

IS DISCRIMINATION JUST ANOTHER TORT?: A DISCUSSION OF OHIO'S ATTEMPT TO TORTIFY EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

The Supreme Court of Ohio has never addressed whether statutory damage caps on noneconomic and punitive damages apply to discrimination claims made under Ohio's discrimination statute, Ohio Revised Code Chapter 4112. The 2011 decision in *Luri v. Republic Services, Inc.* by the Eighth District Court of Appeals for Cuyahoga County is the only case to address whether these damage caps apply to a discrimination case under Chapter 4112.¹ This Comment contends that the court's decision in *Luri* was wrongfully decided. The court in *Luri* determined that punitive damage caps passed as part of the Ohio Tort Reform Act (now set out in Ohio Revised Code § 2315.21(D)(2)(a)) apply to Chapter 4112 statutory discrimination claims, thus limiting the plaintiff's punitive damage award to twice the amount of compensatory damages.² The court concluded that the damage caps in § 2315.21(D)(2)(a) applied to a statutory discrimination claim under Chapter 4112 but provided little rationale for its decision.³ By applying the damage caps from § 2315.21, the *Luri* court implicitly ruled that a Chapter 4112 discrimination claim is a "tort action" under the Ohio Tort Reform Act. What the *Luri* court failed to acknowledge is that a Chapter 4112 discrimination claim is not a tort action under the Ohio Tort Reform Act, and the damage caps set out in §§ 2315.21 and 2315.18 do not apply.

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* Capital University Law School, Juris Doctor candidate 2018; Ohio University, B.A. in English with a focus in pre-law, Phi Alpha Delta Secretary, May 2015. This Comment would not have been possible, nor would this issue have even been brought to life, without the help of my father, Darrell Markijohn. His work and research on this issue inspired me to write this Comment and sparked my interest in labor and employment law. Further, this Comment would not be sensible without the help and guidance of Professor Susan Gilles of Capital University Law School. Thank you.

¹ 953 N.E.2d 859, 864 (Ohio Ct. App. 2011).

² *Id.* at 867.

³ *Id.*

A Chapter 4112 discrimination claim protects individuals in the workplace from discrimination and allows them to bring an action against their employer:

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.⁴

A violation of Chapter 4112 subjects the defendant “to a civil action for damages, injunctive relief, or any other appropriate relief.”⁵ These statutes aim to protect minorities in the workplace and provide remedies to correct those harms.⁶

This Comment demonstrates that, in contrast to *Luri*, the better position on this issue was taken by the United States District Court for the Southern District of Ohio in *Kramer Consulting, Inc. v. McCarthy*.⁷ The district court (admittedly construing a different statutory claim) held that tort reform legislation that limits punitive damages under § 2315.21 in tort actions does not apply to statutory claims, specifically referring to Chapter 4112 claims for discrimination.⁸

Other courts have also determined that civil actions under Chapter 4112 are statutory in nature and establish liability for violations of a person’s rights.⁹ This position was supported by the Ohio Supreme Court in *Rice v. CertainTeed Corp.*¹⁰ The court in *Rice* made a distinction between actions involving recovery for damages to “person, [or] property” and actions involving recovery of damages to a person’s “rights.”¹¹ The statutory definitions of tort action in §§ 2315.18 and 2315.21 only apply to

⁴ OHIO REV. CODE ANN. § 4112.02(A) (West 2016).

⁵ OHIO REV. CODE ANN. § 4112.99 (West 2016).

⁶ *Id.* See also § 4112.02(A).

⁷ No. C2-02-116, 2006 WL 581244 (S.D. Ohio Mar. 8, 2006).

⁸ *Id.* at *8.

⁹ See, e.g., *Meyer v. United Parcel Serv., Inc.*, 882 N.E.2d 31, 37 (Ohio Ct. App. 2007).

¹⁰ 704 N.E.2d 1217, 1218 (Ohio 1999).

¹¹ *Id.* at 1219.

claims for injury or loss to *person or property*.¹² The statutes make no mention of their application when a person's rights are injured;¹³ therefore, they do not apply to claims involving injury to a person's rights.

If the Ohio General Assembly had intended to cap punitive and noneconomic damages for Chapter 4112 claims, it would have done so by referring to the damage caps directly in the language of Chapter 4112 or, at the very least, referring to Chapter 4112 in the statutory definition of tort action.

Part II discusses the history of punitive damage caps—specifically §§ 2315.18 and 2315.21 of the Ohio Revised Code. Section II.B analyzes these statutes and determines whether the General Assembly intended to include Chapter 4112 discrimination claims in its definition of tort action set out in §§ 2315.18 and 2315.21. Section II.C discusses constitutional challenges raised against damage caps and their impacts on plaintiffs' relief. Section II.D examines Ohio's only attempt to answer this question in *Luri*.

Part III analyzes the language in §§ 2315.18 and 2315.21 to determine whether a Chapter 4112 discrimination claim is included in the definition of tort action. Specifically, this Part discusses whether an injury to a person's rights is included in the definition of tort action under §§ 2315.18 and 2315.21.

Part IV discusses other sections of Chapter 4112, in which the General Assembly included floors on punitive damages. It also examines the language within §§ 2315.18 and 2315.21, noting the types of claims they include and exclude.

Lastly, Part V explores the policy reasons for excluding Chapter 4112 claims from the definition of tort action. Section V.A addresses the purpose of remedial statutes and their role in ending discrimination. It also addresses the General Assembly's interest in enacting remedial statutes and the purpose of allowing punitive damages to be collected in Chapter 4112 discrimination claims.

This Comment answers an important question plaguing employment discrimination actions that was never addressed in *Luri*: whether a Chapter 4112 action is a tort action at all. This is an issue that should, and likely will, be addressed by the Ohio Supreme Court.

¹² OHIO REV. CODE ANN. §§ 2315.21(A)(1), 2315.18(A)(7) (West 2016).

¹³ *Id.*

II. THE FORMATION OF STATUTORY NONECONOMIC DAMAGE CAPS

A. General History

One of the first provisions to place a limit on damages was former § 2307.43, which was part of the Ohio Medical Malpractice Act of 1975.¹⁴ This statute placed a \$200,000 cap on general medical malpractice damages (excluding death), with no exception for those suffering severe injuries.¹⁵ The General Assembly passed this legislation to address a perceived malpractice insurance crisis.¹⁶ Eventually, § 2307.43 was held unconstitutional because it violated the due-process protections of the Ohio Constitution.¹⁷ The Ohio Supreme Court determined that the statute did “not bear a real and substantial relation to public health or welfare and . . . it [was] unreasonable and arbitrary.”¹⁸

The General Assembly’s next attempt was the Tort Reform Act of 1987, which sought to change civil justice law and alleviate another “insurance crisis.”¹⁹ Once again, the Ohio Supreme Court struck down this limit on punitive damages as unconstitutional.²⁰ The court examined § 2317.45, which placed a significant limitation on the collateral source rule previously adopted in *Pryor v. Webber*.²¹ The statute required the trial court to subtract certain collateral benefits from a plaintiff’s final award of compensatory damages.²² The court eventually determined that this mandatory deduction of collateral benefits from a plaintiff’s final award was unconstitutional because it violated the right to a jury trial, due process, and equal protection, as well as a right to a remedy.²³

Finally, the General Assembly again passed substantial tort reforms in 1997.²⁴ “The legislation amended, enacted, or repealed over 100 sections of the Revised Code contained in eighteen titles and thirty-eight

¹⁴ See *Morris v. Savoy*, 576 N.E.2d 765, 768 (Ohio 1991).

¹⁵ *Id.* at 768, 771–72.

¹⁶ *Id.* at 768.

¹⁷ *Id.* at 771.

¹⁸ *Id.*

¹⁹ See *Sorrell v. Thevenir*, 633 N.E.2d 504, 508–09 (Ohio 1994).

²⁰ *Id.* at 512.

²¹ *Id.* at 509–10; *Pryor v. Webber*, 263 N.E.2d 235, 238 (Ohio 1970).

²² *Sorrell*, 633 N.E.2d at 510.

²³ *Id.* at 510–13.

²⁴ *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 428 (Ohio 2007).

chapters.”²⁵ The statute amended the collateral source rule in tort actions “to require the trier of fact to consider, but not automatically set off, collateral benefits.”²⁶ It also capped punitive damages, allowed the trier of fact to determine damages in tort and products-liability claims, and capped noneconomic damages at different levels depending on the type of claim.²⁷ The caps placed on punitive and noneconomic damages, passed as part of this reform, are the key provisions examined in this Comment.

B. Damage Caps and Chapter 4112 Actions

In 2005, Ohio again enacted tort reform legislation that established statutory caps on noneconomic and punitive damages in tort cases.²⁸ The statute provides in part:

There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action. . . . [T]he amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.²⁹

The amount of punitive damages a plaintiff could recover in a tort action was capped at two times the amount of compensatory damages awarded to the plaintiff.³⁰ It is this provision that the *Luri* court incorrectly applied to

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Janet G. Abaray, *Déjà Vu All Over Again: Ohio's 2005 Tort Reform Act Cannot Survive a Rational Basis Challenge*, 31 U. DAYTON L. REV. 141, 141 (2006).

²⁹ OHIO REV. CODE ANN. § 2315.18(B)(1)–(2) (West 2016).

³⁰ OHIO REV. CODE ANN. § 2315.21(D)(2)(b) (West 2016) (“If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages
(continued)

Chapter 4112. Had the *Luri* court made a more thorough examination of the language of these statutes and the meaning of tort action within §§ 2315.18 and 2315.21, it may have reached a different conclusion.

C. Constitutionality of §§ 2315.18 and 2315.21

The constitutionality of noneconomic and punitive damage caps has been challenged multiple times, largely because these damage caps materially alter a jury's award of damages.³¹ However, the Ohio Supreme Court is no longer willing to entertain constitutional challenges to these caps. In a recent decision, the court upheld the constitutionality of these damage caps.³² This case began when appellants, Jessica Simpkins and her father, sued Sunbury Grace Brethren Church for the negligent hiring of Pastor Brian Williams, who had sexually assaulted Simpkins by forcing her to engage in oral and vaginal sex during a counseling session.³³ Appellants argued the damage caps were unconstitutional; however, the court disagreed and ultimately held the damage caps were constitutional.³⁴

Dissenting Justices Pfeiffer and O'Neill offered compelling dissents because they strongly opposed this "cookie cutter" approach to limiting damages.³⁵ They noted that allowing the statutes to overreach their intended purpose harms the plaintiff and allows a defendant to get away with heinous acts³⁶:

Today, we learn that "tort reform," not surprisingly, had unintended consequences. It turns out that "tort reform" (and the justices who sanctioned it) also ensured that rapists and those who enable them will not have to pay in

awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars").

³¹ E.g., *Simpkins v. Grace Brethren Church of Delaware*, 75 N.E.3d 122, 126 (Ohio 2016); *Arbino*, 880 N.E.2d at 426.

³² *Simpkins*, 75 N.E.3d at 126.

³³ *Id.* at 127.

³⁴ *Id.* at 128–29.

³⁵ *Id.* at 139 (Pfeiffer, J., dissenting); *id.* at 139–40 (O'Neill, J., dissenting).

³⁶ *Id.* at 139 (Pfeiffer, J., dissenting). Justice O'Neil acknowledged the dissent raised in *Arbino*: "[T]he General Assembly does not have this power; only the people by the amendment process have this power. After today, what meaning is left in a litigant's constitutional right to have a jury determine damages?" *Id.* (O'Neill, J., dissenting) (quoting *Arbino*, 880 N.E.2d at 456 (Pfeiffer, J., dissenting)).

full for the damages they cause—even if they rape a child.³⁷

Simpkins shows the dramatic affect that damage caps under § 2315.18 have on damages awarded by a jury. Arguably, the caps take away the jury's ability to determine the amount of damages a plaintiff is entitled to receive.³⁸

D. Luri v. Republic Services, Inc.: Ohio's Attempt to Determine the Scope of Statutory Damage Caps

On May 19, 2011, the Eighth District Court of Appeals determined that the caps on damage awards apply in an employment discrimination claim.³⁹ Before being terminated by his employer, Luri was asked by his supervisors to discharge three of the oldest employees who reported to him.⁴⁰ Luri informed his supervisors of his concerns that age and disability discrimination lawsuits would result from firing the three employees and refused to terminate them.⁴¹ Luri began to receive poor job reviews for allegedly not accomplishing certain directives, and he was later terminated as a result of those reviews.⁴² Luri then filed a lawsuit against his employer alleging a claim of retaliatory discharge under § 4112.02.⁴³

At trial, Luri provided evidence that his supervisor intentionally altered a piece of evidence in an effort to mislead the court and justify the termination after being named a party to the pending lawsuit.⁴⁴ The jury eventually found in favor of Luri, awarding him \$3.5 million in compensatory damages and over \$43 million in punitive damages.⁴⁵ The defendants argued that the damage caps set out in § 2315.18 applied to the case because an employment discrimination claim was a tort action as defined in § 2315.18(A)(7).⁴⁶ The court, in a brief analysis, held that an action brought under Chapter 4112 is a tort action because it is a "civil action for damages for injury or loss to person or property." Therefore,

³⁷ *Id.* (Pfeiffer, J., dissenting).

³⁸ *Id.* (O'Neill, J., dissenting).

³⁹ *Luri v. Republic Servs., Inc.*, 953 N.E.2d 859, 867 (Ohio Ct. App. 2011).

⁴⁰ *Id.* at 862.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 864.

employment discrimination cases would be subject to Ohio's tort reform provisions.⁴⁷ The court also noted that the Ohio Supreme Court had already mentioned the types of cases to which § 2315.18 did not apply.⁴⁸ These cases included actions for wrongful death, medical malpractice, dental malpractice, and breach of contract.⁴⁹ The *Luri* court reasoned that, because § 2315.18 did not expressly exclude discrimination actions, the General Assembly did not intend to exclude employment discrimination actions from being subject to the damage caps.⁵⁰ The court relied on the decision in *Geiger v. Pfizer Inc.*, which determined that "an action brought under Ohio Rev. Code 4112 is a 'tort action' as it is 'a civil action for damages for injury or loss to person or property.'"⁵¹

The *Luri* court then held that the caps on punitive damages applied to discrimination actions under Chapter 4112.⁵² Section 2315.21 provides that the award of punitive damages cannot exceed two times the amount of compensatory damages.⁵³ Thus, the original award of \$46 million in punitive damages was reduced to \$7 million, or two times the compensatory damages of \$3.5 million.⁵⁴

The brevity of the *Luri* court's analysis calls into question the court's reasoning in how it reached its determination. The *Luri* court incorrectly concluded that (1) because the caps apply to all tort actions, they implicitly also apply to discrimination cases,⁵⁵ and (2) because a Chapter 4112 claim creates a "civil action for damages," it is a tort action for the purposes of

⁴⁷ *Id.* (quoting *Geiger v. Pfizer, Inc.*, No. 2:06-CV-636, 2009 WL 1026479, at *1 (S.D. Ohio Apr. 15, 2009)). The *Luri* court only cited to the relevant provision in § 2315.18 and provided vague analysis as to why the caps would apply. *See id.* It then went on to determine that the caps on punitive damages applied under § 2315.21(D)(2)(a). *Id.* at 866–67.

⁴⁸ *Id.* at 864.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (quoting *Geiger*, 2009 WL 1026479, at *1).

⁵² *Id.* at 867.

⁵³ OHIO. REV. CODE ANN. § 2315.21(D)(2)(a) (West 2016) ("The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.").

⁵⁴ *Luri*, 953 N.E.2d at 867.

⁵⁵ *Id.* at 864.

§§ 2315.18 and 2315.21.⁵⁶ However, the court failed to fully explore the question of whether a Chapter 4112 claim is a tort action at all.⁵⁷ In order for the court to find that these caps apply, it would have to reach a conclusion that the General Assembly intended Chapter 4112 claims to be considered tort actions under §§ 2315.18 and 2315.21. Yet, the court hardly addressed this issue in *Luri*.⁵⁸

The *Luri* court failed to analyze the language in the statutes themselves and focused instead on the meaning of tort action as defined in those statutes. As demonstrated below, a thorough analysis of the damage cap statutes leads to the opposite conclusion: that the damage caps do not apply to employment discrimination actions.

III. INTERPRETING THE DEFINITION OF TORT ACTION IN §§ 2315.18 AND 2315.21

The damage caps in §§ 2315.18 (the cap on noneconomic damages) and 2315.21 (the cap for punitive damages) apply only to tort actions.⁵⁹ Both statutes define tort action with only a slight variation from each other. Section 2315.21(A)(1) defines tort action as follows:

“Tort action” means a civil action for damages for injury or loss to person or property. “Tort action” includes a product liability claim for damages for injury or loss to person or property that is subject to Sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.⁶⁰

Section 2315.18(A)(7) defines tort action similarly:

“Tort action” means a civil action for damages for injury or loss to person or property. “Tort action” includes a civil action upon a product liability claim or an asbestos claim. “Tort action” does not include a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim or a civil action for damages for a

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ OHIO REV. CODE ANN. §§ 2315.21(D), 2315.18(B)(2) (West 2016).

⁶⁰ § 2315.21(A)(1).

breach of contract or another agreement between persons.⁶¹

After considering the entire definition in both statutes, it seems likely that the General Assembly intended to exclude statutory discrimination claims. Neither statute explicitly includes Chapter 4112 discrimination claims or refers to claims for discrimination in general.⁶²

The definitions of tort action in §§ 2315.18 and 2315.21 do not include an injury or loss to an individual's rights, which are the basis of Chapter 4112 claims.⁶³ Section 2315.21, which limits punitive damages, explicitly states tort action means damages for injury to person or property, and does not include a civil action for damages in a breach of contract action.⁶⁴ Neither definition of tort action includes injury to a person's rights.⁶⁵

Section 2315.18 exempts plaintiffs who suffer permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, and other permanent physical injuries that prevent the injured party from being able to independently care for oneself.⁶⁶ It is essential to note that the excluded injuries are all physical injuries.⁶⁷ If the General Assembly intended an employment discrimination claim to fall under the definition of tort action, it would have included harms associated with discrimination in the work place within its list of exceptions. If the General Assembly included physical injuries that are exempt, it would

⁶¹ § 2315.18(A)(7).

⁶² *Id.*; § 2315.21(A)(1).

⁶³ See OHIO REV. CODE ANN. §§ 2315.21(A)(1), 2315.18(A)(7), 4112.02 (West 2016).

⁶⁴ § 2315.21(A)(1). If anything, discrimination claims under Chapter 4112 resemble breach of employment agreements, rather than a common-law tort. In *Ochoa v. American Oil Co.*, the court concluded that claims under Title VII were very much like common-law actions for breach of contract where a wrongful discharge took place. 338 F. Supp. 914, 919 (S.D. Tex. 1972). This analogy drawn by the *Ochoa* court shows that courts characterize employment discrimination actions in different ways. A determination of where these actions fall should be addressed by the Ohio Supreme Court.

⁶⁵ See §§ 2315.21(A)(1), 2315.18(A)(7).

⁶⁶ § 2315.18(B)(3) ("There shall not be any limitation on the amount of compensatory damages . . . for noneconomic loss that is recoverable in a tort action . . . for either of the following: (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.").

⁶⁷ See *id.*

have included those that are exempt for the most serious acts of discrimination.

Further, the text within § 2315.18 defines specific terms used within the statute in a way that would indicate physical injuries are the types of injuries to which it applies. For example, plaintiffs in tort actions may recover “a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.”⁶⁸ The statute itself defines “occurrence” as “all claims resulting from or arising out of any one person’s bodily injury.”⁶⁹ There is no indication that an “occurrence” means anything other than a physical injury.⁷⁰ This speaks to the intent of the General Assembly, which is that a tort action means physical injuries and does not include injuries to a person’s rights.

A. Definitions of Tort Action in §§ 2315.18 and 2315.21 Only Pertain to Injuries to Persons and Property

In 2009, the court in *Meyer v. United Parcel Service, Inc.* determined that Chapter 4112 discrimination claims are statutory in nature and establish liability for violation of an individual’s rights.⁷¹ Justice Cupp wrote, “R.C. 4112.99 functions as a gap-filling provision, establishing civil liability for violations of rights for which no other provision for civil liability has been made.”⁷² This directly conflicts with the definition of tort action in §§ 2315.18 and 2315.21.⁷³ Neither statute includes a violation of rights in the definition of tort action.⁷⁴

Claims involving a person’s rights are distinct from claims for loss or injury to person or property, and the Ohio Supreme Court has made this distinction.⁷⁵ The Ohio Supreme Court’s 1999 decision in *Rice v. CertainTeed Corp.* set forth this principle and established a remedy for plaintiffs suffering injuries to their rights.⁷⁶ The court in *Rice* first decided that punitive damages are recoverable for a Chapter 4112 claimant and, in

⁶⁸ § 2315.18(B)(2).

⁶⁹ § 2315.18(A)(5).

⁷⁰ *See id.*

⁷¹ 909 N.E.2d 106, 109 (Ohio 2009).

⁷² *Id.* at 112.

⁷³ *See* OHIO REV. CODE ANN. §§ 2315.21(A)(1), 2315.18(A)(7) (West 2016).

⁷⁴ *Id.*

⁷⁵ *See Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1219 (Ohio 1999).

⁷⁶ *Id.* at 1219, 1221.

doing so, identified three separate types of damage claims.⁷⁷ Justice Cook defined “damages” as “pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.”⁷⁸ The court was careful to make a distinction between injury to (1) person, (2) property, or (3) rights by listing them as separate identifiable harms that could be remedied.⁷⁹

This distinction by the court in *Rice*, shows that the court identifies a harm to an individual’s rights as separate and distinct from an injury to person or property. The *Luri* court failed to address this holding.⁸⁰ If it had, it would have recognized that an injury to an individual’s rights is distinct from the injuries that encompass a tort action.

The definitions of tort action in §§ 2315.18 and 2315.21 include only two of the three types of damage claims—those to persons or property; these definitions fail to include injury to a person’s rights.⁸¹ Courts have recognized that an individual’s rights are something that can be infringed upon and create damages for which a person should be afforded relief:

Civil rights then, within the meaning of Sections 4112.01 to 4112.08, inclusive, and 4112.99, Revised Code, are economic rights functioning as legally enforceable claims which are structured in legislation. On the other hand civil liberties are natural rights which appertain originally and essentially to each person as a human being and are inherent in his nature; such rights, which are constitutionally protected, are not actually rights but are immunities, or restraints on government. . . . Thus, the Ohio General Assembly, by legislative enactment effective, July 27, 1959, gave to those persons whose civil rights were violated, a legally enforceable claim against the violator.⁸²

⁷⁷ *Id.* at 1219.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *Luri v. Republic Servs.*, 953 N.E.2d 859 (Ohio Ct. App. 2011).

⁸¹ OHIO REV. CODE ANN. §§ 2315.21(A)(1), 2315.18(A)(7) (West 2016).

⁸² *Sowers v. Ohio Civil Rights Comm’n*, 252 N.E.2d 463, 475 (Ohio C.P. 1969).

“Civil rights” are rights afforded in the Constitution.⁸³ The right to work free of discrimination fits this description.⁸⁴

Since a Chapter 4112 discrimination claim is a claim for a violation of an individual’s rights,⁸⁵ and the statutory definitions of tort action do not include claims involving violation of an individual’s rights,⁸⁶ the language in these two statutes does not support the conclusion that Chapter 4112 claims were meant to be included in the definition of tort action.

The *Luri* court’s holding to the contrary on this point is not persuasive because that court never examined this distinction in its decision.⁸⁷ Given that the statutory caps were enacted after the *Rice* decision, it should be presumed that the legislature recognized this distinction between injury to a person’s rights and injury to persons and property.⁸⁸

B. Tort Action in § 2315.21 Has Never Expressly Included Chapter 4112 Claims

If the General Assembly had intended a Chapter 4112 discrimination claim to be included in the definition of tort action, it would have been included in the definition when the statute was created.

The definition of tort action first appeared when the General Assembly enacted § 2315.21 in 1988.⁸⁹ While § 2315.21 has changed many times since then, it has always included the definition of tort action.⁹⁰ A plaintiff was not allowed to recover noneconomic damages in a Chapter 4112 action until 1999.⁹¹ Therefore, a Chapter 4112 action was not included in the definition of tort action in its original form in 1988 because these damages were not even recoverable at that time.⁹²

Today, if the argument is accepted that Chapter 4112 claims fall under the definition of tort action in § 2315.21, the definition of tort action would

⁸³ See *id.* at 474 (defining “civil rights” as rights that the law will enforce).

⁸⁴ See OHIO REV. CODE ANN. § 4112.02 (A) (West 2016).

⁸⁵ See *id.*

⁸⁶ §§ 2315.21(A)(1), 2315.18(A)(7).

⁸⁷ *Luri v. Republic Servs., Inc.*, 953 N.E.2d 859 (Ohio Ct. App. 2011).

⁸⁸ See *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1219 (Ohio 1999).

⁸⁹ See OHIO REV. CODE ANN. § 2315.21 (West 1990).

⁹⁰ H.R. 1, 117th Gen. Assemb. (Ohio 1988); H.R. 350, 121st Gen. Assemb. (Ohio 1996); S. 108, 124th Gen. Assemb. (Ohio 2001); H.R. 412, 124th Gen. Assemb. (Ohio 2002); S. 80, 125th Gen. Assemb. (Ohio 2004).

⁹¹ See *Rice*, 704 N.E.2d at 1221.

⁹² See *id.* at 1220.

have also included those claims in its original form in 1988. Therefore, punitive damages should have immediately been available to claimants in Chapter 4112 discrimination cases. However, § 2315.21's provision capping punitive damages in tort actions was never construed this way and punitive damages were not made available to victims of discrimination until 1999, and on a completely different basis.⁹³ At the time the General Assembly passed § 2315.21, claims under Chapter 4112 were purely equitable in nature and only provided for reinstatement, injunctive relief, and back pay.⁹⁴ Subsequently, the General Assembly amended § 4112.99, and the Ohio Supreme Court, in interpreting that amendment, found that it provided for a full set of damages, including punitive.⁹⁵ It took the Ohio Supreme Court eleven years to reach this conclusion.⁹⁶ More importantly, the Ohio Supreme Court in *Rice* never referred to the definition of tort action in § 2315.21 to justify the award of punitive damages in a Chapter 4112 discrimination claim.⁹⁷

Chapter 4112 claims were not included in the definition of tort action when the tort reform statutes were first enacted,⁹⁸ and they should not be included now, absent legislation indicating they should be included. The General Assembly is presumed to be aware of the decisions of the Ohio Supreme Court when it creates legislation.⁹⁹ The General Assembly knows that Chapter 4112 actions involve an individual's rights and that the definition of tort action does not include these injuries.¹⁰⁰ It is aware of the holding in *Rice* that established a full set of damages for victims of discrimination.¹⁰¹ Yet, it chose to keep the definition of tort action the same as when it was first created.¹⁰² With that knowledge, it is likely that the General Assembly knowingly excluded Chapter 4112 discrimination claims from the definition of tort action.

⁹³ *See id.* at 1221.

⁹⁴ *Hemlick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212, 1215 (Ohio 1989).

⁹⁵ *Rice*, 704 N.E.2d at 1219.

⁹⁶ *See id.*

⁹⁷ *See id.* at 1219–20.

⁹⁸ OHIO REV. CODE ANN. §§ 2315.21(A)(1) (West 1990).

⁹⁹ *See Rice*, 704 N.E.2d at 1220 n.2.

¹⁰⁰ *See id.* at 1219–20.

¹⁰¹ *See id.* at 1220.

¹⁰² *Compare* OHIO REV. CODE ANN. § 2315.21(A)(1) (West 1990), *with* OHIO REV. CODE ANN. § 2315.21(A)(1) (West 2016).

C. Ohio Supreme Court Distinctions Between Chapter 4112 Claims and Common-law Tort Claims

The Ohio Supreme Court has ruled that Chapter 4112 is “comprehensive legislation designed to provide a wide variety of remedies for employment discrimination in its various forms.”¹⁰³ The court in *Hemlick v. Cincinnati Word Processing, Inc.* recognized a distinction between a Chapter 4112 action and common-law tort claims for sexual harassment.¹⁰⁴ The court held that a common-law tort claim for sexual harassment was not superseded by a Chapter 4112 claim.¹⁰⁵ Specifically, the court stated that common-law claims for sexual harassment “have not been abolished, as there is nothing in the language or legislative history of R.C. 4112 barring the pursuit of common-law remedies for injuries arising out of sexual misconduct.”¹⁰⁶ The court noted that the only limitations to Chapter 4112 are laws that are inconsistent with the remedial purpose of the statute.¹⁰⁷ The court rejected the argument that allowing the plaintiff to pursue a common-law tort claim conflicts with Chapter 4112.¹⁰⁸ The court recognized the distinction between a Chapter 4112 claim and a common-law tort, noting the different standards of proof required for each claim.¹⁰⁹ If plaintiffs can bring a common-law tort for sexual harassment in lieu of a Chapter 4112 discrimination claim, there are distinct avenues plaintiffs can take to remedy their harms. If a Chapter 4112 discrimination claim is also a tort claim, why would the court need to make such a distinction? The

¹⁰³ *Hemlick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212, 1215 (Ohio 1989).

¹⁰⁴ *Id.* at 1216.

¹⁰⁵ *Id.* at 1215–16 (“R.C. Chapter 4112 was intended to add protections for victims of sexual harassment rather than reduce the protections and remedies for such conduct. While discretionary hiring practices, discriminatory promotions and discriminatory discharges are not actionable at common law absent an express contract, the express purpose of R.C. Chapter 4112 is to deter these practices and provide a remedy where none existed under state law.”).

¹⁰⁶ *Id.* at 1215.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“Appellees accurately point out that redress under the statute differs significantly from under the common law. First, the burden of proof for discrimination under the statute is quite different from any existing common-law tort and has its own elements and presumptions.”).

¹⁰⁹ *Id.*

elements and burden of proof for a Chapter 4112 claim and a common-law tort are different and afford different relief.¹¹⁰

The court also recognized the limited relief Chapter 4112 afforded plaintiffs:

At the time the instant action was commenced, the relief provided by R.C. Chapter 4112 for sex discrimination in employment was limited to that available in equity, such as injunctive relief, reinstatement, and back pay. No provision was made for the recovery of compensatory and punitive damages available at common law.¹¹¹

The court also recognized Chapter 4112's purpose to provide a remedy for discriminatory practices "where none existed under state law."¹¹²

The court's analysis in *Hemlick* clarifies the General Assembly's intent in enacting Chapter 4112. The General Assembly intended to provide relief not available at common law for those experiencing pure employment discrimination.¹¹³ However, the court concluded that the General Assembly intended to keep these claims separate from common-law tort claims.¹¹⁴ This is evidenced by not allowing the full set of remedies that were afforded initially to common-law tort claims initially when Chapter 4112 was created.¹¹⁵ If the General Assembly had intended for Chapter 4112 to be nothing more than any other tort, it would have afforded from the outset the same common-law remedies available for tort claims. The court would not have made such an obvious distinction in *Hemlick* if it believed the General Assembly had intended a Chapter 4112 claim to be considered just another tort.

¹¹⁰ *Id.*

¹¹¹ *Id.* (citation omitted).

¹¹² *Id.* at 1216.

¹¹³ *Id.* at 1215.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

IV. APPLICATION OF OHIO'S TORT REFORM STATUTE TO STATUTORY CLAIMS

A. Federal Courts Have Ruled Ohio's Tort Reform Statute Does Not Apply to Statutory Claims

Another issue the *Luri* court failed to address is whether the tort reform legislation applies to any statutory claims.¹¹⁶ The United States District Court for the Southern District of Ohio has held that the limit on punitive damages under § 2315.21 does not apply to statutory claims.¹¹⁷ The court held that “because the Ohio General Assembly knows how to apply a limit to the amount of punitive damages available under a statutory claim, if the statute does not explicitly specify such a limit, one should not be applied.”¹¹⁸ “Instead, its language applies to any form of discrimination addressed by R.C. Chapter 4112.”¹¹⁹

The holding in *Kramer* dictates that if an Ohio statute like § 4112.99 provides for punitive damages, and the General Assembly wishes to limit punitive damages for that statutory claim, then it must put that limit within the statute.¹²⁰ *Kramer*, therefore, refused to apply § 2315.21 to a statutory claim for breach of a fiduciary duty under § 1701.59.¹²¹ Because there is no limit on punitive damages contained within § 4112.99, the punitive damage caps in § 2315.21 cannot apply.¹²²

B. Tort Reform Was Never Intended to Apply to Such Claims

Section 2315.21(A)(1) provides that “[t]ort action’ includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code.”¹²³ The General Assembly went even further by amending § 2307.80(E) to specifically include that the damage caps in § 2315.21 applied to products liability claims.¹²⁴

¹¹⁶ *Luri v. Republic Servs., Inc.*, 953 N.E.2d 859 (Ohio 2011).

¹¹⁷ *Kramer Consulting, Inc. v. McCarthy*, No. C2-02-116, 2006 WL 581244, at *8 (S.D. Ohio Mar. 8, 2006).

¹¹⁸ *Id.*

¹¹⁹ *Elek v. Huntington Nat’l Bank*, 573 N.E.2d 1056, 1058 (Ohio 1991).

¹²⁰ *Kramer*, 2006 WL 581244, at *8.

¹²¹ *Id.*

¹²² *Elek*, 573 N.E.2d at 1058.

¹²³ OHIO REV. CODE ANN. § 2315.21(A)(1) (West 2016).

¹²⁴ OHIO REV. CODE ANN. § 2307.80(E) (West 2016).

Likewise, in § 2315.18, the General Assembly stated the definition of tort action included statutory products liability claims and statutory asbestos claims.¹²⁵ If the General Assembly believed the definition of tort action applied indiscriminately to all causes of action, then it would not have included (nor would it have needed to include) statutory product liability claims and asbestos claims.

“In construing a statute, a court’s paramount concern is the legislative intent in enacting the statute.”¹²⁶ A court must first look at the statutory language and the “purpose to be accomplished.”¹²⁷ Most importantly, “[i]t is the duty of the court to give effect to the words used and not to insert words not used.”¹²⁸ When the General Assembly wanted to include specific claims, it explicitly noted them in the language of §§ 2315.18 and 2315.21. This indicates that the General Assembly did not intend to include discrimination claims in the definition of tort action.¹²⁹

In fact, the General Assembly included a minimum on punitive damages in Chapter 4112.¹³⁰ Section 4112.021(D) specifically includes in the language of the statute that the jury may award punitive and compensatory damages of not less than \$100.¹³¹ The fact that the General Assembly created a floor on punitive damages does not support a conclusion that they would want to limit them in any way. If the General Assembly intended to alter the amount of punitive or noncompensatory damages, it would have included these alterations in the language of the statute, just as it has done in other sections of Chapter 4112.¹³²

A review of other statutes reveals statutory products liability claims and statutory asbestos claims are not the only claims that are included in certain definitions.¹³³ In § 3746.25, the definition of tort action specifically

¹²⁵ OHIO REV. CODE ANN. § 2315.18(A)(7) (West 2016).

¹²⁶ *State ex rel. Richard v. Bd. of Trs. of the Police & Firemen’s Disability & Pension Fund*, 632 N.E.2d 1292, 1295 (Ohio 1994).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See* § 2315.18(A)(7).

¹³⁰ OHIO REV. CODE ANN. § 4112.021(D) (West 2016).

¹³¹ *Id.* (“If the court finds that an unlawful discriminatory practice prohibited by this section occurred or is about to occur, the court may . . . award to the plaintiff compensatory and punitive damages of not less than one hundred dollars, together with attorney’s fees and court costs.”).

¹³² *See, e.g.*, OHIO REV. CODE ANN. § 4112.05(G)(1)(b) (West 2016).

¹³³ *See, e.g.*, OHIO REV. CODE ANN. § 3746.25(A)(2) (West 2016).

includes actions arising under § 3746.23.¹³⁴ In the definition of tort action in § 2307.60, the General Assembly includes statutory wrongful death claims under Chapter 2125.¹³⁵

It is clear that when the General Assembly wants to specifically include statutory claims in the definition of tort action, it does so.¹³⁶ In all, the General Assembly included statutory claims in the definition of tort action in half of the different definitions of the term.¹³⁷ If it had intended to include statutory claims arising under Chapter 4112, then it could have done so by placing them directly in the language of the statute. The General Assembly elected to omit any reference to statutory civil rights claims in its definition of tort action under §§ 2315.18 and 2315.21 but included other statutory claims.¹³⁸ The absence of reference to discrimination claims brought under § 4112.01 within the definition of tort action indicates that the General Assembly never intended to include it.

V. THE POLICIES AND PURPOSES OF OHIO DISCRIMINATION STATUTES

A. Chapter 4112's Remedial Legislation and Purpose

The policy behind these Ohio discrimination statutes, and specifically Chapter 4112 discrimination claims, is to end discrimination as a whole.¹³⁹ The Ohio Supreme Court has already held that Chapter 4112 is remedial.¹⁴⁰ The court has specifically stated that Chapter 4112 is social welfare legislation that “has a dual purpose of remedying harm to the individual and deterring socially inimical business practices.”¹⁴¹ “Discrimination in its various forms drains our economic resources, subverts the democratic process and undermines the general welfare.”¹⁴² This rationale, set out in a concurring opinion in *Cosgrove*, was important in the Ohio Supreme Court allowing the recovery of punitive damages in Chapter 4112 discrimination

¹³⁴ *Id.*

¹³⁵ OHIO REV. CODE ANN. § 2307.60(B)(1)(a) (West 2016).

¹³⁶ *See id.*

¹³⁷ *See* §§ 2307.60(B)(1)(a), 3746.25(A)(2).

¹³⁸ OHIO REV. CODE ANN. §§ 2315.18(A)(7), 2315.21(A)(1) (West 2016).

¹³⁹ *See Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 638 N.E.2d 991, 993 (Ohio 1994).

¹⁴⁰ *Id.* at 992.

¹⁴¹ *Id.* at 996 (Resnick, J., concurring) (quoting *Porter v. Household Fin. Corp.* of Columbus, 385 F. Supp. 336, 342 (S.D. Ohio 1974)).

¹⁴² *Id.*

claims.¹⁴³ The Ohio Supreme Court felt the need to allow punitive damages to punish those employers doing bad business and allow appropriate relief for the aggrieved employee.¹⁴⁴

Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing, for the enforcement of rights and the redress of injuries. They also include statutes intended to correct defects, mistakes and omissions in the civil institutions and the administration of the state. Courts have noted that a remedial statute is one enacted for the protection of life and property and which introduces some new regulation conducive to the public good, or is one that relates to practice, procedure, or remedies and does not affect substantive or vested rights.¹⁴⁵

Section 1.11 of the Ohio Revised Code, entitled “Liberal construction of remedial laws,” provides that “[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws.”¹⁴⁶

Courts have found that the term “remedial” has a limited meaning:

(1) Usually “remedial” is used in connection with legislation which is not penal or criminal in nature, in that such laws do not impose criminal or other harsh penalties; and (2) the term “remedial” often describes legislation which is procedural in nature [I]f a statute is considered remedial, it should be given a liberal interpretation and should be construed to give the terms used the most extensive meaning to which they are reasonably susceptible.¹⁴⁷

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:2 (7th ed. 2008) (footnotes omitted).

¹⁴⁶ OHIO REV. CODE ANN. § 1.11 (West 2016).

¹⁴⁷ SINGER & SINGER, *supra* note 145, § 60:2 (footnotes omitted).

Further, a remedial statute gives a party a mode of “remedy for a wrong where he or she had none, or a different one, before, or in other words, is a statute which affords a remedy or improves or facilitates existing remedies.”¹⁴⁸ If Chapter 4112 was enacted to provide a remedy to parties who previously had none, it cannot be reasoned that those parties would have had a viable common-law tort cause of action. If this was the case, the parties could have brought such an action without needing Chapter 4112. The General Assembly enacted Chapter 4112 to afford individuals a remedy for the harms they experienced from discrimination when the common law afforded them none.¹⁴⁹

If the purpose of these statutes is to obtain justice and to deter “socially inimical business practices,”¹⁵⁰ they have a “remedial purpose,” which should not be frustrated. Section 4112.08 provides:

This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply. Nothing contained in this chapter shall be considered to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, familial status, disability, national origin, age, or ancestry¹⁵¹

By applying the caps set out in §§ 2315.18 and 2315.21 to a Chapter 4112 discrimination claim, the “purposes” of the statute will be severely frustrated. Further, “any law inconsistent with any provision of this chapter shall not apply.”¹⁵² Therefore, a cap on damages should not apply to this type of claim. The *Luri* court’s determination that the caps apply to Chapter 4112 discrimination claims is inconsistent with Chapter 4112 because it severely limits the damages a victim is able to collect and is thus inconsistent with the statute’s requirement. Treating a Chapter 4112 statutory claim as a tort action and thus subjecting it to the caps in §§ 2315.18 and 2315.21 directly conflicts with its remedial purpose to

¹⁴⁸ Glenda K. Harnad et al., *Remedial Statutes*, 82 C.J.S. STATUTES § 523 (2017) (footnotes omitted).

¹⁴⁹ See *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1220 (Ohio 1999).

¹⁵⁰ *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 638 N.E.2d 991, 996 (Ohio 1994) (Resnick, J., concurring).

¹⁵¹ OHIO REV. CODE ANN. § 4112.08 (West 2016).

¹⁵² *Id.*

punish those engaging in bad business practices and to end discrimination as a whole.

B. Remedial Statutes Should Be Broadly Interpreted

Remedial legislation is “legislation for the public good.”¹⁵³ “Turning to straight semantics, a remedy is cure for an ill, the improvement of a situation, the filling of a gap.”¹⁵⁴ Remedial statutes are “enacted for a *pre-conceived* helpful purpose. This distinction is far more than academic. In a general statute, the remedial effect is a yardstick of its usefulness; in a specifically-remedial statute, ‘remedy’ is its guiding spirit, its *raison d’etre*, its actual life.”¹⁵⁵ The beneficial purposes, which are the basis of remedial statutes, require liberal application of the statutes.¹⁵⁶ One problem that has arisen in interpreting remedial legislation is the question of broad versus strict construction.¹⁵⁷ Many authorities believe remedial statutes should be broadly interpreted.¹⁵⁸ “The beneficial purpose of a remedial law calls indeed for a liberal application.”¹⁵⁹

Strict interpretation, it appears, clings to the words of a statute, broad interpretation considers their implications; one finds what the statute says, the other what it wants to say. This leads straight to the problem of the legislative intent. In broad interpretation, the search for implications points in the direction of the intent, the moving spirit behind the words. Conversely, the intent should be of lesser importance for strict interpretation, where the wording alone determines the meaning of the law.¹⁶⁰

¹⁵³ Rudolph H. Heimanson, *Remedial Legislation*, 46 MARQ. L. REV. 216, 216–17 (1963) (discussing remedial legislation and how it seeks to provide a remedy when none existed before).

¹⁵⁴ *Id.* at 217.

¹⁵⁵ *Id.* at 218 (footnote omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 219 (noting there are problems with interpreting remedial statutes broadly). Should all other laws only be given strict interpretation, thus singling out only the remedial type? In order to address this issue, the author looks closely at the nature and degrees of interpretation. *Id.*

This liberal interpretation looks to the legislature's intent in drafting the language of the statute.¹⁶¹ Thus, liberal interpretation is required for Chapter 4112 to ensure the legislative intent is accurately interpreted. The *Luri* court reasoned that, because § 4112.99 creates a civil action for damages, it also is considered a tort action.¹⁶² However, the *Luri* court never considered the statute's remedial nature, and it should have considered how applying the caps would inhibit its beneficial purpose. Applying the damage caps is not a liberal interpretation of the statute and only restricts their effects. The *Luri* court ignored the legislative intent and the remedial nature of Chapter 4112. It instead focused on the meaning of the language in § 4112.99 to justify its erroneous conclusion that discrimination under Chapter 4112 is just another tort.¹⁶³

If a Chapter 4112 discrimination claim is an injury to an individual's "rights" and is a distinct harm from injury to "person" or "property," even the strict interpretation of the language, which is required for nonremedial statutes, would lead to the conclusion that injury to "rights" was not covered under the definition of tort action. Including a Chapter 4112 discrimination claim in the definition of tort action would not be a strict interpretation "where the wording alone determines the meaning of the law."¹⁶⁴

C. Construing Chapter 4112 Liberally When Determining Cap Applicability

The Ohio Supreme Court's 4–3 decision in *Genaro v. Central Transport* is an example of the court giving Chapter 4112 a liberal construction.¹⁶⁵ Before this decision, discrimination statutes such as Title VII of the Civil Rights Act¹⁶⁶ and Chapter 4112 allowed plaintiffs to sue their employers, including the supervisor in his or her supervisory capacity.¹⁶⁷ The court in *Genaro* allowed a victim of employment

¹⁶¹ *Id.*

¹⁶² *Luri v. Republic Servs., Inc.*, 953 N.E.2d 859, 864 (Ohio Ct. App. 2011).

¹⁶³ *See id.*

¹⁶⁴ Heimanson, *supra* note 153, at 219.

¹⁶⁵ *See* Karen Gaum, *Genaro v. Central Transport: A New Direction in Ohio Law Regarding Employment Discrimination*, 33 AKRON L. REV. 391, 391–92, (2000) (arguing the *Genaro* court went too far in its decision and failed to recognize the serious implications for the future of the workplace).

¹⁶⁶ 42 U.S.C. §§ 2000e–2000e-17 (2012).

¹⁶⁷ Gaum, *supra* note 165, at 391.

discrimination to sue his supervisor or manager in an individual capacity under Chapter 4112.¹⁶⁸ This decision rested on the meaning of “employer” under § 4112.01(A)(2). The court concluded that “employer” meant individual supervisors and managers whose conduct violated the provisions of Chapter 4112.¹⁶⁹ To reach its decision, the court considered statutory interpretation, public policy, and trends within the Ohio lower courts.¹⁷⁰ The court recognized that Chapter 4112 required a liberal construction to accomplish the purpose of the statute.¹⁷¹

The Ohio Supreme Court has already recognized that Chapter 4112 requires liberal construction to meet its remedial purpose.¹⁷² The court seems very willing to uphold the legislative intent and afford Chapter 4112 the liberal construction it requires to end discrimination.¹⁷³ It understands that the remedial nature of Chapter 4112 requires this.¹⁷⁴ Thus, Chapter 4112 should be liberally construed in determining whether the damage caps set out in §§ 2315.18 and 2315.21 apply.

VI. CONCLUSION

If the court in *Luri* had analyzed whether a Chapter 4112 discrimination claim is a tort action as defined in §§ 2315.18 and 2315.21, it would have determined that it would not fit under this definition. By failing to even address this issue, the court in *Luri* failed to acknowledge the key argument on which this issue rests: What exactly did the General Assembly intend the definition of tort action to encompass? The *Luri* court’s silence on this issue has caused an oversight of the legislature’s intent in enacting the statutes. Sections 2135.18 and 2315.21 require a strict interpretation of the meaning of the words in the statute.¹⁷⁵ Since a Chapter 4112 discrimination action involves injury to a person’s rights,¹⁷⁶ and the definition of tort action makes no mention of injury to “rights,”¹⁷⁷ a Chapter 4112 action should not be included in this definition. Further,

¹⁶⁸ *Id.* at 392.

¹⁶⁹ *Id.* at 399–400.

¹⁷⁰ *Id.* at 399.

¹⁷¹ *Id.* at 400.

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See supra* Part V.

¹⁷⁶ *See* OHIO REV. CODE ANN. § 4112.02(A) (West 2016).

¹⁷⁷ OHIO REV. CODE ANN. §§ 2315.21(A)(1), 2315.18(A)(7) (West 2016).

Chapter 4112 is remedial legislation that requires liberal interpretation to achieve its remedial goals.¹⁷⁸ Allowing caps on noneconomic and punitive damages not only frustrates the remedial purpose to end discrimination in its entirety, but it is not a liberal construction of Chapter 4112. The Ohio Supreme Court has already acknowledged Chapter 4112's liberal construction requirement and has construed it liberally by expanding a plaintiff's rights.¹⁷⁹

This Comment submits that the definitions of tort action in §§ 2315.18 and 2315.21 do not include injury to an individual's rights. The language in § 2315.18 provides injuries that are exempt, and all are catastrophic physical injuries.¹⁸⁰ Nowhere does the language include any catastrophic injuries that would result from discrimination.¹⁸¹

Had the *Luri* court realized this drafting exclusion by the legislature, it would have determined that the legislature meant to exclude Chapter 4112 discrimination claims because an injury to one's right to work free of discrimination is the basis of these claims,¹⁸² and the language within § 2315.18 only refers to physical injuries.¹⁸³ Further, evidence that the legislature expressly included floors on damage caps directly within Chapter 4112¹⁸⁴ shows that if it intended to include a cap on punitive or noneconomic damages, it would have done so by incorporating the cap directly into the statute.

If the legislature had intended for a Chapter 4112 discrimination claim to be just another tort, it would have afforded victims of discrimination a full set of common-law damages from the very beginning. There would have been no need to amend Chapter 4112 to include a full set of common-law damages.

If the *Luri* court had considered whether a Chapter 4112 discrimination claim is a tort, it would have most certainly come to a different conclusion. It would have recognized the Ohio Supreme Court's distinctions between an injury to persons or property and injury to a person's rights.¹⁸⁵ It would have also accounted for the Ohio Supreme Court's decision that a Chapter

¹⁷⁸ See Gaum, *supra* note 165, at 400.

¹⁷⁹ *Id.*

¹⁸⁰ See § 2315.18(B)(3).

¹⁸¹ *Id.*

¹⁸² OHIO REV. CODE ANN. § 4112.02(A) (West 2016).

¹⁸³ OHIO REV. CODE ANN. § 2315.18 (West 2016).

¹⁸⁴ OHIO REV. CODE ANN. § 4112.021(D) (West 2016).

¹⁸⁵ See *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1219 (Ohio 1999).

4112 discrimination claim cannot supersede a common-law tort action as they are distinct claims, and each operates to remedy distinct harms.¹⁸⁶ This obvious distinction would not be necessary if a Chapter 4112 discrimination claim is just another tort.

In a sense, the *Luri* court's decision has set a precedent that Chapter 4112 is nothing more than a common-law tort. By doing so, it frustrates the purpose Chapter 4112 serves: to eradicate discrimination in its entirety. The Ohio Supreme Court should address this issue. It should examine the meaning of tort action in §§ 2315.18 and 2315.21 to determine whether a Chapter 4112 discrimination claim is a tort action. It should take into account the remedial nature of Chapter 4112, and how tortifying it severely frustrates the movement to end discrimination as a whole.

¹⁸⁶ See *id.*