appellants from proving the first requirement of their claim because the issue of probable cause had already been determined in a prior proceeding.

The issue on appeal is whether collateral estoppel precludes appellants' malicious prosecution action. Whether collateral estoppel is available is a mixed question of law and fact, which we review de novo. *Care Inst., Inc.-Roseville v. Cnty. of Ramsey*, 612 N.W.2d 443, 446 (Minn. 2000). Collateral estoppel applies as a bar to retrying an issue

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<sup>2</sup> Appellants' claims against respondent Anoka County and the county's counterclaims against appellant were, by stipulation, dismissed without prejudice. The only remaining claim sought to be advanced by appellants is the malicious prosecution claim involved in this appeal.

in a subsequent action when (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the party sought to be estopped was a party, or in privity with a party to the prior adjudication; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the adjudicated issue. *Haavisto v. Perpich*, 520 N.W.2d 727, 731 (Minn. 1994). We have previously held that “the collateral estoppel effect of a criminal judgment should be determined in the same manner and under the same criteria as any other judgment.” *Fain v. Andersen*, 816 N.W.2d 696, 700 (Minn. App. 2012), *review granted* (Minn. Sept. 25, 2012). Only the second and fourth factors are at issue here.

Appellants argue that the district court’s finding of probable cause in the criminal case does not meet the finality requirement because it was a nonappealable interlocutory order, and the state’s voluntary dismissal of the criminal charge did not lend finality to the claim since jeopardy did not attach. We agree. Generally, a final judgment is a “court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs . . . and enforcement of the judgment.” *Black’s Law Dictionary* 919 (9th ed. 2009). Moreover, “a judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court.” Restatement (Second) of Judgments § 13 cmt. b (1982), *cited in State v. Lemmer*, 736 N.W.2d 650, 659 (Minn. 2007) (finding that collateral estoppel applied when respondent did not appeal a revocation-hearing order and the order became final). Further, a judgment is not final

if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined.

*Id.* Other considerations in determining whether a prior court determination was final include whether “the parties were fully heard, [whether] the court supported its decision with a reasoned opinion, [and whether] the decision was subject to appeal or was in fact reviewed on appeal.” *Id.* cmt. g.

Minn. R. Civ. P. 54.01 defines a judgment as “the final determination of the rights of the parties in an action or proceeding.” In a criminal proceeding, a court may enter either a judgment of conviction under Minn. Stat. § 631.40 (2006), or a judgment of acquittal under Minn. R. Crim. P. 27.03, subd. 8. *See also Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 553–54, 163 N.W.2d 289, 293–94 (1968) (reviewing the application of collateral estoppel in the context of judgment of conviction and judgment of acquittal). A judgment of conviction is considered final when the sentence has been imposed or the imposition of sentence has been stayed. *State v. Murphy*, 537 N.W.2d 492, 494 (Minn. App. 1995) (citing Minn. R. Crim. P. 28.02, subd. 2(1)).

Here, the district court in the prior proceeding made a pretrial finding of probable cause, allowing the state to proceed to trial. Although the district court issued a brief written determination based on the evidence presented at the hearing, the district court’s finding was neither a judgment of conviction nor a judgment of acquittal. The probable cause determination was “tentative, provisional, or contingent” within the meaning of the Restatement (Second) of Judgments § 13 cmt. b. “[T]he amount of the damages, or the

form or scope of other relief” also remained to be determined at trial. *Id.* Additionally, the determination was not appealable as of right. *See* Minn. R. Crim. P. 28.02, subd. 2(1). Therefore, the probable cause determination was not a final judgment and does not support the application of collateral estoppel.

Moreover, the issues reserved for trial were never finally determined because the district court dismissed the complaint in the interests of justice and at the state’s request prior to trial. *See generally* Minn. Stat. § 631.21 (2006) (providing for such dismissals). A dismissal in the interests of justice is not a final order, and it does not invoke the protection of double jeopardy. *In re Welfare of J.H.C.*, 384 N.W.2d 599, 601 (Minn. App. 1986). Although the subsequent expiration of the period of limitations now bars prosecuting appellant on the original criminal charge, there was never a final judgment on the merits.

The district court erred in granting summary judgment by application of collateral estoppel. The absence of a final judgment prohibits the prior probable cause determination in the criminal case from having preclusive effect here. We therefore reverse and remand to the district court for further proceedings.<sup>3</sup>

**Reversed and remanded.**

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<sup>3</sup> We do not reach the question of the existence of a triable issue. We conclude only that collateral estoppel does not bar appellant’s’ claims. *Cf. Dunham*, 708 N.W.2d 552 at 560, 570–71 (affirming summary-judgment dismissal of malicious prosecution, abuse of process and other claims, where the district court found no genuine issue of material fact despite acquittal in the criminal action arising from the alleged wrongful acts).