

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

CHARLENE SIMMONS,
Appellant,

-against-

TRANS EXPRESS, INC.,
Respondent.

NO. 34

20 Eagle Street
Albany, New York
April 28, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

ABDUL K. HASSAN, ESQ.
ABDUL HASSAN LAW GROUP, PLLC
Attorney for Appellant
215-28 Hillside Avenue
Queens Village, NY 11427

EMORY D. MOORE, JR., ESQ.
MCDERMOTT WILL & EMERY LLP
Attorney for Respondent
444 West Lake Street
Suite 4000
Chicago, IL 60606

Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 34, Simmons v. Trans
3 Express.

4 Counsel?

5 MR. HASSAN: Your Honors, thank you very much.
6 Good afternoon, and may it please the court. I'd like to
7 reserve three minutes of rebuttal time?

8 CHIEF JUDGE DIFIORE: Three?

9 MR. HASSAN: Three.

10 CHIEF JUDGE DIFIORE: Of course.

11 MR. HASSAN: Your Honor, I'm Mr. Abdul Hassan.
12 I'm counsel for plaintiff, Charlene Simmons, the plaintiff-
13 appellant.

14 Your Honors, the plaintiff's interpretation of
15 the New York City Civil Court Act Section 1808 is correct
16 for several compelling reasons. But first and foremost
17 among them is that the textual language strongly backs her
18 interpretation of the statute. The Second Circuit - - -

19 JUDGE RIVERA: Let me just clarify, Counsel - - -
20 I'm over here. Sorry.

21 Is your position that the text is unambiguous or
22 that it has certain ambiguity, and the legislative history
23 then supports your reading of the case - - - of the
24 language?

25 MR. HASSAN: Your Honor, it could - - - it - - -



1 it's our position that it - - - given the issue in this
2 case, it's unambiguous as to that issue. There might be
3 some - - - as the Second Circuit pointed out, there is a
4 further interpretation here where there is no preclusion at
5 all.

6 JUDGE RIVERA: Um-hum.

7 MR. HASSAN: There might be some ambiguity in - -
8 - on that front - - -

9 JUDGE RIVERA: Um-hum.

10 MR. HASSAN: - - - which can then be resolved by
11 the legislative history.

12 JUDGE RIVERA: Um-hum.

13 MR. HASSAN: So the statute clearly states that
14 the plaintiff can bring a subsequent action based on the
15 same facts, issues, and parties. At minimum, that fits
16 this case.

17 Even if we make the point that the claims here
18 are different and different facts, it's an even stronger
19 case. But we don't even need to go there.

20 JUDGE FAHEY: What's your position, Counselor, on
21 the 2005 amendments?

22 MR. HASSAN: Yes. The 2005 amendment - - - prior
23 to 2005, the statute even allowed a plaintiff in small
24 claims court to bring the exact same claim, but only
25 allowed res judicata as to the amount.



1 Despite that language, judges were interpreting
2 the statute to preclude the exact same claim. So in 2005,
3 the legislature brought the statute in line with the case
4 law and in effect, advanced the preclusion as opposed to
5 limiting it to the amount. It says - - - now the view was
6 it would preclude the exact same claim as in the small
7 claims action.

8 JUDGE STEIN: Counselor, if we disagree with you
9 about whether - - - how clear or unclear the statute is - -
10 - the statute itself, and we turn to the legislative
11 history, I have to say that in all of the bill jackets I've
12 read over the years, some of them are clearer to me than
13 others about what the legislature intended.

14 This one looks pretty clear. I mean, it
15 specifically - - - the sponsor's memo specifically says
16 that there's been confusion as to whether it's claim
17 preclusion or issue preclusion, and they're clarifying that
18 it is issue preclusion that is not allowed, but claim
19 preclusion is.

20 How do we get around that?

21 MR. HASSAN: Oh, very easily. You go to the next
22 step. When you eliminate issue preclusion - - - let's say
23 you call it that - - - but the legislative history says two
24 things. It says it will allow res judicata as to the same
25 claim. And in other instances, it mentions collateral



1 estoppel or issue preclusion.

2 When you preclude - - - when you eliminate
3 collateral estoppel, what do you do? You allow claims.
4 Right? So by - - - if you take the position - - - if
5 you're eliminating collateral estoppel, you are necessarily
6 limiting res judicata by allowing those claims that
7 collateral estoppel would have precluded or dismissed.

8 And that's especially true when you look at
9 another important factor: what is meant by res judicata?

10 As this court brilliantly explained in Paramount
11 Pictures v. Allianz, res judicata had a different meaning
12 in earlier years than it has now, that it was a very narrow
13 concept. And it only precluded the exact same claim that
14 is ident - - - identity of causes of action, where there is
15 - - - has to be like a carbon copy, where it is a
16 duplicative claim.

17 JUDGE STEIN: Right. But for a long time, we've
18 had a much more flexible analysis. We've had a
19 transactional analysis.

20 So - - - and we've established some exceptions to
21 it, and so on and so forth. So isn't our jurisprudence
22 essentially saying that generally for, you know, certain
23 policy reasons, that if it arises out of the same
24 transaction and so on and so forth, it will be precluded,
25 but - - - but not necessarily? Okay? That there may be



1 situations - - - individual circumstances in which it's not
2 fair to apply the - - - that doctrine.

3 So why - - - you know, why would we - - - why do
4 you think that this - - - that that doctrine doesn't apply
5 in small claims court, just as it does in any other court,
6 where the - - - neither the statute nor the legislative
7 history indicates otherwise?

8 MR. HASSAN: Very simple. Unlike other courts,
9 there is a statute governing preclusion in - - - of small
10 claims court judgments. And for this statute to have any
11 meaning, there has to be some difference in the res
12 judicata that's applied in other courts versus small claims
13 courts.

14 JUDGE STEIN: Well, but the difference is in
15 issue preclusion, which are clearly distinguished, again,
16 by the legislature.

17 MR. HASSAN: Well, once again, Your Honor, if you
18 eliminate issue preclusion, you're going to allow claims,
19 because you don't just litigate the issues in isolation.

20 JUDGE WILSON: Counsel, could - - -

21 MR. HASSAN: For example, if you are allowed to
22 relitigate whether you worked more than forty hours, it has
23 to be in the context of an overtime claim. So you
24 Anecessarily are going to limit res judicata.

25 And here is what is important to look at as well.



1 What we're trying to determine here is what the legislature
2 intended when it adopted the statute. It's not what the
3 general jurisprudence on res judicata is. The intent of
4 the legislature's order is highlighted by the five cases
5 the legislature cited in the legislative history. And if
6 you look at those cases, they all adopted and applied what
7 is called a narrow species of res judicata.

8 They used words like "carbon copy". They - - -
9 claims have to be a carbon copy of each other.

10 JUDGE WILSON: Well, counsel, let me - - -

11 MR. HASSAN: After the - - -

12 JUDGE WILSON: - - - let me ask you this.

13 Counsel? Over here.

14 CHIEF JUDGE DIFIORE: Judge Wilson.

15 JUDGE WILSON: Over here. Could - - - and with
16 as much specificity as possible, could you tell me what the
17 basis for the claim was in small claims court and what the
18 basis is for the claim in federal court, and where in the
19 record we can find that?

20 MR. HASSAN: Your Honor, there is no record of
21 the small claims court proceedings. But if you want me to
22 answer the question - - -

23 JUDGE WILSON: I do.

24 MR. HASSAN: - - - the plaintiff was taken off
25 the schedule in June of 2018. She was effectively fired.



1 So she lost her paycheck. She felt it was wrongful. She
2 felt that they should not have taken her off the schedule.

3 So she, in effect, was suing for lost wages,
4 nonpayment of wages flowing from her wrongful termination,
5 which was her view, at the time.

6 JUDGE WILSON: For what period of time?

7 MR. HASSAN: It was for two months - - -

8 JUDGE WILSON: Two months - - -

9 MR. HASSAN: Two to three months.

10 JUDGE WILSON: - - - following her termination?

11 MR. HASSAN: Yes.

12 JUDGE WILSON: Okay.

13 MR. HASSAN: So she brought that claim, and then
14 afterwards she came to see me. She had no idea about her
15 overtime or claim anything like that. She was still upset
16 about the fact that they took her off the schedule.

17 I evaluated her case and I said you have some
18 clear overtime claims here. So we did not bring the same
19 termination claim, because that was in - - - that's what
20 she explained she litigated in small claims court.

21 In federal court, we brought overtime claims,
22 which is failure to pay time-and-a-half for more than forty
23 hours in a week. We brought a manual worker claim, which
24 is a claim to recover interest and liquidated damages,
25 because she was paid biweekly instead of weekly. New York



1 Labor Law 191 requires weekly payment of wages. And then
2 she brought a claims of wage notice and wage statement
3 violation.

4 JUDGE WILSON: And do any of those - - -

5 MR. HASSAN: Very, very different - - -

6 JUDGE WILSON: - - - do any of those claims - - -
7 are the damages for any of those claims related to the
8 period after her employment was terminated?

9 MR. HASSAN: No. Not at all. None. Zero.

10 CHIEF JUDGE DIFIORE: Thank you - - -

11 JUDGE STEIN: Can - - -

12 CHIEF JUDGE DIFIORE: Judge Stein, go ahead.

13 JUDGE STEIN: I don't know. But I thought the
14 small claims judgment referred to overtime claims?

15 MR. HASSAN: There is a notation in the judgment
16 that says UNPD OT ETC.

17 JUDGE STEIN: Um-hum.

18 MR. HASSAN: Now, that could be interpreted - - -
19 a jury could interpret that as overtime. Or they may say
20 we don't understand what it means, or after hearing the
21 plaintiff, they may say no, it has nothing to do with
22 overtime at all.

23 JUDGE STEIN: I had one other question for you.
24 So I - - - I don't interpret the certified question as
25 asking us to decide whether res judicata applies in this



1 particular case. It's asking a more general rule. Do you
2 agree with that?

3 MR. HASSAN: Yeah. It's asking you to interpret
4 the statute - - -

5 JUDGE STEIN: Right.

6 MR. HASSAN: - - - and to tell the Second Circuit
7 - - -

8 JUDGE STEIN: Okay, so - - -

9 MR. HASSAN: - - - if it - - -

10 JUDGE STEIN: - - - if - - - if we - - -

11 MR. HASSAN: - - - has any preclusion: some, at
12 all, or nothing.

13 JUDGE STEIN: So if we were to decide that under
14 the statute the transactional analysis of res judicata
15 applies to small claims, could the federal court still
16 determine that it doesn't apply to this particular
17 situation?

18 MR. HASSAN: You mean, in terms of the res
19 judicata question - - -

20 JUDGE STEIN: Yes.

21 MR. HASSAN: - - - or some other question?

22 JUDGE STEIN: No, no, that the doctrine of res
23 judicata, although it's - - - it generally applies, it
24 doesn't apply to these facts? It doesn't apply to how this
25 case came about.



1 You're talking about different claims. One's for
2 overtime. One's for - - - one's for wrongful termination.
3 They're different periods of time. Could the federal court
4 say even under the transactional analysis of res judicata,
5 it wouldn't apply to this case?

6 MR. HASSAN: It depends on how specific you are
7 in your ruling. But I think the district court said that
8 because all the claims came from the employment
9 relationship, which is - - - spans several years, that res
10 judicata, in its view, the traditional form of it, would
11 preclude the claim.

12 I don't know how the Second Circuit will view
13 that, if it will view the entire employment relationship as
14 covered or if it will view the termination separately from
15 the overtime and other violations. It will depend on how
16 specific you are - - -

17 JUDGE RIVERA: Well, it wouldn't have certified
18 the question, right? Why would it certify the question if
19 it would not matter?

20 MR. HASSAN: It would matter, but it would - - -

21 JUDGE RIVERA: No, no. If - - - if - - -
22 following Judge Stein's question.

23 MR. HASSAN: Yes.

24 JUDGE RIVERA: If they assumed that res judicata,
25 under the statute, applied, but wouldn't apply under these



1 facts, there's no reason to certify, because you don't have
2 to resolve the question.

3 MR. HASSAN: I agree with you in the sense that
4 if you were to say that res judicata applied, let's say, to
5 the imply - - - entire employment relationship, that would
6 cover everything. It wouldn't - - - then the Second
7 Circuit would dismiss the claim as to the - - - on the res
8 judicata grounds.

9 JUDGE FAHEY: Judge, could I - - - could I ask -
10 - -

11 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

12 JUDGE FAHEY: Thank you.

13 MR. HASSAN: But - - -

14 JUDGE FAHEY: What's the jurisdictional limit in
15 small claims, in Queens small claims?

16 MR. HASSAN: Your Honor, I think currently it's
17 10,000. At the time, it was 5,000.

18 JUDGE FAHEY: It was 5,000, at the time. So was
19 the claim that was filed for 5,000?

20 MR. HASSAN: No, it was - - - it could have been
21 a little bit more, but - - -

22 JUDGE FAHEY: Did she have counsel when the claim
23 was filed?

24 MR. HASSAN: Say what, Your Honor?

25 JUDGE FAHEY: Did she have an attorney when the



1 claim was filed?

2 MR. HASSAN: No, no.

3 JUDGE FAHEY: She did it herself?

4 MR. HASSAN: She did it herself.

5 JUDGE FAHEY: One of the keys to measuring the
6 effect of res judicata under the common law is whether the
7 parties had a full and fair opportunity to litigate the
8 issues that are being raised. Are there issues that were
9 not raised in small claims that you're saying now are being
10 raised in your federal action?

11 MR. HASSAN: Well, Your Honor, there is no - - -
12 this was an arbitrator. There was no record of - - -

13 JUDGE FAHEY: Right, I understand. I was a city
14 court judge in Buffalo. And normally what would happen in
15 that situation was lawyers who were coming into work would
16 be - - - Judge Stein and I did the same kind of thing - - -
17 they - - - they'd be asked to arbitrate cases. They'd go
18 out in the hallway, they'd arbitrate the cases. They come
19 back with a recommended judgment, and we'd file it. And if
20 someone objected, they could have a trial de novo.

21 That was the procedure twenty years ago, when I
22 was doing it. Was it the same procedure then?

23 MR. HASSAN: I am not certain, Your Honor.

24 JUDGE FAHEY: All right. The reason - - -

25 MR. HASSAN: It could be something similar.



1 JUDGE FAHEY: - - - I asked this question is I
2 want to know, are there issues that are being brought in
3 the federal action that were not litigated in the small
4 claims action?

5 MR. HASSAN: Yes. Yes, I think - - -

6 JUDGE FAHEY: And what are they?

7 MR. HASSAN: I think the issue of overtime under
8 the FLS and New York Labor Law.

9 JUDGE FAHEY: Um-hum.

10 MR. HASSAN: The issue of the manual worker
11 claim. The issue of the wage notice and wage statement
12 claims. All of them.

13 JUDGE FAHEY: I see.

14 MR. HASSAN: As far as we're concerned, the only
15 issue that she litigated in small claims court is whether
16 she was wrongfully taken off the schedule, wrongfully
17 terminated. And that's what - - -

18 JUDGE FAHEY: And the lost wages that resulted
19 from that, I'm assuming?

20 MR. HASSAN: Yes. Yes. She needed to pay her
21 rent and - - -

22 JUDGE FAHEY: Okay.

23 MR. HASSAN: - - - she wanted - - -

24 JUDGE FAHEY: No, I understand what you're
25 saying. Thank you.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 MR. HASSAN: Yes.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. MOORE: Good morning, Your Honors. May it
5 please the court, my name is Emory Moore. I am here on
6 behalf of respondent, Trans Express, Inc., to argue in
7 favor of the majority rule.

8 Three out of four New York Appellate Departments,
9 the bill summary, and legal treatises, all agree that New
10 York City Civil Court Act Section 1808 does not grant small
11 claims judgments an exception to the doctrine of res
12 judicata.

13 What Section 1808 does is carve out an exception
14 for collateral estoppel, also known as issue preclusion.

15 We know this because the bill summary for the
16 2005 amendment makes that fairly clear, and here's what it
17 says. You've read this before, but this is an important
18 point: "clarifies that small claims judgments and local
19 commercial claims judgments are res judicata, but shall not
20 have collateral estoppel or issue preclusion effect in any
21 subsequent proceeding."

22 We also know that the offset provision is not a
23 signal that res judicata does not apply to small claims
24 judgments.

25 JUDGE WILSON: But let me ask you - - - over



1 here. Sorry. Let me ask you about that.

2 Can you give me an example of a - - - an act - -
3 - a case where you proceed in small claims court, you get a
4 judgment in your favor, and you bring a - - - another claim
5 in a subsequent court on the same facts, issues, and
6 parties? Where are you allowed to do that? Because if you
7 can't give me an example of where you're allowed to do
8 that, I don't understand how the reduction provision could
9 work at all. It's just surplusage then.

10 MR. MOORE: Sure. So let's take Ms. Simmons'
11 claim, for an example. Ms. Simmons filed her lawsuit in
12 small claims court. We know that res judicata is an
13 affirmative defense. If you fail to plead an affirmative
14 defense - - - if Trans Express failed to plead that in the
15 federal action, it might have been deemed to have waived
16 that affirmative defense, therefore Ms. Simmons' claim
17 would have been allowed to proceed.

18 In that situation, you have an is - - - a claim
19 with the same parties, facts, and issues. And that's where
20 the offset provision would kick in and say, okay, you can
21 proceed with that claim, Ms. Simmons, but you can't obtain
22 a double recovery.

23 JUDGE FAHEY: Well, that's what the offset
24 provision is for, right?

25 MR. MOORE: Yes.



1 JUDGE FAHEY: So you could proceed with the
2 claim, then, in theory, for the amount that you didn't
3 recover for? You're saying, no, you can't.

4 MR. MOORE: We're saying is one of the exceptions
5 to res judicata applies - - -

6 JUDGE FAHEY: Well, you're talking - - - well - -
7 - it does not say that in the statute. What you're
8 referring to, I believe, is the common law, and also the -
9 - - I forget the treatise that was referred to in your
10 brief. You know better than I do.

11 But you make a point, and it's a legitimate
12 point, but it's not a point that's reflected in the
13 statute. And those exceptions that you point to are not in
14 the statute.

15 The way I read the statute - - - and you can
16 correct me - - - is it shall be res judicata only as to the
17 amount involved in a particular action. It doesn't say
18 "collateral estoppel", it says "res judicata".

19 MR. MOORE: That is the pre-amendment version,
20 and - - - and post.

21 JUDGE FAHEY: No, it's the same language in the
22 post, I think.

23 MR. MOORE: Right, it says - - - as far as the
24 issues, facts, and parties - - -

25 JUDGE FAHEY: Right.



1 MR. MOORE: - - - it shall not - - - correct.

2 JUDGE FAHEY: That pretty much covers it.

3 MR. MOORE: Correct.

4 JUDGE FAHEY: So - - - all right. Let me - - -
5 let me posit this to you. I'm an average citizen. I get
6 in an automobile accident. I go in and bring a lawsuit on
7 - - - on behalf of - - - I had to go to the doctor for one
8 visit, and I had 2,000 dollars damage to my car.

9 I go to small claims. They give me the 100
10 dollars for my visit and the 2,000 dollars for damage to my
11 car.

12 Under your theory, am I then precluded from
13 bringing an action in State Supreme Court if I find out I
14 have three herniated discs in my neck and might have a
15 couple-hundred-thousand-dollar claim later?

16 MR. MOORE: No. So the - - -

17 JUDGE FAHEY: Are you sure about that?

18 MR. MOORE: So the - - - that's a question of the
19 definition of same transaction - - -

20 JUDGE FAHEY: Um-hum.

21 MR. MOORE: - - - or series of transactions, and
22 whether the claims could have been brought.

23 If you had no knowledge, then that would play
24 into the discussion at the court level, which is a fact-by-
25 fact, case-by-case basis - - -



1 JUDGE FAHEY: Um-hum.

2 MR. MOORE: - - - as to whether it arose out of
3 the same transaction or series of transactions that could
4 or could not have been brought. But res judicata, whether
5 it applies, is a different - - - is a different question.

6 JUDGE FAHEY: Tell me how?

7 MR. MOORE: So res - - - so I guess I could break
8 it down as a two-step inquiry, if you - - -

9 JUDGE FAHEY: Go ahead.

10 MR. MOORE: The first step is does res judicata
11 apply, and if so, how far and how broad does that
12 application extend to bar further actions?

13 JUDGE FAHEY: Well, here's the problem with it.
14 Is it a new claim, or is it a claim that's worth more
15 because of subsequent information? It doesn't seem to be a
16 new claim. It seems to be a claim that's worth more
17 because of subsequent information. And what, in effect,
18 I'm concerned, from a public-policy point of view - - - not
19 in this particular case, but in broader cases - - - that we
20 would be allowing small claims court to restrict the
21 jurisdiction of higher courts, such as county court, state
22 supreme court, who make those fact-finding determinations
23 in a number of settings, for a much broader damages claim
24 and unlimited jurisdiction - - - limited financial
25 jurisdiction, also.



1 MR. MOORE: Right. So you're right. There is a
2 concern there. And you have to balance the competing
3 interests here.

4 Here you have two interests. You have an
5 interest in making sure that plaintiffs who are unwitting
6 don't unknowingly waive their claims, right?

7 JUDGE FAHEY: Um-hum.

8 MR. MOORE: But you also have the competing
9 interest of making sure there's not repeat litigation.

10 JUDGE FAHEY: Well, that's what the offset
11 provision is for. Isn't that what it's there for; to
12 protect a defendant who's been hit for a certain amount?
13 He can't be hit for that same amount again. Whatever they
14 paid in my scenario for 2,000 dollars for damages, he'll
15 never have to pay that again.

16 Other - - - other issues that can arise, as a
17 result of it, are - - - is a separate question. But here,
18 you're saying that the determination as to everything would
19 be final.

20 MR. MOORE: So the - - - the public policy - - -
21 the reason behind res judicata is a bit broader than
22 specifically making sure there aren't double damages. It's
23 about relitigating and - - - and plaintiffs obtaining a
24 second bite at the apple. It's - - -

25 JUDGE WILSON: And that's because of the



1 transaction cost to society in having proceedings and those
2 sorts of things?

3 MR. MOORE: Correct.

4 JUDGE WILSON: So the - - - in the case, though,
5 where the first proceedings is in small claims court, where
6 there typically aren't lawyers, there's no discovery, there
7 - - - you don't have most of the trappings that make
8 litigation expensive, isn't that concern diminished,
9 somewhat?

10 MR. MOORE: No, Your Honor. So first and
11 foremost, just to address a prior point about the fairness
12 of the situation. When plaintiffs enter small claims
13 courts, they sometimes and quite often are not represented
14 by counsel, right? But the - - - the system - - - the
15 legal system balances those competing interests by first
16 giving those plaintiffs advance warning, giving them
17 resources and notice that, look, you can have a claim - - -
18 claim preclusive effect of proceeding in small claims
19 court.

20 To answer your question directly, the - - - I
21 think it depends on the case-by-case basis. But
22 continuously having to relitigate a case certainly has
23 costs in the small claims court system, it has costs to the
24 defendants - - -

25 JUDGE WILSON: Yeah, my only question is aren't



1 those costs less? That is, if the first trial had been
2 Supreme and the second was in Supreme, it would be more - -
3 - we'd think more about cost than if the first is in small
4 claims, no?

5 MR. MOORE: I think that's a fair assessment.
6 It's not true in every situation where the cost is
7 automatically less in small claims court. But certainly we
8 would expect it to be, quite often.

9 So we talked about public policy. And I think
10 comparing the public policies of collateral estoppel versus
11 res judicata makes the point a bit clearer. We talk about
12 res judicata, the purpose is to prevent second bites at
13 that apple in - - - in - - -

14 JUDGE RIVERA: So - - - so the consequence - - -
15 if we agreed with you, the consequence is a claim like the
16 individual in this case cannot go to small claims court,
17 because it sounds like it's quite the disparity between the
18 amounts available at the time, when she filed in small
19 claims court, versus what she's seeking in the federal
20 action. And so the only recourse is to not pursue any
21 action in small claims court. Is that correct?

22 MR. MOORE: That is - - - that is partially
23 correct, Your Honor. When they proceed, they receive - - -
24 back when this case first arose, the facts, they receive a
25 notice that if your claim is over 5,000 dollars, don't



1 proceed in small claims court. You need to, you know, seek
2 counsel and pursue in a different court.

3 JUDGE RIVERA: Well, that claim wasn't over 5,000
4 dollars, right? But your point is that there are a bunch
5 of other claims - - -

6 MR. MOORE: If - - -

7 JUDGE RIVERA: - - - that are going to be over
8 5,000 dollars, correct?

9 MR. MOORE: Exactly, Your Honor.

10 JUDGE RIVERA: So it's not so obvious in the
11 notice - - - if you're arguing she's on notice, I'm not so
12 sure that notice argument is that strong - - - but - - -

13 MR. MOORE: Yeah, correct. That notice also
14 talks about claim splitting. If you have other claims, it
15 says, you know, you can be precluded from raising those
16 claims if you don't raise them in this action.

17 So when you combine those two warnings, if your
18 claim is over 5,000 dollars, maybe don't pursue in this
19 court. If you have other claims, pursue those all in this
20 court, if you can. I think that covers that - - - the
21 required warnings to balance those - - -

22 JUDGE RIVERA: Does the monetary limitation
23 affect at all the analysis about your opportunity to bring
24 an action? I mean, she's got claims that exceed the
25 jurisdictional cap. She could not proceed in small claims



1 on those claims, right, because she can't get the full
2 remedy she's seeking, right? Does that, at all, influence
3 the - - - your analysis on the res judicata effect?

4 MR. MOORE: No. So the - - - the law precludes
5 her from - - - with respect to the jurisdictional amount
6 bar - - -

7 JUDGE RIVERA: Um-hum. Um-hum.

8 MR. MOORE: - - - that doesn't bar you from
9 raising the claim. It just sets the upper limit of the
10 amount of damages. So you sort of pigeonhole yourself if
11 you bring that claim.

12 JUDGE WILSON: Let me ask you if you can read the
13 statute and legislative history together in the following
14 way: that if you look at the legislative history, it cites
15 several cases. And then when you look at those cases,
16 those were all basically Supreme Court or - - - or courts
17 of instant - - - essentially lower courts.

18 But all those cases are cases in which the
19 plaintiff in small claims court lost. And you could read
20 the legislative history and the statute, perhaps, to say
21 that the res judicata effect is if you go to small claims
22 court and you lose, you're going to be barred from bringing
23 a subsequent action in a higher court, but if you go there
24 and you win something, you're not barred; what happens is
25 the reduction as set out in the statute. Is that a



1 plausible reading?

2 MR. MOORE: I don't think that is - - - that's
3 not reflected in the statute. It's not reflected in the
4 legislative history. It's not expressly reflected in the
5 case law. You have to sort of imply different things. And
6 those are cases going back to, I think, the 1990s, well
7 before this amendment occurred.

8 So I don't think that's a plausible reading from
9 those cases.

10 JUDGE RIVERA: So - - - so what - - -

11 JUDGE STEIN: How - - -

12 JUDGE RIVERA: - - - what do you view as the
13 meaning of the first sentence: "A judgment obtained under
14 this article shall not be deemed an adjudication of any
15 fact at issue or found therein in any other action or
16 court"?

17 MR. MOORE: That first - - - that first section
18 addresses exclusively collateral estoppel.

19 JUDGE RIVERA: Um-hum.

20 MR. MOORE: The second section then provides an
21 offset, when there are the same facts, issues, and parties.
22 If - - - If- - - that's if a situation like that could
23 arise.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 MR. MOORE: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MR. HASSAN: Yes, Your Honor. Your Honor, one of
3 the - - - one of the biggest obstacles for the defense
4 throughout the litigation has been inability to identify a
5 case in which you can bring a subsequent claim, because if
6 res judicata eliminates all claims that were or could have
7 been brought, then - - - and if you still say, well, you -
8 - - collateral estoppel doesn't apply. But he can't
9 identify any examples.

10 When you have a setoff provision, that's aimed at
11 identical or very similar causes of action. For example,
12 you're discharged because of your gender from your job.
13 That's covered under the city law, the state law, and the
14 federal law. You sue under the city law, the issue of
15 whether you were discriminated against is the main issue.

16 Each one of the claims is a separate claim. So
17 then let's say you - - - you - - - whatever happened in the
18 city case, you then bring a federal case. The issue is
19 still the same, but you can bring the claim again. Let's
20 say you recover more money. Let's say you recover ten
21 dollars in the - - - in the city court.

22 JUDGE WILSON: In your view, can you bring that
23 claim again if you lost the first time?

24 MR. HASSAN: Yes. Yes.

25 JUDGE WILSON: So you can - - - you can fully



1 litigate an employment discrimination case in small claims
2 court, lose, and then bring it in federal court?

3 MR. HASSAN: But it wouldn't be the same claim.
4 It would be a state claim involving the same facts - - -

5 JUDGE WILSON: Well, let's suppose - - - let's
6 not use your employment discrimination example, then.
7 Let's say it's just a breach of contract. I, you know,
8 sell you my bicycle for 1,000 dollars. You claim there's a
9 contract. I say there's not. You take it to small claims
10 court. You lose. Can you then bring that claim in another
11 court?

12 MR. HASSAN: No. No.

13 JUDGE WILSON: Why?

14 MR. HASSAN: I - - - under the interpretation
15 that we put forward, it appears from the legislative
16 history that the 2005 change in the law was intended to
17 preclude you from bringing the exact same claim. Before
18 that, there was no preclusion as to the claim. You could
19 bring the same claim again. And judges complained about
20 that.

21 Before 2005, you can bring the same claim, but
22 only seek a setoff as to the amount. After 2005, you were
23 precluded from bringing the exact same claim. But you can
24 bring a different claim under a different legal theory or
25 under a different law, based on the same occurrence or



1 incident. Right?

2 And that's what distinguishes the small claims
3 court from every other court. There is no - - - and Judge
4 Stein mentioned policy consideration. Yes, res judicata is
5 intended to ease the burdens on the court. But the
6 legislature made a policy judgment to limit it, because
7 there's more compelling interests in terms of the laypeople
8 that use the small claims court.

9 A single mom, as I pointed out, like the
10 plaintiff here, who lost her wages, who wanted a quick
11 remedy to pay her rent. She shouldn't have to surrender
12 her federal statutory rights in order to use - - - that's a
13 heavy price to pay to use the small claims court system.

14 And it goes against the statute. Once again, the
15 statute becomes meaningless, absolutely meaningless, if the
16 defense's interpretation is adopted, because you will never
17 have a case where the setoff provision will be implemented
18 or applied.

19 CHIEF JUDGE DIFIORE: Thank - - -

20 MR. HASSAN: There'll be zero.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MR. HASSAN: And the language itself, which
23 allows a subsequent action based on the same facts and
24 issues will have no meaning. It's been two years. They
25 have yet to identify one case in which their interpretation



1 would allow it.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 MR. HASSAN: Thank you.

4 (Court is adjourned)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Charlene Simmons v. Trans Express Inc., No. 34, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: May 04, 2021

