

1993

Ann C. House v. Armour of America, Inc., Lawco Police Supply, E.I. Du Pont de Nemours : Petition for Rehearing

Utah Court of Appeals

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UTAH
COURT
OF
APPEALS

IN THE UTAH COURT OF APPEALS NO. 930552 - CA

ANN C. HOUSE, individually, and
as the Personal Representative of
the Estate of Freddie Floyd House,

Plaintiff/Appellant,

vs.

ARMOUR OF AMERICA, INC., a
California corporation; LAWCO
POLICE SUPPLY, a Utah corporation,
E.I. Du PONT de NEMOURS, and
JOHN DOES III through XX,

Defendants/Appellees.

Case No. 930552-CA

**PETITION FOR REHEARING
OF APPELLEE
LAWCO POLICE SUPPLY**

Appeal from the Judgment of the Third Judicial District Court,
Salt Lake County, the Honorable Richard H. Moffat, Presiding

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NOV 28 1994

Marilyn M. Branch
Clerk of Court

FILED

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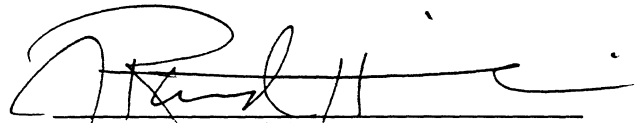
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**STATEMENT OF COUNSEL PURSUANT TO
UTAH R. APP. P. 35**

The undersigned attorneys hereby certify that Lawco Police Supply's petition for rehearing is presented in good faith and not for delay.

DATED this 28th day of November, 1994.



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Appellee Lawco Police Supply

Pursuant to Rule 35, Utah R. App. Pro., defendant-appellee Lawco Police Supply ("Lawco") petitions the Court for rehearing of its Opinion reported at 251 Utah Adv. Rep. 14 ("the Opinion"), which reversed the summary judgment entered in the district court dismissing plaintiff-appellant Ann House's claims against Lawco. For the reasons set forth below, this Court should grant this petition and affirm the judgment of the district court.

INTRODUCTION

Lawco joins in the Petition for Rehearing of defendant-appellee Armour of America, Inc. ("Armour"). In addition to the points raised in Armour's petition, which are equally applicable to Lawco, rehearing is required on the claim against Lawco because, although the Court determined that the testimony of Officer Karl Bartell was sufficient to raise a question of whether a warranty of fitness for a particular purpose was given (Opinion, 251 Utah Adv. Rep. at 21), the Court overlooked or misapprehended that no evidence supports a breach of the purported warranty.

ARGUMENT

I. THE OPINION OVERLOOKS THAT THERE IS NO EVIDENCE OF A BREACH OF THE PURPORTED WARRANTY OF FITNESS.

Plaintiff stipulated that there was no manufacturing defect in either the soft armor vest or the hard ceramic insert. At page two of the Initial Pre-trial Order (R. 1276, Add. Ex. 1) plaintiff stated, "Lt. House's 'bullet proof vest' was defective and unreasonably dangerous, not because of any defect in its material, design or manufacturing, but because it was unaccompanied by adequate warnings or instructions concerning its capabilities and limitations" Plaintiff has never claimed elsewhere that the ceramic insert was defective,

or would not stop rifle fire. As the Court states in the Opinion, "The bullet struck the non-ceramic inside edge of the hard armor chest panel and penetrated through the soft body portion of Lieutenant House's bullet resistant vest."

Plaintiff relied entirely on Mr. Bartell's testimony to make out her claim of a warranty of fitness. Mr. Bartell knew that the hard ceramic plate was necessary to stop rifle fire; he claims that this was part of the sales representation. In addition to his testimony quoted in the Opinion, he stated:

Q. Did you understand that it would stop rifle fire without the plate?

A. Obviously without the plate it wouldn't stop a rifle slug, but it was represented if the rifle slug were to hit any part of that plate it would stop it.

(R. 1357, Add. Ex. 6 at 26).

The round that killed Lieutenant House missed the strike face of the ceramic insert, striking only the non-ceramic inside edge of the plate. This fact is not disputed.

In both her opening brief at pages 46 and 47 and her reply brief at pages 28 and 29, plaintiff implied that the warranty of fitness for a particular purpose was that the soft body armor would stop a rifle round. However, she relies solely on the testimony of Officer Bartell to establish the warranty of fitness, and Officer Bartell made clear that he understood the sales representative, whoever he may have been, to have told the Tactical Squad that the hard ceramic insert was necessary to stop rifle rounds. Only Officer Bartell was willing to say that the Tactical Squad made a decision based on the representations of one salesman. Other officers agreed that the tactical squad

made its own independent investigation, talking to several different sales representatives and collecting and studying various technical and promotional literature. Plaintiff has stipulated that they did so. (Add. Ex. 1, ¶ 23, R. 1292-93).

The Opinion is silent as to what the warranty of fitness entailed and how it might have been breached. Plaintiff advanced no evidence that any warranty of fitness that may be constructed out of Officer Bartell's recollection of an eleven year old sales presentation may have been breached. There is certainly no evidence that the ceramic chest plate failed to stop a rifle round. The round in question missed the plate, contacting only the non-ceramic inside edge of it. Because the Opinion overlooks this fundamental element of plaintiff's claim, a rehearing should be granted.

II. LAWCO JOINS IN ARMOUR OF AMERICA, INC.'S PETITION FOR REHEARING

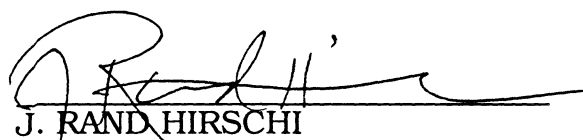
The points made by Armour in its Petition for Rehearing are equally applicable to Lawco. In connection with the review of undisputed facts at pages 12 and 13 of Armour's Petition—that there is no evidence that Lt. House knowingly exposed himself to rifle fire and that the arrest plan was made without reference to the stopping capacity of the vests of the various officers involved—the Utah Supreme Court said in *Mitchell v. Pearson Enterprises*, 697 P.2d 240, 246 (Utah 1985), quoting *Staheli v. Farmers' Cooperative of Southern Utah*, 655 P.2d 680 (Utah 1982), "When the proximate cause of an injury is left to speculation, the claim fails as a matter of law." In *Mitchell* the Court upheld a summary judgment because the proximate cause depended on speculation. Here, plaintiff has failed to present any evidence that Lt. House's conduct at

Marion had anything at all to do with the vest he was wearing. As Armour points out in its Petition, all of the evidence is that the arrest plan was formulated without reference to the body armor of the participants, that there was no knowing exposure to rifle fire, and that all of the officers, both those with rifle resistant vests and those without, were equally exposed to the rifle fire that killed Lieutenant House.

CONCLUSION

For the reasons stated in this Petition and Armour's Petition, a rehearing should be granted and the judgment of the District Court Paffirmed.

DATED this 28th day of November, 1994.



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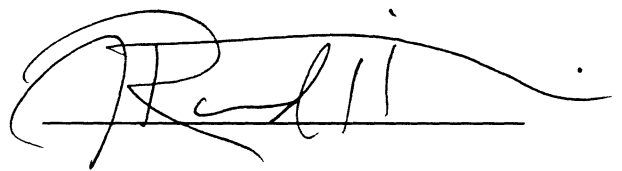
Attorneys for Defendant and
Appellee Lawco Police Supply

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 21(d) Rules of the Utah Court of Appeals, a true copy of the attached PETITION FOR REHEARING OF APPELLEE LAWCO POLICE SUPPLY was served upon the following by depositing a properly addressed envelope containing the same in the U.S. Mail, postage pre-paid, this 28th day of November, 1994.

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A handwritten signature in black ink, appearing to read "R. Hill", written over a horizontal line.