

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 16-6179

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Feb 28, 2017  
DEBORAH S. HUNT, Clerk

PREFERRED CARE OF DELAWARE, INC., )  
et al., )  
 )  
Plaintiffs-Appellants, )  
 )  
v. )  
 )  
DOROTHY CROCKER, )  
 )  
Defendant, )  
 )  
and )  
 )  
MARY NELL QUARLES, Executrix of the Estate )  
of Elizabeth Tyler, )  
 )  
Defendant-Appellee. )  
 )

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF  
KENTUCKY

ORDER

Before: NORRIS, McKEAGUE, and WHITE, Circuit Judges.

Appellants Preferred Care of Delaware, Inc., Preferred Care Partners Management Group, L.P., and Cadiz Health Facilities (collectively “Preferred Care”) appeal the district court’s judgment dismissing their complaint to compel arbitration pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a)(2)(C).

In July 2015, Dorothy Crocker, as the attorney-in-fact for Frances Elizabeth Tyler, filed a negligence complaint against Preferred Care in Kentucky circuit court concerning Tyler’s alleged mistreatment while she was a resident at Shady Lawn Nursing and Rehabilitation Center.

In August 2015, Preferred Care filed a complaint against Crocker in the United States District Court for the Western District of Kentucky to enjoin Crocker's state court case and to compel arbitration of her negligence claims pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.* Preferred Care's complaint was based on an Alternative Dispute Resolution Agreement that Crocker signed as attorney for Tyler when Tyler was admitted to Shady Lawn. In that agreement, the parties agreed to submit any dispute concerning the resident's stay to binding arbitration.

Crocker argued both in the state trial court and in the district court that the parties had not actually formed an agreement to arbitrate pursuant to the Kentucky Supreme Court's decisions in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), and *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), *cert. granted sub nom., Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 368 (2016), because Tyler did not expressly give Crocker the authority in her power of attorney to waive her constitutional right of access to the courts. The Kentucky Supreme Court held in these two cases that the power-of-attorney document must expressly grant the attorney-in-fact the authority to waive the principal's right of access to the courts and that "an arbitration 'agreement' entered into by an attorney-in-fact which exceeds the grant of authority conferred by his principal is no agreement at all." *Whisman*, 478 S.W.3d at 328, 330. The district court, however, ruled that *Whisman* violates the FAA pursuant to the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), because *Whisman* has a disproportionate impact on arbitration agreements. *See Preferred Care of Del., Inc. v. Crocker*, 173 F. Supp. 3d 505, 515-22 (W.D. Ky. 2016). The district court therefore denied Crocker's motion to dismiss on the basis of *Whisman*, but stated that Crocker had presented allegations sufficient to conclude that the arbitration agreement was invalid on the ground of fraud. *Id.* at 525.

Meanwhile, the state trial court issued an order ruling that the arbitration agreement was not enforceable pursuant to *Whisman*. Preferred Care filed an interlocutory appeal of the state trial court's decision not to enforce the arbitration agreement. This appeal remains pending. In the district court, Mary Nell Quarles (now substituted for Crocker as the executrix of Tyler's

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estate) filed a motion to dismiss Preferred Care's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the state trial court's order was entitled to preclusive effect on the issue of the enforceability of the arbitration agreement. Despite its earlier conclusion that *Whisman* violates the FAA, the district court concluded that the state trial court's order that the arbitration clause was unenforceable was entitled to full faith and credit under 28 U.S.C. § 1738 and granted Quarles's motion to dismiss. *See Preferred Care of Del., Inc. v. Quarles*, No. 5:15-CV-177-TBR, 2016 WL 3562123, at \*2-4 (W.D. Ky. June 24, 2016).

Preferred Care filed a timely appeal. Preferred Care argues that the district court erred by giving the state trial court's order preclusive effect because it was not a final judgment under Kentucky law. Preferred Care also argues that the district court erred when it dismissed its complaint because the issue of the enforceability of the arbitration agreement was itself reserved for arbitration by the parties' agreement.

We review de novo a district court's order granting a Rule 12(b)(6) motion to dismiss. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 597 (6th Cir. 2013). We also review de novo a district court's dismissal of a case on the ground of issue preclusion. *Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999). The federal Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give full faith and credit to the judicial proceedings of state courts. *In re Calvert*, 105 F.3d 315, 317 (6th Cir. 1997). Pursuant to § 1738, a federal court must give preclusive effect to a state-court judgment if the judgment is entitled to preclusive effect according to the law of the state in which the judgment was rendered. *Id.* Under Kentucky law, issue preclusion bars further litigation when five elements are met: 1) at least one party to be bound in the second case was a party in the first case; 2) the issue in the second case is the same as the issue in the first case; 3) the issue must have actually been litigated; 4) the issue must have actually been decided in the first action; and 5) the decision in the first action must have been necessary to the court's judgment. *See Yeoman v. Commonwealth*, 983 S.W.2d 459, 465 (Ky. 1998) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)); *Miller v. Admin. Office of Courts*, 361 S.W.3d 867, 872 (Ky. 2011).

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All of the elements of issue preclusion are satisfied in this case. The parties in the two cases are the same, the issue of the enforceability of the arbitration agreement was at issue in both cases, the parties litigated this issue in the first case, the state court actually resolved this issue, and the state court's decision was necessary to resolve the issue of whether Tyler's negligence claims had to be submitted to binding arbitration. Preferred Care argues that the state trial court's order is not entitled to preclusive effect because Kentucky law recognizes that an appeal from an order denying a motion to compel arbitration is interlocutory in nature, *see Kindred Hosp. Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 920 (Ky. 2006), and that therefore the order is not a "final judgment" under the Kentucky Rules of Civil Procedure. Although the Second Restatement of Judgments requires a "valid and final judgment" for issue preclusion to apply, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), Preferred Care conflates what constitutes a final judgment for procedural purposes with what constitutes a final judgment for the purpose of issue preclusion. Section 13 of the Second Restatement of Judgments, which is incorporated by reference into Section 27, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. k (1982), provides that a "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." "Thus, when res judicata is in question, 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). The state trial court's order was a "final judgment" for the purpose of issue preclusion because it was a definitive ruling on the issue of the enforceability of the arbitration agreement and was the completion of all of the steps necessary to adjudicate that issue. Consequently, the district court was correct to give the state court's order preclusive effect under § 1738.

Given our conclusion that the district court correctly dismissed Preferred Care's complaint on the ground of issue preclusion, we need not address Preferred Care's argument that the district court should have ordered the issue of the enforceability of the arbitration agreement to arbitration.

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Accordingly, for the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

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Deborah S. Hunt, Clerk