

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
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## Intentional Interference

Wescold, a privately-held family corporation, hired Glass & Associates to provide consulting services in an effort to make the company profitable. On the morning of Glass' arrival, the board-member called and spoke directly with plaintiff, the General Manager, and instructed him to inform Wescold's President to expect the agents from Glass. Plaintiff left the President a message on his desk. When the agents arrived, the President had not yet seen the message. The President refused the Glass agents access and left the premises. Plaintiff spoke with local counsel, who advised him to get a list of requested information from the Glass agents. When the agents returned, plaintiff met with them and requested a list specifying what they were seeking and he would get authorization from the board before providing any information. The agents agreed and again left to generate the list. Later that evening, one agent

returned and handed plaintiff the list and plaintiff agreed to provide the information to Glass within a few days. The next morning, the agents returned and handed plaintiff a letter from the Wescold board, placing plaintiff on paid administrative leave and excluding him from all business operations. Plaintiff was subsequently terminated. Defendants Glass and its agents moved for summary judgment on plaintiff's first claim, intentional interference with economic relations. Judge Hubel granted this motion, finding no evidence suggesting that the alleged interference was accomplished through an improper purpose or a wrongful means.

Nelson v. Glass & Assoc.,  
CV 02-469-HU

(Opinion, February 2004)

Plaintiff's Counsel:

Craig Alan Crispin

Defense Counsel:

Courtney W. Wiswall

## Excessive Force

On December 5, 1999,  
Damon Lowery consumed

hallucinogenic mushrooms, fought with a friend, and, when police officers arrived, jumped or fell out of a second story plate-glass window onto a concrete patio. Lowery was surrounded by seven officers, and although unarmed and severely injured, was shot ten times with a "less lethal" shotgun, sprayed with at least six cans of pepper spray, hit numerous times with ASP batons, and finally was forced into the maximum restraint position while an officer stood on his upper body and head. He died at the scene. Lowery's parents sued on behalf of themselves and their estate, alleging that excessive force caused Lowery's death and that Portland failed to adequately train its officers.

After an eight day trial, the jury found that the officers did not use excessive force. As a result, the jury never reached the issue of whether excessive force caused Lowery's death or whether Portland failed to adequately train its officers. Plaintiffs filed post-trial motions asking for judgment as a matter of law that excessive force was

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used on Lowery (regardless of whether it caused his death), and alternatively, for a new trial on these matters.

Judge Janice Stewart found that the officers involved (with the exception of one not present on the scene) were liable for excessive force as a matter of law for the first four to five “less lethal” rounds and the first three cans of pepper spray used on Lowery while he was still lying or kneeling on the patio. Alternatively, Judge Stewart granted a new trial on this initial use of force.

Judge Stewart denied the motion for judgment as a matter of law on the subsequent force used after Lowery charged one of the officers and grabbed him about the waist. At that point, a reasonable jury could conclude Lowery posed a significantly greater risk to the officers. In the alternative, Judge Stewart, after raising the issue *sua sponte*, concluded that she erred by failing to instruct the jury that: (1) it could find that the use of force was excessive at any point during Lowery’s encounter with defendants, and not at other points; (2) a strong governmental interest is required to justify the use of “less lethal” shots, pepper spray, and standing on a person who is in the maximum restraint position; and (3) if the initial use of “less lethal” shots and pepper spray provoked Lowery, then the

subsequent force used to restrain him also could be unreasonable – even if otherwise reasonable. Judge Stewart held that although plaintiffs did not request these jury instructions, they were necessary to prevent a miscarriage of justice.

Finally, Judge Stewart rejected plaintiff’s motion for a new trial based on inconsistent verdict forms. The jury had delivered a first verdict that only answered part of the required questions. After the presiding juror explained there was an error, Judge Stewart sent the jury back with a second verdict form, which it returned finding defendants not liable. Judge Stewart found the second verdict acceptable because its inconsistency with the first verdict can be explained either by a simple scrivener’s error or by redeliberations after re-submission.

Marsall v. City of Portland,

CV 01-1014-ST

(Opinion May 7, 2004)

Plaintiff’s Counsel:

Edwin Budge

Defense Counsel:

Harry Auerbach

## Contract

Plaintiffs alleged that defendant Railroad breached its contract with plaintiffs by

failing and refusing to convey the real property to plaintiffs, and by selling it to a third party. Defendant argued that no contract to sell was ever formed. Judge Aiken held that there was no evidence that defendant breached an agreement to sell the property to plaintiffs by selling the property instead to a third party prior to termination of the lease. The court further found no argument or evidence to support plaintiffs’ claim for interference with contract. Judge Aiken granted summary judgment in favor of the defendant and dismissed the case.

NW Sales v. Union Pac. RR,

CV 03-6068-AA

(Opinion, June 3, 2004)

Plaintiff’s Counsel:

Patrick Kouba

Defense Counsel:

Jill Schneider