No. 87593-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I,

TEELA BAUER, as Guardian of the Person and Estate of MILO BAUER, a minor child; and TEELA BAUER and THOMAS BAUER, individually,
Plaintiffs/Respondents,
v.
THE BOEING COMPANY,
Defendant/Petitioner,
and
EXOTIC METALS FORMING COMPANY LLC; GIDDENS INDUSTRIES, INC. d/b/a CADENCE AEROSPACE GIDDENS OPERATIONS; HYTEK FINISHES CO.; NEWCO, INC. d/b/a NEWCO COLUMBIA DISTRIBUTION COMPANY; and TORAY COMPOSITE MATERIALS AMERICA, INC. f/k/a TORAY COMPOSITES (AMERICA), INC.,
Defendants.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF AMICI CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS

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Identity and Interest of Amici Curiae

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional organization comprised of corporate members representing a broad cross-section of American and international product manufacturers.[1] Its members seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries across the various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including this Court, on behalf of its members. PLAC's amicus briefs present the broad perspective of product manufacturers seeking fairness and balance in the

[1] *See* https://plac.com/web/Amicus.

application and development of the law as it affects product risk management.

PLAC has a direct and substantial interest in the outcome of this case because the issue presented threatens to create new and boundless categories of tort liability in this state. A ruling that establishes a preconception duty owed by employers to their employees' future, not-yet conceived offspring would detrimentally transform the legal landscape for all product manufacturers and employers. This ruling would extend the boundaries of existing tort law and create a liability framework lacking clear limits based on foreseeability, causation, or the class of potential plaintiffs.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is

vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

PLAC and NAM are uniquely qualified to speak on this matter due to their extensive experience in briefing the merits of novel or expansive theories of tort liability.

Issues Addressed by Amici

1. Should Washington law recognize a duty on the part of an employer to the not-yet-conceived off-spring of its employees (*i.e.*, a "preconception" duty)?

2. If so, would a claim for breach of such a duty be barred by the exclusivity provision of the Washington Industrial Insurance Act when it arises from an occupational disease that impairs the employee's ability to reproduce?

Procedural and Factual Background

Amici adopt the Statement of the Case as stated in Petitioner's Opening Brief (the "Brief") filed by Defendant/Petitioner, The Boeing Company ("Boeing"), in

the Court of Appeals, Division I of the State of Washington, Docket No. 87593-1. (Pet. Op. Br. at 8-12.)

Summary of Argument

The Superior Court's decision should be reversed. Washington law does not and should not recognize a preconception tort duty. Further, the claims that form the basis of Plaintiffs' suit are derivative of Thomas Bauer's rights under the Washington Workers Compensation Act, and the claims are accordingly barred under the Act.

Argument

I. Washington law does not recognize a preconception duty in the employment context, and there is no compelling public policy that would justify recognizing such claims on the facts of this case.

Washington courts consider logic, common sense, justice, policy, and precedent, as applied to the facts of the case, when determining whether a defendant owes a duty in tort. *Certification from the United States Court of Appeals for the Ninth Circuit in Centurion Properties III, LLC v. Chicago Title Ins. Co*., 186 Wn.2d 58, 65, 375 P.3d 651, 654 (2016). The concept of a legal duty reflects all of those public policy considerations that lead the law to conclude that a "plaintiff's

interests are entitled to legal protection against the defendant's conduct." *Taylor v. Stevens Cnty*., 111 Wn.2d 159, 168, 759 P.2d 447, 452 (1988) (quoting W. Page Keeton, et al., *Prosser and Keeton on Torts* § 53, at 357 (5th ed. 1984)). In assessing whether a tort duty is owed, courts exercise judgment in balancing the interests at stake. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 450, 243 P.3d 521, 526 (2010) (citing *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096, 1102 (1976)).[2]

Whether a duty is owed is a question of law. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166, 168 (1984). As such, no deference is owed to the trial court's determination on this subject. See *Androckitis v. Virginia Mason Med. Ctr.*, 32 Wn. App. 2d 418, 460, n.17, 556 P.3d 714, 737, n.17 (2024), *review denied*, 4 Wn.3d 1007, 563 P.3d 448 (2025). The determination whether a legal duty is owed is generally an abstract analysis governing a class or category of cases.

[2] Washington's "logic, common sense, justice…" approach is similar to the multi-factorial duty standards used by at least 30 jurisdictions. See W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U.L. Rev. 1873, 1882-1884 & n.26 (2011).

See 1 Dan B. Dobbs, Paul. T. Hayden & Ellen M. Bublick, *The Law of* Torts § 200 at 690-91 (2d ed. 2011). Broadly speaking, "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *Michaels v. CH2M Hill, Inc*., 171 Wn.2d 587, 608, 257 P.3d 532, 543 (2011) (quoting Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a) (2010)).

At common law, every individual owes a duty of reasonable care "to refrain from directly causing harm to another through affirmative acts of misfeasance." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608, 614 (2019). The common law distinguishes between torts based on "acts" and "omissions." *Pitoitua v. Gaube*, 28 Wn. App. 2d 141, 153, 534 P.3d 882, 890 (2023). In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act—"that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from harm

[nonfeasance].” W. Keeton, *supra* § 56, at 373. “Misfeasance involves active misconduct resulting in positive injury to others and ‘necessarily entails the creation of a new risk of harm to the plaintiff.’” *Pitoitua*, 28 Wn. App. 2d at 153, 534 P.3d at 890 (quoting *Robb v. City of Seattle*, 176 Wn.2d 427, 437, 295 P.3d 212, 217 (2013). Conversely, nonfeasance is a “‘passive inaction or failure to take steps to protect others from harm.’” *Id.* (quoting *Robb*, 176 Wash.2d at 437, 295 P.3d at 218 (quoting *Lewis v. Krussel*, 101 Wash. App. 178, 184, 2 P.3d 486, 490 (2000))). In nonfeasance cases the existence of a duty has been recognized only in situations involving a limited group of special relationships between parties. These special relationships are predicated on “some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.” W. Keeton, *supra* § 56, at 374; *see also* Restatement (Second) of Torts § 314 (1965) (“The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.”). Imposition of a duty in all such cases would simply

not meet the test of fairness under contemporary standards. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 57-58 (Colo. 1987).

A. No preconception duty is owed based on a misfeasance theory.

On appeal, Plaintiffs contend that Boeing's liability arises from *misfeasance*, rather than nonfeasance. (Resp. Br. 30-31.) But, as explained in Boeing's briefing, Plaintiffs' Complaint contained allegations of nonfeasance only. (Pet. Reply Br. at 11 (citing CP 13-14, ¶ 59(a)-(g).) Even if Plaintiffs were able to recast their claims as asserting misfeasance only, they would not state a viable claim for relief on behalf of Milo Bauer. In assessing whether a duty exists in the context of misfeasance, many factors may be relevant, but no one factor is controlling; the question whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists. *See* W. Keeton, *supra* § 53, at 359.

One essential factor in assessing the existence and scope of a duty is whether the plaintiff is in a class of persons that the law recognizes as being subject to a "recognized risk

of harm" from the type of conduct at issue. Restatement (Second) of Torts § 281 cmt. c (1965). Duties do not exist entirely in the abstract; they are, rather, owed to a particular person or group of people. "In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member."). "When a duty is owed to a specific individual or class of individuals, that person or persons may bring an action in negligence for breach of that duty." *Rodriguez v. Perez*, 99 Wn. App. 439, 444, 994 P.2d 874, 877 (2000). But when a plaintiff cannot show that he or she is a member of the class of persons to whom a common law duty is owed, the plaintiff cannot prevail on a negligence claim. *Tallariti v. Kildare*, 63 Wn. App. 453, 456, 820 P.2d 952, 954 (1991).

In assessing whether a duty exists, courts and commentators agree that "foreseeability in terms of whether conduct creates an unreasonable risk of harm" is a relevant factor in "prescribing or limiting legal duties." *See Wells v.*

City of Vancouver, 77 Wn.2d 800, 805, 467 P.2d 292, 296 (1970) (Finley, J., concurring) (citing *Palsgraf v. Long Island R. Co*., 248 N.Y. 339, 162 N.E. 99 (1928)). Thus, in assessing whether a defendant is negligent, the foreseeability inquiry focuses on whether the defendant should have foreseen some harm, of some kind, to some other person or entity, such that a reasonable person would have acted to guard against that harm. Dobbs, et al., *supra* § 200 at 688-89.

But foreseeability is not the sole or even primary driving factor in determining the existence of a duty. Indeed, under Washington's formulation, foreseeability of the risk is not, itself, part of the duty inquiry. *Rosengren v. City of Seattle*, 149 Wn. App. 565, 572, 205 P.3d 909, 913 (2009). Rather, it is only *after* a duty is found to exist, then "concepts of foreseeability serve to define the scope of the duty owed." *Michaels*, 171 Wn.2d at 608, 257 P.3d at 543 (quoting *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749, 753 (1998) (citing *Burkhart v. Harrod*, 110 Wn.2d 381, 395, 755 P.2d 759, 766 (1988) (Utter, J., concurring)).

B. The safe-workplace duty is owed only to employees or certain independent contractors at the worksite.

Here, on appeal, Plaintiffs contend that Boeing had a legal duty to refrain from "the unsafe use of birth-defect-causing chemicals" in a workplace setting, again seeking to recast their claims to sound like misfeasance allegations. (Resp. Br. at 34.) At a broad level, "a jobsite owner owes a common law duty to provide a safe workplace to workers other than its own employees [such as independent contractors and their employees] when the jobsite owner retains sufficient control over the work site." *Farias v. Port Blakely Co*., 22 Wn. App. 2d 467, 485–86, 512 P.3d 574, 587 (2022). The common law duty to provide a safe workplace for *employees* was statutorily supplanted by the Industrial Insurance Act, which grants immunity to employers from suits by employees for workplace injuries in exchange for "sure and certain relief" for employees suffering job-related injuries through workers compensation benefits. *See Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 752, 912 P.2d 472, 476 (1996).

The common law safe-workplace duty and the federal and state regulations governing workplace safety "were designed to ensure safe working conditions for *employees*" and certain other individuals performing operations at the workplace. *See Tallariti*, 63 Wn. App. at 457, 820 P.2d at 954 (emphasis added). Relying on unpublished court of appeals opinions only, Plaintiffs argue that Washington appellate courts have already extended the class of persons to whom the safe-workplace duty is owed beyond employees by recognizing a duty to protect family members of asbestos workers from asbestos fibers brought home on the workers' clothing. (*See* Resp. Br. at 35-37 (citing *Estate of Brandes v. Brand Insulations, Inc.*, 197 Wn. App. 1043, 2017 WL 325702 (Jan. 23, 2017) (recognizing potential tort duty of care from industrial premises owner to "a family member who launders [a worker's] clothes").) *See also Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 793, 106 P.3d 808, 812 (2005) (recognizing strict product liability claims for take-home asbestos exposure). However, in cases where courts have recognized a take-home theory of recovery in

asbestos litigation, most have limited the scope of potential plaintiffs to whom such a duty is owed, "namely, members of a worker's household." *Kesner v. Superior Court*, 1 Cal. 5th 1132, 1157, 384 P.3d 283, 300, 210 Cal. Rptr. 3d 283, 303 (2016). There was never a contemplation that such a duty would extend to hypothetical persons, who were not even conceived at the time of the employee's alleged exposure, and therefore were not members of the "worker's household" to whom any duty would be owed.

C. Courts in other jurisdictions have refused to recognize a preconception safe-workplace duty.

Even while some courts have recognized a duty to members of an exposed workers household to protect against environmental toxic exposure, they have been far more reluctant to extend that duty to persons not yet conceived at the time of the exposure. Notably, in 1990s cleanroom litigation involving claimed birth defects allegedly arising from in utero exposure to chemicals parents encountered in their workplaces, New York courts determined there was no duty owed to the plaintiffs as a matter of law. *See Ruffing v. Union Carbide Corp*., 1 A.D.3d 339, 341, 766 N.Y.S.2d 439,

441 (N.Y. App. Div. 2003) (affirming dismissal of daughter's claim premised on alleged exposure to cleanroom chemicals in utero through mother's laundering of father's clothing and "unprotected sex during the postconception period," as claim "failed to state a cognizable cause of action against IBM under either common-law negligence or strict liability.").

The *Ruffing* court relied on well-established New York jurisprudence. In *Catherwood v. Am. Sterilizer Co*., 130 Misc. 2d 872, 498 N.Y.S.2d 703 (N.Y. Sup. Ct. 1986), *aff'd*, 126 A.D.2d 978, 511 N.Y.S.2d 805 (N.Y. App. Div. 1987), and *aff'd*, 126 A.D.2d 980, 511 N.Y.S.2d 807 (N.Y. App. Div. 1987), plaintiff mother alleged that she was exposed to ethylene oxide at her workplace. She later conceived and delivered a daughter, who was born with chromosomal damage and died soon afterward. The plaintiff asserted tort claims on behalf of the daughter's estate. The court held that the proposed claims failed to state a claim, reasoning that:

> In order to allow a cause of action for preconception tort there requires the finding of a duty to the unconceived. Such a duty can only be couched in terms of a duty to protect the potentiality of life….New York has not recognized any such duty.

Id., 130 Misc. 2d at 875, 498 N.Y.S.2d at 706 (citation omitted). In so holding, the court cited other New York decisions disallowing preconception liability, including *Albala v. City of New York*, 54 N.Y.2d 269, 274, 429 N.E.2d 786, 788, 445 N.Y.S.2d 108, 110 (1981) ("the recognition of a cause of action under these circumstances would require the extension of traditional tort concepts beyond manageable bounds," and "[t]he perimeters of liability although a proper legislative concern, in cases such as these, cannot be judicially established in a reasonable and practical manner."). Other New York decisions follow similar reasoning. *See Enright by Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 387, 570 N.E.2d 198, 203, 568 N.Y.S.2d 550, 555 (1991) (affirming dismissal of third-generation DES claim; "[i]t is our duty to confine liability within manageable limits"); *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 307-08, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994) ("[t]he recognition of a common-law cause of action under the circumstances of this case [in utero exposure to substances from father's work clothes laundered by mother] would, in our opinion, expand

traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs").

Courts in California and other states have also refused to recognize preconception liability based on alleged toxic tort exposure. *See Elsheref v. Applied Materials, Inc*., 223 Cal. App. 4th 451, 461-463, 167 Cal. Rptr. 3d 257, 265-266 (2014) (rejecting preconception duties in the employment context under misfeasance, nonfeasance, and assumed duty analyses); *see also Whitlock v. Pepsi Americas*, 681 F. Supp. 2d 1123, 1126 (N.D. Cal. 2010) (dismissing preconception injury claims based on alleged exposure to defendants' hazardous wastes, noting that California courts have recognized preconception liability only in the context of "medical services or products related to the reproductive process"); *accord Avila v. Willits Envtl. Remediation Tr.*, 633 F.3d 828, 844 (9th Cir. 2011). Other courts are in accord. *Peters ex rel. Peters v. Texas Instruments Inc.*, CIV.A. 10C-06-043JRJ, 2011 WL 4686518, at *7 (Del. Super. Ct. Sept. 30, 2011) (applying Texas law and holding that no preconception duty was owed to child born with birth defects as an alleged result

of his father's occupational exposure to harmful substances), *aff'd*, 58 A.3d 414 (Del. 2013).

D. Washington's limited preconception duty applies only in medical malpractice cases.

Plaintiffs try to distinguish the New York cases by asserting that Washington—unlike New York—has already recognized *some* preconception duties in the medical malpractice context. (Resp. Br. at 45 n.6 (citing *Harbeson v. Parke-Davis, Inc*., 98 Wn.2d 460, 656 P.2d 483 (1983)).) The preconception duty recognized in *Harbeson* is narrowly confined to certain health care providers and is owed "only to those persons foreseeably endangered by [the providers'] conduct," specifically, in that case, "future children [who] were therefore foreseeably endangered by defendants' failure to take reasonable steps to determine the danger of prescribing Dilantin for their mother." *Id.* 480–81, 656 P.2d at 496. Imposition of such a duty will provide a means to compensate the child for "extraordinary out-of-pocket expenses" and "foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice." *Id.* at 481, 656 P.2d at 496 (citation omitted).

The *Harbeson* court held that the "duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children." *Id.* at 472, 656 P.2d at 491.

The *Harbeson* court's rationale does not extend to the employer-employee relationship. Employment is fundamentally economic and contractual, with limited or confined aspects of confidentiality. Employers do not assume responsibility for employees' reproductive health, nor do employees rely on them for medical guidance or genetic counseling. Treating the employer-employee relationship as a "special relationship" for purposes of preconception liability would be an unjustified expansion of duty and liability. Many courts have therefore declined to treat employment as a relationship giving rise to duties toward future children. The employer's role in the workplace bears no resemblance to the physician's duty to a patient seeking reproductive care, and

conflating the two would distort the special relationship limitation beyond recognition.

Nothing about the *Harbeson* holding or its rationale suggests that preconception duties would be owed outside of the medical malpractice context. This is fully consistent with how other courts have recognized preconception duties in relation to healthcare defendants.

E. Courts in other jurisdictions have narrowly confined preconception duties even in the medical malpractice context.

Even within medical malpractice law, courts have been cautious in articulating a narrow scope for preconception duties. Some of Plaintiffs' medical-malpractice authorities involve Rh-blood type incompatibility claims, an area where courts have narrowly circumscribed the particular standard of care, and linked any duty to the physician/patient relationship. *See Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 854 (Mo. 1993) (observing that "there will not be a duty in every case where allegedly negligent conduct harms a plaintiff not yet conceived. It is sufficient to say that in this case, a duty exists"); *see also Lynch v. Scheininger*, 162

N.J. 209, 232, 744 A.2d 113, 126 (2000) (noting that "[i]n the fields of obstetrics and gynecological surgery, the relationship between a physician's responsibilities and the possibility of consequences to the mother that affect future pregnancies is well understood"); *Walker v. Rinck*, 604 N.E.2d 591, 595-596 (Ind. 1992) (finding duty where subsequently-conceived children were known "beneficiaries of the consensual relationship" between their mother and her physician); *see generally Monusko v. Postle*, 175 Mich. App. 269, 277, 437 N.W.2d 367, 370 (1989) (in recognizing duty from failure to administer rubella test to mother, "[w]e emphasize the direct connection between the test and immunization procedure and the harm in this case, and the fact that the test and the preconception immunization are specifically designed to prevent rubella syndrome in children that are not yet conceived").[3]

[3] A dissenting justice in *Walker* observed that the consequences of the court's ruling could "pass beyond the second generation and into the third," "a very long liability tail indeed." 604 N.E.2d at 597. The *Monusko* dissent commented on the very lengthy period of liability and "extension of traditional tort concepts beyond reasonable

F. Preconception duties give rise to open-ended liability for employers.

Claims asserting preconception harm to an unconceived child due to parental occupational exposures are inherently dependent on speculative, attenuated causal chains that intertwine with time, biology, and circumstances. Extending liability without clear limits would contravene fundamental tort principles and risk exposing defendants to infinite and unforeseeable claims. *See* W. Keeton, *supra* § 41. The recognition of a preconception duty in the workplace or environmental context would force courts to evaluate uncertain and unresearched scientific theories regarding

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bounds" that the majority ruling could create. 437 N.W.2d at 370-72.

Indeed, the *Walker* dissent's admonition is reflected in *Houser v. Kaufman*, 972 N.E.2d 927, 940 (Ind. Ct. App. 2012), in which the court refused to recognize a preconception tort duty based on a second-generation PKU claim. Plaintiff, conceived after alleged malpractice by her mother's physician, claimed that the physician owed her a duty because he failed to diagnose PKU at the time of her mother's birth. The court noted the "speculative, remote, and secondary" nature of the plaintiff's claim; that "[r]ecognizing duty in a case such as this could extend a physician's potential liability for several decades after an alleged negligent act"; and that public policy required "reasonable limits upon a physician's exposure."

reproductive exposure, genetic mutation, and fetal development. The causal relationship between an employee's workplace exposure and a future child's condition would depend on countless intervening variables, including timing of conception, parental health, genetics, and environmental factors. Imposing liability on such an uncertain basis would collapse the distinction between possible and probable causation, replacing judicially manageable standards with speculation. Tort law has long resisted this kind of open-ended, indeterminate responsibility.

The connection between an employer's conduct and alleged harm to an unconceived child is too remote to support a duty in negligence. Imposing a preconception duty would not only distort foreseeability, it would expand beyond and dismantle doctrinal limits that make causation in tort law coherent and predictable.

G. A nonfeasance-based preconception duty by employers would invite, if not require, intrusions on fundamental privacy rights.

Plaintiffs appear to have partially abandoned their nonfeasance-based theories of duty in favor of a misfeasance-

based theory. To the extent that Plaintiffs might continue to assert that employers owe an affirmative duty to the unborn and yet-to-be-conceived population of employees' future children, such a duty would invite employers to intrude upon employees' protective privacy interests in a manner that contravenes important public policies in Washington.

The Washington State Legislature has enacted legislation that clearly outlines the importance of reproductive privacy. Under RCW § 9.02.100, "the sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions." *See* RCW § 9.02.100. Recognizing a tort duty that effectively requires employers to anticipate or prevent reproductive harm might invite employers to inquire into employees' reproductive plans, genetic predispositions, and family-planning decisions. Such inquiries would also place employers on a collision course with federal and state anti-discrimination laws, including the Genetic Information Nondiscrimination Act, which prohibits employers from

acquiring or using genetic information in employment decisions.[4]

An affirmative duty to protect not-yet-conceived children from parental exposures would compel employers to make a Hobson choice between the risk of decades of future uncertain potential liabilities and taking present action that may affect employees' lifestyle choices, reproductive decision-making, and ability to earn a living. With every potentially fertile employee representing a daily risk of uncertain future liability, employers might perceive a need to inquire about fertility status, sexual activity, birth control measures, desires for starting or expanding a family through biological reproduction, or a host of other deeply private decisions made by employees in their personal lives. Alternatively, employers might perceive that the potentially

[4] The Genetic Information Nondiscrimination Act (GINA) was established in 2008 by the Equal Employment Opportunity Commission created by section 705 of the Civil Rights Act of 1964. The purpose of GINA is meant to prohibit employers from using genetic information in employment decisions such as firing, hiring, and promotions. Employers are not able to request, require, or purchase genetic information. *See generally* 42 U.S.C. § 2000ff.

fertile population of workers is simply too high-risk for some occupations, and prioritize employment of those whose perceived likelihood of procreation is reduced.

In short, extending an open-ended affirmative preconception duty to employers would place them in the untenable position of potentially monitoring employees' reproductive health and genetic information resulting in an intrusion on personal autonomy that conflicts directly with fundamental constitutional values and anti-discrimination mandates embodied in Washington public policy.

II. The Industrial Insurance Act's exclusivity provision bars any negligence claim against an employer flowing from an alleged impairment to an employee's ability to reproduce – whether the claim is asserted by the employee in his own capacity or on behalf of a child.

The employee injury compensation system established in the Industrial Insurance Act (the Act) was designed after careful consideration of competing interests. The system provides benefits to employees without evidence of fault of the employer, and spreads the risk and cost of medical and other benefits to the employer as a cost of doing business. This system would cease to be effective if employers were

required to respond to tort suits. The legislative intent in enacting the Act was to make the remedies provided therein exclusive. *Ledesma v. A. F. Murch Co.*, 87 Wn.2d 203, 205, 550 P.2d 506, 507 (1976). The legislature spoke with deliberate breadth in articulating the exclusivity of the Act's remedies: "all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided." RCW § 51.04.010.

Developing a tort-law duty for claims that are derivative of an employee's occupational injury or exposure risks undermining the legislative balancing of interests articulated in the Act. The legislature has the "authority to enact laws creating causes of action. If the court limits or

abrogates such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area." *Eastwood v. Horse Harbor Found., Inc*., 170 Wn.2d 380, 403, 241 P.3d 1256, 1269 (2010) (Madsen, J., concurring) (quoting *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd*., 753 So. 2d 1219, 1222 (Fla. 1999)).

Given the breadth with which the State Legislature described the exclusivity of the Act, it is the unique province of the legislative branch to articulate any exceptions to it. Therefore, it falls to the legislature and not the courts to define and delimit any new right of recovery based on a tort law duty by employers to protect as-yet-unconceived children of Washington workers from birth defects allegedly caused by their parents' occupational exposure to harmful conditions or substances. For this reason, the Court should refrain from intruding upon the province of the legislature in formulating a common law duty owed by employers to the potential offspring of Washington workers who are otherwise covered by the Act's protections.

Conclusion

For the foregoing reasons, PLAC and NAM submit that the Court should reverse the decision of the Superior Court, declare that Boeing had no tort duty to Milo Bauer under Washington law, and remand the case to the Superior Court with directions to dismiss the Complaint.

Respectfully submitted,

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Dated this 6th day of November 2025.

/s/ Shreya K. Shah
Shreya K. Shah
WSBA #62805

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DATED this 6th day of November, 2025.

/s/ Shreya K. Shah
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