IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JACOB MEYERS, by his natural mother and next friend, JANNA LYNN MEYERS, and individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. N11C-07-009 JRJ
INTEL CORPORATION,	)	
Defendant.	)	

Date Submitted: July 10, 2013
Date Decided: October 9, 2013

OPINION

Upon Defendant Intel Corporation's Motion to Dismiss Plaintiffs' First Amended Complaint: **DENIED**

Steven J. Phillips, Esquire (*pro hac vice*) (argued), Ari L. Taub, Esquire (*pro hac vice*) Phillips & Paolicelli, LLP, 380 Madison Avenue, 24th Floor, New York, New York, 10017, J. Zachary Haupt, Esquire, Bifferato LLC, 800 North King Street, Plaza Level, Wilmington, Delaware, 19801. Attorneys for Plaintiffs.

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Jurden, J.

I. INTRODUCTION

Before the Court is Defendant's 12(b)(6) Motion to Dismiss Plaintiffs' First Amended Complaint for failure to state a claim. Assuming that Colorado law controls, Defendant moves to dismiss because Plaintiffs' claims are not recognized by Colorado, excluded by Colorado's Premises Liability Statute, and/or Plaintiffs failed to allege required elements of their claims. For the reasons that follow, Defendant's motion is **DENIED**.

II. COMPLAINT

Jacob Meyers ("Jacob") was born in Colorado on April 19, 2002 with severe birth defects,[1] including partial agenesis of the corpus callosum and hydrocephalus.[2] Plaintiffs allege Jacob's birth defects were caused by "wrongful exposures to hazardous, genotoxic and reproductively toxic substances, pollutants or contaminants," during Jacob's parents' ("Parents") employment with Intel,[3] especially while Jacob was *in utero*.[4] Although only Jacob's mother, Janna Meyers ("Mother"), is a party plaintiff, both Parents worked for Defendant at its semiconductor manufacturing facilities in Oregon and Colorado.[5]

[1] First Am. Compl. ("FAC") ¶ 1, Trans ID 43501350.
[2] *Id.* ¶ 32.
[3] *Id.* ¶¶ 12, 30, 32.
[4] *Id.* ¶¶ 6, 16, 30-32.
[5] *Id.* ¶¶ 1-5. Jacob's father worked at Intel's Aloha, Oregon facility from 1995 through 2000, then at the Colorado Springs, Colorado facility from 2000 through 2007. Mother worked at two of Intel's Oregon facilities from 1996 through 2000, then transferred to Intel's Colorado Springs site where she remained until 2007. In 2007, Jacob and his family left Colorado and relocated to Arizona where they currently reside.

During Parents' employment with Intel, they worked in and around "clean rooms" and elsewhere at Intel's facilities where semiconductor "wafers," "microchips," and "boards" were manufactured for use in computers.[6] Plaintiffs allege Defendant exposed Parents and Jacob *in utero* to several allegedly "reproductively toxic chemicals, processes, and/or substances," including gallium arsenide and trichloroethylene,[7] and that several chemicals used by Defendant are known in the semiconductor industry to cause reproductive harm and lead to "adverse reproductive outcomes,"[8] such as spontaneous abortion, still birth, malformations, and birth defects.[9] Plaintiffs further allege their exposure and Jacob's resulting injuries were foreseeable, and could or should have been anticipated by Defendant.[10]

Among other things, Plaintiffs allege Defendant: failed to configure ventilation systems to protect against inhalation and/or skin exposure;[11] failed to warn its workers of the dangerous characteristics of the chemicals and substances and the health threats that they posed;[12] failed to test and study the chemicals to

[6] *Id.* ¶ 10. A clean room is "a manufacturing area with particle counts less than or greater to 100 particles per cubic feet, of a particular size greater than 0.5 microns." *Tumlinson v. Adv. Micro Devices, Inc.*, 2012 WL 1415777, at *1, n. 2 (Del. Super. Jan. 6, 2012) (Silverman, J.).
[7] FAC ¶¶ 6, 50-63.
[8] *Id*. ¶¶ 50-63.
[9] *Id*. ¶ 15.
[10] *Id*. ¶ 13.
[11] *Id*. ¶¶ 14, 64(g).
[12] *Id*. ¶ 17. Plaintiffs also allege the Material Safety Data Sheets supplied to Parents by Defendant did "not provide adequate information [for employees] to protect themselves from reproductive toxins." FAC ¶ 73.

fully appreciate their capacity to cause reproductive harm;[13] made representations "incorrectly and untruthfully" that the chemicals and substances were safe and suitable for use;[14] assured its workers, including Parents, that adequate protections were in place to prevent any harm to them or their future offspring;[15] failed to meet "good occupational medicine practice" obligations within the semiconductor industry;[16] and, concealed from Parents that contact with these chemicals and substances posed severe health hazards to their offspring.[17]

Plaintiffs expressly state in the FAC that they "*do not allege direct injuries* or causes of action by the Parents or [Mother]. Rather [Mother's] claims are [] derivative of the direct claims by [Jacob] and against Defendants [*sic*]."[18] Further, Plaintiffs expressly allege "[a]ny exposure by the Parents or [Mother …] that contributed to, caused or resulted in the injuries to [Jacob] did not manifest damage to [Mother] until her child was born with injuries caused by the exposures."[19]

Based on the above exposure to Parents and Jacob *in utero*, Plaintiffs assert claims of: (1) negligence, (2) premises liability, (3) strict liability, (4) abnormally

[13] *Id*. ¶¶ 18-19.
[14] *Id*. ¶ 20.
[15] *Id*. ¶¶ 20, 42-43.
[16] *Id*. ¶¶ 64-73. One of the many other breaches alleged in ¶64, is Defendant's failure to institute an adequate "healthy pregnancy" program. FAC ¶64(i).
[17] *Id.* ¶¶ 21-22, 44. Plaintiffs further allege that health service providers employed by Defendant "concealed and suppressed material facts … regarding the reproductively toxic nature of [Defendant's] manufacturing chemicals and processes," and "falsely represented to [Parents] that there was no causal connection" between chemical exposures at Defendant's facilities and Jacob's injuries. FAC ¶¶ 67-70.
[18] *Id*. (emphasis added).
[19] *Id*. ¶ 31.

dangerous/ultra hazardous activity, (5) willful, wanton, and intentional conduct, (6) breach of an assumed duty, and (7) loss of consortium.[20]

III. PROCEDURAL HISTORY

Plaintiffs filed their initial complaint on July 1, 2011.[21] On April 5, 2012, Plaintiffs filed an amended complaint and, anticipating Defendant's motion to dismiss, the parties submitted a proposed briefing schedule.[22] The Court accepted the parties' proposed schedule,[23] and briefing concluded on August 10, 2012. The Court heard oral argument December 17, 2012, and deferred decision pending a pertinent ruling from the Colorado Supreme Court.[24] The Colorado Supreme Court issued its decision in *Larrieu v. Best Buy Stores*[25] on June 24, 2013, clarifying the application of Colorado's premises liability statute. The parties submitted their supplemental arguments regarding that ruling on July 10, 2013 and this matter is now ripe for decision.

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[20] *Id.* ¶¶ 61-106.
[21] Trans. ID 38474699.
[22] Trans. ID 43501234.
[23] Trans. ID 43701103.
[24] Trans. ID 48550919. Finding a case before it presented "a close question … important and novel [to Colorado's] state legal policy," the Tenth Circuit Court of Appeals asked the Colorado Supreme Court to determine the scope of the Colorado Premises Liability Statute ("PLS"). *Larrieu v. Best Buy Stores, L.P.*, 491 F.App'x. 864 (10th Cir. 2012). In so doing, the Tenth Circuit acknowledged "the case potentially involves the fate of a large province of state tort law – and a question the Colorado Supreme Court has already indicated an interest in resolving." *Id*. Thus, the Tenth Circuit asked the Colorado Supreme Court to determine whether the PLS "effected a sea change in [Colorado's] tort law, displacing not just a small island but continents of common law." *Id*. at 868. Ultimately, the Tenth Circuit certified the following question of state law: "Does Colorado's [PLS] apply to injuries caused by a defendant-landowner's employee during an activity not directly or inherently related to the land?" *Id*. at 869.
[25] 303 P.3d 558 (Colo. 2013) (en banc). The Colorado Supreme Court rephrased the certified question: "Whether Colorado's [PLS] applies as a matter of law only to those activities and circumstances that are directly or inherently related to the land?" *Id*. at 559. The Colorado Supreme Court answered, "no." *Id*.

IV. PARTIES' CONTENTIONS

Defendant argues that because Parents worked at Defendant's Colorado Springs facility before, during, and after Jacob's *in utero* exposure, Colorado law governs Plaintiffs' claims.[26] On that premise, Defendant argues that Mother's claim for loss of filial consortium fails because Colorado law does not recognize such a claim.[27] Defendant also argues that Plaintiffs' sole means of recovery is a claim under the Colorado PLS and all other common law claims against Defendant are preempted by the PLS.[28] As to the PLS, Defendant argues that its liability, at most, is limited to the statutory duty owed to a licensee based on Jacob's *in utero* status at the Colorado Springs site,[29] and Plaintiffs have not properly alleged a breach of that duty, i.e., that Defendant "had actual knowledge of the specific danger presented to the allegedly injured licensee".[30]

In the alternative, Defendant argues that even if the PLS does not apply, Plaintiffs' strict liability claims fail to allege required elements.[31] Defendant argues that Plaintiffs fail to allege Intel placed the allegedly defective chemicals into the stream of commerce or that the chemicals were otherwise distributed.[32] Defendant further argues that Plaintiffs' "abnormally dangerous and ultrahazardous activity"

[26] Def. Op. Br. ("Mot.") 5-7.
[27] *Id*. 8 ("Colorado law is clear – its Supreme Court has expressly refused to recognize a claim for loss of filial consortium due to injury.") (citing *Elgin v. Bartlett*, 994 P.2d 411, 417 (Colo. 1999) (en banc)) .
[28] *Id*. 8-9.
[29] *Id*. 12.
[30] *Id*. 13-14.
[31] *Id*. 17-19.
[32] *Id*. 17-18.

claim fails as a matter of law because "Plaintiffs' allegations do not even address – let alone satisfy – several [Restatement (Second)] factors."[33]

Last, Defendant argues that Plaintiffs' claims fail in whole for failure to allege causation.[34] Defendant bases this argument on the express allegation that "Plaintiffs do not allege or assert that [Mother] or Parents sustained any injury at all. [If Parents did sustain an injury] that injury was not the cause of [Jacob's.]"[35] Defendants argue that Plaintiffs cannot possibly plead causation if Parents suffered no injury from their exposure.[36]

With regard to choice of law, Plaintiffs contend that it is premature for the Court to determine the applicable substantive law and the issue is "not susceptible to a preliminary determination."[37] Plaintiffs further contend that Defendant ignores the potential applicability of the laws of Oregon, Arizona, and California.[38] Plaintiffs maintain that for purposes of Defendant's motion, the only applicable law is Delaware because, regardless of which state's substantive law controls, the

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[33] *Id*. 18-19. Defendant contends that the Court must determine whether an activity is "abnormally dangerous" after examining several factors set forth in Restatement (Second) Torts § 520:

(1) existence of a high degree of risk of harm to the person, land or chattels of others;
(2) likelihood that the harm that results from it will be great;
(3) inability to eliminate the risk by the exercise of reasonable care;
(4) extent to which the activity is not a matter of common usage;
(5) inappropriateness of the activity to the place where it is carried on; and
(6) extent to which its value to the community is outweighed by its dangerous attributes.

[34] *Id*. 20.
[35] *Id*. 21.
[36] *Id*.
[37] Pltfs.' Ans. Br. ("Resp.") 1, 4-9, 15, Trans. ID 45178844.
[38] *Id*.

forum state's procedural rules govern.[39] Accordingly, Plaintiffs argue that because their complaint satisfies Delaware's "notice" requirement, it is sufficient to survive Defendant's motion.

Plaintiffs contend that Defendant's motion focuses on several legal arguments which are premature at the motion to dismiss stage. Specifically, Plaintiffs argue that the Court's determination as to whether Defendant's chemical use constitutes an abnormally dangerous activity is "to be determined by the Court . . . upon the facts in evidence."[40] Plaintiffs maintain that regardless of the applicable substantive law, their strict liability and ultra hazardous activity claims are well-pled and survive.[41]

As to the PLS, Plaintiffs assert the statute is inapplicable because it applies only to activities inherently related to the land.[42] In the alternative, Plaintiffs argue that if the PLS applies, they have appropriately alleged the required elements.[43] They contend that Jacob was an invitee, not a licensee, because his presence benefited Defendant through Mother's continued employment.[44] Finally, Plaintiffs request leave to amend their complaint a second time in order to remedy any insufficiencies.[45]

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[39] *Id*. 9.
[40] *Id*. 12 (quoting Restatement (Second) Torts § 520, cmt. l).
[41] *Id*. 13.
[42] *Id*. 15.
[43] *Id*. 17-20.
[44] *Id*. 22.
[45] *Id*. 14, 25.

V. CHOICE OF LAW

Delaware applies the "most significant relationship" test in determining the applicable substantive law.[46] Pursuant to the Restatement (Second) of Conflicts, the Court considers: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the parties' domicile, residence, nationality, place of incorporation and place of business; and, (d) the place where the parties' relationship centered.[47] These contact factors are weighed in light of several other factors listed in § 6 of the Restatement.[48] And finally, in tort cases, the Restatement directs courts to apply the law of the state where the injury occurred unless "some other state has a more significant relationship" under the § 6 factors.[49]

The Court disagrees with Plaintiffs' contention that a choice of law determination is premature, and based on the well-pled allegations in Plaintiffs' FAC, there is little question that Colorado substantive law applies. Parents were employed by Defendant in Colorado at the time Jacob was conceived, Mother continued to work at the Colorado Springs site throughout her pregnancy with Jacob, Mother and Jacob's alleged exposures occurred in Colorado, and Jacob was

[46] *Travelers Indemn. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991).
[47] Restatement (Second) Conflicts § 145(2).
[48] Restatement (Second) Conflicts § 6(2).
[49] *See Ortega v. Yokohama Corp. of N. Am.*, 2010 WL 1534044, at *1, *2 (Del. Super. Mar. 31, 2010) (Jurden, J.).

born in Colorado, thus satisfying several Restatement factors. The parties' relationship is centered in Colorado.

VI. STANDARD OF REVIEW

On a 12(b)(6) motion to dismiss, the Court must accept every well-pled allegation as true and draw all reasonable inferences in the non-movant's favor.[50] Allegations are well-pled if they place a defendant on notice of the claim at issue.[51] Dismissal should be denied unless "it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[52]

VII. DISCUSSION

A. Colorado Does Not Recognize a Loss of Filial Consortium Claim

Having decided that Colorado substantive law controls, Mother's loss of consortium claim fails. Colorado has explicitly refused to adopt a parental claim for tortious loss of consortium.[53]

B. *Larrieu* and the Colorado Premises Liability Statute

The Colorado PLS "predicates a cause of action for landowner liability on injury that occurs to a person while on the landowner's property and as a result of

[50] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[51] *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).
[52] *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).
[53] *Elgin*, 994 P.2d at 417-20.

the condition of the property or of activities conducted or circumstances existing on the property."[54] Specifically, the statute reads:

> In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section.[55]

The Colorado legislature adopted the PLS in order to "'promote a state policy of responsibility by both landowners and those upon the land' and 'to create a legal climate which will promote private property rights and commercial enterprise and will foster the availability and affordability of insurance.'"[56] Thus, the PLS abrogates the common law in order to protect landowners from prior common law liabilities.[57] The abrogation of common law tort claims leaves the PLS as the exclusive remedy against a landowner.[58]

The Colorado Supreme Court held in *Larrieu* that the PLS applies to a personal injury action when: "(1) the action involves the plaintiff's entry on the landowner's real property; (2) the plaintiff's injury occurred while on the landowner's real property; (3) the injury occurred by reason of the property's

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[54] *Larrieu*, 303 P.3d at 559.
[55] COLO. REV. STAT. ANN. § 13-21-115(2) (West 2006).
[56] *Larrieu*, 303 P.3d at 561 (internal citations omitted).
[57] *Id*.
[58] *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004) (en banc) (Noting that "[s]everal panels of the court of appeals have reached the conclusion that the [PLS] is the exclusive remedy available for injured parties against landowners.") (citing with approval, *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1461 (D. Colo. 1997) (Finding the PLS "is unambiguous … that [a] plaintiff may recover against [a] landowner … only pursuant to that statute and not under any other theory of negligence, general or otherwise.")).

condition, activities conducted on the property, or circumstances existing on the property; and (4) the landowner breached the duty of care it owed the plaintiff under the [PLS]."[59] The court further explained that the PLS "delineates duties owed by landowners to third persons who enter on the land under circumstances that cause those persons to be categorized as trespassers, licensees, or invitees."[60] Those third-party categories and the corresponding liabilities of a landowner are:

> 3(a) A **trespasser** may recover only for damages willfully or deliberately caused by the landowner.
>
> (b) A **licensee** may recover only for damages caused:
> (I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or
> (II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.
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> (c)(I) . . . an **invitee** may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.[61]

In *Larrieu*, the plaintiff went to a Best Buy warehouse to pick up a purchased freezer.[62] The plaintiff arrived at the warehouse in a truck with an attached trailer that would enable him to transport the freezer in an upright

[59] *Larrieu*, 303 P.3d at 562.
[60] *Id*. at 561 (internal citations omitted).
[61] Colo. Rev. Stat. Ann. § 13-21-115(3)(a-c) (emphasis added).
[62] *Larrieu*, 303 P.3d at 560.

position.[63] Because the tailgate on the trailer was too heavy for one person, a Best Buy employee assisted Larrieu by carrying one end of the gate.[64] As the plaintiff was walking backwards while carrying the other end of the gate, he tripped over a curb and the employee continued to carry the gate towards him.[65] Ultimately, the gate fell on the plaintiff, fracturing his spine.[66]

The Colorado Supreme Court in *Larrieu* focused on the meaning of the phrase, "activities conducted or circumstances existing on such property."[67] While the court held that the PLS is not restricted "solely to activities directly or inherently related to the land," it ruled that the PLS is not so broad as to encompass "any tort that happens on another's property."[68] The court in *Larrieu* determined that the PLS applies to "conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner."[69] The *Larrieu* court refused to set a bright-line rule for the PLS's application, but rather adopted a step-by-step analysis for courts to apply on a case-by-case basis. That analysis is whether: "(a) the plaintiff's alleged injury occurred while on the landowner's real

[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 559.
[69] *Id*.

property; and (b) the alleged injury occurred by reason of the property's condition or as a result of activities conducted or circumstances existing on the property."[70]

The Colorado Supreme Court noted that although the legislature intended "a broad range of activities causing injury" to be covered under the PLS, the application of the PLS is limited to injuries that occurred on a landowner's property.[71] Thus, the *Larrieu* court explained that the statute's requirement that a covered injury occur "by reason of the condition of such property, or activities conducted or circumstances existing on such property" constrains the PLS by "tying the cause – not just the occurrence – of a plaintiff's injury to the landowner's property . . . ."[72] In the end, the Colorado Supreme Court found the circumstances in *Larrieu* "fit[] squarely within [the PLS's] purview."[73]

Prior to the Colorado Supreme Court's ruling in *Larrieu*, Defendant argued that Plaintiffs' claims were restricted exclusively to the PLS. Plaintiffs countered that the PLS applied to a landowner's action involving activities inherently related or directly tied to the land. Now, *Larrieu* reinforces Defendant's position and Defendant's supplemental briefing generally recapitulates its earlier arguments.[74] Plaintiffs continue to argue that a determination of the PLS's applicability is

[70] *Id*.
[71] *Id*. at 564.
[72] *Id*.
[73] *Id*.
[74] Deft. Supp. Resp. ("Deft. Supp.") 1, July 10, 2013.

premature, but argue two new points they believe render the PLS inapplicable.[75] First, Plaintiffs argue that, "as a legal matter, injury cannot accrue until the child is born, which obviously occurred off the premises."[76] Second, Plaintiffs argue that the misconduct alleged is not "a result of activities conducted or circumstances existing on the property."[77]

Plaintiffs' arguments are not persuasive.[78] First, Plaintiffs seem to forget that Count II of the FAC alleges a premises liability claim.[79] Plaintiffs allege that "Defendant Intel . . . controlled the property,"[80] Plaintiffs were "rightfully present at the [] premises,"[81] Defendant had a duty to keep premises in a "reasonably safe condition,"[82] and Defendant "negligently failed to provide reasonably safe premises . . . and thereby breached its duty of care."[83] Based on the four PLS claim requirements set forth in *Larrieu*, the only allegations missing in Count II are the claim of injury and that the injury was caused by the landowner. Those missing allegations, however, are pled elsewhere in the FAC, and Count II expressly

[75] Pltf. Supp. Resp. ("Pltf. Supp.") 3, July 10, 2013.
[76] *Id*.
[77] *Id*.
[78] Plaintiffs fail to support either new argument with case law and the Court will not spend its time researching on a party's behalf. Failure to support an argument with case law can be deemed a waiver. *See, e.g., Novkovic v. Paxon*, 2009 WL 659075, at *3 (Del. Super. Mar. 16, 2009) (Ableman, J.) (quoting *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008)).
[79] FAC, Count II, ¶¶ 88-93.
[80] FAC ¶ 89.
[81] *Id*. ¶ 90.
[82] *Id*. ¶ 91.
[83] *Id*. ¶ 92.

incorporates and realleges all previous paragraphs.[84] With that, Plaintiffs' claim clearly satisfies the four requirements set forth in *Larrieu*, while also satisfying the Delaware notice requirement.

Second, even without Count II, Plaintiffs' claims fall under the PLS. It is clear from the allegations in the FAC that Plaintiffs complain of Defendant's use of chemicals at its manufacturing sites – an activity conducted on Defendant's property – and that the chemical use resulted in toxic exposure to Plaintiffs which proximately caused Jacob's birth defects. In other words, the cause and occurrence of Jacob's injuries are tied to activities on Defendant's property. Moreover, Plaintiffs allege that several defects on Defendant's property led to their exposure, such as the lack of a ventilation system.[85] Given that the Colorado Supreme Court recently held that a customer's injury from a trailer gate "fits squarely within [the PLS's] purview," then injuries stemming from a landowner's manufacturing processes conducted on the property also fit within the PLS. Given the well-pled allegations in the FAC, the PLS applies and Plaintiffs' common law tort claims are abrogated as a result.

[84] FAC ¶ 88. The FAC alleges elsewhere that Defendant negligently used chemicals at its sites and exposure to those chemicals caused Jacob's birth defects. FAC ¶¶ 75-87.
[85] *See* FAC ¶¶ 14, 44.

C. Defendant's Duty to Jacob

The Court must next determine whether Jacob, while *in utero* at the Colorado site, was a trespasser, licensee, or invitee.[86] The parties do not contest that Mother, as Defendant's employee, was an invitee on the premises. They disagree as to whether Jacob while *in utero* was a licensee or an invitee.

Status classification in Colorado has had a tumultuous history.[87] The Colorado courts adhered to strict status delineations, then changed to a "foreseeability" standard,[88] and upon the enactment of the PLS reverted back to the common law trespasser, licensee, and invitee classifications.[89] The PLS defines each as follows:

> "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.
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> "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.

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[86] *Vigil*, 103 P.3d at 328 ("Under the [PLS], the only issue of law to be determined by the court is the classification of the injured plaintiff; liability and damages are questions of fact.").
[87] *See, e.g., Mile High Fence Co. v. Radovich*, 489 P.2d 308, 313 (Colo. 1971) (en banc) (Ultimately superseded by statute, the *Radovich* court noted "the harsh consequences and judicial waste which have resulted from adherence to status classification."); *Vigil*, 103 P.3d at 325-26.
[88] *Id*.
[89] *Lakeview Associates, Ltd. v. Maes*, 907 P.2d 580, 583, n. 4 (Colo. Ct. App. 1994) ("[T]he definitions of invitee and licensee provided in the [PLS] appear to be identical to the common-law definitions of such persons as they existed prior to [*Radovich*].").

> "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.[90]

While it is clear that Jacob was not a trespasser,[91] there is no Colorado case law addressing the status classification of a fetus *in utero*.

That a Colorado court would extend Mother's invitee status to Jacob makes sense on a variety of levels. First, Mother continued to work while pregnant, thereby conferring a benefit upon Defendant. And, Defendant impliedly invited Jacob on the premises in order to continue the mutually beneficial relationship it had with Mother. Second, the Colorado Supreme Court has lamented the "harsh consequences and judicial waste" resulting from adherence to status classifications.[92] Finally, affording Jacob invitee status does not place a duty on Defendant it did not otherwise have. The Court therefore finds that Plaintiffs have sufficiently pled that Defendant breached the duty owed to Jacob as an invitee.

D. Jacob's Causation Theory Survives

As noted above, Plaintiffs expressly state in the FAC that they "do not allege direct injuries or causes of action by the Parents or [Mother]. Rather [Mother's] claims are [] derivative of the direct claims by [Jacob] and against Defendants

[90] Colo. Rev. Stat. Ann. § 13-21-115(5)(a)-(c).
[91] While not expressly arguing that Jacob is a trespasser, Defendant does argue that Plaintiffs failed to properly allege the landowner's duty to a trespasser, i.e., that Intel willfully or deliberately harmed Jacob. *See* FAC ¶¶ 97-111. The Court holds that Jacob, while *in utero*, was not a trespasser.
[92] *Radovich*, 489 P.2d at 313.

[*sic*]."[93] Further, Plaintiffs specifically allege "[a]ny exposure by the Parents or [Mother …] that contributed to, caused or resulted in the injuries to [Jacob] did not manifest damage to [Mother] until her child was born with injuries caused by the exposures."[94] Based on those averments, Defendant argues that "Plaintiffs have pled themselves out of a legally cognizable theory of causation."[95]

Plaintiffs' FAC alleges exposure to Parents during their employment history *and exposure to Jacob during gestation*. Plaintiffs expressly allege that Jacob's injuries resulted from his own *in utero* exposure and are not dependent upon injuries sustained by his parents. Colorado law expressly recognizes a child's right to bring claims for prenatal injuries.[96] Like the child in *Keefe*, Jacob was born alive, permitting his own separate and distinct claims.[97] Under Colorado law, Jacob's theory of causation is sufficient to pass this early stage of scrutiny.[98] Thus, Plaintiffs' allegations that Jacob was exposed to toxic chemicals *in utero*, without injury to Parents while his Parents worked at Defendant's manufacturing facility, is sufficient to pass muster at this stage.[99]

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[93] FAC ¶ 30.
[94] *Id*. ¶ 31.
[95] Deft. Reply Br. ("Reply") 15.
[96] *Pizza Hut of Am., Inc. v. Keefe*, 900 P.2d 97, 101 (Colo. 1995) (en banc) (citing several cases in support); *see also*, *Snyder v. Michael's Stores, Inc.*, 945 P.2d 781 (Cal. 1997) (same).
[97] *Keefe*, 900 P.2d at 101.
[98] *Id*. at n. 3 ("Pizza Hut contends that a fetus *in utero* is inseparable from its mother and any injury to the child therefore can only occur as the result of some injury to the mother The facts of this case do not require us to answer today the difficult question of whether a fetus is a separate and distinct person from the mother, since in this case, the baby was in fact born and hence it was at the time of her death a separate person.").
[99] *See* FAC ¶¶ 6, 16, 30-32.

VIII. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss is **DENIED**. Plaintiffs do not have leave to amend a second time.

IT IS SO ORDERED.

Jan R. Jurden, Judge