

No. A05-862

No. A05-871

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STATE OF MINNESOTA IN COURT OF APPEALS

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Commercial Associates, Inc.,

Respondent (A05-862),

Appellant (A05-871),

v.

The Work Connection, Inc.,

Appellant (A05-862),

Respondent (A05-871).

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COMMERCIAL ASSOCIATES, INC.'S REPLY AND RESPONSIVE APPELLATE  
BRIEF

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## SUMMARY OF REPLY

In response to Commercial Associates appeal, The Work Connection fails to address why a scaled-fee forfeiture is available when a fiduciary negligently breaches a duty to multiple principals but an inflexible, absolute-fee forfeiture remedy applies when the breach is to a single principal. The Work Connection also fails to cite a single case since *Rice v. Perl*, 320 N.W.2d.407 (Minn. 1982) (*Perl I*) that has applied its absolute-fee forfeiture remedy under facts similar to this case. Not being deterred by lack of case law, The Work Connection cites an Ohio Court of Common Pleas case to support its appeal to recover the risk management fees and money Commercial Associates received from others. An agent that attempts, but negligently fails, to properly disclose its commission should not be judged the same as a fiduciary that intentionally commits fraud. A scaled-fee forfeiture, measured to the harm caused, and as determined by the jury in this case, should be the result. Accordingly, the jury Verdict should be reinstated.

In its appeal, The Work Connection argues that the trial court's JNOV order should be reviewed under an abuse of discretion standard because it was an equitable remedy. But The Work Connection requested and submitted the damages questions to the jury for its deliberation and it presented its post-trial motion as a question of law to determine if *Perl I's* remedy should apply to this case. This waives The Work Connection's equitable remedy argument because it was not raised or argued at the trial court. Thus, the trial Court's JNOV Order should be reviewed *de novo*.

The trial court did not abuse its discretion when it refused to let The Work Connection's breach of contract claims go to the jury because there was no clear and convincing evidence to

support any modification of the insurance proposal and policy that Commercial Associates procured for The Work Connection.

Commercial Associates asks this Court to reverse the trial court's partial granting of The Work Connection's post-trial motion, reinstate the jury's Verdict, and affirm the trial court's dismissal of the breach of contract claim.

## **ARGUMENT**

### **A. Standard Of Review**

#### **1. Review of Orders Granting JNOV.**

Prior to filing its responsive brief, counsel for The Work Connection argued that the trial court's decision to order fee forfeiture was a "legal question." (T 541.) This is consistent with The Work Connection submitting breach of fiduciary damages to the jury in its Special Verdict Form. (A. 9.) The Work Connection did not ask the trial court for an equitable remedy in its post-trial motion, and the judge did not weigh any equitable factors when he partially granted The Work Connection's motion. Because a scaled-fee forfeiture remedy was not addressed in *Perl I*, and it presents a question of law, the trial court's granting of the JNOV motion is reviewed *de novo*. *Gilchrist v. Perl*, 387 N.W.2d 412, 414 & 416 (Minn. 1986) (*Perl III*).

#### **2. Review of Trial Court's Refusal to Submit Contract Theory to Jury.**

District courts are allowed considerable latitude in determining jury instructions. *State Farm Fire & Cas. Co v. Short*, 459 N.W.2d 111, 113 (Minn. 1990); *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). District courts also have broad discretion in drafting special-verdict questions. *Dang v. St. Paul Ramsey Med. Ctr.*, 490 N.W.2d 653, 658 (Minn.App.1992), *review denied* (Minn. Dec. 15, 1992). Where jury instructions fairly and correctly state the applicable law, this court will not reverse the trial court's actions. *Alevizos v. Metropolitan Airports Comm'n*, 452 N.W.2d 492, 501 (Minn.App.1990), *review denied* (Minn. May 11, 1990).

**B. Fee Forfeiture Should Not Be The Result.**

In response to our appeal, The Work Connection fails to cite any case after *Perl I* that resulted in a fee forfeiture under facts similar to this case. Instead, The Work Connection attempts, through argument, to alter what the Special Verdict Form states. Specifically, The Work Connection argues that, regardless of actual harm, there is no difference between a fiduciary that intentionally or negligently fails to disclose material information. (R. Brief 32.) The Work Connection claims that both are fraud. (*Id.*) But the jury did not find fraud. It found that Crandall made a mistake. (A 9.)

Based upon the jury's findings, Crandall's mistake was that the disclosure form Commercial Associates used to inform The Work Connection that it was charging a fee (because the commissions were not enough compensation) failed to inform it of the commissions. (A 9 & 14.) This is not fraud. Despite these findings, The Work Connection maintains it was fraud. It maintains that position because without it The Work Connection is not entitled to fee forfeiture under *Perl I*.

Although not appealed, The Work Connection goes to great lengths to argue that Commercial Associates breached its standard of care based upon a statute that does not provide a private cause of action. (*Id.* at 31-32.) The use of the statute by The Work Connection to create a standard was properly denied by the trial court and should not be considered here. It is also not relevant to the resolution of this appeal.

The Work Connection also argues that Judge Monahan used his equitable powers when he ordered fee forfeiture. This argument is incorrect. Counsel for The Work Connection stated that the application of *Perl I* to this case was purely a legal question. (T. 541.) As discussed below, the jury should be able to apply a scaled-fee forfeiture; Commercial Associates did not commit fraud; equitable remedies were waived; and a rehashing of the *Perl III* factors are not helpful.

**1. The Jury May Use A Scaled-Fee Forfeiture.**

The Work Connection cites a number of cases in support of their inflexible, absolute-fee forfeiture rule. The Work Connection fails to provide any analysis as to why those cases should be considered. *Perl III* stated that the issue of a fee forfeiture, scaled to the degree of misconduct, was not addressed by *Perl I*. *Perl III* 387 N.W.2d at 416.

The Work Connection's reliance on *Doyen v. Bauer* is not helpful because that case involved a real estate broker that purchased property from the seller he represented only to flip the property to another buyer, at an increased price, and keep both the profit and commissions. 300 N.W.2d 451, 453-54 (Minn. 1941). *Handy v. Garmaker* is not helpful because it involved a failure to disclose a real estate broker's dual agency role and the fact that he was coordinating a second closing to become the eventual owner of the real estate he agreed to sell. 324 N.W.2d

168, 170-71 (Minn. 1982.) *Raymond Farmers Elevator Co. v American Surety Co* was a case involving a grain elevator manager that began competing with his employer by buying and selling grain on his own. 290 N.W. 231 (Minn 1940.) *Tarnowski v. Resop* involved an agent who secretly took a commission and failed to exercise proper due diligence while investigating an investment for Tarnowski. 51 N.W.2d 801, 802 (Minn. 1952). Resop represented to Tarnowski that he had made a thorough investigation of the investment – he did not. *Id.* Interestingly, this case was tried to a jury. *Id.* Lastly, *Dahl v. Charles Schwab & Co.* does not help, as that case dealt with the issue of whether or not the SEC rules preempted Minnesota law. 545 N.W.2d 918 (Minn. 1996).

These cases either dealt with fraud, intentional conduct, misrepresentation, or federal preemption. Here, Commercial Associates attempted to disclose the commission; the jury found that Commercial Associates negligently failed to disclose its commissions. There was no finding of fraud. Accordingly, the jury applied the a scaled-fee forfeiture result when it awarded zero damages.

**2. The Work Connection's Arguments In Support Of Its Breach Of Fiduciary Duty Claim Are Not Relevant.**

The Work Connection argues that Commercial Associates breached its fiduciary duties by failing to disclose material information concerning commissions. (R. Brief at 30-33.) The jury already addressed all of these claims in the Special Verdict Form. Rearguing these claims does not help resolve this appeal. Likewise, providing a statutory argument in its brief does nothing as the only issues on appeal are the impact and scope of *Perl I* and dismissal of a breach of contract claim.

**3. The Work Connection Waived Equitable Relief When It Submitted Damages To The Jury.**

While disgorgement of fees when a fiduciary breaches his duties may be an equitable claim, The Work Connection argued for, and submitted its damages claims to the jury. (T. 421-34.) Likewise, The Work Connection did not ask for equitable relief in its post-trial motion; rather it asked the trial court to make a legal determination that *Perl I* required forfeiture. (T. 541.)

This Court will generally not consider matters not argued or considered by the trial court. *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988.) While a court of equity has flexibility and expansiveness to craft any remedy it needs to accomplish justice for the facts of each particular case, *Beliveau v. Beliveau*, 14 N.W.2d 360 (Minn. 1944), it must base its remedy on the circumstances and facts of each case in order to accomplish a just result. *Clark v. Clark*, 288 N.W.2d 1, 11 (Minn. 1979).

In this case, the trial court did not make any findings as to how The Work Connection was harmed by Commercial Associates. Rather, the trial court properly concluded that evidence existed, supporting the jury's findings that The Work Connection was not entitled to any damages. (A. 1-8.) The trial court stated that The Work Connection could not show damages because it did not present evidence that another policy was available at lower cost. (A 191-4.) At the post-trial motion hearing, Judge Monahan observed that The Work Connection was attempting to retain the benefit of insurance without having to pay for it. (T. 528.) Given these observations, an absolute-fee forfeiture rule would not provide a just result. Because The Work Connection waived its equitable damages claim by submitting it to the jury and *Perl III* applies to this case, the jury's Verdict should be reinstated.

**4. Rehash Of The *Perl III* Factors Is Not Warranted.**

The Work Connection argues that considering the *Gilchrist* factors would not change the result. In this, they are correct, as the jury had all the factors it needed when they determined not to award any damages. While The Work Connection argues that *Perl I* applies, it argues that *Perl III* does not apply because Perl's conduct "was arguably a *de minimus* technicality." (R. Brief 38.) But the attorney/client relationship is held to a higher standard than that of any other fiduciary, certainly one of an insurance agent. Unlike Perl, Crandall attempted to disclose the commissions. Therefore, *Perl III's* fee forfeiture is the law and the jury's Verdict should be affirmed.

**C. This Case Does Not Require Expansion Of The Inflexible-Fee Forfeiture Rule.**

The Work Connection wants more. It wants all of the commissions Commercial Associates received from various insurance companies over its six-year relationship with The Work Connection. (R. Brief 39-41.) The Work Connection fails to cite a Minnesota case that supports its position.

The only case cited by The Work Connection in support of expanding *Perl I* is a common pleas court case from Ohio. In *Meyer v. Preferred Credit, Inc.*, a mortgage broker took advantage of elderly, ill and unsophisticated customers by failing to disclose that he was receiving payment from the lender. 766 N.E.2d 612, 620-621 (Ct. Cmn. Pleas. Ohio 2001). The court awarded the Meyers punitive damages because the mortgage broker had taken advantage of the Meyers' age, ill health, lack of sophistication and their dire financial conditions when he secured the loan.

Unlike the Meyers, The Work Connection has been providing temporary workers to companies in multiple states for almost twenty years (A. 158 & 185.) The Work Connection is

sophisticated and there is nothing to suggest that it was in dire financial condition while a customer of Commercial Associates. Therefore, the facts the Ohio court considered in *Meyers* are not present in this case and it fails to support an expansion of the absolute fee forfeiture rule.

**D. The Trial Court Did Not Abuse Its Discretion In Refusing To Submit The Breach Of Contract Claim To The Jury.**

The Work Connection argues that Judge Monahan abused his discretion when he refused to let it present its breach of contract claim to the jury. (R. Brief 41-45.) The Work Connection contends that it should be able to present a potential fraud claim as a breach of contract claim because Crandall made oral promises to procure contract for workers compensation with a 19% scheduled credit. (R. Brief 42.) But the proposal presented to and accepted by The Work Connection shows unequivocally that it accepted a policy with a 19% debit. (A 168-69.) Three audits of this policy also shows that the work connection received what it paid to obtain. (A 176-80; A 47, 78 and 125.)

District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction." *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). "A party is entitled to a jury instruction that sets forth his or her theory of the case if evidence supports it and if it is consistent with the applicable law." *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn.Ct.App. 1992). Jury instructions "must be construed as a whole." *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). "As a general rule, a new trial will not be granted because of refusal of a proffered instruction if the general charge fairly and correctly states the applicable law." *Gleeman v. Triplett*, 222 N.W.2d 787, 788 (Minn.1974).

Judge Monahan explained to The Work Connection that its claims were based on fraud, not breach of contract. Specifically, he stated that what he heard at trial was that The Work Connection purchased the written policy knowing it had a debit and that it paid Ace in conformance with the policy. (A-191-94.) According to The Work Connection, they complained that the policy was wrong and Crandall agreed to straighten it out. (*Id.*) This lasted almost two years. Ultimately, Judge Monahan concluded that The Work Connection's theory was that Crandall had lied, not that he failed to get the proper insurance. (*Id.*) This is not evidence of a breach of contract; it goes to fraud, which the jury rejected in its Special Verdict form.

A party asserting that there has been a modification of a written contract must show that the modification was agreed to by clear and convincing evidence. *Merickel v. Erickson Stores Corp.*, 95 N.W.2d 303, 305 (Minn. 1959). Aside from the testimony from The Work Connection and Crandall's suicide note, there is nothing from Commercial Associates that it agreed to do anything other than what was contained in the proposal. Further, the jury's verdict was supported by evidence that The Work Connection "realized the true nature of the policy at an early point and elected to accept the policy knowing it was not as represented by" Crandall. (A 1-8.) The testimony and Crandall's note do not constitute clear and convincing evidence that Commercial Associates agreed to provide anything other than the policy it obtained.

While Minnesota black letter law states that an agent may be liable on a theory of breach of contract for failure to procure insurance as instructed, those cases involve the type of coverage available under the policy, not how much the policy cost. For example, in *Eddy v. Republic Nat'l Life Ins. Co.*, an agent failed to include a sister corporation on its endorsement for a corporation's life insurance policy when it had been requested to include the company. 290 N.W.2d 174, 176

(Minn. 1980) The court found that the agents failure to obtain the proper insurance subjected him to a tort or contract claim. *Id.* at 177.

Unlike the plaintiff in *Eddy*, The Work Connection does not contend that it received the wrong coverage, it contends that it paid too much for the policy because Crandall stated that the policy should contain a scheduled credit. This is what the trial court concluded when the breach of contract theory was not allowed to go to the jury. It was not an abuse of discretion to refuse to allow the breach of contract claim to go to the jury because there was not clear and convincing evidence that the policy was modified.

#### CONCLUSION

Based upon the foregoing, Commercial Associates asks the Court to reverse the trial court's post-trial Order for judgment and affirm the Jury's Verdict. Commercial Associates also requests that the trial court's refusal to submit the breach of contract claim to the jury be affirmed.

Dated: \_\_\_\_\_

9/21/05

**BRIGGS AND MORGAN, P.A.**

By \_\_\_\_\_

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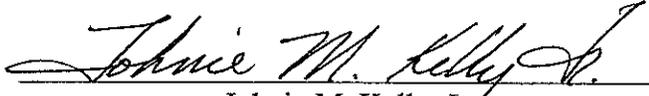
STATE OF MINNESOTA                    )  
  ) ss.       Court File No. A05-862 and A05-871  
COUNTY OF HENNEPIN                )

Johnie M. Kelly, Jr., being first duly sworn, deposes and states that on the 22<sup>nd</sup> day of September, 2005, he served the attached Commercial Associates, Inc.'s Reply and Responsive Appellate Brief:

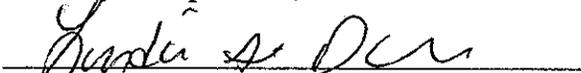
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(which are the last known addresses of said attorneys) by depositing true and correct copies thereof in the United States mail, postage prepaid.

  
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Subscribed and sworn to before me this  
22<sup>nd</sup> day of September, 2005.

  
\_\_\_\_\_  
Notary Public

