IN THE INDIANA SUPREME COURT
CAUSE NO. _____

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant Defendant Below VS. KIMBERLY S. EARL and THE ESTATE OF JERRY EARL, Appellees Plaintiffs Below	)	INDIANA COURT OF APPEALS CAUSE NO. 36A05-1212-CT-635 APPEAL ROM THE JACKSON CIRCUIT COURT TRIAL COURT CAUSE NO. 36C01-1008-CT-13 THE HONORABLE WILLIAM E. VANCE, JUDGE

BRIEF OF *AMICUS CURIAE*, THE INDIANA TRIAL LAWYERS ASSOCIATION

Nicholas C. Deets, Attorney No. 17293-53
Frederick R. Hovde, Attorney No. 10649-49
HOVDE DASSOW & DEETS LLC
Meridian Tower, Suite 500
201 W. 103rd Street
Indianapolis, Indiana 46290
(317) 818-3100
Fax (317)818-3111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INDIANA CASES

FOREIGN STATE CASES

INDIANA RULES

OTHER AUTHORITY

QUESTION PRESENTED ON TRANSFER

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF THE LIMITS OF THE EARL'S UNINSURED MOTORIST COVERAGE WHEN THE COURT OF APPEALS HAD PREVIOUSLY, AND CORRECTLY, HELD THAT IT IS REVERSIBLE ERROR AND A MISSTATEMENT OF THE LAW NOT TO ADMIT EVIDENCE OF AN INSURED'S POLICY LIMITS AND INSTRUCT THE JURY THAT ITS VERDICT CANNOT EXCEED THIS AMOUNT IN A BREACH OF CONTRACT CLAIM SEEKING TO RECOVER UNINSURED MOTORIST BENEFITS.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Indiana Trial Lawyers Association ("ITLA") is composed of members of the bar who regularly represent victims of negligent motorists who are uninsured or underinsured. The issues raised by this appeal are of great importance to the victims of uninsured and underinsured motorists and the members of ITLA who represent them. The interests of ITLA are aligned with the interests of Kimberly Earl and the Estate of Jerry Earl.

SUMMARY OF ARGUMENT

In *Allstate Ins. Co. v. Hammond*, 759 N.E.2d 1162 (Ind.Ct.App. 2001) and *Allstate v. Hennings*, 827 N.E.2d 1244 (Ind.Ct.App. 2005), first-party automobile insurers created clear and unequivocal law that it is reversible error and a misstatement of the law for a trial court *not* to admit evidence of the plaintiff's uninsured policy limits and to instruct the jury that their verdict cannot exceed the policy limits in a contract claim for uninsured motorist benefits.

In *Malott v. State Farm Mut. Auto. Ins. Co.*, 798 N.E. 924 (Ind.Ct.App. 2003), the trial court employed this trial practice and admitted evidence of the insured's policy limits of $100,000 and instructed the jury that its verdict could not exceed the policy limits. After the jury returned a verdict of $14,000, the insured appealed claiming that she was prejudiced by State Farm framing the case as a contract case. Despite acknowledging that the jury's damage award was low under the facts of the case, the Indiana Court of Appeals affirmed the verdict and the practice of trying uninsured/underinsured motorist claims as contract claims.

Hammond, *Hennings*, and *Malott* establish the correct and most efficient practice to try uninsured/underinsured motorist claims. Their holdings confirm the relevance of the insured's uninsured motorist policy limits to establish the parameters of the jury's damage award.

This practice recognizes that uninsured and underinsured motorist claims are, at their essence, contractual claims that only exist because of the policy purchased by the insured. As with all other contract and insurance claims, the terms of the insured's uninsured/underinsured motorist policy-including the fact that the insured contracted for only a specific amount of coverage-are admissible. The insured has the burden of establishing the policy's existence and coverage terms; and the insurer has the burden of establishing the policy's exclusions and limitations, including the contractual limits of liability. This ensures that the jury is given the necessary evidence and instruction so that both parties receive the benefit of their bargain.

Allowing the jury to know the applicable contractual limits of liability in a UM/UIM trial is also in the interests of judicial economy because it prevents jurors from deliberating and possibly becoming deadlocked over amounts that are not at issue and could never be recovered by the insured. It also reduces the collateral bad faith litigation that usually arises when a jury's verdict exceeds the insured's policy limits.

The Majority Opinion below represents unfounded speculation that the jury was improperly influenced by evidence of the Earl's uninsured motorist policy limits. This speculation should have been dispelled by the favorable outcome State Farm obtained under the exact same practice in *Malott*.

There is no evidence that the jury in this case used the policy limits in any manner other than its intended purpose of capping State Farm's liability at the policy limits purchased by the Earls. Any concern that a jury could improperly use an insured's policy limits is best addressed through a limiting instruction that the policy limits cannot be used for any purpose other than capping the damages award and may not be considered in valuing the insured's damages. No such limiting instruction was requested by State Farm in this case.

ARGUMENT

I. Basis for Granting the Petition

Contrary to the statement of the Majority Opinion below, this is not an issue of first impression in Indiana. As noted by Judge Riley's dissent, prior decisions by the Indiana Court of Appeals uniformly held that evidence of the insured's policy limits is relevant and admissible at trial where the insured seeks uninsured/underinsured motorist benefits. Slip Op., p. 10, J. Riley dissenting.

In fact, *Hammond* and *Hennings* explicitly held that it is reversible error for a trial court *not* to admit evidence of the insured's policy limits and instruct the jury that their verdict may not exceed the insured's policy limits. *Hammond*, 759 N.E.2d at1166-1167; *Hennings*, 827 N.E.2d 1252-53.

The effect of the Majority Opinion by the Court of Appeals is to reverse the trial court for admitting evidence which the Court of Appeals had previously held was reversible error *not* to admit. In doing so, the Court of Appeals created an irreconcilable conflict with is prior precedents. The unfortunate effect is the creation of an unfair playing field where it is reversible error for a trial court not to employ the trial practice preferred by the uninsured/underinsured insurer under the particular facts of the case. The insurer should not be allowed to claim relevance and admit evidence of the policy limits when the limits are relatively modest (*e.g. Hammond* and *Hennings)* and then claim the policy limits are irrelevant and inadmissible in cases where policyholders like the Earls elect to purchase greater protection.

The conflict between the Majority Opinion below and the decisions in *Hammond*, *Hennings*, and *Malott*, warrants the grant of transfer on this important issue. Ind. Appellate Rule 57 (H) (1).

II. Uninsured/Underinsured Motorist Benefits Claims are Contract Claims Where the Policy Limits are Relevant and Admissible

In *Sullivan v. American Casualty Co.*, 605 N.E.2d 134, 139 (Ind. 1992), this Court held that an insured may file suit directly against his uninsured motorist insurance carrier. Since that time, Indiana courts have uniformly recognized that a claim for uninsured/underinsured motorist benefits is a first-party contract claim. *See Hammond*, 759 N.E.2d at 1166-1167; *Hennings*, 827 N.E.2d at 1252-53; *Malott*, 798 N.E.2d at 926; *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548 (Ind. Ct. App. 2009), *trans. denied*; *Howard v. Am. Family Mut. Ins. Co.*, 928 N.E.2d 281 (Ind. Ct. App. 2010).

As such, just as with a claim for life insurance benefits, environmental coverage, health insurance benefits, or property damage under a homeowner's policy, the case is filed and tried against the insurer in the insurer's name under general principles of contract law. *Brown-Day*, 915 N.E.2d at 553 (insurer must be the named defendant in uninsured motorist claim); *Howard*, 928 N.E.2d at 284 (insurer must be the named defendant in uninsured motorist claim). *See also Gov't Employees Ins. Co. v. Krawzak*, 675 So. 2d 115 (Fla. 1996) (the uninsured motorist carrier must be identified as the defendant), *Lamz v. Geico Gen. Ins. Co.*, 803 So. 2d 593 (Fla. 2001) (the jury must be told defendant insurer is plaintiffs' uninsured motorist carrier to avoid "charades in trials"), *Earle v. Cobb,* 156 S.W.3d 257, 259, 260 (Ky. 2004) (the insurer must be identified as plaintiff's underinsured motorist carrier at trial); *State Farm Mut. Auto Ins. Co. v. Canady*, 475 S.E.2d 107 (W.Va. 1996) (holding jury is entitled to be aware of uninsured motorist carrier's identity); *Lima v. Chambers,* 657 P.2d 279, 285 (Utah 1982) (insurer must be the named defendant at trial).[1]

[1] As legal commentators have noted, if jury deception is justified for insurance companies on the grounds that jurors are biased against defendants perceived to have sufficient funds to pay a

Trials of insurance claims are governed by the same rules as trial involving other contract claims. *Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009). The insured has the burden of establishing the policy's existence and coverage terms. *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E2d 705, 722 (Ind. Ct. App. 2004) (In insurance coverage litigation, the insured has the burden of establishing the policy's existence and coverage terms); David L. Leitner, Reagan W. Simpson & John M. Bjorkman, 2 Law and Practice of Insurance Coverage Litigation § 23:11, p. 23-16 (Thomson West 2005). The insurer has the burden of establishing the policy's exclusions and limitations, including the contractual limits of liability. *Hoosier Ins. Co. v. Audiology Foundation*, 745 N.E.2d 300, 309 (Ind.Ct.App. 2001).

Consistent with this principle, several decisions of this Court have held that evidence of insurance is relevant and admissible if it is pertinent to the issues and is offered for any purpose other than proving that the defendant acted negligently, which is not a concern in first-party UM/UIM litigation. In other words, evidence that reveals the existence of insurance is not so inherently improper or prejudicial that it must be removed from a case where it is otherwise at issue. *See City of Terre Haute v. Deckard,* 183 N.E.2d 815, 818 (Ind. 1962) (proof of insurance was admissible and required in underlying action to establish defense that governmental entity

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judgment, should we not also deceive jurors as to the identity of all parties, where their accurate identification invokes potential prejudice?

> "Seen from this vantage point, the issue under Rule 411 is not the relevance of insurance as evidence of fault, but rather how far fact finding is to be distorted in order to permit insurance companies to remain disguised. If the fear of juror prejudice is sufficient to allow an insurance company to masquerade as the Salvation Army, why should not [all litigants be permitted to hire others to impersonate them at the counsel table in order to avoid the well-known impact of other prejudices on personal injury awards?]"

23 Fed. Prac. & Proc. Evid. § 5362, Wright & Graham, current through 2009 update.

was immune for judgment in excess of insurance coverage); *Pickett v. Kolb*, 237 N.E.2d 105 (Ind. 1968) (evidence that expert is paid by defendant's insurer is admissible to show bias and prejudice of witness even if it reveals existence of insurance); *Snider v. Truex*, 222 Ind. 18, 51 N.E.2d 477 (Ind. 1943) (evidence of insurance admissible to prove that defendant was driving the vehicle as the agent of his employer at the time of the occurrence).

This Court codified this body of case law, and the important principle that the very utterance of insurance is not taboo, when it enacted Ind. Evidence Rule 411, which states:

> **Rule 411. Liability Insurance.**
> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. The Rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

On its face, the second sentence of Evid. R. 411 is clear that this Court does not sanction the exclusion of otherwise relevant evidence merely because such evidence would advise the jury of the interest of an insurance company. It expressly affirms the reasoning of *Deckard, Pickett,* and *Truex* and allows evidence of insurance to be admitted when it is offered for any purpose other than showing a party acted negligently or wrongfully. Miller, 12 Ind. Practice, Ind. Evid., sec. 411.102, at p. 646-47 (Thomason West 3d ed. 2007) (The list of other purposes in Rule 411 is not exhaustive, and evidence concerning insurance may be admissible to prove any relevant fact, such as the existence of a contract).

As courts have noted, some judges have been trained to have a hypersensitivity to the mention of insurance that produces decisions which clearly violate the well-defined parameters of Evid. R. 411.

> "The second sentence of Evidence Rule 411 exists for a reason – it recognizes that testimony regarding insurance is not always

> prejudicial. However, too often Courts have a Pavlovian response to insurance testimony – immediately assuming prejudice. It is naive to believe that today's jurors, bombarded for years with information about healthcare insurance, do not already assume in a malpractice case that the defendant doctor is covered by insurance. The legal charade protecting juries from information they already know keeps hidden from them relevant information that could assist them in making their determinations. All rules of evidence are designed with truth and fairness in mind; they do not require that Courts should be blind to reality."
>
> "Given the sophistication of our juries, the first sentence of Evidence Rule 411 ('evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully') does not merit the enhanced importance that it has been given. Instead of juries knowing the truth about the existence and extent of coverage, they are forced to make assumptions which may have more prejudicial effect than the truth. "
>
> "Thus, the second sentence of Evidence Rule 411, which allows Courts to operate in a world free from truth stifling legal fictions, ought to be embraced. In such instances as the case at hand, truth should win out over a naively inspired fear of prejudice."

Ede v. Atrium S. OB/GYN, Inc., 642 N.E.2d 365, 368 (Ohio 1994).

Evid. R. 411, and the cases upon which it is based, are clear that the terms of an insurance policy are admissible in evidence just as they would be in any other contract action. *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 722 (Ind. Ct. App. 2004) (holding insured must prove at trial the substance of relevant policy provisions); *Federal Ins. Co v. Purvis Bros.*, 212 Ky. 107, 278 S.W. 581 (1925) (finding no error in jury instruction stating terms of crop damage insurance policy); *Dill v. Montana Thirteenth Judicial District Court*, 979 P.2d 188, 191-193 (Mont. 1999) (holding State Farm's policy admissible in underinsured action even though the only issue to be tried was amount of damages plaintiff could recover from insurer).

It is against this backdrop that the Court of Appeals decided *Hammond*, *Hennings*, and *Malott*, and, at the request of the auto insurers, held that it was not only proper to allow evidence

of the insured's policy limits and to instruct the jury that their damages award could not exceed those limits, *it was reversible error not to do so.*

In *Hammond, supra*, an insured brought a contract action against her automobile insurer for uninsured motorist benefits. The insured had UM coverage of $50,000 and medical payments coverage of $1,000. At the conclusion of the evidence, the trial court instructed the jury as follows:

> You are instructed that the policy of insurance between Sharon Hammond and Allstate Insurance Company provided uninsured motorist benefits with a policy limit of $51,000. In assessing damages for the injury suffered by Sharon Hammond, you are to fairly value that injury based on these instructions without regard to the policy limits that were in effect at the time of this collision.

Hammond, 759 NE2d at 1170. The jury returned a verdict of $160,000.00 in favor of the plaintiff and the insurer appealed. The Court of Appeals held it was reversible error to instruct the jury that it could consider damages without regard to the policy limits, stating:

> It is a misstatement of the law, in a breach of contract case brought by an insured to recover uninsured motorist benefits, to instruct the jury that it may assess damages against the insurer without reference to the policy limits.

Id.

Similarly, in *Hennings, supra*, an insured brought an action against her automobile insurer for UM benefits. The insured had UM limits of $100,000. At the conclusion of the evidence, the UM insurer, Allstate Insurance Company, tendered the following instruction:

> The limits of liability under the underinsured motorist provisions of Plaintiff policy of insurance with The Allstate Insurance Company are One Hundred Thousand Dollars ($100,000). Any award of monetary damages entered in favor of the Plaintiff and against the Defendant, Allstate Insurance Company, cannot exceed the policy limits.

827 N.E.2d at 1252.

The trial court rejected Allstate's tendered instruction and allowed the jury to consider the case without reference to the insured's policy limits. The jury returned a verdict of $115,000 and Allstate appealed, claiming that the trial court had erred in failing to give the tendered instruction that the monetary damages could not exceed the insured's policy limits of $100,000.

The Court of Appeals reversed the trial court for failing to give Allstate's tendered instruction, finding: "The instruction tendered by Allstate was a correct statement of the law, it was supported by the evidence at trial, and it was not covered by any other instructions. Therefore, the trial court abused its discretion when it failed to instruct the jury as requested by Allstate." 827 N.E.2d at 1253.

In *Malott*, an insured brought an action against her automobile insurer for UM benefits. Like in *Hennings*, the insured had UM limits of $100,000. The insured's policy as well as the policy limits were admitted at trial. At the conclusion of the evidence, State Farm Insurance requested that the jury be instructed on general principles of contract law and that the jury could not award damages in excess of the $100,000 policy limits. Despite being advised the that insured had policy limits of $100,000, the jury only returned a verdict against State Farm Insurance for $14,000. The insured appealed, claiming that instructing the jury on the principles of contract law had resulted in prejudice and a low damages award. The Court of Appeals acknowledged that the jury's damages award was on the lower end but nevertheless affirmed the verdict because the case was properly tried under the principles of contract law. *Malott*, 798 N.E.2d at 927.

Indiana appellate courts are not alone in holding that uninsured/underinsured motorist claims are to be tried as contract actions where it is proper to instruct the jury on the insured's policy limits and that the damage award cannot exceed these limits.

In *Leuchtenmacher v. Farm Bureau Mutual Insurance Co.*, 461 N.W.2d 291 (Iowa 1990), the Supreme Court of Iowa held that evidence of the insured's policy limits is admissible in direct action against insurer for underinsured motorist benefits under Rule of Evidence 411, stating:

> Evidence of the insurance limits in this case was not offered on the issue of whether Odegard "acted negligently or otherwise wrongfully"; it was offered by the estate to prove its claim under the insurance contract. In order to recover, the estate necessarily must prove the existence of the insurance contract and its terms. Any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms.

461 N.W.2d at 294. *See also Mahaffey v. CNA Ins. Cos.*, 2003 WL 356330 (Mich.Ct.App. 2003) (evidence of limits of underinsured motorist coverage were admissible at trial) and *Noone v. Progressive Direct Insurance Co.*, 2013 WL 8367579, (M.D. Penn. 2013) (holding that evidence of limits of underinsured motorist coverage were admissible at trial under the federal rules of evidence).

The Majority Opinion below represents unfounded speculation that the jury was improperly influenced by evidence of the Earl's uninsured motorist policy limits. This type of speculation should have been dispelled by the favorable outcome State Farm obtained under the exact same practice in *Malott*.

Malott unequivocally demonstrates that admitting evidence of the insurance policy, the limits of liability, and instructing the jury on principles of contract law does not necessarily favor the insured over the insurer and lead to improperly inflated verdicts. Instead, it suggests that our juries consider the evidence adduced at trial and render verdicts that are supported by the evidence and do not exceed the insured's policy limits. This practice ensures that both parties to the insurance policy get the benefit of their bargain.

Instead of accepting the balance of interests that come with the uniform practice established by *Hammond*, *Hennings*, and *Malott*, State Farm has requested, and the Court of Appeals has created a doctrine where it is always reversible error not to try the case in the manner the insurer believes is more favorable to it under the particular facts of the case.

The rule of law that exists after the Majority Opinion below is as follows:

1) The trial court will be reversed when it fails to admit evidence of the insured's policy limits and instructs the jury that the damages award may not exceed these limits when requested to do so by the insurer. *Hammond,* 759 NE2d at 1170; *Hennings,* 827 N.E.2d at 1252.

2) The trial court will be affirmed when it admits evidence of the insured's policy limits and instructs the jury that the damages award may not exceed these limits when requested to do so by the insurer. *Malott,* 798 N.E.2d at 927.

3) The trial court will be reversed when admits evidence of the insured's policy limits when requested to do so by the insured but the insurer objects. Slip Op., Majority Opinion.

This position is untenable. The interests of insurers should not and cannot be favored over the interests of insureds depending on the trial tactics preferred by the insurer in any particular case. Insurers and insureds must be equal before the law. *See Coble v. McClintock,* 10 Ind. App. 562, 38 N.E. 74, 75 (1894) (The law only designs to place both parties upon an equal footing, in so far as it is possible to do so, and this is fully accomplished when both are given the same opportunity of placing the facts before the tribunal).

Admitting the parties' agreement and the applicable policy limits, and allowing the jury to give both sides the benefit of their bargain, accomplishes this objective. Indeed, without this

evidence, jurors have no frame of reference for properly determining the damages "reasonably assumed to have been within the contemplation of the parties at the time the contract was formed." *Hammond*, 759 N.E.2d at 1166-1167.

In addition, without knowledge of the policy limits, jurors may become deadlocked in a debate over figures that are irrelevant because they are beyond the limits of the policy at issue. For instance, if the insured purchased an insurance policy that only provides $100,000 in UM/UIM coverage but suffers more significant harm than the coverage allows, a jury should not risk becoming deadlocked deliberating over whether the insured's damages are $250,000 or $300,000. Requiring juries to deliberate without knowing the applicable policy limits could result in unnecessary deadlocked juries. Alternatively, the jury could award an excess judgment, leading to further collateral litigation against the insurer for alleged bad faith. *See Hammond*, 759 N.E.2d at 1167-69 (insured brought bad faith action against insurer after obtaining verdict in excess of policy limits).

Principles of judicial economy favor allowing the jury to know the limits of the insured's uninsured motorist insurance to prevent unnecessary retrials and to limit collateral bad faith litigation.

Any concern that juries may improperly use an insured's policy limits is best addressed through a limiting instruction that the insured's policy limits cannot be used for any purpose other than limiting the damages that can be awarded and may not be considered in valuing the insured's damages. *See* Canady, 475 S.E.2d at 114 (creating a presumption against prejudice when the issue of insurance is introduced at trial and a limiting instruction is given by the trial court). No such limiting instruction was requested by State Farm in this case.

CONCLUSION

The Majority Opinion below is in direct conflict with the decisions in *Hammond*, *Hennings*, and *Malott*. The *Amicus Curiae* requests that this Court grant transfer, vacate the Court of Appeals' opinion, and reinstate the jury verdict rendered below.

Respectfully submitted,

INDIANA TRIAL LAWYERS ASSOCIATION

By: _____

Attorneys for the *Amicus Curiae*
Frederick R. Hovde, Attorney No. 10649-49
Nicholas C. Deets, Attorney No. 17293-53
HOVDE DASSOW & DEETS LLC
10585 North Meridian Street, Suite 205
Indianapolis, Indiana 46290

VERIFIED STATEMENT OF WORD COUNT

I hereby verify that, pursuant to Appellate Rule 44(E), the Reply to Amicus Brief contains 4,000 words, as counted by the word processing system used in Microsoft Office Word 2003. I further verify under the pains and penalties for perjury that the foregoing representation is true and correct.

Nicholas C. Deets, Attorney No. 17293-53

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 8, 2014, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, was served upon the following by depositing the foregoing in the US. Mail, postage prepaid:

Rodney L. Scott, Esq.
Tricia K. Hofmann, Esq.
Chad M. Smith, Esq.
WATERS, TYLER,
HOFMANN & SCOTT, LLC
1947 East Spring Street
New Albany, IN 47150
(812) 949-1114

Roger L. Pardieck
Karen M. Davis
The Pardieck Law Firm
100 North Chestnut Street
P.O. Box 608
Seymour, Indiana 47274

Nicholas C. Deets, Attorney No. 17293-53

CERTIFICATE OF SERVICE

Pursuant to Ind. Appellate Rule 24(D), I hereby certify that on the _____ day of May, 2014, a true and complete copy of the foregoing document was served upon the following counsel by depositing the same in the United States mail in an envelope properly addressed to them and affixed with sufficient first class postage.

Rodney L. Scott, Esq.
Tricia K. Hofmann, Esq.
Chad M. Smith, Esq.
WATERS, TYLER,
HOFMANN & SCOTT, LLC
1947 East Spring Street
New Albany, IN 47150

Roger L. Pardieck
Karen M. Davis
The Pardieck Law Firm
100 North Chestnut Street
P.O. Box 608
Seymour, Indiana 47274

_____
Nicholas C. Deets, Attorney No. 17293-53