

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

ACE AMERICAN INSURANCE COMPANY,)
a Pennsylvania corporation, as subrogee of)
SAFARILAND, LLC., a Florida limited)
liability company (formerly known as ARMOR)
HOLDINGS PRODUCTS, LLC., the successor)
in interest to PRO TECH ARMORED)
PRODUCTS OF MASSACHUSETTS, INC.),)
and FEDERAL INSURANCE COMPANY, an)
Indiana corporation, as subrogee of)
SAFARILAND, LLC., a Florida limited)
liability company (formerly known as ARMOR)
HOLDINGS PRODUCTS, LLC., the successor)
in interest to PRO TECH ARMORED)
PRODUCTS OF MASSACHUSETTS, INC.),)

Plaintiff,)

v.)

SANDBERG PHOENIX & VON GONTARD,)
P.C., a Missouri professional corporation; G.)
KEITH PHOENIX, a Missouri resident; AND)
W. WYLIE BLAIR, a Missouri resident,)

Defendants.)

CASE NO. 12-242-MJR-DGW
COMPLAINT

NOW COME Plaintiffs ACE American Insurance Company (“ACE”) and Federal Insurance Company (“Federal”), by and through their attorneys, and for their complaint against Defendants, SANDBERG PHOENIX & VON GONTARD P.C. (“Sandberg Phoenix”), G. KEITH PHOENIX (Phoenix), AND W. WYLIE BLAIR (“Blair”), alleges as follows:

INTRODUCTION

1. This is an action against Defendants for legal malpractice arising out of their negligent defense of Safariland, LLC and related and/or predecessor companies (hereinafter referred to collectively as “Safariland”) in the lawsuit styled as *Brough v. Safariland, LLC, et. al.*, Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 07-L-358 (the “*Brough* case”). At all relevant times Plaintiff ACE was the second-level excess liability insurer of Safariland, and Plaintiff Federal was the primary and first-level excess liability insurer of Safariland. As a result of Defendants’ legal malpractice, the trial court sanctioned Safariland for Defendants’ egregious discovery misconduct and struck all of Safariland’s defenses to liability in the *Brough* case. As a result of that sanction, Safariland and its insurers, ACE and Federal, prudently determined to settle the *Brough* case immediately prior to trial. Pursuant to that settlement, ACE and Federal have paid substantial sums on Safariland’s behalf. In addition, due to Defendants’ malpractice and breaches of duty, Safariland and its insurers, ACE and Federal, incurred substantial attorney fees that would not have been incurred but for Defendants’ legal malpractice. Through this legal and equitable subrogation action against Defendants, ACE and Federal seek to recover the full amount of the settlement they paid on Safariland’s behalf, legal expenses they paid on Safariland’s behalf, and other damages sustained due to Defendants’ legal malpractice and breaches of duty.

PARTIES

2. Plaintiff ACE American Insurance Company (“ACE”) is and was at all times relevant to this Complaint an insurance company incorporated in the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. Plaintiff ACE issued an Excess Liability Catastrophe Policy (the “ACE Policy”) to Armor Holdings, Inc., predecessor in interest to Safariland, LLC.

3. Plaintiff Federal Insurance Company (“Federal”) is and was at all times relevant to this Complaint an insurance company incorporated in the State of Indiana, with its principal place of business in Warren, New Jersey. Plaintiff Federal issued a primary Commercial General Liability policy (the “Primary Policy”) to Armor Holdings, Inc., predecessor in interest to Safariland, LLC. Plaintiff Federal also issued a Commercial Excess and Umbrella liability insurance policy (the “Umbrella Policy”) to Armor Holdings, Inc., predecessor in interest to Safariland, LLC.

4. Defendant Sandberg Phoenix & Von Gontard P.C. (“Sandberg Phoenix”) is and was at all times relevant to this Complaint a professional corporation incorporated under the laws of the State of Missouri. Upon information and belief, Sandberg Phoenix’s principal place of business is in St. Louis, Missouri.

5. Defendant G. Keith Phoenix is and was at all times relevant to this Complaint an individual residing in the State of Missouri. Mr. Phoenix is and was at all times relevant to this Complaint authorized to practice law in the State of Illinois and is and was at all times relevant to this Complaint employed as Senior Counsel at Sandberg Phoenix.

6. Defendant W. Wylie Blair is and was at all times relevant to this Complaint an individual residing in the State of Missouri. Mr. Blair is and was at all times relevant to this Complaint authorized to practice law in the State of Illinois and is and was at all times relevant to this Complaint employed as an Associate attorney at Sandberg Phoenix.

JURISDICTION AND VENUE

7. Plaintiffs are incorporated and have their principal places of business in Pennsylvania, Indiana and New Jersey. Defendant Sandberg Phoenix is incorporated and has its principal place of business in Missouri, and Defendants Phoenix and Blair are residents of Missouri. The amount in controversy exceeds \$75,000. This Court has jurisdiction pursuant to 28 U.S.C. §1332 (Diversity of Citizenship).

8. Venue in the Southern District of Illinois, East St. Louis Division, is proper under 28 U.S.C. §1391 because a substantial part of the acts or omissions giving rise to Plaintiffs' claims occurred in this District, in St. Clair County, Illinois.

BACKGROUND FACTS

9. In 2006, Jon Brough, a police sergeant for the City of Belleville, Illinois, participated in a tactical team high-risk dynamic entry into a residence for the apprehension and arrest of a fugitive. Brough was using an "Intruder" brand ballistic shield, and flashbang stun grenades were used by his team, during the dynamic entry. Both the shield and stun grenades were allegedly manufactured and sold by Safariland, LLC, or a predecessor thereof. During the dynamic entry, the fugitive fired a shotgun in Mr. Brough's direction, striking him in the face and causing him serious disfiguring and disabling injuries.

10. Mr. Brough and his wife thereafter sued Safariland, seeking to hold it liable for their injuries. The Broughs' legal claims changed throughout the course of the litigation, but generally alleged various causes of action against Safariland for products liability and negligence. Safariland denied the *Brough* plaintiffs' allegations of products liability and negligence.

11. Defendants were retained by Safariland in 2008 to defend it in the *Brough* case. Defendants entered their appearances on behalf of Safariland in or about September 2008, and after a couple of continuances, trial in the *Brough* case was scheduled to begin on August 22, 2011.

12. Approximately one month before the scheduled trial date, the *Brough* plaintiffs filed their Tenth Amended Complaint against Safariland. Count I of the *Brough* Complaint asserted that Safariland failed to warn or instruct users that a shield operator should not lead a tactical team during a dynamic entry or that the shield should not be used to push on doors during a dynamic entry. Counts II-IV asserted that Safariland and its predecessors in interest negligently promoted the use of ballistic shields in dynamic SWAT entries and the use of

flashbang stun grenades and ballistic shields simultaneously during dynamic entries when they knew such use to be a hazard to team members. Counts V-VII asserted that Safariland and its predecessors in interest willfully and wantonly promoted the use of ballistic shields during dynamic SWAT team entries and encouraged police departments similar to the one in Belleville, Illinois, to have tactical response teams perform high risk dynamic entries when it knew such actions presented a hazard to team members. Counts VIII-XI asserted claims for loss of consortium and damages on behalf of Wendy Brough.

13. On July 15, 2011, the trial court granted Plaintiffs' motion for summary judgment on one aspect of the product liability claim (included in Count I of the Ninth Amended Complaint) based on failure to warn that the shield should not be used to push on doors during a dynamic entry. Despite the summary judgment ruling by the trial court, Defendants, appellate counsel for Safariland, and even the *Brough* plaintiffs' counsel, agreed the decision was likely to be reversed on appeal.

14. Despite having asserted the willful and wanton misconduct claim in an apparent effort to obtain an award of punitive damages at trial, the *Brough* plaintiffs never requested the evidentiary hearing required under Illinois law, 735 ILCS 5/2-604.1, as a condition precedent to assertion of a claim seeking punitive damages. Instead, on August 26, 2011, the plaintiffs filed an Eleventh Amended Complaint, dropping the willful and wanton misconduct claims and any potential claim for punitive damages.

15. Safariland also had strong legal and factual defenses to the Broughs' other liability theories. Safariland denied that the Broughs would be able to prove the elements of their product liability and negligence claims. Safariland also asserted that the conduct of third parties, and the contributory negligence of Mr. Brough, were the predominant causes of the Broughs' injuries. The law and the facts supported Safariland's defenses.

16. Under Illinois law, a defendant will be liable for failure to warn only if the injury it should have warned about was reasonably foreseeable, as assessed from an objective standpoint.

A plaintiff must prove that the defendant—here, Safariland—knew or should have known of the dangers posed by its product. Moreover, a product manufacturer has no duty to warn of dangers that are readily apparent or “open and obvious.”

17. The “gap hazard” referenced by the Brougths was “open and obvious,” and therefore it could not serve as a basis for liability based on the Brougths’ failure to warn or negligence theories. It is obvious—particularly to a trained SWAT member—that if one places a shield against a door and pushes the door open, following the door swing, there will be a gap between the door frame and the shield and part of the shield holder’s body will be exposed. Mr. Brough acknowledged that he was aware that for a shield to be effective it needed to be between his person and the threat. Because Safariland had no duty to warn of the inherent propensities of its product which are obvious to those who come into contact with it, as a matter of law Safariland could not have been held liable for failing to warn of the “gap hazard.”

18. There was also evidence Mr. Brough did not use the shield to push on the door and that he was not shot through a “gap” that resulted from pushing against the door. If Mr. Brough’s injuries did not result from being shot through a gap created by his pushing on the door with the shield, Safariland could not be liable under the Plaintiffs’ product liability theory even if it had breached a duty to warn.

19. There was considerable evidence that the use of a ballistic shield during dynamic SWAT entries and use of “flashbang stun grenades” and ballistic shields simultaneously during dynamic entries was a matter of local and individual preference in light of tactical circumstances. Several experienced law enforcement officers who were expected to testify as witnesses in the *Brough* case testified in their depositions that ballistic shields can or should be used in dynamic entries. Based on this evidence, a defense verdict on the product liability and negligence claims was likely.

20. There was also evidence establishing that neither Mr. Brough nor his employer saw or relied on any promotional materials from Safariland, thus the *Brough* plaintiffs would

have been unable to prove that Safariland's promotion of ballistic shields in dynamic entries proximately caused the Broughs' injuries.

21. There was no evidence that supported the Broughs' allegation that flashbang stun grenades should not be used for dynamic entries when a ballistic shield was also being used, so there was no basis for any negligence liability on this theory, either.

22. There was ample evidence that the Belleville Police Department's procedural and tactical errors contributed to cause Mr. Brough's injuries. The Belleville Chief of Police testified that a dynamic entry should not have been used in the attempt to apprehend the fugitive that shot Mr. Brough. Mr. Brough and other members of the dynamic entry team testified in their depositions that that the dynamic entry team was improperly led and briefed on the day of the entry, and that standard practices, such as informing the entry team that the fugitive was believed to be armed, were not followed.

23. There was also evidence that, to the extent Mr. Brough's injuries resulted from the manner in which he used Safariland's shield, his own negligence contributed to cause his injuries. Mr. Brough testified that he knew the shield would only protect him if he held the shield between himself and the threat. The evidence established that the gun shot that struck Mr. Brough did not impact the shield and, therefore, that the shield was not held between Mr. Brough and the fugitive. If a jury found Mr. Brough was more than fifty percent at fault for his injuries, any recovery would have been barred as a matter of law.

24. Despite Safariland's strong legal and factual defenses to the Broughs' liability theories, Defendants did not attempt to seek an early ruling as to Safariland's liability.

25. Defendant Phoenix, lead counsel for Safariland in the *Brough* case, failed to adequately supervise or direct the defense of Safariland in *Brough*. Defendant Phoenix and the other attorneys at Sandberg Phoenix failed to assert legal defenses on behalf of Safariland to seek dismissal as a matter of law of the Brough plaintiffs' claims, and they failed to competently oppose the Broughs' motion for summary judgment on their product liability claim.

26. Notwithstanding Defendants' advice to Safariland that the Broughs' claims had no merit, Defendants elected not to make a motion for summary judgment or dismissal as a matter of law. Defendants thereby foreclosed any opportunity for Safariland to terminate the Broughs' claims in Safariland's favor before trial.

27. The parties in the *Brough* case engaged in extensive pretrial discovery over a period of years. The plaintiffs in *Brough* served Safariland with extensive document requests seeking numerous categories of documents, including "the statement of any witness or other persons having knowledge of any facts relevant to this suit."

28. On behalf of Safariland, Defendants had contacted various potential witnesses to interview them about the *Brough* case. Defendants drafted memoranda and other correspondence summarizing their interviews of these witnesses.

29. Despite the fact that they created the witness interview summaries, which documents were responsive to the discovery requests propounded by the *Brough* plaintiffs, Defendants failed to timely produce, identify, log or otherwise inform the *Brough* plaintiffs of the existence of the documents.

30. In June and July 2010, the *Brough* plaintiffs filed motions to compel and motions seeking sanctions based on Safariland's failure to produce documents containing witnesses' statements.

31. Following the *Brough* plaintiffs' discovery motions in 2010, Defendants determined they, acting on behalf of Safariland, had failed to produce, identify, log or otherwise inform the *Brough* plaintiffs of requested documents. Defendants then produced additional documents to the *Brough* plaintiffs, and, in an August 2010 letter from Defendant Phoenix to Safariland, stated that documents requested by the *Brough* plaintiffs in discovery "have now all been produced."

32. In Defendants' communications with Safariland from 2008 through 2011, Defendants reported to Safariland that the *Brough* plaintiffs were trying, and would continue to

try, to obtain a ruling striking Safariland's pleadings as a sanction against Safariland for discovery misconduct. In an August 2010 letter to Safariland, Defendant Phoenix stated, "it is imperative that all information and documents responsive to plaintiffs' requests are timely gathered and disclosed."

33. Contrary to their representation to Safariland and its insurers that all documents called for in the Brough plaintiffs' discovery requests had been produced, as of August 2010 and continuing until August 2011, Defendants failed to produce, identify or log all responsive documents. Defendants' failures to appropriately respond to discovery and inaccurate representations to Safariland constituted violations of Illinois Rules of Professional Conduct ("IRPC") 1.1 (Competence), 1.3 (Diligence) and 1.4 (Communication).

34. Defendants failed to disclose to Safariland that it had not produced all documents in their possession that were responsive to the *Brough* plaintiffs' discovery requests. Defendants' failure to disclose their noncompliance with the Brough plaintiffs' discovery requests constituted violations of IRPC 1.1 (Competence), 1.3 (Diligence), and 1.4 (Communication).

35. Defendants waited until after the close of discovery, within less than a month of the date on which trial was scheduled to begin, to produce or log additional responsive discovery documents.

36. In response to Defendants' late disclosure of the responsive documents, in August 2011 the *Brough* plaintiffs filed additional motions seeking sanctions against Safariland based on the late production.

37. In opposing the *Brough* plaintiffs' motions for sanctions, the Defendants represented to the court that they had produced or disclosed all responsive documents by the time of the hearing. However, by the end of the week-long hearing, it had become apparent that Defendants had not produced or disclosed all responsive documents, despite their assurances to

the court to the contrary. The Defendants' lack of candor to the court constituted a violation of IRPC 3.3 (Candor Toward the Tribunal).

38. After a week-long hearing on the *Brough* plaintiffs' motions for sanctions, the trial court judge in St. Clair County sanctioned Safariland for its counsel's misconduct, striking Safariland's pleadings, and thus all defenses to liability, on the eve of trial. The court's order, as amended on October 28, 2011, states in pertinent part:

Based solely on the evidence presented in open court, the Court finds that the discovery violations committed by defense counsel requires the Court to impose a sanction under Supreme Court Rule 219.

The Court *finds it disappointing* that in the face of all the evidence defense counsel still argues that their *flagrant violations* fall short of sanctionable conduct.

Additionally, the Court *finds defense counsel's answers to these discovery violations totally unsatisfactory*.

It is the responsibility of the Court to confront these violations without hesitation and to impose a sanction proportionate to the violations and NOT TO PUNISH. *The discovery violations committed by defense counsel were not mere delays or insignificant mistakes that occurred inadvertently but rather deliberate or systematic conduct. Their violations undermine the entire system. Their actions showed a pronounced disregard of the Court's authority because they believe that they and they alone decide discovery matters. These violations cannot be cured and they have deprived Wendy and Jon Brough of a fair trial.*

The striking of pleadings is to be granted *only in the most egregious and systematic, deliberate or intentional discovery violations*. This Court has never granted such a motion in its seventeen year tenure and never filed such a motion as an attorney, but justice requires the Court to strike the defendant's pleadings. Defense counsel's misconduct is binding on their client. As difficult as a decision as this has been, the Court believes the ruling is just.

(Amended Order, *Brough v. Armor Holdings*, No. 70-L-358 (Ill. Cir. Ct. Oct. 28, 2011)

(underlining and capitals in original, remaining emphasis added), attached hereto as Exhibit "A.").

39. As a result of the court's order, the potential verdict and settlement value of the *Brough* case increased substantially.

40. Faced with the forfeiture of all defenses due to Defendants' breaches of duty, discovery misconduct and the resulting prospect of an enormous verdict after a damages-only trial, Safariland and its insurers negotiated a settlement with the Broughs. The negotiated settlement called for Safariland's insurers to make substantial monetary payments to the Broughs. Pursuant to confidentiality provisions contained in the settlement agreement, Plaintiffs ACE and Federal are prohibited from publicly disclosing the dollar amount of the settlement.

41. Federal issued Commercial General Liability Policy No. 3583-99-36 ("Federal Primary Policy"), effective April 1, 2006 to April 1, 2007, to Armor Holdings, Inc. Safariland, LLC is the successor in interest to Armor Holdings, Inc. and qualified as an insured under the Federal Primary Policy. The Federal Primary Policy provided limits of \$1 million per occurrence, in excess of a \$1 million self-insured retention. Pursuant to the Federal Primary Policy, Federal was required to pay amounts for which its insured was liable, including settlements or judgments, within the scope of coverage provided by the Policy. Federal was also required to pay defense expenses incurred by its insured in defense of claims within the scope of coverage provided by the Policy. The Federal Primary Policy provides Federal with a contractual right to subrogation in the event Federal makes any payment under the Policy.

42. Federal issued Commercial Excess and Umbrella Policy No. 7981-84-53 ("Federal Excess Policy"), effective April 1, 2006 to April 1, 2007, to Armor Holdings, Inc. Safariland, LLC is the successor in interest to Armor Holdings, Inc. and qualified as an insured under the Federal Excess Policy. The Federal Excess Policy provided limits of \$5 million per occurrence. Pursuant to the Federal Excess Policy, Federal was required to pay amounts for which its insured was liable, including settlements or judgments, within the scope of coverage provided by the policy. The Federal Excess Policy provides Federal with a contractual right to subrogation in the event Federal makes any payment under the Policy.

43. ACE issued Excess Liability Catastrophe Policy No. XCPG23712623 (“ACE Excess Policy”), effective April 1, 2006 to April 1, 2007, to Armor Holdings, Inc. Safariland, LLC is the successor in interest to Armor Holdings, Inc. and qualified as an insured under the ACE Excess Policy. The ACE Excess Policy provided limits of up to \$20 million per occurrence. Pursuant to the ACE Excess Policy, ACE was required to pay amounts for which its insured was liable, including settlements or judgments, within the scope of coverage provided by that policy. The ACE Policy also provides ACE with a contractual right to subrogation in the event ACE makes any payment under the policy.

44. Pursuant to the terms of the Federal Primary Policy, Federal provided a defense to Safariland in the *Brough* case once the Self-Insured Retention had been satisfied. Federal paid Defendant Sandberg Phoenix to defend Safariland in the *Brough* case. In the course of that defense effort, Federal was required to pay for defense counsel to represent Safariland in connection with the hearing on the Broughs’ motions for sanctions. Federal incurred substantial fees and expenses in connection with the attorney’s fees and costs it paid on Safariland’s behalf.

45. Pursuant to the terms of the ACE Excess Policy, ACE retained additional defense counsel to represent Safariland at the hearing on the motion for sanctions. The additional defense counsel retained by ACE to represent Safariland was necessary because Defendants’ own conduct was placed at issue in the hearing and Defendants’ had by their misconduct created a conflict of interest between their own self interests and the interests of Safariland and its insurers.

46. Also pursuant to the terms of their respective policies, Federal and ACE were required to pay a substantial amount of money to settle the Broughs’ claims against Safariland in order to avoid the substantial risk of an even larger verdict against Safariland after trial.

47. The sums that Federal and ACE had to pay in defense against the motions for sanctions, and the sums they had to pay to settle the *Brough* litigation were incurred because of Defendants' legal malpractice and breaches of duty, and they are therefore rightfully the responsibility of Defendants.

**COUNT I – LEGAL MALPRACTICE
(Conventional Subrogation Claim by ACE Against All Defendants)**

48. Plaintiffs incorporate by reference Paragraphs 1 through 47 as though set forth fully herein.

49. Defendants represented Safariland as counsel of record in the *Brough* case.

50. By virtue of their representation of Safariland, Defendants owed Safariland a duty of reasonable care and professional competence arising from the attorney-client relationship.

51. Defendants guaranteed that Safariland would be provided professional and competent representation.

52. Defendants also guaranteed to Safariland that it would "receive timely, responsive and cost-effective legal services," and Safariland's satisfaction with how they provided their services, promising to resolve any service-related issue to Safariland's reasonable satisfaction, even if it meant reducing Defendants' fees.

53. In their representation of Safariland in the *Brough* case, Defendants failed to satisfy their professional obligations and neglected to exercise a reasonable degree of professional care and skill, thereby breaching their duty of care to Safariland. Defendants' violations of their professional obligations and breach of their standard of care includes their repeated, egregious discovery violations during their representation of Safariland, and their failure to appropriately defend Safariland in the *Brough* case.

54. Defendants' misconduct violated various governing Rules of Professional Conduct, including but not limited to IRPC 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), and 3.3 (Candor Toward the Tribunal).

55. Defendants' egregious discovery violations caused the court in the *Brough* case to enter an order striking all of Safariland's pleadings, including all of its defenses, as a sanction for Defendants' actions. As a direct result of forfeiting all of its meritorious defenses, Safariland lost the opportunity to try the case to obtain a defense verdict. Safariland was forced to settle with the *Brough* plaintiffs for a sum substantially greater than it would have had to pay but for Defendants' misconduct, causing it damages in the amount of the settlement and the additional attorney fees Safariland incurred due to Defendants' misconduct.

56. In addition, Defendants' failure to conduct the defense of Safariland using a reasonable degree of professional care also led to Safariland being found liable on one of the *Broughs'* liability theories and to Safariland not securing the dismissal of the *Brough* case prior to trial. As a direct result of its disadvantaged position as the trial date approached, Safariland was forced to settle with the *Brough* plaintiffs for a sum substantially greater than it would have had to pay but for Defendants' breach of the standard of care. Accordingly, Defendants' breach of the standard of care caused Safariland damages in the full amount of the settlement and additional attorney fees Safariland incurred due to Defendants' malpractice.

57. But for Defendants' misconduct, which breached their duty of care to Safariland, Safariland would either have received a directed verdict or jury verdict in its favor, a favorable result on appeal, or it would have settled the *Brough* case for substantially less than the final settlement amount.

58. The striking of Safariland's meritorious defenses, which was a proximate result of Defendants' malpractice, was the legal cause of Safariland's injuries.

59. Safariland thus has a meritorious cause of action for legal malpractice against Defendants arising out of their negligent conduct and their breaches of their duties in representing Safariland during the *Brough* case.

60. ACE, as excess liability insurer to Safariland, paid a substantial sum toward the settlement in the *Brough* case pursuant to the ACE Policy and for attorney fees that were necessitated by the Defendants' discovery misconduct, as a direct and proximate result of Defendants' malpractice, thereby suffering injury in that amount.

61. ACE is a contractual subrogee of Safariland's claims against Defendants arising out of Defendants' legal malpractice during the *Brough* case, and is entitled to recover all sums ACE was required to expend due to the Defendants' malpractice.

62. ACE is therefore contractually subrogated to Safariland's rights of recovery from Defendants.

**COUNT II – LEGAL MALPRACTICE
(Conventional Subrogation Claim by Federal Against All Defendants)**

63. Plaintiffs incorporate by reference Paragraphs 1 through 60 as though set forth fully herein.

64. Defendants represented Safariland as counsel of record in the *Brough* case.

65. By virtue of their representation of Safariland, Defendants owed Safariland a duty of reasonable care and professional competence arising from the attorney-client relationship.

66. Defendants guaranteed that Safariland would be provided professional and competent representation.

67. Defendants also guaranteed to Safariland that it would "receive timely, responsive and cost-effective legal services," and Safariland's satisfaction with how they provided their services, promising to resolve any service-related issue to Safariland's reasonable satisfaction, even if it meant reducing Defendants' fees.

68. In their representation of Safariland in the *Brough* case, Defendants failed to satisfy their professional obligations and neglected to exercise a reasonable degree of professional care and skill, thereby breaching their duty of care to Safariland. Defendants' violations of their professional obligations and breach of their standard of care includes their repeated, egregious discovery violations during their representation of Safariland, and their failure to appropriately defend Safariland in the *Brough* case.

69. Defendants' conduct violated various governing rules of professional conduct, including but not limited to IRPC 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), and 3.3 (Candor Toward the Tribunal).

70. Defendants' egregious discovery violations caused the court in the *Brough* case to enter an order striking all of Safariland's pleadings, including all of its defenses, as a sanction for Defendants' actions. As a direct result of forfeiting all of its meritorious defenses, Safariland lost the opportunity to try the case to obtain a defense verdict. Safariland was forced to settle with the *Brough* plaintiffs for a sum substantially greater than it would have had to pay but for Defendants' misconduct, causing it damages in the amount of the settlement and the additional attorney fees Safariland incurred due to Defendants' misconduct.

71. In addition, Defendants' failure to conduct the defense of Safariland using a reasonable degree of professional care also led to Safariland being found liable on one of the Broughs' liability theories and to Safariland not securing the dismissal of the *Brough* case prior to trial. As a direct result of its disadvantaged position as the trial date approached, Safariland was forced to settle with the *Brough* plaintiffs for a sum substantially greater than it would have had to pay but for Defendants' breach of the standard of care. Accordingly, Defendants' breach of the standard of care caused Safariland damages in the amount of the settlement and additional attorney fees Safariland incurred due to Defendants' malpractice.

72. But for Defendants' misconduct, which breached their duty of care to Safariland, Safariland would either have received a directed verdict or jury verdict in its favor, a favorable result on appeal, or it would have settled the *Brough* case for substantially less than the final settlement amount.

73. The striking of Safariland's meritorious defenses, which was a proximate result of Defendants' malpractice, was the legal cause of Safariland's injuries.

74. Safariland thus has a meritorious cause of action for legal malpractice against Defendants arising out of their negligent conduct in representing Safariland during the *Brough* case.

75. Federal, pursuant to the Federal Primary Policy and Federal Excess Policy it issued, paid a substantial sum toward the settlement in the *Brough* case and for attorney fees that were necessitated by the Defendants' discovery misconduct, as a direct and proximate result of Defendants' malpractice, thereby suffering injury in that amount.

76. Federal is a contractual subrogee of Safariland's claims against Defendants arising out of Defendants' legal malpractice during the *Brough* case, and is entitled to recover all sums Federal was required to expend due to the Defendants' malpractice.

77. Federal is therefore contractually subrogated to Safariland's rights of recovery from Defendants.

**COUNT III – LEGAL MALPRACTICE
(Equitable Subrogation Claim by ACE Against All Defendants)**

78. Plaintiffs incorporate by reference Paragraphs 1 through 73 as though set forth fully herein, including but not limited to the allegations in Paragraphs 48 through 60 regarding Defendants' legal malpractice.

79. ACE, on behalf of Safariland, has paid substantial sums in satisfaction of Safariland's settlement with the Broughs, as well as other damages caused by Defendants' legal malpractice.

80. ACE did not voluntarily pay these sums but was obligated to do so under the Excess Liability Catastrophe Policy.

81. Defendants are primarily liable for the payment of these sums due to their malpractice during the *Brough* case.

82. Safariland has a right to recover from Defendants that ACE seeks to enforce.

83. ACE is equitably subrogated to Safariland's rights of recovery from Defendants.

**COUNT IV – LEGAL MALPRACTICE
(Equitable Subrogation Claim by Federal Against All Defendants)**

84. Plaintiffs incorporate by reference Paragraphs 1 through 79 as though set forth fully herein, including but not limited to the allegations in Paragraphs 61 through 73 regarding Defendants' legal malpractice.

85. Federal, on behalf of Safariland, has paid substantial sums in satisfaction of Safariland's settlement with the Broughs, as well as other damages caused by Defendants' legal malpractice.

86. Federal did not voluntarily pay these sums but was obligated to do so under the Federal Primary Policy and the Federal Excess Policy.

87. Defendants are primarily liable for the payment of these sums due to their malpractice during the *Brough* case.

88. Safariland has a right to recover from Defendants that Federal seeks to enforce.

89. Federal is equitably subrogated to Safariland's rights of recovery from Defendants.

PRAYER FOR RELIEF

WHEREFORE, ACE and Federal pray for the entry of judgment as follows:

1. For an award of damages for the full amount ACE and Federal paid on behalf of their insured, Safariland, to settle the claims asserted against Safariland in the *Brough* case;

2. For all additional damages sustained by Safariland, ACE and/or Federal due to Defendants' legal malpractice, including legal fees paid by ACE and/or Federal on Safariland's behalf, as proven herein;

3. For disgorgement of fees paid by Federal and/or Safariland to Defendants;

4. For ACE's and Federal's costs and disbursements incurred herein; and

5. For such other relief as the Court deems just and proper.

PLAINTIFFS DEMAND TRIAL BY JURY ON ALL CAUSES OF ACTION.

Respectfully submitted,

ACE AMERICAN INSURANCE COMPANY and
FEDERAL INSURANCE COMPANY, as
Subrogees of SAFARILAND, LLC.

By: s/ Nicole J. Moody
One of Its Attorneys

Tia C. Ghattas, Il. Bar No. 6269818
Nicole J. Moody, Il. Bar No. 6297229
COZEN O'CONNOR
333 W Wacker Drive, Suite 1900
Chicago, Illinois 60606-1293
312.382.3100
Attorneys for Plaintiffs

Of Counsel for Plaintiffs

Stephen A. Cozen
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
215.665.2000