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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2342**

Unitrin/Kemper Insurance Company,
Appellant,

vs.

Mark D. Roerick,
Respondent.

**Filed October 14, 2008
Reversed
Klaphake, Judge**

Morrison County District Court
File No. 49-CV-07-677

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(for appellant)

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Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Unitrin/Kemper Insurance Company challenges the district court's dismissal of its claim against respondent Mark D. Roerick for reimbursement of expenses for chiropractic services that respondent allegedly misrepresented that he provided to

appellant's insured, Susan Struchen, after she was injured in an automobile accident. Appellant's conciliation court claim was dismissed with prejudice, and it appealed to the district court. The district court concluded that the issue was decided in a prior no-fault insurance arbitration involving appellant and Struchen, and it dismissed the claim against respondent on the basis of res judicata. Appellant claims that the district court erred by sua sponte dismissing its claim. Because the district court considered evidence outside of the pleadings, we construe the district court's ruling as a grant of summary judgment. Because we conclude that the district court erred in granting summary judgment when the record did not support that the prior proceedings had collateral estoppel effect, we reverse.

D E C I S I O N

A district court shall grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “On appeal, [an appellate court] review[s] a grant of summary judgment to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted).

Initially, this court must decide whether the district court erred by considering evidence outside of the pleadings in granting respondent's motion to dismiss. Under Minn. R. Civ. P. 12.02, “such a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are

submitted to the district court for consideration and not excluded.” *N. States Power Co. v. Minn. Met. Council*, 684 N.W.2d 485, 490 (Minn. 2004); see *Antone v. Mirviss*, 720 N.W.2d 331, 334 n.4 (Minn. 2006). The district court’s memorandum attached to its order dismissing appellant’s claim relies on and evaluates evidence not included in the record. In addition, the court ruled that based on this non-record account of the no-fault arbitration between Struchen and appellant, the issue of whether Struchen received payment for respondent’s massage therapy services was settled.

Appellant contends that its claim is not barred by the doctrine of res judicata because the claim is not precluded by the prior arbitration or conciliation court decisions. We agree. However, we conclude that the claim is not barred by the doctrine of collateral estoppel, rather than res judicata, as applied by the district court.¹ “Fundamental” to the theories of res judicata and collateral estoppel “is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quotation omitted). Collateral estoppel applies only under the following circumstances:

- (1) the issue must be identical to one in a prior adjudication;
- (2) there was a final judgment on the merits;
- (3) the estopped party was a party or was in privity with a party to the prior adjudication; and
- (4) the estopped party was

¹ The doctrine of res judicata applies to a subsequent suit for the same cause of action, while collateral estoppel applies to a subsequent suit involving relitigation of the same issues. *McBroom v. Al-Chroma, Inc.*, 386 N.W.2d 369, 372-73 (Minn. App. 1986). Because the arbitration and district court action involve the same issue but different causes of action, collateral estoppel applies.

given a full and fair opportunity to be heard on the adjudicated issue.

Id. (quotation omitted).

Here, the arbitration award constitutes a “prior adjudication.” *See State Farm Mut. Auto. Ins. Co. v. Spartz*, 588 N.W.2d 173, 176 (Minn. App. 1999) (noting that weight of authority is to consider a prior arbitration award as a prior adjudication for purposes of collateral estoppel), *review denied* (Minn. Mar. 30, 1999). However, the issue in the arbitration was what amount Struchen was to receive from appellant as no-fault benefits for her medical expenses; the issue in the current action is whether appellant should be reimbursed by respondent for benefits it paid to Struchen that were induced by respondent’s alleged misrepresentation. The arbitrator’s decision granted a lump sum amount for medical expenses without itemizing any of those expenses. Thus, this issue was not “distinctly” decided by the arbitrator. Finally, respondent, as a medical service provider, was not a party to the arbitration proceedings, and his interests are diverse from, and possibly contrary to, those of Struchen and appellant, so he cannot be in privity with either of those parties.

As to the dismissal of the conciliation court action, the district court properly noted that this had no res judicata effect on appellant’s claim. *See Minn. R. Gen. Pract.* 521 (allowing a person aggrieved by a conciliation court decision to remove the cause to district court for trial de novo).

For the reasons enumerated above, we conclude that the district court erred in ruling that appellant's claim was barred. *See Hauschildt*, 686 N.W.2d at 837 (providing for de novo review of collateral estoppel issue).

Reversed.