Supreme Court No. 99319-0

Court of Appeals Case No. 79520-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174,

Petitioner,

v.

GLACIER NORTHWEST, INC., d/b/a CalPortland,

Respondent/Cross-Petitioner.

RESPONDENT/CROSS-PETITIONER GLACIER NORTHWEST, INC.'S ANSWER AND CROSS-PETITION

Brian P. Lundgren, WSBA #37232
Jonathan M. Minear, WSBA #41377
Jackson Lewis P.C.
520 Pike Street, Suite 2300
Seattle, WA 98101
206-626-6424

Joshua D. Brittingham, WSBA #42061
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
206-447-0182

Attorneys for Respondent/Cross-Petitioner

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I. INTRODUCTION

Respondent/Cross-Petitioner Glacier Northwest, Inc. d/b/a CalPortland ("Glacier") is a material supply company that manufactures and delivers concrete. Glacier sued Petitioner International Brotherhood of Teamsters Local Union No. 174 ("Union") for two acts that caused Glacier significant damages in violation of state tort law.

First, Glacier sued the Union for intentionally destroying Glacier's batched concrete. The Union miscasts Glacier's claim as being about a strike or walkout. The Union's assertion is not true. While a strike can be perfectly lawful, conduct during a strike can violate state tort law. Glacier seeks only damages caused by the Union's intentional property damage tort, not strike damages such as lost business or profits.

The applicable legal principle was decided long ago. The U.S. Supreme Court holds that state courts have jurisdiction over property damage tort claims that occur during a strike. The National Labor Relations Board ("NLRB") holds that destructive acts like intentional damage to property are not protected strike activity. Congress did not vest the NLRB with authority to adjudicate and remedy property damage tort claims. The state court has jurisdiction here.

The trial court dismissed Glacier's tort claims for intentional destruction of property under CR 12(b), erroneously believing that the

National Labor Relations Act ("NLRA") preempted the trial court from exercising jurisdiction. The Court of Appeals correctly reversed and remanded these claims for trial. Because the Union cannot satisfy the requirements of RAP 13.4(b), this Court should deny review.

Second, Glacier sued the Union for lying about instructing drivers to report to service Glacier's concrete mat pour after a strike had ended. When asked if the drivers would service that mat pour, the Union's Secretary-Treasurer twice falsely stated, "We have specifically instructed the drivers to respond to dispatch." "Respond to dispatch" means to report to work. Dispatch provides drivers with their job assignment. But for the Union's false statements, the mat pour would not have been mobilized that night and Glacier would not have suffered the resulting damages.

Glacier brought misrepresentation and tortious interference claims based on the Union's lie, which the trial court erroneously dismissed under CR 56. While the Court of Appeals agreed with Glacier that the trial court's analysis was wrong, the Court of Appeals then erred by deciding that the Union's false statement was not one of existing fact and did not cause Glacier damages. This conflicts with opinions from this Court and the Court of Appeals. If the Court accepts review of the Union's petition, then Glacier asks the Court to accept review of Glacier's cross-petition.

II. IDENTITY OF RESPONDENT/CROSS-PETITIONER

Glacier was the Plaintiff in the trial court and the Appellant below.

III. THE COURT OF APPEALS' DECISION

On November 16, 2020, the Court of Appeals, Division 1, published its amended decision at *Glacier Northwest, Inc. d/b/a CalPortland v. International Brotherhood of Teamsters Local Union No. 174*, __ Wn. App. 2d __, __ P.3d __ (2020) ("the Opinion," found at Appendix A).

IV. ISSUE PRESENTED: ANSWER TO PETITION

Did the Court of Appeals correctly hold that the NLRA did not sweep away state jurisdiction over Glacier's tort claims of intentional property damage? (Yes.)

V. STATEMENT OF CASE: ANSWER TO PETITION

On August 11, 2017, Glacier was batching concrete for delivery. CP 3-4. Batched concrete is a highly perishable product. CP 3. It contains environmentally sensitive chemicals that must be disposed of promptly in an environmentally safe manner. *Id.* Once batched, concrete cannot be saved for another day—it must be loaded into a ready-mix truck for immediate delivery. CP 4-5. Abandoning batched concrete in Glacier's equipment places the equipment and concrete at immediate risk. CP 4.

Knowing this, Union agents waited at Glacier's facility until a substantial volume of batched concrete was loaded into Glacier's barrels,

hoppers, and ready-mix trucks. CP 6-8. Then, a Union Business Agent made a throat-slashing "cut signal" across his neck, signaling the start of the plan to sabotage Glacier's operations and intentionally destroy the batched concrete. CP 53. Glacier Dispatch immediately instructed those ready-mix drivers whose trucks were loaded with batched concrete to finish their concrete deliveries. CP 53. Across the dispatch radio, Union agents countered, "Return your vehicle to your domicile immediately," which then continued, "I was told to go park my truck," "Leave the f---er running," "We will not be dumping them or rinsing them out …. Somebody else's problem," and "Consequences are Consequences." *Id.* Concrete was destroyed, and a massive clean-up project ensued. CP 7-8.

Glacier sued the Union, alleging the Union sabotaged Glacier's operations and intentionally destroyed Glacier's batched concrete. CP 1-9, 14-16. The Union moved under CR 12(b) to dismiss Glacier's claims, solely on NLRA preemption grounds. The trial court missed the key legal distinction between the right to strike and the obligation not to intentionally destroy property in violation of state tort law. The Court of Appeals correctly reversed the trial court on these claims and concluded that the claims were not subject to CR 12(b) dismissal.

VI. ARGUMENT: ANSWER TO PETITION

The Court of Appeals correctly determined that the trial court has jurisdiction over Glacier's property damage tort claims. Absent clear congressional intent to the contrary, state court jurisdiction over state law tort claims is not preempted. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004).

State courts must not apply *Garmon*[1] preemption in a way that "sweeps away state-court jurisdiction over conduct traditionally subject to state regulation." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 188, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977). Glacier has a right to petition in state court to recover the "damages directly and proximately caused by the wrongful conduct chargeable to" the Union "as defined by the traditional law of torts." *Garmon*, 359 U.S. at 248 n.6.

Preemption is inappropriate where, like here, the NLRB can award no damages to remedy the claim. *Sears*, 436 U.S. at 201-03; *Belknap, Inc. v. Hale*, 463 U.S. 491, 510-12, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983); *United Auto. Workers v. Russell*, 356 U.S. 634, 645-46, 78 S. Ct. 932, 2 L.

[1] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.E. 2d 775 (1959).

Ed. 2d 1030 (1958); *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656, 665-67, 74 S. Ct. 833, 98 L. Ed. 1025 (1954). Congress did not grant the NLRB authority to adjudicate and remedy Glacier's property damage tort claims. *Laburnum*, 347 U.S. at 665-69; *Roofers Local 30*, 227 NLRB 1444 (1977); *Iron Workers Local 783*, 316 NLRB 1306, 1310 (1995); *Service Employees District 1199*, 312 NLRB 90, 102 (1993).

A. The Court of Appeals' decision does not conflict with U.S. Supreme Court or NLRB precedent.

"Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 136, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976). *Garmon* itself made clear that the NLRA did not sweep away state law jurisdiction over destruction of property torts. 359 U.S. at 237, 248 & n.6.[2] There is "no doubt" that if union agents tortiously damage property, the NLRA does not prevent an injured party from holding the union responsible in a state court. *Laburnum*, 347 U.S. at 666-67 & n.8.

While the Union seeks to misdirect the Court's attention to strikes and walkouts, Petition at 4-9, the truth is that state courts have long handled

[2] The Union cites Division 2's *Wal-Mart* case, which was a trespass case like *Sears*, 436 U.S. 186, not a property damage tort case. *Wal-Mart Stores, Inc. v. United Food & Commer. Workers Int'l Union*, 190 Wn. App. 14, 354 P.3d 31 (2015). But Division 2 correctly notes that state law tort claims for "property damage" are not preempted by the NLRA. *Id.* at 26.

property tort claims that occur during a strike or walkout. *Laburnum*, 347 U.S. at 667-69 & n.8; *Russell*, 356 U.S. at 644-46. This includes claims for conversion of goods and despoiling of employer property, which are no different than an assault or other unlawful acts. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253-54, 59 S. Ct. 490, 83 L. Ed. 627 (1939). Employers may resort to the state courts to recover damages caused by such conduct. *Id.* at 254.

Despite having the burden to prove preemption, the Union has presented not a single case holding that intentionally damaged perishable product is NLRA-protected conduct. The cases are all to the contrary. The intentional destruction of employer property, equipment, or product is not protected Section 7 activity. *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314, 315 (1953) (abandonment of molten iron loaded in a cupola is not protected Section 7 strike activity); *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 n.7 (5th Cir. 1955) (same).

The same is true of perishable batched concrete. State law tort claims to recover damages are not preempted, and deliberate abandonment of batched conduct is not protected strike activity. *Rockford Redi-Mix, Inc. v. Teamsters Local 325*, 551 N.E.2d 1333, 1334-40 (Ill. App. 1990) (the NLRA does not preempt tort claim for abandonment of batched concrete);

NLRB v. Mardsen, 701 F.2d 238, 242 n.4 (2d Cir. 1983) (abandonment of batched concrete is not NLRA Section 7 activity).

While damage to property could involve both discipline of employees and a state tort claim to recover damages, this overlap does not preempt the state law tort claim. *Fansteel*, 306 U.S. at 254 (when employee damages property an employer may both discipline the employee and proceed to state court to recover the property damage). Controversies are not identical for preemption purposes just because facts could be relevant to an NLRB case and a state law tort case. *Sears*, 436 U.S. at 197-98; *Belknap*, 463 U.S. at 509-10; *Farmer*, 430 U.S. at 302-07.

The Union claims that NLRB cases create a "perishable product exception" to U.S. Supreme Court preemption doctrine, but there is no such exception. Section 7 of the NLRA does not protect intentional damage to an employer's product (perishable or not). *Int'l Protective Servs., Inc.*, 339 NLRB 701, 702 (2003) (failure to protect employer plant, equipment, or products from imminent danger that would foreseeably result from a sudden cessation of work is not protected Section 7 strike activity); *Boghosian Raisin Packing Co.*, 342 NLRB 383, 396-97 (2004) (abandonment of perishable raisins at start of strike is not protected Section 7 strike activity).

The cases the Union cites do not even involve intentional damage to a perishable product. *Central Oklahoma Milk Producers Ass'n*, 125 NLRB

419, 435 (1959) (supervisors delivered the milk, which was not damaged); *Leprino Cheese Co.*, 170 NLRB 601, 604 (1968) (cheese was not damaged because other employees completed the necessary tasks); *Lumbee Farms Coop., Inc.*, 285 NLRB 497, 507 (no product contamination occurred); *Morris Fishman & Sons, Inc.*, 122 NLRB 1436, 1445-47 (1959) (while the leather was perishable, the employer processed the leather, and there was no loss); *Ablon Poultry & Egg Co.*, 134 NLRB 827, 828-29 (1961) (while some chickens spoiled they were not intentionally damaged).

In the other NLRB cases cited by the Union, the record revealed no evidence of intentional damage to employer property. *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 256 (6th Cir. 1990); *M&M Bakeries, Inc.*, 121 NLRB 1596, 1605 (1958); *Crookston Times Printing Co.*, 125 NLRB 304, 315 (1959); *NLRB v. A. Lasaponara & Sons*, 541 F.2d 992, 998 (2d Cir. 1976); *ABC Concrete Co.*, 233 NLRB 1298, 1304 (1977); *Spencer Trucking Corp.*, 274 NLRB 1444, 1449 (1985); *Technicolor Gov. Servs., Inc.*, 276 NLRB 383, 385 (1985); *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294 (1984). Thus, the Union's cases do not hold that the NLRA protects intentional damage to employer property.

In sum, the Court of Appeals' properly followed longstanding U.S. Supreme Court precedent, which squarely holds that the NLRA did not sweep away state jurisdiction over Glacier's property damage tort claims.

B. The Union's new "violence only" theory does not preempt intentional damage to property torts.

Under the Union's view, the NLRA eliminated the state court jurisdiction because intentional destruction of batched concrete is not "violent." Petition at 9-14. That is not the law. The U.S. Supreme Court has always viewed "conversion of goods" and "despoiling of property" as no different than assault or sabotage. *Fansteel*, 306 U.S. at 253-54. The U.S. Supreme Court has expressly and consistently held that states are to police property damage tort claims that occur during a strike. *Laburnum*, 347 U.S. at 667-69 & n.8; *Russell*, 356 U.S. at 644-46; *Machinists*, 427 U.S. at 136.

The Union's cited cases do not hold that intentional damage to property claims are preempted because they are not "violent." The Union cites *United Mine Workers v. Gibbs*, 383 U.S. 715, 729-34, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), *superseded in part by* 28 U.S.C. § 1367,[3] where the U.S. Supreme Court noted that the NLRA does not preempt state court jurisdiction over violence and threats to public order. The *Gibbs* case did not hold that the NLRA preempted property damage tort claims unless they

[3] *Gibbs* involved analysis of a Section 303 secondary boycott claim under 29 U.S.C. §§ 158(b)(4) and 187. 383 U.S. at 728-30. The Union also cites another inapposite Section 303 case, *Firebird Structures, LCC v. United Bhd. of Carpenters, Local Union No. 1505*, 252 F. Supp. 3d 1132, 1179-80 (D.N.M 2017). But the present case is not a secondary boycott case. The Court of Appeals' decision does not involve Section 303 preemption. The *Laburnum* Court expressly held that Congress's decision to create a Section 303 secondary boycott remedy does not preempt state court jurisdiction over a state law intentional tort claim for a union's damage to property. 347 U.S. at 665-69.

are "violent." *Id.* The Union also cites *Rider v. MacAninch*, 424 F. Supp. 2d 353, 356 (D.R.I. 2006), and *NLRB v. Roywood Corp.*, 429 F.2d 964, 965 (5th Cir. 1970), which do not say that either.

Contrary to the Union's theory, the U.S. Supreme Court has consistently recognized in many "non-violent" circumstances that the NLRA does not preempt state jurisdiction over traditional tort claims. *Farmer*, 430 U.S. at 302-07 (intentional emotional distress claim not preempted because the NLRA does not protect "outrageous conduct"); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 55-67, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) (defamation not preempted despite that NLRA regulates speech during union campaigns); *Belknap*, 463 U.S. at 509-12 (fraud and breach of contract not preempted—NLRB awards no relief for such claims); *Sears*, 436 U.S. at 196-208 & n.25 (peaceful trespass not preempted despite some NLRA overlap).

Glacier properly pleaded only its traditional property damage tort claim. CP 2. The Union's citation to *Pantex Towing Corp. v. Gildewell*, 763 F.2d 1241 (11th Cir. 1985), makes the point for Glacier. In *Pantex*, the court held that even if a walkout was protected activity, the plaintiff may recover any damages that were proximately caused by trespass. *Id.* at 1248-49. Likewise, Glacier properly seeks damages proximately caused by the Union's tortious damage to concrete, not strike or walkout damages.

C. The Court of Appeals' decision does not conflict with Washington precedent.

The Union also claims there is a conflict between the Court of Appeals' decision and Washington precedent. Petition at 14-17. There is no conflict. Once again, the precedent cited by the Union does not involve damage to property claims. *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 807 P.2d 849 (1991) (breach of employment promise); *Freeman v. Retail Clerks Union*, 58 Wn.2d 426, 363 P.2d 803 (1961) (trespass); *Kilb v. First Student Transportation, LLC*, 157 Wn. App. 280, 236 P.2d 968 (2010) (retaliatory discharge); *HERE, Local 8 v. Jensen*, 51 Wn. App. 676, 754 P.2d 1277 (1988) (intentional termination of NLRA collective bargaining relationship); *Wal-Mart Stores*, 190 Wn. App. 14 (trespass). Thus, neither RAP 13.4(b)(1) nor (b)(2) are met.

D. The Court of Appeals' decision does not involve a significant constitutional question, so RAP 13.4(b)(3) is not met.

There is no significant constitutional question under the Supremacy Clause for the Court to review here. The Union's "constitutional" argument merely repackages its faulty *Garmon* preemption argument. As explained above, the U.S. Supreme Court has long held that the NLRA does not preempt tort claims for intentional damage to property.

E. The Court of Appeals' decision does not involve an issue of substantial public interest.

The Union contends that the Court of Appeals' decision somehow risks a right of Washington workers to intentionally destroy employer property. No such right exists, and no such right is at stake here. Protection for workers against retaliatory state court lawsuits is an NLRB issue, not a state court issue, and that protection already exists.

The Union's request that this Court surrender state court jurisdiction on this topic and effectively grant immunity to unions that intentionally destroy batched concrete and risk environmental damage is not only legally unsound, but it is frankly absurd and dangerous. The Union has not satisfied RAP 13.4(b)(4).

VII. ISSUES PRESENTED: GLACIER'S CROSS-PETITION

Misrepresentation: Did the Court of Appeals erroneously determine that the Union's statement, "We have specifically instructed the drivers to respond to dispatch," was a promise of future performance rather than an actionable false representation of existing fact? (Yes.)

Tortious Interference: Did the Court of Appeals erroneously resolve proximate causation when, but for the Union's false representation, Glacier would not have suffered the mobilization losses? (Yes.)

VIII. STATEMENT OF CASE: CROSS-PETITION

GLY Construction subcontracted for Glacier to supply concrete to a concrete mat pour, which had been postponed during the Union's strike. CP 488, 1582, 1610, 1622, 1646. Union Secretary Treasurer Rick Hicks and GLY Construction President Ted Herb discussed the huge mat pour, including the losses that would occur if it was mobilized and then cancelled. CP 1316-1319, 1325-1327, 1378-1380, 1644-1646.

Typically, when a strike ends, Union drivers want to work because they have "bills to pay and mouths to feed." CP 1363-1364, 1591-1592, 1600. Drivers not showing up to work "is rarely, if ever, an issue." CP 1658. When drivers know there is work, the drivers just listen to the call-out recording from dispatch (the job assignment) for a start time and they then report to work per the instructions. CP 1549, 1591-1593, 1629, 1659.

After the Union strike ended the morning of Friday, August 18, 2017, there were rumors the Union had instructed the drivers not to report to work. CP 1119, 1583-1584, 1624-1625. Glacier and GLY decided they would not proceed with the huge mat pour without assurances from the Union. CP 1551-1553, 1610-1611, 1625, 1627-1628, 1646-1647.

As a result, Herb called Hicks around 12:35 p.m. on August 18 about the mat pour scheduled for that night (early Saturday morning) and then asked Hicks twice: **"Will you service the mat pour or not?"** CP 1647.

Hicks responded the same way both times: **"We have specifically instructed the drivers to respond to dispatch."** CP 1648. That was a lie.[4]

In the trucking business, "respond to dispatch" means report to work. CP 1611. Hicks's statement was understood to be a statement of an existing fact—that the Union had instructed the drivers to respond to dispatch. CP 1628, 1649. Hicks was present at their ratification meeting earlier that morning; he answered driver questions about returning to work; and he had control over whether the returning drivers would report to work. CP 1309-1311, 1315, 1343-1346, 1411-1412, 1627.

In reliance on Hicks's statements to Herb, Glacier and GLY Construction mobilized the mat pour, which was entirely reasonable. CP 1593, 1602, 1628, 1630-1634, 1651. This was a significant undertaking. Glacier needed 40 drivers but provided start times for all drivers (approximately 80) who were not otherwise on vacation. CP 1548, 1663, 1659. Besides showing up, nothing else was necessary for the drivers to report to work that night. CP 1547-1548, 1584-1585, 1591-1592, 1600-1602, 1629-1630, 1660-1661.

The labor agreement "had nothing to do with the decision to mobilize the mat pour." CP 1549, 1586-1588, 1592-1593, 1600-1602, 1630,

[4] At deposition, Hicks admitted that the Union had not instructed the drivers to respond to dispatch. CP 1313-1315. A Union driver testified that Hicks had, in fact, instructed the drivers to return to work on Monday, August 21, 2017. CP 1343-1344.

1632-1634, 1664-1666. The labor agreement does not tell drivers not to work, or that they cannot work; nor does it determine whether Hicks had lied to Herb. CP 1592-1593, 1586-1588, 1600-1602, 1632-1634. There was nothing prohibiting the drivers from working that night. CP 934-935, 1591-1593, 1600, 1602.

GLY Construction and Glacier mobilized the mat pour for early Saturday morning (1:00 a.m. on August 19), but when only 22 drivers showed up, it had to be cancelled. CP 1553-1555, 1584-1586, 1630-1632, 1662-1663. But for Hicks's false representations to Herb, the mat pour would not have been mobilized, and Glacier would not have suffered those losses. CP 1614-1615, 1632, 1652.

IX. ARGUMENT: CROSS-PETITION

A. "We have specifically instructed the drivers to respond to dispatch" is an actionable statement of <u>existing</u> fact.

The Court of Appeals erroneously dismissed Glacier's intentional and negligent misrepresentation claims, determining *sua sponte* that Hicks's false statement was not a representation of existing fact. Opinion at 20. On this point, the decision conflicts with other cases in Washington.

The Court of Appeals relied on *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 906, 247 P.3d 790 (2011), which holds that an oral promise may not be justifiably relied upon if it is contradicted

by unequivocal written evidence showing the representation to be false. But *Cornerstone Equipment* conspicuously conflicts with the facts here because there is no writing that would have told Glacier that the Union had not instructed the drivers to respond to dispatch. There was no writing that disproved Hicks's false representation to Herb.

The Court of Appeals' decision also conflicts with "promises" cases *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) (we intend to take a sample of brain tissue), and *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197, 49 P.3d 912 (2002) (we promise to procure insurance). The Court of Appeals mistakenly characterized Hicks's statement ("we have specifically instructed the drivers to respond to dispatch") as a promise of future action. Hicks's representation, "we have specifically instructed," is just like the statement of existing fact in *Stieneke v. Russi*, 145 Wn. App. 544, 563, 190 P.3d 60 (2008) (seller had not had any problems with the roof).

By resolving the issue as a matter of law, the Court of Appeals' decision also conflicts with longstanding Washington precedent. In Washington, it is for the jury to determine if a representation is one of existing fact in the context of all the evidence. *Westby v. Gorsuch*, 112 Wn. App. 558, 571, 50 P.3d 284 (2002); *Lawyers Title Ins. Corp. v. Soon J. Baik*, 147 Wn.2d 536, 547-48, 55 P.3d 619 (2002). A statement is one of existing

fact even when in the form of a prediction or promise, ambiguously expressed, about the intention of others, or incomplete. Restatement (Second) Torts §§ 525 cmt. f, 526, 527, 528, 529, 530, 541, 552.[5]

A jury could easily find Hicks's false representation to be one of "existing fact." The Court of Appeals' decision on this point satisfies RAP 13.4(b)(1) and (2) and should be taken up on review.

B. But for the false representation by Hicks, Glacier would not have mobilized the huge mat pour or suffered those losses.

The Union interfered with Glacier's performance by improper means when Hicks falsely represented to GLY Construction President Ted Herb that the drivers had been instructed to respond to dispatch. CP 1648; Restatement (Second) of Torts § 766A.

The Court of Appeals erroneously concluded that Glacier could not prove causation as a matter of law. The Court of Appeals reasoned that Hicks's false representations to Herb did not cause Glacier's mobilization losses because drivers were not "contractually obligated," could not be "ordered," and had no "duty to comply" with any instruction by the Union. Opinion at 23-24.

This analysis significantly conflicts with other Washington cases. Factual causation is a jury question unless inferences are incapable of

[5] Our courts look to Restatement (Second) of Torts on such points. *Baik*, 147 Wn.2d at 551-55; *Westby*, 112 Wn. App. at 570-76

reasonable difference of opinion. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982); *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 330, 966 P.2d 353 (1998).

Factual causation is the "but for" cause of the loss. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). To wit, but for Hicks's statement, Glacier would not have scheduled the mat pour that night and suffered the resulting losses. Glacier reasonably believed that, had the Union instructed drivers to report for work, as Hicks stated, enough drivers would have checked the call-out recording and completed the mat pour. In this situation, causation is an issue for a jury.

The Court of Appeals also created conflict in the case law by relying on *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 803, 699 P.2d 217 (1985),[6] because here, unlike *Sea-Pac Co.*, there is a direct link between Hicks's false statement and the losses Glacier suffered. But for Hicks's representation to Herb, the mat pour would not have been mobilized that night, and Glacier would not have suffered the resulting losses. CP 1614-1615, 1632, 1652. This causal link is not remote.

[6] *Sea-Pac Co.* involved a claim that a supervisor's trip to Europe was changed to a later date due to a legal hearing and the union could have postponed the hearing. *Id.* at 803-05. The claimed losses were that while the supervisor was in Europe the salmon market deteriorated, and the company purchased salmon at an unrealistic price. *Id.*

The Court of Appeals' alternative examination of other potential but-for causes is not a lawful reason to take the issue from the jury. An event may have more than one "but for" cause, and it is immaterial if other considerations also contributed to the loss. Restatement (Second) of Torts § 546, cmt. b.[7] Causation turns on the losses caused by Glacier's reasonable reliance on Hicks's false statement. Whether any drivers would have elected not to work that night had the Union instructed them to respond to dispatch is speculative and immaterial.

The Court of Appeals erred by taking the causation issue from the jury. Because it is an intentional tort, the Union is liable for the entire harm and does not sidestep liability by blaming the drivers, GLY Construction, or Glacier for the losses. Restatement (Second) of Torts § 879.

X. CONCLUSION

The Court should deny the Union's petition for review. If the Court accepts that petition, then Glacier respectfully requests that the Court grant Glacier's cross-petition for review as well.

[7] *See, e.g., Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739, 207 L. E. 2d 218 (2020) (events often have multiple but-for causes like when a car accident occurred, both because one person ran a red light and because another person failed to signal a turn).

Respectfully submitted this 13th day of January, 2021.

JACKSON LEWIS P.C.

By: _____

Brian P. Lundgren, WSBA #37232
Jonathan M. Minear, WSBA #41377
520 Pike Street, Suite 2300
Seattle, WA 98101
Telephone: (206) 626-6424
Brian.Lundgren@jacksonlewis.com
Jonathan.Minear@jacksonlewis.com

Davis Grimm Payne & Marra

By: _____

Joshua D. Brittingham, WSBA #42061
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
Telephone: (206) 447-0182
Jbrittingham@davisgrimmpayne.com

Attorneys for Respondent/Cross-Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document was sent in the matter set forth below:

Via E-mail & Legal Messenger
Dmitri Iglitzin, WSBA #17673
Darin Dalmat, WSBA #51384
Barnard, Iglitzin & Lavitt
18 W. Mercer Street, Suite 400
Seattle, WA 98119-3971
iglitzin@workerlaw.com
dalmat@workerlaw.com

Attorneys for Petitioner

Via Electronic Filing
Office of Clerk
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314

Dated this 13th day of January, 2021, at Lynnwood, Washington.

Nani Vo
4836-1552-9686, v. 1

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

November 16, 2020

Joshua Daniel Brittingham
Davis Grimm Payne & Marra
701 5th Ave Ste 4850
Seattle, WA 98104-7094
jbrittingham@davisgrimmpayne.com

Brian P Lundgren
Jackson Lewis P.C.
520 Pike St Ste 2300
Seattle, WA 98101-4099
brian.lundgren@jacksonlewis.com

Darin M Dalmat
Barnard Iglitzin & Lavitt LLP
18 W Mercer St Ste 400
Seattle, WA 98119-3971
dalmat@workerlaw.com

Dmitri L. Iglitzin
Barnard Iglitzin & Lavitt LLP
18 W Mercer St Ste 400
Seattle, WA 98119-3971
iglitzin@workerlaw.com

Benjamin Daniel Berger
Barnard Iglitzin & Lavitt LLP
18 W Mercer St Ste 400
Seattle, WA 98119-3971
berger@workerlaw.com

CASE #: 79520-1-I
Glacier NW., App v. International Brotherhood of Teamsters, Resp's
King County, Cause No. 17-2-31194-4

Counsel:

Enclosed is a copy of the order denying motion for reconsideration, withdrawing opinion and substituting opinion and opinion filed in the above-referenced appeal which states in part:

"Affirmed in part, reversed in part."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

SSD

Enclosure

c: The Honorable John P. Erlick
Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GLACIER NORTHWEST, INC. d/b/a CALPORTLAND, Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174 Respondent.	No. 79520-1-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Appellant, Glacier Northwwest, Inc., has filed a motion for reconsideration of the opinion filed in the above matter on August 31, 2020. Respondent, International Brotherhood of Teamsters, Local Union NO. 174, has filed a response to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied, the opinion should be withdrawn, and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that the opinion filed on August 31, 2020, is withdrawn and a substitute opinion be filed.

Andrus, A.C.J.

Mann, C.J.

Dwyer, J.

FILED
11/16/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

GLACIER NORTHWEST, INC. d/b/a CALPORTLAND, Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174 Respondent.	)	No. 79520-1-I AMENDED PUBLISHED OPINION

ANDRUS, A.C.J. – Glacier Northwest Inc., who employs drivers represented by the International Brotherhood of Teamsters Local Union No. 174 (Union), filed this lawsuit against the Union for intentional destruction of property, misrepresentation, and tortious interference with a business relationship, relating to the Union's conduct during and immediately after an August 2017 strike. The trial court initially dismissed Glacier's property destruction claims, concluding they were federally preempted. It subsequently dismissed the misrepresentation and tortious interference claims on summary judgment, concluding Glacier failed to present a genuine issue of material fact on the elements of justifiable reliance or proximate cause.

We reverse the dismissal of Glacier's claims for intentional destruction of property because those claims are based on conduct neither actually nor arguably protected under section 7 of the National Labor Relations Act.[1] We affirm the dismissal of Glacier's remaining claims.

FACTS

Glacier sells and delivers ready-mix concrete throughout Washington State.[2] Its 80 or 90 truck drivers, who work out of Glacier's facilities in Seattle along the Duwamish River, and in Kenmore and Snoqualmie, are represented exclusively by the Union. Glacier's lawsuit was based on two instances of alleged Union misconduct at the beginning of a strike on August 11, 2017, and on the day the strike ended on August 18, 2017.

August 11 Work Stoppage

Glacier alleged that in the early morning hours of August 11, 2017, Glacier and its drivers began the process of batching and delivering concrete to Glacier customers. "Batching" is the process of preparing concrete for the immediate delivery to a customer, and generally requires measuring and mixing different ingredients (cement, sand, aggregate, admixture, and water) pursuant to a customer's specifications. Glacier places these raw materials into a hopper and blends them together. Once it is batched, Glacier discharges the concrete into a ready-mix truck for immediate delivery to a customer's project site. The trucks are specifically designed to maintain the integrity of the batched concrete in a revolving drum during transport.

[1] 29 U.S.C. § 157.
[2] Glacier Northwest Inc. does business as CalPortland.

Glacier further alleged that concrete is a perishable product because once at rest, it begins to harden immediately and can begin to set within 20 to 30 minutes. Once the raw materials are batched, the concrete cannot be saved for another day and must be delivered, poured, and finished. As a result, Glacier's drivers have a limited amount of time in which to deliver and pump the concrete or it becomes useless. If the drivers do not deliver the concrete within this short time period, the concrete is rendered unusable because the concrete's physical condition materially changes, and it eventually hardens. And if the batched concrete remains in the revolving drum of the ready-mix truck beyond its useful life span, the concrete will harden inside the revolving drum and cause significant damage to the truck. Once concrete starts to set, it begins to thicken, placing pressure on the hydraulic system of the rotating barrel of the truck. If a driver stops the rotation of the drum, the setting process commences and the concrete starts to harden inside. Glacier alleged the Union representatives and Glacier's drivers all knew of this perishable nature of batched concrete.

Glacier alleged that shortly before 7:00 a.m., on the morning of August 11, 2017, Union agents were physically present at Glacier's Seattle facility and observed drivers loading batched concrete onto its trucks. Glacier's collective bargaining agreement (CBA) with the Union had expired as of July 31, 2017, and the Union was in the process of negotiating a replacement CBA with Glacier and other concrete companies. Glacier further alleged that once the Union representatives knew there was a substantial volume of batched concrete in Glacier's barrels, hoppers, and ready-mix trucks, they called for a work stoppage.

Glacier alleged that the Union intentionally timed this cessation of work to ensure the destruction of all of the batched concrete.

According to Adam Doyle, Glacier's dispatch coordinator, at the time the Union called the strike, Glacier had mixer trucks already on job sites delivering concrete, drivers on the road with fully loaded trucks, drivers in the yard waiting to have their trucks loaded from Glacier barrels and hoppers, and drivers in the yard with fully loaded trucks ready to depart. Doyle notified the drivers that they were obligated to finish any job that Glacier had started. Normally, when drivers return to the yard after delivering concrete, they offload any leftover concrete into a "reclaimer" or into a form to make ecology blocks. They then rinse out the drum and return to the line to take on another load.

But on August 11, the drivers all brought their mixer trucks back to the yard between 7:00 a.m. and 7:45 a.m. Justin Denison, Glacier's ready-mix concrete manager, testified that some of the drivers, who were on their way to jobsites with trucks loaded with 9 to 10 cubic yards of concrete when the Union called the strike, returned their trucks to Glacier's Duwamish facility without delivering the concrete. He testified that at least 16 drivers came back with fully loaded trucks, and 9 drivers abandoned them in Glacier's yard without notice to Glacier. Seven drivers parked their trucks, notified Glacier of their return, and sought instructions for dealing with the concrete. Denison described the scene:

> I was present in the yard when the loaded trucks came rolling back in on August 11. . . . It was complete chaos. We had to offload the concrete from the barrels before it "set up." We had to dispose of the concrete in a timely manner to avoid costly damage to the mixer trucks and in a manner so as not to create an environmental disaster. We had to reorganize material storage bunkers into which we offloaded the concrete. We had to deal with settling ponds, treatment

> of material and filter presses to handle hundreds of cubic yards of concrete. It took us 5 hours to properly handle and clean-up the mess created by the drivers.

Glacier contended it took emergency measures to offload the hardening concrete into hastily constructed bunkers in an environmentally safe manner, and quickly washed out the trucks to prevent damage to them. But it was unable to save any of the concrete. Glacier had to subsequently bring in excavation equipment and trucks to break up the fully hardened concrete and haul it to a disposal site.

Glacier initially issued disciplinary letters to the 16 drivers who returned their loaded trucks to Glacier's facility for abandoning the trucks and violating Glacier's work rules and safety rules by deliberately putting Glacier's business in imminent harm. When Glacier's management learned that 7 of the drivers had given Glacier advance notice of the strike and their intent to return loaded trucks to Glacier's facility, Glacier withdrew the warning letters to these drivers.

August 19 Mat Pour

GLY Construction, a general contractor, had subcontracted with Glacier to supply concrete for a commercial project in the South Lake Union neighborhood of Seattle (the Vulcan Project). When the Union called the August 11 strike, GLY had a large mat pour,[3] as part of the Vulcan Project, scheduled for Saturday, August 12, 2017. Glacier canceled this job due to the strike.

[3] A "mat pour" involves the delivery of concrete by several trucks, one after another, to pour a concrete foundation for a large commercial building. The work requires a substantial labor force including dispatchers, laborers, batch plant personnel, truck drivers, GLY personnel, and City of Seattle inspectors and police. Because a mat pour requires street closures, having a sufficient number of drivers to deliver concrete is essential.

In the early morning hours of August 18, 2017, the Union and Glacier agreed to a successor CBA covering August 1, 2017 through July 31, 2021. Around 11 a.m. that morning, the Union called a meeting with the drivers, during which they voted to approve the CBA (August 2017 CBA).[4] Immediately after the August 18 ratification vote, the Union drafted a press release announcing the vote, and posted it on the Union's website and Facebook page within a couple hours of the meeting. This release said that the Glacier strike was over and "everyone is now back to work."

That same day, GLY Construction employee Dane Buechler called Ted Herb, the president of the company, to inform him that the Union had ratified a new CBA with Glacier. Buechler wanted to proceed with the Vulcan Project mat pour after midnight that night but was unsure if the Glacier drivers would respond to work that night. Glacier managers had heard rumors that the drivers had been instructed not to answer phones for Saturday work. Glacier's vice president and general manager, Melanie O'Regan, was unwilling to mobilize for the mat pour without reason to believe the drivers would show up because Glacier would then be responsible for both Glacier's losses and GLY's mobilization costs and potentially liquidated damages.

Buechler asked Herb to call the Union's agent, Rick Hicks, with whom Herb had previously discussed the complexities of this concrete job, to find out if the rumors were true. Greg Mettler, Glacier's ready-mix sales manager, also spoke to

[4] Union Secretary-Treasurer Rick Hicks signed the formal agreement on September 19, 2017, and Glacier Director of Industrial Relations Brian Sleeper signed on November 20, 2017. But the parties do not dispute that the drivers approved it before noon on August 18, 2017.

Herb that afternoon and learned Herb intended to call Hicks to discuss the concerns about whether drivers would show up for the mat pour.

Herb called Hicks around 12:35 p.m. that afternoon, and Hicks confirmed the Union had approved the successor CBA. Herb told Hicks that GLY wanted to reschedule the Vulcan Project mat pour for shortly after midnight that night, on August 19. He recounted his conversation with Hicks:

> I told Mr. Hicks: "Dane is trying to reschedule the mat pour for tonight and there's some concern about whether it will be properly serviced. So, I have been asked to call and get a response and some information on what will happen." I asked: "I've been asked by Dane to call you and get verification; will you service the mat pour or not?"

Herb testified that Hicks responded to his question by stating that "the drivers have been instructed to respond to dispatch." Herb asked the same question a second time and Hicks "responded exactly the same way both times." Hicks denied making this statement to Herb.

Herb communicated the contents of this conversation to O'Regan and Mettler around 1 p.m. They interpreted Hicks's statement that "the drivers have been instructed to respond to dispatch" to mean that the Union had instructed the drivers to show up to work the mat pour. O'Regan testified that she reasonably relied on Hicks's statement in making the decision to proceed that night to mobilize to the job. But no one from Glacier spoke to Hicks directly.

Glacier decided to proceed with the mat pour. Glacier dispatcher Dirck Armitage testified that generally, for weekend work, he will call drivers individually to inform them of their start time and to tell them to check a "call-out recording" listing all drivers' start times for that weekend work. On August 18, Armitage began calling drivers around 1:22 p.m. By 3:42 p.m., he had posted the call-out recording

with start times. Armitage testified that he listened to the call-out recording to ensure it was functional, per standard practice, at 3:47 p.m. The last round of first calls ended at 4:01 p.m., and dispatchers called each driver a second time, beginning at 4:15 p.m.

Armitage and a second dispatcher spoke to some drivers personally and left voice mail messages with others. According to Armitage's dispatch notes, 12 of the drivers answered this phone call, and the majority of those drivers indicated they would work the mat pour. Approximately 39 drivers did not answer.

The earliest assigned start time for the mat pour was at 12:30 a.m., and the latest start time was at 7:00 a.m., with the majority of drivers scheduled to arrive between 12:30 a.m. and 1:05 a.m. At 12:45 a.m. on August 19, Glacier employees realized they had a problem. By 1:00 a.m., only 11 or 12 drivers had arrived for the mat pour. Shortly before 1:15 a.m., only 17 of the 40-50 drivers needed showed up for the mat pour, while another 5 drivers indicated they were on their way. Knowing they could not complete the mat pour with only 22 drivers, Glacier cancelled the pour at 1:15 a.m.

On August 23, 2017, Glacier sent disciplinary warning letters to the 39 drivers who did not show up for the August 19 mat pour, contending the failure to report to work violated Glacier's work rule prohibiting the participation "in any interruption of work or production."

Procedural History

Glacier commenced this suit on December 4, 2017, alleging six separate causes of action. Glacier's first three claims related to the August 11 work stoppage: (1) wrongful sabotage and destruction of concrete, (2) intentional

interference of Glacier's performance of its business relationships, and (3) civil conspiracy to commit sabotage and to destroy Glacier's concrete. Glacier's remaining claims related to the August 19 mat pour: (4) fraudulent misrepresentation and concealment, (5) negligent misrepresentation, and (6) intentional interference with Glacier's performance of the GLY contract.

On December 15, 2017, the Union filed a grievance against Glacier with the National Labor Relations Board (NLRB), alleging Glacier had violated the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157-158, by retaliating against the Union drivers for engaging in a lawful strike, retaliating against drivers for not showing up for work in August 19, and filing "an objectively baseless federally preempted lawsuit" against the union in state court.

In January 2018, the Union moved to dismiss Glacier's claims under CR 12(b)(1) and 12(b)(6), arguing that all of Glacier's claims were preempted under San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). It maintained that under the Garmon preemption doctrine, state courts may not adjudicate any claims where the conduct at issue is actually or arguably protected under section 7, or actually or arguably prohibited under section 8 of the NLRA. 29 U.S.C. § 157-158.[5] It argued the August 11 work stoppage was lawful concerted activity and any alleged misrepresentations that

[5] 29 U.S.C. § 157 provides in pertinent part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." And 29 U.S.C. § 158(b)(3) makes it an unfair labor practice for a labor union or its agents "to refuse to bargain collectively with an employer" when that union is the certified representative of that employer's employees.

workers would return to work were arguably covered by section 8(b)(3) of the NLRA, which prohibits dishonesty by a labor union during the bargaining process.

The trial court dismissed the three claims arising from the August 11 events. It concluded that the strike, in which Glacier drivers returned their loaded trucks to Glacier's Seattle facility, was protected work stoppage activity. The court acknowledged that while the economic losses from the strike were unfortunate, such losses did not "touch[] an interest so deeply rooted in local feeling and responsibility, such as vandalism or violence, that it clearly falls outside the protection of [the Act]." The trial court, however, declined to dismiss the three claims related to the August 19 mat pour. Accepting Glacier's factual allegations as true, the trial court concluded the alleged misrepresentations did not arguably fall within the scope of section 8 of the NLRA.

In October 2018, after conducting discovery, the Union moved to dismiss Glacier's remaining claims on summary judgment. The Union asked the court to dismiss the fraud and negligent misrepresentation claims, arguing that Glacier unreasonably relied on Hicks's alleged statement because Hicks did not say drivers would work the mat pour and only a handful of drivers actually answered the dispatch call before Glacier chose to proceed with it. The Union also maintained Glacier's reliance was unjustified because the Union could not require any drivers to work that night because Glacier had not given the drivers sufficient notice as required by the August 2017 CBA. The Union sought the dismissal of the remaining tortious interference claim, arguing GLY did not end its contractual relationship with Glacier after the drivers failed to show for the mat pour. GLY rescheduled and completed the mat pour later in August 2017. Finally, the Union

argued the trial court lacked jurisdiction to adjudicate these claims because they were preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.[6]

On November 16, 2018, the trial court granted the Union's motion and dismissed Glacier's remaining claims. Glacier appeals the dismissal of two of its claims arising from the August 11 work stoppage and all three claims arising from the August 19 mat pour.[7]

ANALYSIS

Glacier raises three main arguments on appeal. First, it argues that the trial court erred when it concluded that Glacier's intentional destruction of property claims arising from the August 11 work stoppage were preempted under Garmon. Second, it argues that the trial court erred in its alternate conclusion that Glacier's misrepresentation claims were preempted by section 301 of the LMRA. Third, it maintains that the trial court erred when it dismissed its misrepresentation and tortious interference claims on summary judgment, contending there are issues of fact needing to be resolved at a trial.

[6] 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This provision of the LMRA has been held to preempt state law claims based directly on rights created by a CBA as well as claims that are "substantially dependent on an interpretation of a collective bargaining agreement." Beals v. Kiewit Pac. Co., 114 F.3d 892, 894 (9th Cir. 1997).

[7] Glacier does not appeal the dismissal of its tortious interference claim arising out of the August 11 work stoppage.

We conclude the trial court erred in dismissing Glacier's August 11 work stoppage claims but did not err in dismissing the claims relating to the August 19 mat pour.

A. Garmon Preemption of Glacier's Property Destruction Claims

Glacier contends the trial court erred in concluding Glacier's intentional destruction of property claims were preempted under Garmon. We agree.

1. Standard of Review

This appeal arises out of a dismissal on the Union's motion to dismiss for lack of subject matter jurisdiction under CR 12(b)(1) and failure to state a claim under CR 12(b)(6). A motion to dismiss under CR 12(b)(1) may be either facial or factual. Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp., 172 Wn. App. 799, 806, 292 P.3d 147 (2013). In a facial challenge, the sufficiency of the pleadings is the sole issue. Id. at 806-07. In a factual challenge, the trial court may weigh evidence to resolve disputed jurisdictional facts. Id. at 807. In this case, the Union's challenge to the trial court's jurisdiction appears facial, in that it relied on the allegations in Glacier's complaint but it also submitted evidence relating to the unlawful labor practice complaint it filed with the NLRB. In response, Glacier submitted, with the trial court's permission, declarations filed with the NLRB. Although the Union did not concede any factual allegations made by Glacier in these pleadings, it did not offer evidence to dispute them. Thus, although the trial court reviewed evidence in addition to the complaint, in rendering its determination it does not appear it had to resolve any disputed jurisdictional facts. We thus assume for our analysis that the Union's motion was a facial challenge to subject matter jurisdiction.

When a court rules on a facial challenge, based on the complaint alone or the complaint supplemented by undisputed facts gleaned from the record, the existence of subject matter jurisdiction is a question of law that we review de novo. Id.; see also Ricketts v. Bd. of Accountancy, 111 Wn. App. 113, 116, 43 P.3d 548 (2002) (motion to dismiss for lack of subject matter jurisdiction is reviewed de novo). The party asserting subject matter jurisdiction bears the burden of proof on its existence. Outsource Servs., 172 Wn. App. at 806.

The Union's motion also invoked CR 12(b)(6). We review dismissals under CR 12(b)(6) de novo. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Dismissal for failure to state a claim is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. Cutler v. Phillips Petrol. Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Under this rule, the plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not part of the formal record. Id.

In this case, the trial court concluded as a matter of law that Glacier's state law claims were preempted by federal law. Whether a claim is preempted is a question of law reviewed de novo. McKee v. AT&T Corp., 164 Wn.2d 372, 387, 191 P.3d 845 (2008); Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union, 190 Wn. App. 14, 21, 354 P.3d 31 (2015).

2. Garmon Preemption

In Garmon, a union sought recognition as the representative of nonunion employees of lumber suppliers. 359 U.S. at 237. The suppliers refused to recognize the union, and the employees began a peaceful picket at the suppliers' places of business. Id. A California state court enjoined the picketing and awarded

damages for losses sustained by the companies. Id. at 237-38. The United States Supreme Court held that the suppliers' state law claims were preempted by federal labor law. Id. at 245.

Under what has become known as the Garmon preemption doctrine, when an activity is arguably subject to section 7 or section 8 of the NLRA, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id.. And it held that state courts should not determine whether conduct is arguably protected by the NLRA. Id. at 244. The court stated, "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." Id. at 246.

Here, we have a clear determination from the NLRB that the intentional destruction of property during a lawful work stoppage is not protected activity under section 7 of the NLRA. "Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 136, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) (emphasis added); see also Cranshaw Constr. of New England, LP v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 891 F. Supp. 666, 674 (D. Mass. 1995) (vandalism or the intentional destruction of property during a strike is not protected activity under the NLRA).

Moreover, the NLRB, as well as reviewing federal courts, has explicitly stated that workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage may be disciplined by an employer for this conduct. In Marshall Car Wheel & Foundry Co., 107 N.L.R.B. 314, 315 (1953), the Board stated:

> [T]he right of certain classes of employees to engage in concerted activity is limited by the duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work. We are of the opinion that this duty extends as well to ordinary rank-and-file employees whose work tasks are such as to involve responsibility for the property which might be damaged. Employees who strike in breach of such obligation engage in unprotected activity for which they may be discharged or subjected to other forms of discipline affecting their employment conditions.

The Fifth Circuit affirmed this general statement of the law. Nat'l Labor Relations Bd. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 413 (5th Cir. 1955). The court agreed with the NLRB that the workers' conduct was unprotected activity because "the striking employees intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off, and . . . a lack of sufficient help to carry out the critical pouring operation might well have resulted in substantial property damage and pecuniary loss" to the employer. Id. at 411 (footnote omitted). The employer was able to prevent this damage from occurring by using employees who refused to honor the strike and its supervisory staff. Id. The court held that because the union "deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss" to the employer, the NLRB had no authority to compel the employer to

reinstate the employees who participated in, authorized, or ratified the illegal activity. Id. at 413.

The NLRB's decision in Marshall Car Wheel has been recognized by federal courts and the NLRB for decades. See Int'l Protective Servs., Inc., 339 N.L.R.B. 701, 702 (2003) (striking employees' failure to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable harm is not protected activity).[8] In Boghosian Raisin Packing Co., 342 N.L.R.B. 383 (2004), the NLRB determined that the employees, who walked off the job without protecting the employers' perishable products from spoilage, had engaged in unprotected activity under the NLRA:

> The Union apparently decided on the evening of September 30 to strike the next day, however rather than having employees not report for work, the Union did the opposite. The employees reported and began working, then at 7:15 a.m. word was passed to strike. While the employees did a mini cleanup, of the type required when they went on a short break, there is no question that by leaving for the day, there was product damage. . . . And there can be little question that the product damage was intentional. In such a situation, the action of employees is unprotected.
>
> The Board has long held that employees have the duty to take reasonable precautions when striking in order to avoid damage to the company's property. Necessarily a strike will cause some economic loss to an employer, as well as to the employees. But damage to the company's property goes beyond such loss and where strikers deliberately time their strike to cause product damage,

[8] The NLRB said:

> Both the Board and the courts recognize that the right to strike is not absolute, and section 7 [of the NRLA] has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible. The Board has held concerted activity indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work.

Int'l Protective Svcs., 339 N.L.R.B. at 702 (alteration in original) (citation omitted) (quoting Bethany Med. Ctr., 328 N.L.R.B. 1094, 1094 (1999)).

> then their activity is unprotected for which they can be disciplined or discharged.

Id. at 396-97 (emphasis added) (citation omitted).

Glacier's allegations are similar to those of Boghosian Raisin. Glacier alleged that "[o]n August 11, 2017, the Union and some or all of its officers, employees, and members consciously acted together . . . to sabotage, ruin and destroy Glacier's batched concrete." It further alleged the Union failed to take reasonable precautions to protect Glacier's equipment, plant, and batched concrete from "foreseeable imminent danger" resulting from the Union's sudden cessation of work. Glacier also claimed the Union drivers "knew their August 11, 2017 conduct was certain to, or substantially certain to, destroy or so materially alter the physical condition of Glacier's batched concrete as to deprive Glacier of possession or use of the batched concrete."

Because the trial court dismissed Glacier's claims on a CR 12(b)(1) and (b)(6) motion, we accept these allegations as true. And if we assume the Union ordered Glacier's truck drivers to wait to stop work until Glacier had batched a large amount of concrete and loaded it into the drivers' waiting trucks, and the Union did so with the intention of causing maximum product loss to Glacier, this conduct was clearly unprotected under section 7 of the NLRA. Because the conduct Glacier has alleged here is neither actually nor arguably protected activity, there is no Garmon preemption. The trial court erred in concluding to the contrary.

B. LMRA Preemption of Glacier's Remaining Claims

Glacier next contends the trial court erred in dismissing Glacier's fraudulent and negligent misrepresentation claims relating to the August 19 mat pour, concluding the claims were preempted by section 301 of the LRMA.

1. Standard of Review

We review summary judgment rulings de novo. Rhoads v. Evergreen Utils. Contractors, Inc., 105 Wn. App. 419, 423, 20 P.3d 460 (2001).

2. Section 301 Preemption

Section 301 of the LMRA provides exclusive federal court jurisdiction over claims that an employer or union violated a CBA. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 863, 93 P.3d 108 (2004). "LMRA supremacy 'ensure[s] uniform interpretation of collective-bargaining agreements, and thus . . . promote[s] the peaceable, consistent resolution of labor-management disputes.'" Id. (alterations in original) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988)). Section 301 preemption occurs when the state claim is " 'inextricably intertwined with consideration of the terms of the labor contract,' " id. (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)), and application of state law " 'requires the interpretation of a collective-bargaining agreement,' " id. (quoting Lingle, 486 U.S. at 413).

Glacier's claims are not based on the CBA but instead arise in tort. Our Supreme Court has recognized that "[a] different issue arises . . . when a plaintiff brings a claim that does not sound in breach of contract, but nevertheless arguably implicates the CBA." Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d

120, 126, 839 P.2d 314 (1992). The Union contends Glacier's tort claims implicate the CBA because its defense is based on specific provisions of that agreement. The Supreme Court, however, held in Commodore that such an indirect connection to a CBA does not trigger section 301 preemption. Id. at 139.

In Commodore, the trial court concluded a union member's claims for defamation, outrage, racial discrimination, and tortious interference with a business relationship against his employer were preempted by section 301 of the LMRA. Id. at 123. On review, our Supreme Court adopted the "Marcus model,"[9] which states that "[a] state statutory or common law claim is independent of the CBA–and therefore should not be preempted by section 301–if it could be asserted without reliance on an employment contract." Id. at 129 (emphasis omitted). The court held that section 301 preemption occurs only in cases involving claims of breach of contract, claims of breach of the implied covenant of good faith and fair dealing, and claims based directly on violation of the CBA. Id. at 129-30. The court concluded that the union member's tort claims were not based on any violation of the CBA and thus not preempted by section 301. Id. at 139.

Here, Glacier alleged that the Union fraudulently or negligently misrepresented the Union's directive to its members regarding reporting to work for the mat pour. Glacier's claim is based on Hicks's statement to Herb that the drivers would "respond to dispatch." This claim is not directly based on any violation of the August 2017 CBA—that CBA did not define the phrase "respond to

[9] The "Marcus model" was based on a 1989 law review note in the *Yale Law Journal* by Stephanie Marcus, which interpreted the 1988 Supreme Court decision in Lingle. Commodore, 120 Wn.2d at 126; see also Stephanie R. Marcus, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 YALE L.J. 209 (1989).

dispatch." Determining whether Hicks's statements were misrepresentations would not have required the trial court to interpret the August 2017 CBA. Although the Union raised provisions of the August 2017 CBA to undercut the reasonableness of Glacier's reliance on Hicks's statement, there was no dispute as to the meaning of these provisions. Under Commodore, Glacier's fraudulent and negligent misrepresentation claims can be resolved by tort law, and the trial court did not need to resolve any disputes in interpreting the August 2017 CBA's provisions. Cf. Joy v. Kaiser Alum. & Chem. Corp., 62 Wn. App. 909, 816 P.2d 90 (1991) (court affirmed dismissal of plaintiff's tort claim against employer because claim required court to interpret employer's promises to plaintiff in CBA). The trial court erred in concluding otherwise.

C. Glacier's Misrepresentation and Tortious Interference Claims

Although the trial court erred in holding that Glacier's claims for misrepresentation were preempted by the LMRA, it also addressed the merits of these claims, concluding Glacier failed to present a genuine issue of material fact. We conclude the trial court correctly dismissed these claims on their merits but do so on alterative grounds. See Jenson v. Scribner, 57 Wn. App. 478, 480, 789 P.2d 306 (1990) (appellate court can affirm the dismissal claims on any ground established by the pleadings and supported by the evidence).

1. Fraudulent and Negligent Misrepresentation

A claim of fraudulent misrepresentation requires proof of a representation of an existing fact. Cornerstone Equip. Leasing, Inc. v. MacLeod, 159 Wn. App.

899, 905, 247 P.3d 790 (2011).[10] It is well established in Washington that a promise of future performance is not an actionable representation of existing fact required for a fraud claim. Adams v. King County, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) ("a false promise does not constitute the representation of existing fact"). A false representation of presently existing fact is also a prerequisite to a negligent misrepresentation claim. Donald B. Murphy Contractors, Inc. v. King County, 112 Wn. App. 192, 197, 49 P.3d 912 (2002).

Hicks's alleged statement that "the drivers will respond to dispatch" is a promise that the drivers will do something in the future. As such, it is not an actionable statement of existing fact. Summary judgment dismissal of Glacier's fraudulent and negligent misrepresentation claim was appropriate on this alternative ground.

2. Tortious Interference

Glacier next maintains the trial court erred in dismissing its claim that the Union tortiously interfered with its performance of the GLY contract. Glacier argued below that the Union interfered with its performance of its contractual obligations to GLY by falsely stating that drivers would show up for the mat pour. The trial court concluded that there was no evidence that Hicks's statement "intended to breach or terminate Glacier's relationship with GLY" or that the alleged

[10] The nine elements of fraud are

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stieneke v. Russi, 145 Wn. App. 544, 563, 190 P.3d 60 (2008).

representation caused Glacier's injury because the drivers had the discretion to refuse to work under the August 2017 CBA. While we agree with Glacier that the trial court applied an incorrect legal standard, we nevertheless affirm the trial court's conclusion that Glacier's evidence failed to establish a question of fact on the element of proximate cause.

The trial court relied on Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 374, 617 P.2d 704 (1980), for the proposition that Glacier had to prove that the Union caused a breach or termination of Glacier's business relationship or contract with GLY. While Brown correctly set out the necessary elements of a claim under *Restatement (Second) Torts* Section 766 (Am. Law Inst. 1979) (tortious interference causing a breach of contract with a third person), that case did not address a claim arising under *Restatement (Second) Torts* Section 766A (tortious interference preventing plaintiff from performing under a contract with a third person). Section 766A provides "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for pecuniary loss resulting to him." Washington recognizes claims under section 766A. Eserhut v. Heister, 52 Wn. App. 515, 518, 762 P.2d 6 (1988); see also Pac. Typesetting Co. v. Int'l Typographical Union, 125 Wash. 273, 216 P. 358 (1923) (union coerced employees to strike to render it impossible for employer to complete printing contract with other companies). Under section 766A, Glacier did not have to prove the Union caused it to breach its contract with GLY or that GLY terminated the contract with Glacier as a result of the mat pour cancellation. It only had to

establish that the Union used improper means to make Glacier's performance of its contract with GLY more expensive or burdensome. Glacier presented evidence to establish this element of its tortious interference claim.

However, the trial court correctly concluded that Glacier failed to establish that the Union, through Hicks's statement, proximately caused the losses associated with canceling the mat pour on August 19. Although causation is usually an issue for the jury, where inferences from the facts are remote or unreasonable, factual causation is not established as a matter of law. Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 103 Wn.2d 800, 805, 699 P.2d 217 (1985) (affirmed dismissal of tortious interference claim). The undisputed evidence in this case showed that Glacier's truck drivers had no contractual obligation to show up for work that night, regardless of any instruction to do so from Hicks.

Although the August 2017 CBA gave Glacier the exclusive power to make work assignments, it was required to follow a specific procedure for doing so. Article 3.02 of the August 2017 CBA provided that Glacier was required to advise drivers by noon on Thursday before the weekend whenever it anticipated weekend work. CP 569, 1677. This notice permitted drivers to volunteer for such jobs. CP 1678. Article 3.02 gave Glacier two options for enlisting volunteers. First, it could offer the weekend job by seniority to employees paid for 32 or fewer hours that week. CP 569, 1678. Or if it could not recruit enough volunteers through this process, it could offer the job by seniority to employees paid that week for more than 32 hours. Id. If, by 5 p.m. on Friday, Glacier did not obtain a sufficient number

of volunteers, it could force a driver to work by using a third option of assigning work by inverse seniority to employees. CP 569, 1679.

But the mandatory assignment process in Article 3.02 remained subject to Article 3.10, which provides that the employer must notify drivers by 9 a.m. each workday if they would be scheduled for work some time that day. CP 570, 1679. If work became available after 9 a.m., the employer "may call drivers" but it could not discipline any employee who declined to report for work. Drivers have no contractual obligation to take dispatch calls after 9:00 a.m. and, if they do, they may accept or decline work without repercussion. CP 570, 1679. Finally, any driver who is scheduled to begin work between 12:00 a.m. and 4:59 a.m. must be given at least 10 hours' notice. CP 570, 1679.

It was undisputed that Glacier did not notify drivers of the midnight mat pour by noon on Thursday, August 17, or by 9:00 a.m. on Friday, August 18. Glacier also called drivers by seniority, rather than by inverse seniority. CP 1680. And because Glacier did not begin contacting drivers until approximately 1:30 p.m. on Friday afternoon, for report times beginning that night at 12:30 a.m., many did not receive the mandatory 10 hours' notice. CP 1703-07. Thus, under the unambiguous terms of the August 2017 CBA, the workers had no obligation to perform work on the night of August 18 or the early morning of August 19.

Glacier concedes the August 2017 CBA did not require any of its drivers to report to work for the mat pour. Glacier argues, however, that the terms of the August 2017 CBA are irrelevant because the Union representative promised the workers would come to work. Even if we accept this assertion as true, there is nothing in this record to support the notion that the Union had any authority or

ability to order drivers to work when the August 2017 CBA did not require them to do so. Even had Hicks instructed the drivers to show up to work that night, Glacier has no evidence the drivers had any duty to comply with such an instruction. Under these circumstances, no reasonable jury could conclude that Hicks's statement caused Glacier's losses. For this reason, summary judgment dismissal of the tortious interference claim was appropriate.

CONCLUSION

We reverse the dismissal of Glacier's property destruction claims arising out of the August 11 work stoppage. Glacier alleged conduct by the Union—sabotage and the intentional destruction of property—that the NLRB has clearly held is not protected under section 7 of the NLRA. We affirm the dismissal of the tort claims arising out of the August 19 mat pour.

Affirmed in part, reversed in part.

Andrus, A.C.J.

WE CONCUR:

Mann, C.J.

Dwyer, J.

JACKSON LEWIS P.C.

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