To be Argued by:
EMORY D. MOORE, JR.
(Time Requested: 30 Minutes)

Court of Appeals No. CTQ-2020-00003
United States Court of Appeals for the Second Circuit,
Eastern District of New York, Docket No. 19-438

Court of Appeals

of the

State of New York

CHARLENE SIMMONS,

Plaintiff-Appellant,

– against –

TRANS EXPRESS INC.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Respondent Trans Express Inc. hereby states that it is a wholly owned subsidiary of National Express Transit Corp., which is, in turn, a wholly owned subsidiary of National Express LLC, whose sole member is NE Durham UK Limited. Respondent has no subsidiaries. Respondent has the following affiliates: Rainbow Management Services, Inc., NU Express LLC, National Express Coach LLC, and Total Transit Enterprises, LLC.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Respondent Trans Express Inc. states that, as of the date of the completion of this Brief, the only related litigation pending before any court is the action before the United States Court of Appeals, Second Circuit (No. 19-438) from which the instant certified question originated. *Simmons v Trans Express Inc.*, 955 F3d 325 [2d Cir 2020], certified question accepted, 35 NY3d 966 [2020].

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I. PRELIMINARY STATEMENT

This case arises on a certified question from the United States Court of Appeals for the Second Circuit. That certified question asks whether *res judicata* applies in exactly the same way for a small claims court judgment as it would were that judgment entered in any other New York trial court. The statutory provision that triggers this question is New York City Civil Court Act § 1808.

Respondent, Trans Express Inc. ("Trans Express"), submits that the 2005 amendment to §1808 confirms that *res judicata* applies the same way to small claims court judgments as to any other trial court judgments. Where, as here, a small claims court has rendered a judgment in favor of Appellant Charlene Simmons ("Simmons"), *res judicata* precludes a subsequent action against Trans Express. Nothing in the post-2005 version of § 1808 limits the *res judicata* effect of a small claims judgment; that statute simply limits the collateral estoppel effect of such judgments.

II. BACKGROUND FACTS

Trans Express provides charter bus services. (A170 ¶¶8 – 9). Simmons worked for Trans Express as a bus driver. (A171 ¶12). Post-employment, Simmons sued Trans Express seeking "monies arising out of nonpayment of wages" in the Queens County Civil Court, Small Claims Part 45. (A183). Simmons received a

judgment for $1,020 for unpaid overtime, etc. (*Id.*) Trans Express paid the judgment in full. (A186).

Simmons then commenced another lawsuit, but in the United States District Court for the Eastern District of New York, again seeking unpaid wages. (A169 – A177). Her complaint sought "unpaid overtime compensation" under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203, *et. seq.* in her First Cause of Action (A174 ¶37); "unpaid overtime wages" under the New York Labor Law ("NYLL") § 650 *et seq.* in her Second Cause of Action (A174 ¶41); and additional relief in her Third Cause of Action for failing to pay those "unpaid overtime wages…within the time required under NY Labor Law." (A175 ¶45).

Judge Vitaliano dismissed Simmons' lawsuit. (A200; A187 – A199). His thirteen-page Memorandum & Order explained that Simmons' action is barred by the doctrine of *res judicata* because the same claims could have been raised in Simmons' prior action. (A194). Simply stated, Simmons had improperly engaged in claim-splitting, which is forbidden by the doctrine of *res judicata*.

Simmons' second action represented an impermissible attempt to split her claim for unpaid wages into separate actions and/or recast her unpaid wages claim under other statutes. Either way, *res judicata* (more modernly termed "claim preclusion") bars such piecemeal litigation. *Tovar v. Tesoros Prop. Mgmt., LLC*, 119 A.D.3d 1127 (3d Dep't 2014) (affirming dismissal of wage claim where the

plaintiff previously sought unpaid wages in a small claims action; plaintiff "was not entitled to split his claim for unpaid wages into separate actions").

Under *res judicata*, a final judgment on the merits precludes relitigating not only claims that were raised but also – and distinctively – claims that could have been raised in that action. *Weinberg v. Picker*, 172 A.D.3d 784, 787, 99 N.Y.S.3d 421, 425 (N.Y. App. Div. 2019) (dismissing claim that could have been litigated in prior small claims court proceedings). Unraised claims are barred by *res judicata* as well as those that had been raised and decided.

By contrast, "collateral estoppel" (more modernly termed "issue preclusion") only precludes a party from relitigating an issue of fact that was actually decided. "The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result." *Buechel v. Bain*, 97 NY2d 295, 303 [2001]. Collateral estoppel never reaches what "could" have been decided only what "was" decided.

These are two different doctrines with two different policy justifications and two discrete ranges of operation. In short, *res judicata* precludes splitting claims while collateral estoppel only precludes relitigation of decided facts and issues. Here, Judge Vitaliano held that Simmons' federal court case was barred by *res judicata* because those additional claims could have been and should have been raised in a single action with her original claim.

Simmons appealed from that ruling to the Second Circuit Court of Appeals. Following oral argument there, Simmons moved to have a question certified to this Court regarding the impact Section 1808 has on the *res judicata* effect of small claims judgments. (A94 – A117). The Second Circuit then chose to certify a question to this Court regarding the *res judicata* effect of a small claims judgment in light of Section 1808.

III. ANALYSIS

A. Post-2005, Section 1808 Imposes No Limits On *Res Judicata*

Section 1808 was amended in 2005. That amendment is the key to this case. Pre-2005, Section 1808 did two different things. It limited "*res judicata*" to the judgment amount and barred "collateral estoppel" entirely. The 2005 amendment eliminated Section 1808's limits on *res judicata* altogether by completely striking *res judicata* from the statutory text:

> § 1808. Judgment obtained to be res judicata in certain cases. A judgment obtained under this article [~~may be pleaded as res judicata only as to the amount involved in the particular action and~~] shall not [~~otherwise~~] be deemed an adjudication of any fact at issue or found therein in any other action or court; **except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article**.

New York Bill Jacket, 2005 A.B. 4320, Ch. 443. This alteration of statutory language intentionally rejected any limit on the *res judicata* effect of small claims court judgments, while continuing to impose limits on the collateral estoppel effect of those judgments. This intent is explicitly confirmed in the Bill Summary:

> Clarifies that small claims judgments and local commercial claims judgments are res judicata, but shall not have collateral estoppel or issue preclusion effect in any subsequent proceeding.

New York Assembly Bill Summary, 2005 A.B. A4320 (emphasis added). Thus, today, *res judicata* applies equally to all judgments in New York courts.[1]

B. Authorities Concur That Today's Section 1808 Imposes No Limits on *Res Judicata*

The 2005 legislative alteration to eliminate any limits on *res judicata* (claim preclusion) for small claims judgments is widely recognized. As a practical matter, it is now a hornbook rule:

> The statute is not intended to divest a small-claims judgment of its claim-preclusion effect. Thus, a small-claims judgment may also be advanced as an affirmative defense on the ground of res judicata but not collateral estoppel.

73A N.Y. Jur. 2d Judgments § 431.

This has been echoed repeatedly in post-amendment decisions:

> Although judgments of the small claims court are statutorily prohibited from having collateral estoppel or issue preclusive effect (see City Court Act [CCA] § 1808), this provision "does not divest the small claims judgment of its res judicata, or claim preclusion, effect."

[1] Simmons' "textual analysis" argument (Appellant's Brief at pp. 10-13) divorces "text" from "context." Where, as here, the statutory text has been amended, it is essential to address the context: i.e., the statutory history. Justice Holmes' admonition remains true a century later: "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Here, the current text can only be understood in light of the 2005 legislative amendment; the current textual language cannot be read out of that context.

Platon v. Linden-Marshall Contracting Inc., 176 A.D.3d 409, 109 N.Y.S.3d 41 (N.Y. App. Div. 2019) (quoting *Chapman v. Faustin*, 150 A.D.3d 647, 647, 55 N.Y.S.3d 219 [1st Dept. 2017]).[2]

Those post-amendment cases likewise persuaded the federal district court in this case. There, Judge Vitaliano concluded that Section 1808 did not grant Simmons an exception to the general rule against claim-splitting:

> The legislative history of this provision [Section 1808] makes clear that it concerns only collateral estoppel, or issue, as opposed to claim, preclusion, and, therefore, not the preclusive effects of res judicata.
>
> * * *
>
> Plainly, this history confirms that New York law gives claim preclusive effect to small claims court judgments. It is a conclusion that is reinforced by abundant case law. Therefore, the fact that Simmons' prior suit was decided in small claims court will not rescue this action from the bar of res judicata, if the bar is otherwise applicable.

Simmons v. Trans Express Inc., 355 F Supp 3d 165, 169 [EDNY 2019] (internal citations omitted) (A154 – A155).[3]

Simmons' proffered case law for a contrary interpretation offer no comfort for her flawed view of Section 1808. *Katzab v. Chaudhry*, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2008) relied exclusively on case law interpreting the pre-2005 version of

[2] Other New York courts have reached this same conclusion after the 2005 amendment – small claims judgments have *res judicata* effect, barring subsequent actions arising out of the same transactions or occurrences. *See*, *e.g.*, *Davis v. Jarvis*, 44 Misc. 3d 1217(A), 997 N.Y.S.2d 98 (City Ct. 2014); *Feng Gao v. Jing Hong Li*, 31 Misc. 3d 1243(A), 932 N.Y.S.2d 760 (Sup. Ct. 2011); *Yarmosh v. Lohan*, 16 Misc. 3d 1119(A), 847 N.Y.S.2d 900 (Dist. Ct. 2007).

[3] Simmons' brief erroneously suggests that the Second Circuit ruled in her favor after reviewing Judge Vitaliano's decision. Not so. The Second Circuit simply felt that this case presented a question of New York law that should be decided conclusively by this Court.

Section 1808. In contrast, *Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp.*, 102 A.D.3d 754, 961 N.Y.S.2d 183 (2013) applied the 2005 amendment to Section 1808 and properly held the second suit barred by *res judicata*. Contrary to Simmons, paying attention to the history of Section 1808 is what is outcome dispositive.

Simmons also asserts that *res judicata* should be limited to the "same claim" and does not extend to claims that are not literally identical. That too is wrong. This Court's decision in *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018] recognized that the "modern notion of *res judicata* has called for a broadened standard for determining whether two claims … are the "same" for purposes of claim preclusion." *Id.* at 77. Thus, "same claim" does not mean "identical claim" but includes claims arising out of the same transactions or occurrences.[4]

C. Today's Section 1808 Bars Simmons' Claim Without Legislative Amendment

Section 1808 states its current limits clearly and efficiently:

[4] *See*, *e.g.*, *Clark v. Haas Group, Inc.*, 953 F2d 1235, 1239 [10th Cir 1992] (analyzing "what constitutes a single cause of action" for purposes of *res judicata* under the Restatement (Second) of Judgment's transactional approach – like New York – the court held that plaintiff's initial action for unpaid overtime barred plaintiff's subsequent action for employment discrimination; "There was a single 'transaction' in that the 'claims' in each case were predicated on [plaintiff's] employment with [defendant] from January 11, 1984 through October 31, 1986) *cert denied* 506 US 832, 113 S Ct 98, 121 L Ed 2d 58 [1992]; *see also Cieszkowska v. Gray Line New York*, 295 F.3d 204 (2d Cir. 2002) (dismissal of initial employment-related action barred subsequent employment-related action that was based on a different legal theory; both actions arose out of the employment relationship and could have been brought in the initial action).

> A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article.

New York City Civil Court Act § 1808. On its face, Section 1808 is limited in its scope to imposing limits on the collateral estoppel impact of small claims judgments elsewhere. This limitation (even beyond the legislative history of the 2005 amendment) is apparent in its focal phrase: "…any fact at issue…" Collateral estoppel is, after all, about just such issues of fact.

This limitation is even more apparent upon considering what Simmons asks. If the legislature wanted to limit the *res judicata* effect of small claims judgments tomorrow, it could do so with language to achieve that result, but that would radically alter the current statutory text:

Section 1808 as amended in 2005	**Section 1808 as Simmons proposes**
"A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article."	A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein **or any claim litigated therein** in any other action or court**, unless the claim in the other action or court is identical to the claim litigated in the judgment obtained under this article**; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article.

Simmons' proposed interpretation of Section 1808 requires the addition of language that appears nowhere in the current text of Section 1808. Such additions are a legislative task, not a judicial task.

> Courts are not supposed to legislate under the guise of interpretation, and in the long run it is better to adhere closely to this principle and leave it to the Legislature to correct evils if any exist. If harm has been done by the resolution in question there is nothing about it that cannot be corrected by the Legislature.

Bright Homes, Inc. v. Wright, 8 NY2d 157, 162 [1960]; *see also People v. Boothe*, 16 NY3d 195, 198 [2011] (despite what the Court viewed as a clear failure by the legislature to criminalize certain conduct, the Court held that such failure could not "be remedied through statutory interpretation" because "courts are not to legislate under the guise of interpretation").

Adhering to the actual language of Section 1808 is not only dictated by considerations of the line between judging and legislating, but also by respect for legislative policy judgments. Allowing *res judicata* to operate normally based on small claims judgments (as the 2005 amendment permits) achieves a public policy goal by preventing a recognized potential for the misuse of those small claims courts:

> The small claims part has from time to time been used to harass a defendant with repetitious suits on the same dispute despite the claimant's prior losses. This can of course be done in the regular part of the court as well, but it is particularly easy in small claims procedure because it is so inexpensive.

§ 585.Res Judicata as Applied to Small Claim, Siegel, N.Y. Prac. § 585 (6th ed.). Simmons' proposed rewriting of Section 1808 both ignores its text and defeats its public policy purpose.[5]

D. Simmons Misconstrues Section 1808's Offset Provision

If small claims judgments have *res judicata* effect, why does Section 1808 contemplate a subsequent action "involving the same facts, issues and parties" and provide for a set-off in those circumstances? The answer is simple: there are multiple exceptions to *res judicata* under which a subsequent action "involving the same facts, issues and parties" could be maintained.

The Restatement (Second) of Judgments § 26 (1982) lists those exceptions:

> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires

[5] Simmons' peroration on public policy (Appellant's Brief at pp. 18-19) fails to recognize that there are competing policy choices and that legislative judgments involve compromising and accommodating such competing policy interests. *Matter of New York State Ch., Inc. v. New York State Thruway Auth.*, 88 NY2d 56, 83 [1996] (explaining that the balancing of competing policy interests is best left to the legislative branch of government). Her proposal for drawing the line differently in balancing access to small claims court versus misuse of such proceedings is misaddressed; that is a proposal for legislative change, not an analysis of how to interpret the existing provisions of Section 1808. *De Angelis v. Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983] (recognizing that, though sympathy may tempt a court to impose new duties and liabilities, legislative intervention is the appropriate source of such change).

> in the second action to rely on that theory or to seek that remedy or form of relief; or
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or
>
> (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

These exceptions provide the proper cases for application of the offset provision. *See*, *e.g.*, *Weitz v. Wagner*, No. CV-07-1106(ERK)(ETB), 2008 WL 5605669, at *4 (E.D.N.Y. July 24, 2008), adopted (Aug. 11, 2008) (prior small claims judgment lacked *res judicata* effect because the Fair Credit Reporting Act claim was exclusively within the jurisdiction of the federal courts and thus could not have been raised in the small claims action). Simmons has wisely waived any such exception because none even remotely apply here.

Section 1808's set-off provision addresses scenarios where there is a need to prevent plaintiffs from recovering the same damages twice in those six categories of cases itemized by the Restatement; it is most definitely not a message that Section

1808 means the opposite of what its text provides and what its legislative history confirms.

E. Simmons Misconstrues Section 1808's Legislative History

Simmons' brief tosses out multiple misconceptions on statutory construction.

First, Simmons suggests that Section 1808's title is dispositive. This "title-only" argument (Appellant's Brief at pp. 14-15) is frivolous. It begins by ignoring both statutory text and statutory history in favor of looking only at the section title. *People v. Taylor*, 42 AD3d 13, 18 (2d Dept. 2007) ("Statutory titles, however, are of little significance in statutory construction"). Yet, even if that pre-2005 title were instructive, it states that *res judicata* is limited to "certain cases." Given the presumption that the legislature knows the law (and thus the exceptions set out in the Restatement *supra*), Simmons' suggestion that "certain cases" necessarily means "all cases" is both illogical and untenable. *B & F Bldg. Corp. v. Liebig*, 76 NY2d 689, 693 [1990] ("The Legislature is presumed to be aware of the law in existence at the time of an enactment …").

Second, Simmons asserts (Appellant's Brief at pp. 15-16) that there is a statement in the 2005 Bill Jacket that *res judicata* has been applied to bar the same claim from being litigated twice, and leaps from that to the erroneous conclusion that the legislature must have intended that *res judicata* be limited to that exact scenario. Not at all. Reading the full statement confirms that the legislature was

simply explaining that Section 1808 is not intended to alter the application of *res judicata*; as *Paramount Pictures Corp.*, *supra*, illustrates, *res judicata* applies to far more than just refiling the identical claim.

Finally, Simmons' brief (Appellant's Brief at p. 16) cites a statement by the New York Public Interest Research Group in support of the amendment. The reasons for one group lobbying in favor of that statutory amendment (which here is more confusing than clarifying) are just not a proper consideration in statutory interpretation. *Kuzmich v. 50 Murray St. LLC*, 34 NY3d 84, 92 [2019] ("Thus, we decline to defer to a private advisory letter issued by the New York State Division of Housing and Community Renewal that defendants advance in support of their proffered reading"). It is, of course, the statute itself with both its pre and post 2005 language that must be construed, not the sideline chatter of lobbyists.

IV. CONCLUSION

Where a small claims court has rendered a judgment, *res judicata* applies in exactly the same way as it would were that judgment entered in any other New York trial court. Nothing in Section 1808 permits any other result.

As amended in 2005, Section 1808 creates no unique *res judicata* rule for judgments in small claims court. Here, in short, the federal district court rightly ruled that Simmons' attempted second suit was barred by *res judicata* from her earlier (and favorable) small claims court judgment.

Dated: August 21, 2020

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 3,480 words.

This brief was prepared on a computer using:

- Microsoft Word.
- Times New Roman, a proportionally spaced font; 14-point size.

Dated: August 21, 2020
Oak Park, Illinois

Emory D. Moore, Jr.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK)		**MAIL**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on August 21, 2020

MARIA MAISONET
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Qualified in Queens County
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