

FILED
SUPREME COURT
STATE OF WASHINGTON
8/17/2026 4:56 PM
BY SARAH R. PENDLETON
CLERK

Supreme Court No. 105476-9
Court of Appeals No. 87593-1 - Division I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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.

**MEMORANDUM OF AMICI CURIAE THE PRODUCT
LIABILITY ADVISORY COUNCIL, INC. AND THE
NATIONAL ASSOCIATION OF MANUFACTURERS IN
SUPPORT OF PETITIONER'S PETITION FOR REVIEW**

Marissa A. Alkhazov, WSBA #34278
BUCHALTER LLP
600 University Street, Suite 3100
Seattle, WA 98101
Telephone: 206.319.7052

L. Michael Brooks, Jr.,
Pro Hac Vice Pending
THOMPSON, COE, COUSINS &
IRONS, LLP
1700 Broadway, Suite 900
Denver, Colorado 80290
Telephone: (303) 812-1256
Facsimile: (303) 830-0898

Attorneys for Amici Curiae
The Product Liability Advisory Council, Inc.
and the National Association of
Manufacturers

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICI CURIAE.....	1
II. ISSUE STATEMENT.....	3
III. INTRODUCTION.....	3
IV. ARGUMENT.....	6
A. The Court of Appeals’ holding that misfeasance is not required to find a duty conflicts with <i>Robb v. City of Seattle</i> and Division One’s prior precedent in <i>Pitoitua v. Gaube</i>	6
1. Washington ties duty to the misfeasance-nonfeasance distinction, outside of a special relationship.....	6
2. The decision below cannot be reconciled with <i>Robb</i> and <i>Pitoitua</i>	8
B. The Court of Appeals’ near-exclusive reliance on foreseeability conflicts with <i>Centurion Properties</i> and threatens an unbounded expansion of duty.....	11
1. Foreseeability limits existing duties, but does not, by itself, create duties.....	11
2. Finding an employer has a foreseeability-based duty to employees’ not-yet-conceived children cannot be squared with sound public policy.....	12
V. CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.</i> , 170 Wn.2d 442 (2010).....	16
<i>Arnold v. Saberhagen Holdings, Inc.</i> , 157 Wn. App. 649 (2010).....	13
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537 (2019).....	6
<i>Certification from the United States Court of Appeals for the Ninth Circuit in Centurion Properties III, LLC v. Chicago Title Ins. Co.</i> , 186 Wn.2d 58 (2016).....	3, 11
<i>Elsheref v. Applied Materials, Inc.</i> , 223 Cal. App. 4th 451 (2014).....	14
<i>Enright by Enright v. Eli Lilly & Co.</i> , 77 N.Y.2d 377 (1991).....	15
<i>Folsom v. Burger King</i> , 135 Wn.2d 658 (1998).....	7
<i>Harbeson v. Parke-Davis, Inc.</i> , 98 Wn.2d 460 (1983).....	4
<i>Kesner v. Superior Court</i> 1 Cal. 5th 1132 (2016).....	13
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 125 Wn. App. 784 (2005).....	13

<i>Mancini v. City of Tacoma</i> , 196 Wn.2d 864 (2021).....	7
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587 (2011).....	11
<i>Mita v. Guardsmark, LLC</i> , 182 Wn. App. 76 (2014).....	10
<i>Pitoitua v. Gaube</i> , 28 Wn. App. 2d 141 (2023).....	Passim
<i>Robb v. City of Seattle</i> , 176 Wn.2d 427 (2013).....	Passim
<i>Rosengren v. City of Seattle</i> , 149 Wn. App. 565 (2009).....	11
<i>Ruffing v. Union Carbide Corp.</i> , 1 A.D.3d 339 (N.Y. App. Div. 2003).....	15
<i>Simonetta v. Viad Corp.</i> , 165 Wn.2d 341 (2008).....	11
<i>Ultramares Corp. v. Touche</i> , 255 N.Y. 170 (1931).....	16
<i>Washburn v. City of Fed. Way</i> , 178 Wn.2d 732 (2013).....	7
<i>Widera v. Ettco Wire & Cable Corp.</i> , 204 A.D.2d 306 (N.Y. App. Div. 1994).....	14
Rules	
RAP 13.4	4
RAP 18.17	18

I. 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. 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

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.

II. ISSUE STATEMENT

Whether an employer owes an independent duty of care to the potential future children of its employees before they are conceived.

III. INTRODUCTION

Boeing's Petition identifies two independent grounds for review: that the decision below conflicts with this *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 (2016), and *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 480–81 (1983), and that it presents an issue of substantial public interest under RAP 13.4.

Amici agree, and write separately to identify additional grounds for review that follows from the Division One panel’s opinion. In holding that “misfeasance is not a requirement to find negligence” once a duty of care is assumed, and that the misfeasance/nonfeasance distinction is “irrelevant” to the *Bauers’* claim, Op. 17, Division One departed from this Court’s controlling decision in *Robb v. City of Seattle*, 176 Wn.2d 427 (2013), and conflicts with Division One’s prior decision in *Pitoitua v. Gaube*, 28 Wn. App. 2d 141 (2023).

Rather than asking whether Boeing’s conduct created a new risk to Milo Bauer—the touchstone the common law and this Court’s precedent have applied to nonfeasance-type claims outside a special relationship—the Court of Appeals asked only whether Milo’s harm was, in hindsight, a foreseeable consequence of Boeing’s alleged failure to warn, train, and

monitor. At that level of generality, a foreseeability-only inquiry will invariably result in a finding of duty because virtually any harm can be characterized as foreseeable after the fact, once its cause is known. Foreseeability of that kind has never been sufficient, alone, to establish a duty under Washington law. It is only after a duty is established—through precedent, a special relationship, or a finding of defendant’s misfeasance—and only then, that foreseeability is used to define the extent of the duty. By collapsing the inquiry into a foreseeability-only test and declaring the misfeasance/nonfeasance distinction irrelevant to a “general negligence” claim involving alleged omissions, the Court of Appeals has drawn a template predisposed to identifying a duty in any case where a defendant’s inaction is followed, perhaps years or decades later, by harm, including to a person who did not exist at the time of the exposure.

This Court should grant review to correct that error and to restore the discipline that *Robb*, *Centurion Properties*, and this

Court's foreseeability precedents impose on Washington's duty analysis.

IV. ARGUMENT

A. The Court of Appeals' holding that misfeasance is not required to find a duty conflicts with *Robb v. City of Seattle* and Division One's prior precedent in *Pitoitua v. Gaube*.

1. Washington ties duty to the misfeasance-nonfeasance distinction, outside of a special relationship.

Under this Court's precedent, 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 (2019). "Misfeasance involves active misconduct resulting in positive injury to others" and "necessarily entails the creation of a new risk of harm to the plaintiff." *Robb v. City of Seattle*, 176 Wn.2d 427, 437 (2013). Nonfeasance, in contrast, "consists of 'passive inaction or failure to take steps to protect others from harm,'" through which "the risk is merely made no worse." *Id.* Absent a special relationship, a voluntary undertaking, or conduct by the

defendant that itself increases the peril, nonfeasance does not give rise to a duty of care. *Id.* at 435–39; *Folsom v. Burger King*, 135 Wn.2d 658, 676 (1998). This Court has applied that framework repeatedly, including in *Washburn v. City of Fed. Way*, 178 Wn.2d 732 (2013), and *Mancini v. City of Tacoma*, 196 Wn.2d 864 (2021). In neither decision did the Court suggest that the misfeasance/nonfeasance distinction is confined to claims involving third-party criminal acts.

Division One reaffirmed the same principle in *Pitoitua v. Gaube*, 28 Wn. App. 2d 141 (2023), holding that nonfeasance-type conduct (there, a casino’s failure to intervene to protect patrons) is actionable “only where there is a special relationship.” *Id.* at 153–54. Boeing’s petition cites *Pitoitua* for that proposition. Pet. at 25. Amici write to underscore that the conflict created by Division One’s opinion undermines the long-established distinction between misfeasance and nonfeasance.

2. The decision below cannot be reconciled with Robb and Pitoitua.

The Bauers’ complaint alleges that Boeing “fail[ed]” to provide adequate warnings, training, ventilation, monitoring, and alternative work assignments to Thomas Bauer. CP 13 ¶ 59(a)–(g). Each of these allegations describes an omission, more specifically a failure to guard against a risk (workplace toxicity) that existed independent of Boeing’s conduct and not an affirmative act that created a new risk. That combination of facts calls for the same analysis this Court performed in *Robb*: determining whether Boeing’s conduct created a *new* risk to Milo, or whether Boeing merely failed to eliminate a preexisting one. *See Robb*, 176 Wn.2d at 438 (no misfeasance where “the situation of peril...existed before” the defendant’s involvement and “the danger was unchanged by [the defendant’s] actions”).

Rather than perform that analysis, the Court of Appeals held the entire inquiry was beside the point, because “where a duty of care exists requiring an actor to use ordinary care for the protection of another against unreasonable risk, misfeasance is

not a requirement to find negligence.” Op. 17. That holding assumes the very thing *Robb* requires a plaintiff to establish: that a duty exists in the first place. *See Robb*, 176 Wn.2d at 439 (a duty to protect another from a third party’s criminal act arises, absent a special relationship, only where “the actor’s conduct constitutes misfeasance”). By assuming a duty and then declaring misfeasance irrelevant, the Court of Appeals inverted that framework.

The panel attempted to confine *Robb* to “the context of whether police owed a duty to protect individuals from criminal acts of a third party.” Op. at 16. Nothing in *Robb*, *Washburn*, *Beltran-Serrano*, or *Mancini* necessarily limits the misfeasance/nonfeasance distinction to that narrow class of cases; each describes it as the general common-law mechanism separating actionable affirmative conduct from non-actionable inaction. And *Pitoitua* applied the same framework just three years before *Bauer* was decided. 28 Wn. App. 2d at 153–54.

The stakes of leaving this case-law conflict unresolved extend well beyond this matter. Washington courts already struggle to apply the misfeasance/nonfeasance line consistently outside the public-duty-doctrine context in which *Robb* arose. Compare *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 87–89 (2014) (Division Three, applying a flexible, conduct-based approach to the voluntary-undertaking doctrine), with *Pitoitua*, 28 Wn. App. 2d at 153–56 (Division One, applying an arguably stricter requirement). The lower court’s decision deepens that inconsistency by holding that the misfeasance/nonfeasance inquiry can be avoided altogether simply by pleading a defendant’s conduct as “general negligence” rather than as a claim sounding in premises liability, product liability, or a special relationship. Op. 16 n.2. Nothing in the panel’s reasoning would prevent a plaintiff in any other nonfeasance case from doing the same thing. This Court should articulate a uniform framework for assessing duty.

B. The Court of Appeals’ near-exclusive reliance on foreseeability conflicts with *Centurion Properties* and threatens an unbounded expansion of duty.

1. Foreseeability limits existing duties, but does not, by itself, create duties.

In determining whether a duty of care exists, Washington courts weigh “logic, common sense, justice, policy, and precedent.” *Certification from the United States Court of Appeals for the Ninth Circuit in Centurion Properties III, LLC*, 186 Wn.2d at 65. Foreseeability plays a role in that analysis, but this Court has repeatedly cautioned that foreseeability “does not create a duty but sets limits once a duty is established.” *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 349 n.4 (2008); *accord Rosengren v. City of Seattle*, 149 Wn. App. 565, 572 (2009) (“the foreseeability of the risk is not, itself, part of the duty inquiry”); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608 (2011) (foreseeability defines “the scope of the duty owed” only after a duty is found).

The panel’s description of its analysis illustrates the problem. Having already concluded that Boeing owed Milo a

duty of care, based substantially on the foreseeability of harm in the take-home-asbestos cases, Op. 15, the panel then asked whether “foreseeability sets limits on duty,” and answered that question, again, by reference to foreseeability: “Milo was a foreseeable plaintiff.” Op. 13, 16. Foreseeability thus did the work of both establishing the duty and defining its scope, collapsing the two-step inquiry *Simonetta* and *Rosengren* require into a single, foreseeability-only test. Boeing’s Petition makes the same point with respect to the panel’s treatment of “common sense, logic, and justice,” which likewise reduced to the observation that “every actor whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect,” a formulation that, as Boeing notes, is simply foreseeability by another name. Pet. at 25 (quoting Op. 13).

///

///

///

2. Finding an employer has a foreseeability-based duty to employees' not-yet-conceived children cannot be squared with sound public policy.

Once foreseeability is allowed to do this much work, there is no principled place to stop. The take-home-asbestos cases on which the Court of Appeals principally relied, *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784 (2005), and *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649 (2010), involved plaintiffs who were living members of a worker's household who were physically exposed to asbestos carried home on workers' clothing. Even the California Supreme Court's decision in *Kesner v. Superior Court*, which the panel invoked to extend that line of authority, expressly limited the resulting duty to "members of an employee's household," reasoning that such persons are "foreseeably in close and sustained contact with the worker." 1 Cal. 5th 1132, 1154–55 (2016). Milo Bauer was not a member of Thomas Bauer's household at the time of the alleged exposure; he did not yet exist. The panel nonetheless extended *Kesner's* foreseeability rationale to "children that

workers have and for those that they will have,” Op. 15, without confronting the difference between a present, identifiable household member and an unknowable future person who may or may not ever be conceived.

Courts elsewhere confronting materially identical claims have declined to take that step, for reasons rooted in the same policy considerations *Centurion Properties* directs Washington courts to weigh. The California Court of Appeal in *Elsheref v. Applied Materials, Inc.*, 223 Cal. App. 4th 451 (2014), held that a preconception duty does not extend to employers, reasoning the connection between an employer’s workplace conduct and a later-conceived child’s injury is too attenuated, and that recognizing such a duty would “burden the employer with an unpredictable and overly expansive scope of potential liability.” *Id.* at 460–61. New York’s courts, confronting the same theory in 1990s “clean-room” litigation, reached the same result, holding that recognizing preconception tort liability outside the medical-malpractice context would “expand traditional tort

concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.” *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 307–08 (N.Y. App. Div. 1994); *Ruffing v. Union Carbide Corp.*, 1 A.D.3d 339, 341 (N.Y. App. Div. 2003); *Enright by Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 387 (1991) (“[i]t is our duty to confine liability within manageable limits”). These courts did not reach that conclusion because the harm to the child was unequivocally unforeseeable—arguably, it *was* foreseeable, on facts materially similar to those alleged here—but because foreseeability alone does not answer the logic, common sense, justice, and policy questions that a genuine multifactor duty analysis requires.

Amici are not bystanders to this question. A rule that permits duty to be established primarily by hindsight foreseeability, untethered from the misfeasance/nonfeasance framework that has long constrained nonfeasance-based claims, exposes manufacturers and employers throughout Washington to claims brought by an indeterminate class of plaintiffs for an

indeterminate time which is the very risk this Court has cautioned against even while recognizing that “economic concerns about liability run amok are overstated.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 454 (2010) (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179 (1931)). The 17 preconception-exposure cases already pending against Boeing alone, Pet. at 10, illustrate that this is not a hypothetical concern. This Court should grant the Petition and use this opportunity to articulate whether, and how far, Washington law should extend duty into this new territory, and, if it does, on what disciplined and predictable terms.

V. CONCLUSION

Amici curiae PLAC and NAM urge this Court to grant Boeing’s Petition for Review.

DATED this 17th day of August, 2026.

BUCHALTER LLP

By: /s/ Marissa A. Alkhazov

Marissa A. Alkhazov, WSBA #34278
malkhazov@buchalter.com

L. Michael Brooks, Jr.,
Pro Hac Vice Pending
THOMPSON, COE, COUSINS &
IRONS, LLP
1700 Broadway, Suite 900
Denver, Colorado 80290
Telephone: (303) 812-1256
Facsimile: (303) 830-0898

*Attorneys for Amicus Curiae
Products Liability Advisory Council,
Inc. and the National Association of
Manufacturers*

CERTIFICATE OF COMPLIANCE

This document contains 2,495 words, excluding the parts of the document exempted from the word count by RAP 18.17. In preparing this certificate, I relied on the word count generated by Microsoft Word 365.

DATED this 17th day of August, 2026.

BUCHALTER LLP

By: /s/ Marissa A. Alkhazov
Marissa A. Alkhazov, WSBA #34278
malkhazov@buchalter.com

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on August 17, 2026, I electronically filed the foregoing document via the Washington State Appellate Court's Secure Portal e-filing notification to the registered participants' email addresses as recorded this date with the Supreme Court, which will send a copy of the document to all parties of record via electronic mail and via separate email as follows:

- eservicepal@libertymutual.com
- kristine.kruger@ashurstperkins.com
- linda.wheeler@stokeslaw.com
- ajenkins@tysonmendes.com
- alex@weinsteincaggiano.com
- anna.armitage@stokeslaw.com
- antonio.alexander@wilsonelser.com
- arianah.musser@stoel.com
- ashley.paynter@ogletree.com
- brian@weinsteincaggiano.com
- caryn.jorgensen@stokeslaw.com
- cbannan@gth-law.com
- dcorneil@grsm.com
- dirk.muse@wilsonelser.com
- helen.habib@lewisbrisbois.com
- june.starr@ashurstperkins.com
- kristinekruger@gmail.com

- kxc@leesmart.com
- lburgess@bpmlaw.com
- linda.coberly@winstontaylor.com
- maria.tiegen@wilsonelser.com
- marten.king@ashurstperkins.com
- maxwell.wesemann@wilsonelser.com
- mincorvaia@bpmlaw.com
- mtapio@grsm.com
- mvs@leesmart.com
- ray.weber@stokeslaw.com
- service@weinsteincaggiano.com
- service@weinsteincouture.com
- snoel@bpmlaw.com
- yhon.frakes@wilsonelser.com

DATED this 17th day of August, 2026.

BUCHALTER LLP

/s/ Marissa A. Alkhazov

Marissa A. Alkhazov, WSBA #34278

BUCHALTER

August 17, 2026 - 4:56 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 105,476-9
Appellate Court Case Title: Teela Bauer, et al. v. The Boeing Company, et al.

The following documents have been uploaded:

- 1054769_Motion_20260817165449SC569393_4648.pdf
This File Contains:
Motion 1 - Other
The Original File Name was 2026.08.17 Motion for Leave to File Amicus Curiae Memorandum.pdf
- 1054769_Motion_20260817165449SC569393_5479.pdf
This File Contains:
Motion 2 - Amicus Curiae Brief
The Original File Name was 2026.08.17 PLAC and NAM Amicus Memorandum in Support of Petition for Review Boeing ads. Bauer WA.pdf

A copy of the uploaded files will be sent to:

- EservicePAL@LibertyMutual.com
- Kristine.Kruger@ashurstperkins.com
- Linda.Wheeler@stokeslaw.com
- ajenkins@tysonmendes.com
- alex@weinsteincaggiano.com
- anna.armitage@stokeslaw.com
- antonio.alexander@wilsonelser.com
- arianah.musser@stoel.com
- ashley.paynter@ogletree.com
- brian@weinsteincaggiano.com
- caryn.jorgensen@stokeslaw.com
- cbannan@gth-law.com
- dcorneil@grsm.com
- dirk.muse@wilsonelser.com
- helen.habib@lewisbrisbois.com
- june.starr@ashurstperkins.com
- kristinekruger@gmail.com
- kxc@leesmart.com
- lburgess@bpmlaw.com
- linda.coberly@winstontaylor.com
- maria.tiegen@wilsonelser.com
- marten.king@ashurstperkins.com
- maxwell.wesemann@wilsonelser.com
- mincorvaia@bpmlaw.com
- mtapio@grsm.com
- mvs@leesmart.com
- ray.weber@stokeslaw.com

- service@weinsteincaggiano.com
- service@weinsteincouture.com
- snoel@bpmlaw.com
- yhon.frakes@wilsonelser.com

Comments:

Sender Name: Marissa Alkhazov - Email: malkhazov@buchalter.com

Address:

600 UNIVERSITY ST STE 3100

SEATTLE, WA, 98101-3122

Phone: 206-319-7008

Note: The Filing Id is 20260817165449SC569393