

A05-862
A05-871

STATE OF MINNESOTA
IN COURT OF APPEALS

Commercial Associates, Inc.

Respondent (A05-862)
Appellant (A05-871)

v.

The Work Connection, Inc.,

Appellant (A05-862),
Respondent (A05-871)

THE WORK CONNECTION, INC.'S RESPONDENT BRIEF AND APPENDIX

Jeffrey F. Shaw (99879)
David H. Grounds (0285742)
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Appellant
Commercial Associates, Inc.*

M. Gregory Simpson (204560)
Siegel, Brill, Greupner, Duffy & Foster, PA
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100

Robert J. Gilbertson (22361X)
A. L. Brown (0331909)
Robins, Kaplan, Miller & Ciresi, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

*Attorneys for Respondent
The Work Connection, Inc.*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
LEGAL ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
1. The Work Connection	4
2. Commercial Associates	5
3. Commercial Associates Becomes The Work Connection's Agent	6
4. Commercial Associates Fails to Disclose it is Taking Commissions	7
5. Commercial Associates Charges Annual Fees from 1996-2002	12
6. Commercial Associates Secretly Also Takes Commissions	12
7. Norman Spencer's Quote to Commercial Associates	13
8. Commercial Associates' Written Proposal	13
9. Commercial Associates' Verbal Modification of the Written Proposal	16
10. The Meeting of the Minds on the ACE Policy	17
11. The ACE Policy	18
12. Audits of the ACE Policy – Final "Earned Premium"	18
13. The Second ACE Policy	19
14. Stringing The Work Connection Along	19
15. Crandall's Suicide	21
16. Wistrill Promises to Make Things Right	22
17. The Work Connection's Efforts to Resolve the Dispute	22
18. The Demand for \$184,000	22
19. The Work Connection Refuses to Pay	22
20. The Suit	23
21. A Word About Footnote 1	23
22. The Jury's Answers to Special Verdict Form Questions	24
23. The Post Trial Motion	26
STANDARD OF REVIEW	27
I. Standard of Review for Disgorgement of Commissions Issue	27
II. Standard of Review for Refusal to Submit Contract Theory to Jury	28

ARGUMENT28

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE EQUITABLE REMEDY OF FORFEITURE OF FEES28

 A. Total Forfeiture of Compensation is Mandatory Where a Fiduciary Fails to Disclose Compensation.....29

 B. Commercial Associates Was The Work Connection’s Fiduciary.....30

 C. Commercial Associates Breached its Duty31

 D. The Breach was Material32

 E. The Jury’s Finding of no Damages Does Not Preclude Equitable Relief33

 F. *Gilchrist* Does Not Apply – Scaling of Fees is not Required.....34

 G. Consideration of the *Gilchrist* Factors Doesn’t Help Commercial Associates35

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALSO ORDERING FORFEITURE OF COMMISSIONS39

III. THE TRIAL COURT ERRED BY REFUSING TO SUBMIT THE WORK CONNECTION’S BREACH OF CONTRACT THEORY TO THE JURY41

CONCLUSION45

APPENDIX.....RA-1 – RA-16

TABLE OF AUTHORITIES

Statutes:	<u>Page</u>
Minn. Stat. § 60K.46	11, 32, 36
Minn. R. Civ. P. 52.01	28
Minn. Stat. § 549.20, subd. 3	36
 Cases:	
<i>A. Gay Jenson Farms Co. v. Cargill, Inc.</i> , 309 N.W.2d 285, 290 (Minn. 1981).....	30
<i>Carlson v. Carlson</i> , 363 N.W.2d 803, 805 (Minn. App. 1985)	30
<i>Case v. Business Centers</i> , 357 N.E.2d 47, 50 (Ohio Ct. App. 1976).....	40
<i>Christenson v. Argonaut Ins. Cos.</i> , 308 N.W.2d 515, 519 (Minn. App. 1986)	28
<i>City of Cloquet v. Cloquet Sand & Gravel, Inc.</i> 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977).....	27
<i>Dahl v. Charles Schwab & Co.</i> , 545 N.W.2d 918, 925 (Minn. 1996).....	30
<i>Dain Bosworth, Inc. v. Goetze</i> , 374 N.W.2d 467, 471 (Minn. App. 1985)	27
<i>Doyen v. Bauer</i> , 211 Minn. 140, 300 N.W. 451, 454 (1941).....	30, 32, 35
<i>Eddy v. Republic Nat’l Life Ins. Co.</i> , 290 N.W.2d 174, 177 (Minn. 1980)	42
<i>Edgewater Motels, Inc. v. Gatzke</i> , 277 N.W.2d 11, 14 (Minn. 1979)	27
<i>Gabrielson v. Warnemunde</i> , 443 N.W.2d 540, 543 (Minn. 1989)	42
<i>Gilchrist v. Perl</i> , 387 N.W.2d 412 (Minn. 1986).....	34
<i>Hageman v. Colombet</i> 198 P. 842, 843-44 (Cal. Dist. Ct. App.).....	40
<i>Handy v. Garmaker</i> , 324 N.W.2d 168, 173 (Minn. 1982).....	30, 40
<i>Haueber v. Can-Do, Inc.</i> , 666 F.2d 275, 280 (5 th Cir. 1982).....	43

<i>Hokanson v. Western Empire Land Co.</i> , 132 Minn. 74, 155 N.W. 1043, 1044 (1916).....	43
<i>Klein v. First Edina Nat'l Bank</i> , 293 Minn. 482, 196 N.W.2d 619, 622 (1972)	31
<i>Lum v. McEwen</i> , 56 Minn. 278, 282, 57 N.W. 662, 662 (1894).....	29, 30
<i>Myer v. Preferred Credit, Inc.</i> , 117 Ohio Misc.2d 8, 766 N.E.2d 612 (2001)	40
<i>Nadeau v. County of Ramsey</i> , 277 N.W.2d 520, 524 (Minn. 1979)	27
<i>North Star Mut. Ins. Co. v. Zurich Ins. Co.</i> , 269 F. Supp.2d 1140, 1151 (D. Minn. 2003)	42
<i>Oldendorf v. Eide</i> , 260 Minn. 458, 464, 110 N.W.2d 310, 314 (1961)	1, 28, 41
<i>Ornamental and Structural Steel, Inc., v. BBG, Inc.</i> 509 P.2d 1053, 1056-57 (Ariz. Ct. App. 1973).....	40
<i>Perl v. St. Paul Fire and Marine Ins. Co.</i> , 345 N.W.2d 209, 213 (Minn. 1984).....	29
<i>Peters v. Mutual Life Ins. Co.</i> , 420 N.W.2d 908, 915 (Minn. App. 1988)	42
<i>Raymond Farmers Elevator Co. v. American Surety Co.</i> 207 Minn. 117, 125, 290 N.W. 231, 235 (1940).....	30
<i>Real Estate Dynamics, Inc. v. Richards</i> , 392 N.W.2d 250, 252 (Minn. App. 1986)	40
<i>Rice v. Perl</i> , 320 N.W.2d 407, 411 (Minn. 1982).....	29, 30, 32
<i>S O Designs USA v. Rollerblade, Inc.</i> , 620 N.W.2d 48, 52 (Minn. App. 2000).....	42
<i>St. Paul Dredging Co. v. State</i> , 259 Minn. 398, 407, 107 N.W.2d 717, 723-24 (1961).....	43
<i>Sandhofer v. Abbott-Northwestern Hosp.</i> , 283 N.W.2d 362, 367 (Minn. 1979).....	1, 28, 41
<i>Standard Constr. Co. v. National Tea Co.</i> , 240 Minn. 422, 430-31, 62 N.W.2d 201 (1953)	43
<i>State v. Ambaye</i> , 616 N.W.2d 256, 261 (Minn. 2000).....	27
<i>State by Humphrey v. Alpine Air Prods</i> 490 N.W.2d 888, 895 (Minn. App. 1992), <i>aff'd</i> , 500 N.W.2d 788 (Minn. 1993)	27

<i>Sweeney & Moore, Inc , v. Chapman</i> , 294 N.W. 711, 712-713 (Mich. 1940)	40
<i>Tarnowski v. Resop</i> , 236 Minn. 33, 51 N.W.2d 801 (1952)	31, 33.
.....	40, 41
<i>Tracey v. Blake</i> , 118 N.E. 271, 272 (Mass. 1918)	40
<i>Wilhelm Lubrication Co. v. Brattrud</i> , 197 Minn. 626, 633, 268 N.W. 634, 636-37 (1936)	42
<i>Wilmar Poultry Co. v. Carus Chem. Co.</i> , 378 N.W.2d 830, 836 (Minn. App. 1985)	28
<i>Wood v. Newman, Hayes & Dixon Ins. Agency</i> , 905 S.W.2d 559, 564 (Tenn. 1995).....	44

LEGAL ISSUES

1. The Forfeiture of Compensation Issue:

Profits earned by a fiduciary belong to the principal. A faithless fiduciary forfeits its profits regardless of whether the principal has suffered damages. Commercial Associates breached its fiduciary duty to The Work Connection by not disclosing that it received commissions in addition to agency fees on insurance policies it procured for The Work Connection. The trial court ordered forfeiture of the agency fees, but not the commissions. Must Commercial Associates disgorge all profits it derived by breaching its fiduciary duties to The Work Connection?

Trial court holding: The trial court ordered Commercial Associates to disgorge the \$483,000 in agency fees it took while in breach of its fiduciary duties, but declined to order disgorgement of the \$485,070 in secret commissions.

Most apposite authorities: *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982); *Tarnowski v. Resop*, 236 Minn. 33, 51 N.W.2d 801 (1952).

2. The Breach of Contract Issue:

A party's theory of the case must go to the jury if it is supported by evidence and is in accordance with law. The Work Connection proved that Commercial Associates agreed to procure an insurance policy containing a price discount called a "schedule credit," but instead got one with a debit, costing The Work Connection an extra \$304,647. Did the trial court err by not submitting The Work Connection's breach of contract theory to the jury?

Trial court holding: The trial court refused to submit The Work Connection's breach of contract theory to the jury.

Most apposite authorities: *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979); *Oldendorf v. Eide*, 260 Minn. 458, 110 N.W.2d 310 (1961).

STATEMENT OF THE CASE

For six years, The Work Connection, Inc., a staffing company, hired Commercial Associates, Inc. to act as its insurance agent for a variety of types of insurance, including

liability, auto, property, employment practices and, of most significance here, workers compensation. As to the workers compensation insurance, Commercial Associates charged an annual fee for its services that Commercial Associates said, in writing, was in lieu of commissions. These annual agency fees, over the period 1996 until their relationship ended in 2002, amounted to some \$483,000.

During the same period, however, Commercial Associates *secretly* took commissions on The Work Connection's policies in an amount totaling \$485,070. This undisclosed compensation was deducted from funds that The Work Connection paid to Commercial Associates at the beginning of each policy term, pursuant to an undisclosed arrangement with the insurance companies. The balance, net of commissions, was turned over to the insurers in payment of The Work Connection's premium. In other words, Commercial Associates derived twice as much compensation from its relationship with The Work Connection as it disclosed. The secret half of its compensation was a reward from the insurance companies for placing The Work Connection's insurance with them.

Near the end of 2000, Commercial Associates told The Work Connection that it would obtain for The Work Connection a policy of workers compensation insurance offered by ACE Insurance Co. for the period December 31, 2000, to December 31, 2001, that contained a "schedule credit" – a price discount – of 19%. The Work Connection authorized Commercial Associates to procure the policy with the 19% price credit, and Commercial Associates agreed to do so. When issued, the policy instead had a 19% *debit*, and ultimately cost The Work Connection \$304,647 more than the policy Commercial Associates had promised to procure.

After the parties parted ways at the end of 2002, Commercial Associates issued account reconciliation statements to The Work Connection and demanded payment of the balance it claimed was owing. The Work Connection disputed items of the account statement, and ultimately refused to pay it because the amounts claimed were more than offset by the amounts owed to it by Commercial Associates.

Commercial Associates sued The Work Connection, which then counterclaimed with its offsetting claims. During a jury trial from December 6-10, 2004, the trial court directed a verdict in favor of Commercial Associates on its account claim in the amount of \$184,273.60. The trial court refused to submit to the jury The Work Connection's breach of contract theory that related to the ACE insurance policy and its fictional premium discount. The trial court submitted a special verdict form to the jury relating to The Work Connection's claims of breach of fiduciary duty, intentional misrepresentation and negligent misrepresentation.

The jury found that Commercial Associates owed fiduciary duties to The Work Connection, and had failed to disclose that it was taking commissions on the supposedly "no-commission" policies. The jury did not find any consequential damages from that breach of fiduciary duty. The jury further found that Commercial Associates had falsely and negligently represented the price of the ACE policy issued to The Work Connection. The jury agreed that The Work Connection had reasonably relied on Commercial Associates' misrepresentation about the ACE policy, but declined to find resulting damages. The trial court entered judgment based on the jury's findings on January 31, 2005.

The Work Connection timely moved for judgment notwithstanding the verdict or, in the alternative, for a new trial under Minn. R. Civ. P. 50.02 and 59. The trial court partially granted the post-trial motion on the basis that the jury's finding of a breach of a fiduciary duty compelled the remedy of disgorgement of all agency fees paid by The Work Connection during the period Commercial Associates was breaching its fiduciary duties. Accordingly, the trial court amended the judgment by awarding \$483,000 to The Work Connection.

But the trial court declined to order disgorgement of compensation received by Commercial Associates in the form of commissions, and thus allowed Commercial Associates to keep the \$485,070 in commissions it secretly took while in breach of its fiduciary duties to The Work Connection. The amended judgment was entered on March 7, 2005. Both parties appealed; the appeals were consolidated, and the briefing schedule issued by the Court of Appeals deemed Commercial Associates the appellant and The Work Connection the respondent.

STATEMENT OF FACTS

1. The Work Connection.

The Wolds formed The Work Connection in 1986.¹ Originally, it provided temporary workers to businesses in the St. Paul area.² The workers perform jobs including light industrial, call centers, medical clean rooms, machinists and supervisor machinists,

¹ T. 249.

² T. 249.

managers and office staffing.³ Over the years it has expanded and opened up offices in other Minnesota cities.⁴ Steve Wold is its President; Jeff Wold its Vice President.⁵

The Work Connection has a variety of insurance needs, including workers compensation, general liability, auto, employee dishonesty, employment practices liability, and property.⁶ Of these, the biggest insurance expense The Work Connection has is workers compensation, which costs roughly \$1 million each year.⁷ Nobody at The Work Connection has any education or training in the field of insurance.⁸

2. Commercial Associates.

Commercial Associates, an independent insurance agency, was formed in 1980 by Dave Wistrick.⁹ From 1982 on, Wistrick and Gerry Crandall were each 50% owners.¹⁰ Wistrick was president; Crandall vice-president.¹¹ Both had managerial duties.¹² It offers a broad range of coverages, primarily for businesses, including those needed by The Work Connection.¹³ Based in Burnsville, it has 13 employees, nets around \$2 million per year, and has about 2,000 clients.¹⁴

³ T. 250.

⁴ T. 250.

⁵ T. 250.

⁶ T. 251.

⁷ T. 251.

⁸ T. 252.

⁹ T. 118.

¹⁰ T. 208.

¹¹ T. 209.

¹² T. 209.

¹³ T. 119.

¹⁴ T. 119, 120.

3. Commercial Associates Becomes The Work Connection's Agent.

Commercial Associates procured insurance for The Work Connection over the period 1996 to 2002.¹⁵ Until his death in 2002, Crandall was the primary contact with The Work Connection and Wistrill's involvement was in an advisory capacity.¹⁶ The Work Connection was one of Commercial Associates' largest clients.¹⁷ Commercial Associates provided The Work Connection with a broad range of insurance coverages including workers compensation, automobile, general liability, property, crime, excess/umbrella, employee benefits, and health.¹⁸ Prior to Crandall's suicide in November 2002, the relationship between The Work Connection and Commercial Associates was very strong.¹⁹

With respect to The Work Connection's workers compensation insurance, Commercial Associates expressly undertook to perform the following services:

- "Extensive marketing of your proposed insurance coverages to various insurance companies."
- "Our furnishing of on going [sic] Risk Management advice and consultation to you and/or your producing agent concerning your Insurance Program."
- "Claims Management and the supervision of the Insurance Company's claims activities."

¹⁵ T. 130.

¹⁶ T. 132-134.

¹⁷ T. 131.

¹⁸ T. 132.

¹⁹ T. 134.

- “Other administrative and consulting services as requested.”²⁰

In its capacity as The Work Connection’s agent, Commercial Associates undertook all direct communications with The Work Connection’s insurance companies.²¹ The Work Connection therefore received no information from the insurance companies except through Jerry Crandall.²² Crandall would take the information provided by various insurers and summarize it in a proposal to The Work Connection.²³ The Work Connection relied on Crandall because of his expertise in insurance matters.²⁴ There was ample evidence to support the jury’s finding that Commercial Associates owed a fiduciary duty to The Work Connection.²⁵

4. Commercial Associates Fails to Disclose it is Taking Commissions.

The first workers compensation policy procured by Commercial Associates for The Work Connection was one issued in 1996. As part of that transaction, Jerry Crandall had Jeff Wold sign a disclosure statement, which read, in pertinent part:

RISK MANAGEMENT DISCLOSURE STATEMENT

In accordance with Minnesota Statute 60A, Subdivision 6B, this disclosure is being furnished to provide you with the following notice.
Only the items whose number or letter is checked apply:

- X 1. The commission paid by the insurance company is not adequate to compensate us for the work required in servicing your account to our normal standards.

²⁰ Exhibit 37 - Risk Management Disclosure Form, A14.

²¹ T. 254.

²² T. 254.

²³ T. 135.

²⁴ T. 255.

²⁵ Special Verdict Answer 13 (A10-11).

Therefore, Commercial Associates is charging \$ 48,000 as a risk management fee.

- _____ 2. *This risk management fee is in addition to commissions which will be included in the premiums which you will be paying to Commercial Associates on behalf of the Insurance Company providing your Insurance protection.*²⁶

In other words, at the inception of their relationship, Jerry Crandall told The Work Connection that Commercial Associates would charge \$48,000 for its services that year, and failed to disclose that it would be taking a commission on top of that. The Wolds had never before encountered such a fee.²⁷ It would have been unusual for a fee to be charged on top of commissions – Wistrick testified that only 30% of Commercial Associates' clients pay both a commission and a fee.²⁸

Consistent with the 1996 written disclosure, both principals of The Work Connection, Jeff and Steve Wold, testified that Jerry Crandall told them that Commercial Associates would not be taking commissions on workers compensation policies procured for The Work Connection.²⁹ Crandall explained that the risk management fee was necessary because no commission would be paid.³⁰ He did not say that the fee was in addition to commissions.³¹ Crandall had also told Gerald Duffy, The Work Connection's

²⁶ Trial Ex. 37 and 63 (italics supplied) (A14).

²⁷ T. 278.

²⁸ T. 154.

²⁹ T. 277-279, 341.

³⁰ T. 277-279

³¹ T. 281.

attorney, that the 1996 policy was a “no commission” policy, and that the agency fee was in lieu of commissions.³²

Although Wistrick claimed to have reviewed the annual proposals that Crandall presented to The Work Connection,³³ he admitted he had no personal knowledge about the disclosure statement because he was not present when it was signed and never spoke with Crandall about it.³⁴ Wistrick had no personal knowledge about what The Work Connection was told regarding commissions being taken on workers compensation policies procured for The Work Connection.³⁵ However, he testified that there was no document anywhere in Commercial Associates’ files that disclosed the fact that it was taking commissions on workers compensation policies issued to The Work Connection.³⁶

Wistrick testified that he knew about the statute requiring annual disclosures of agency fees and commissions.³⁷ He also testified on direct examination that Commercial Associates had “always complied with the rules and [sic] informing our clients about fees and commissions.”³⁸ But on cross examination, he admitted that he had once had his insurance agent license suspended for failing to disclose a fee.³⁹

At trial, Commercial Associates advanced a clever argument that the written disclosure statement was ambiguous, and that the first paragraph, which was checked, could

³² T. 404.

³³ T. 133.

³⁴ T. 241.

³⁵ T. 242.

³⁶ T. 243.

³⁷ T. 238.

³⁸ T. 199.

³⁹ T. 245.

be read to mean that Commercial Associates was taking both the risk management fee and commissions. Wistrick testified to his opinion that by checking the first box only, Crandall had disclosed that fees and commissions were being charged. This argument failed to account for the unchecked paragraph 2, and also failed to account for the unimpeached testimony of the Wolds and their attorney, Gerry Duffy, that Crandall had told them he was not taking commissions.

In any case, the jury expressly found that Crandall/Commercial Associates “fail[ed] to disclose to The Work Connection that Commercial Associates was taking commissions on workers’ compensation policies that it obtained for The Work Connection in addition to charging an agency or risk management fee.”⁴⁰ This finding can only mean that the jury found Wistrick not to be credible and believed the testimony, bolstered by the 1996 disclosure statement itself, that Crandall had failed to disclose that fees were in addition to commissions.

Commercial Associates was familiar with the statute requiring insurance agents to disclose their compensation – it is cited in the 1996 disclosure form signed by Jeff Wold. That statute provides that the disclosure of compensation must occur *for each insurance contract*:

No person shall charge a fee for any services rendered in connection with the solicitation, negotiation, or servicing of any insurance contract unless:

- (1) before rendering the services, a written statement is provided disclosing:

⁴⁰ Special Verdict Answer 10 (A10).

- (i) the services for which fees are charged;
 - (ii) the amount of the fees;
 - (iii) that the fees are charged in addition to premiums; and
 - (iv) that premiums include a commission; and
- (2) all fees charged are reasonable in relation to the services rendered.⁴¹

Thus, Commercial Associates was legally required to disclose the basis of its compensation each and every time it procured a contract of insurance. As Wistrill admitted, the 1996 disclosure form was the only attempt by Commercial Associates to disclose its compensation – he could find no other documents evidencing disclosure of Commercial Associates’ compensation. Certainly the annual proposal presented to The Work Connection did not disclose any commissions, although it disclosed the annual fee.⁴²

Although the trial court excluded the actual statute from evidence, the jury was permitted to hear, through Wistrill’s testimony, the language of the statute.⁴³ Thus, the jury knew that Crandall’s failure to disclose that it was taking commissions each year was a violation of the statute governing insurance agents, which could effect his agent’s license, as Wistrill learned. The fact that Commercial Associates was acting in violation of its licensing statute, coupled with the 1996 disclosure statement and the accompanying testimony of the Wolds, more than supports the jury’s finding that Commercial Associates

⁴¹ Minn. Stat. § 60K.46, subd. 2. The statute was renumbered in 2001, but has been substantively the same at all times since 1996.

⁴² A35, A46.

⁴³ T. 238-240.

failed to disclose it was taking commissions on workers compensation policies procured for The Work Connection from 1996 to 2002.

5. Commercial Associates Charges Annual Fees from 1996-2002.

The uncontradicted testimony at trial was that The Work Connection paid annual agency fees over that period totaling \$483,000, as follows:

Year	Agency Fee⁴⁴
1996-1997	\$63,000
1997-1998	\$60,000
1998-1999	\$95,000
1999-2000	\$80,000
2000-2001	\$100,000
2001-2002	\$85,000
TOTAL	\$483,000

These fees were invoiced annually and promptly paid by The Work Connection.⁴⁵

6. Commercial Associates Secretly Also Takes Commissions.

After failing to disclose to The Work Connection that it was taking commissions on workers compensation policies, in circumstances where the lapse could hardly have been accidental, Commercial Associates proceeded to take hundreds of thousands of dollars in commissions over a 6-year period. Wistrill admitted that Commercial Associates took an average of 7-8% as commissions on \$9 million of premium over the period in question, which comes to \$630,000 - \$720,000.⁴⁶

⁴⁴ T. 288-297.

⁴⁵ T. 288-297.

⁴⁶ T. 204.

The Work Connection performed a more conservative analysis and arrived at the figure of \$485,070:

Year	Premium⁴⁷	Commission⁴⁸	Amount
1996-1997	\$832,000	10%	\$83,200
1997-1998	\$950,000	6%	\$57,000
1998-1999	\$1,013,000	10%	\$101,300
1999-2000	\$1,163,000	10%	\$116,300
2000-2001	\$954,000	8%	\$76,320
2001-2002	\$1,019,000	5%	\$50,950
TOTAL	\$5,931,000		\$485,070

Even on the most conservative assumptions, Commercial Associates secretly took \$485,070 of commissions on workers compensation policies it procured for The Work Connection.

The Work Connection did not discover that commissions were being taken until 2002 when, by happenstance, its lawyer reviewed Commercial Associates' records obtained by subpoena in an unrelated lawsuit.⁴⁹

7. Norman Spencer's Quote to Commercial Associates.

Near the end of 2002, Commercial Associates proposed to The Work Connection a program of workers compensation insurance to be issued by ACE Insurance Co.⁵⁰ Commercial Associates had no direct agency relationship with ACE – it had to use an intermediary insurance broker, Norman Spencer McKernan, Inc., to place The Work Connection's workers compensation with ACE.⁵¹ Commercial Associates therefore

⁴⁷ T. 276-277.

⁴⁸ Ex. 80 (RA-1 to RA-12).

⁴⁹ T. 299, 380.

⁵⁰ T. 142-145.

⁵¹ T. 123.

contracted with Norman Spencer McKernan to procure the ACE policy.⁵² The policy itself – a contract of insurance – would be issued by ACE.⁵³ The Work Connection had no direct dealings with Norman Spencer McKernan and never saw its quote to Commercial Associates.

On November 1, 2000, Commercial Associates received a quotation from Norman Spencer for an insurance policy to be issued by ACE.⁵⁴ Norman Spencer's quote showed Commercial Associates taking a 5% commission, and showed that the premium for the policy would be based on a 19% schedule debit.⁵⁵

The schedule debit contained in the ACE policy was a charge that was authorized by ACE's scheduled rating plan, which is filed with the Department of Commerce.⁵⁶ This rating plan allowed it discretion, based on underwriting considerations described in the plan, to increase or decrease premium by up to 40%.⁵⁷

8. Commercial Associates' Written Proposal.

As The Work Connection's insurance renewal date of December 31 approached, Commercial Associates used the Norman Spencer quote to prepare a written proposal to present to The Work Connection.⁵⁸ The proposal was, in Wistrill's words, "a representation of the quotation that Norman Spencer would have given us to present to the

⁵² T. 134.

⁵³ T. 126-127.

⁵⁴ T. 155.

⁵⁵ T. 153-155.

⁵⁶ T. 146-147.

⁵⁷ T. 147.

⁵⁸ T. 135, 153; Ex. 2 (RA-13 to RA-14).

buyer, the insured.”⁵⁹ Commercial Associates’ written proposal to The Work Connection outlined the terms and conditions of the policy, including the pricing.⁶⁰ However, consistent with its pattern of concealing its commissions, Commercial Associates’ proposal to The Work Connection deleted the reference to its 5% commission that had been in the Norman Spencer quote.⁶¹

Commercial Associates presented its proposal to The Work Connection for renewal of its workers compensation insurance.⁶² The proposal indicated Commercial Associates would charge a \$75,000 risk management fee, which The Work Connection agreed to and paid.⁶³ This fee compensated Commercial Associates for its expertise and effort as The Work Connection’s agent in properly classifying payroll, managing claims, issuing certificates of insurance to The Work Connection’s customers, and day-to-day management and discussion of The Work Connection’s risks.⁶⁴

Regarding the premium for the ACE policy, the written proposal indicated that the pricing would include a 19% “schedule debit,” which increased the estimated premium for the ACE policy by \$266,214.⁶⁵ When workers compensation insurance policies are issued, the premium can only be estimated because the final premium will depend on the actual payroll and other factors that develop during the policy period.⁶⁶ After all of the factors that

⁵⁹ T. 135.

⁶⁰ T. 138.

⁶¹ T. 245-246.

⁶² T. 135.

⁶³ T. 150.

⁶⁴ T. 152-153.

⁶⁵ T. 147-148.

⁶⁶ T. 148-149.

determine the premium are determined by audits after the policy expires, a final “earned” premium is determined.

9. Commercial Associates’ Verbal Modification of the Written Proposal.

Crandall’s presentation of the proposal for the ACE policy in late December of 2000, was made to Steve and Jeff Wold.⁶⁷ In the preceding years, The Work Connection’s workers compensation policies were issued with schedule credits.⁶⁸ When the Wolds saw that Crandall’s proposal showed a schedule *debit*, they called it to Crandall’s attention.

Jeff Wold testified:

I said, “Jerry, this has a schedule debit in it. That can’t be right.” I said, “We’ve been creating [sic] a schedule credit the last two years.” He goes, “You’re right. That’s supposed to be a schedule credit.”⁶⁹

Jeff Wold testified Crandall responded that “he’d take care of it. And he’d fix it. And don’t worry about it.”⁷⁰ Steve Wold also testified that Crandall told them the ACE policy was to have a schedule credit, notwithstanding the reference in the written proposal to a schedule debit.⁷¹

Jeff Wold summarized the meeting, and what happened afterwards, as follows:

In the year – in the policy year 12/31/01 – or excuse me – 12/31/00 through 12/31/01 Jerry Crandall made a proposal to us. And during that proposal, he said, “There’s a mistake in the proposal. It should be a scheduled credit.” During the next following year he still promises us it was a schedule credit. He said it would be taken care of at audit. At audit, which didn’t

⁶⁷ T. 259.

⁶⁸ T. 260, 337.

⁶⁹ T. 260.

⁷⁰ T. 260.

⁷¹ T. 336.

occur until mid-way through 2002, he – it didn't – the audit did not reflect the schedule credit. We continued to ask him about it. He continued to promise us and to represent to us that there should be a schedule credit. And the – we were led to believe that there was a scheduled credit the entire time from the proposal on through the completion of that policy year, and after that also.⁷²

10. The Meeting of the Minds on the ACE Policy.

At the December 2000 meeting, The Work Connection, represented by the Wolds, and Commercial Associates, represented by Crandall, discussed the coverages and reached an agreement as to what those coverages were to be.⁷³ Jeff Wold testified:

Q. At the end of the meeting, was there an agreement that Mr. Crandall would go out and procure the coverage for the Work Connection?

A. Yes.

* * *

Q. But as to workers comp, was there an agreement as to what sort of policies he would obtain?

A. He would obtain a schedule credit.⁷⁴

Wistrick explained what happened next: “[O]nce we receive the authority from the insured to process the renewal, we then notified Norman Spencer to issue the policy per the agreed terms.”⁷⁵

⁷² T. 257-258.

⁷³ T. 135.

⁷⁴ T. 261-262.

⁷⁵ T. 135.

11. The ACE Policy.

Despite Crandall's verbal representations that the ACE policy was to contain a schedule credit of 19%, in fact it turned out that the written proposal accurately reflected ACE's intent to apply a schedule debit to the premium – the ACE policy was issued with a 19% schedule debit.⁷⁶

Once a policy issues, the only way to change it is by endorsement issued by the insurance company.⁷⁷ Because Commercial Associates was not a direct agent of ACE, no claim could be made directly against ACE based on Crandall's misrepresentation about the schedule debit. ACE had not misrepresented its pricing – Crandall had.

Based on The Work Connection's estimated payrolls at the time Commercial Associates quoted the policy, a 19% debit in ACE's policy equated to a \$266,214 increase in The Work Connection's estimated premium.⁷⁸ The final impact of the schedule debit would not be known until the audit after the policy expired.

12. Audits of the ACE Policy – Final “Earned Premium.”

The ACE policy, as is typical of workers compensation policies, was issued with an estimated premium. Per the terms of the contract, final premium would be determined by audit annually after the policy expired.⁷⁹ The premium would be determined by use of a

⁷⁶ T.155-156.

⁷⁷ T. 127.

⁷⁸ T. 147.

⁷⁹ T. 149.

formula applied to The Work Connection's payroll expense during the policy year.

Accordingly, ACE audited the policy on several occasions.⁸⁰

The Work Connection's outside accountant, Dawn Cardelli, performed a simple analysis of what the premium for the ACE policy would have been had it contained a 19% credit as promised. The premium would have been \$304,647 lower.⁸¹ Thus, the cost to The Work Connection of the schedule credit in the ACE policy was \$304,647.

13. The Second ACE Policy.

At the end of 2001, The Work Connection renewed the ACE policy, this time fully understanding that it contained a schedule debit instead of a credit. Jeff Wold explained that after the terrorist attacks on September 11, 2001, insurance prices had increased dramatically and it was no longer realistic to expect a discount on premium.⁸²

14. Stringing The Work Connection Along.

After initially misrepresenting the 19% debit as a credit, costing The Work Connection an extra \$304,000 for its first ACE policy, Crandall continued to bluff his way along. He told the Wolds on numerous occasions, practically weekly, that ACE had made a mistake and that he would make sure it was corrected.⁸³

On occasion, Crandall deceived people other than the Wolds about the ACE credit/debit issue. Crandall reviewed The Work Connection's monthly workers

⁸⁰ T. 161.

⁸¹ T. 363.

⁸² T. 332.

⁸³ T. 260, 262, 263, 266, 268, 269, 336, 339, 340.

compensation premium reports prepared by Cardelli.⁸⁴ The Work Connection had these reports done for purposes of paying its taxes on an accrual basis, which requires allocating workers compensation expenses to the month they are incurred.⁸⁵ Cardelli therefore prepared reports each month running actual payroll through the premium formula, and arriving at the workers compensation insurance expense for that month.⁸⁶ To do this she needed the workers compensation premium formula, including the schedule credit/debit, which she initially got from Crandall's assistant.⁸⁷ Cardelli testified that she submitted the reports every month to Crandall and the Wolds.⁸⁸

The first report she gave them used a 19% debit, because that is what Crandall's assistant had told her to use.⁸⁹ When Steve Wold informed her that the ACE policy actually was supposed to contain a 19% credit, she faxed a corrected report to Crandall with a note explaining that she had changed the 19% debit to a credit.⁹⁰ Crandall did not inform her that the credit was wrong.⁹¹ She sent Crandall reports every month during 2001, all of them showing a 19% credit; Crandall never indicated the credit should be a debit.⁹² On the sole occasion when she specifically discussed the credit/debit issue, Crandall told her that he was aware of the problem and was working on it.⁹³

⁸⁴ T. 348.

⁸⁵ T. 337.

⁸⁶ T. 348.

⁸⁷ T. 349.

⁸⁸ T. 355.

⁸⁹ T. 349.

⁹⁰ T. 351-352.

⁹¹ T. 354-355.

⁹² T. 355.

⁹³ T. 357-358.

15. Crandall's Suicide.

During the last week of October 2002, Crandall told Wistrick that he was going to pick up the receivable owed by The Work Connection the following week.⁹⁴ On Friday of the same week, he told Jeff Wold that The Work Connection would get a check from ACE for the erroneous schedule debit the following week.⁹⁵ Over the weekend Crandall committed suicide.⁹⁶

Crandall left a note for Wistrick, in which he wrote that he had "screwed up big time," and had "kept it buried for a few months." He then explained the ACE credit/debit issue. He said he "misread" the schedule debit as a credit in his proposal to The Work Connection, and "tried to work it out with ACE but to no avail." He then stated that The Work Connection's shortfall was about \$300,000, and that Commercial Associates would have to pay it.⁹⁷

This testimony meshed perfectly with that of the Wolds and their accountant, Cardelli. Crandall had indeed told the Wolds during the insurance proposal that the ACE policy had a credit in it, when in fact it had a debit. He did keep it buried for months, and he clearly expected that Wistrick would pay the money to The Work Connection.

⁹⁴ T. 221.

⁹⁵ T. 268-69.

⁹⁶ T. 268-69.

⁹⁷ Ex. 84 (RA-15 to RA-16).

16. Wistrick Promises to Make Things Right.

After Crandall's suicide, Wistrick initially promised to resolve the ACE credit issue with them, but he soon became belligerent and angry, and refused to pay the ACE credit.⁹⁸

17. The Work Connection's Efforts to Resolve the Dispute.

After Crandall's suicide, Wistrick made a presentation to renew The Work Connection's insurance in December of 2002. Wistrick demanded that The Work Connection pay the outstanding account balance then estimated to be \$175,916.60. The Wolds demanded that Commercial Associates honor its commitment to reimburse The Work Connection for the promised ACE credit. The Wolds proposed to pay the outstanding balance in exchange for payment by Commercial Associates of the ACE credit.⁹⁹ They also offered to renew the insurance through Commercial Associates if it waived the outstanding balance.¹⁰⁰

18. The Demand for \$184,000.

Wistrick refused all attempts at resolution, and began issuing account reconciliation statements showing various balances and threatening legal action. The last of these was dated June 1, 2003, in the amount of \$184,273.60.¹⁰¹

19. The Work Connection Refuses to Pay.

The Work Connection, which had never before refused to pay a bill to Commercial Associates, been late in paying a Commercial Associates bill, or short-paid a bill; which

⁹⁸ T. 270.

⁹⁹ T. 272.

¹⁰⁰ T. 188.

¹⁰¹ T. 194.

regularly paid millions of dollars in premium before the due date, refused to pay this statement.¹⁰² When Wistrick did not return their telephone calls, the Wolds issued a certified letter objecting to the bill on the basis that the audit was not complete and because of the ACE schedule credit/debit issue.¹⁰³

20. The Suit.

Not interested in compromise, Commercial Associates brought suit for \$184,000. The Work Connection counterclaimed for the ACE credit and disgorgement of compensation received by Commercial Associates while in breach of its fiduciary obligations. Commercial Associates then brought a third-party claim against The Work Connection's lawyers, the authors of this brief, for legal malpractice. Upon being informed that a legal malpractice claim can only be brought against one's own attorney, Commercial Associates voluntarily dismissed its third party claim.

21. A Word About Footnote 1.

Commercial Associates suggests in footnote 1 of its brief that the Siegel Brill firm was "precluded" from representing The Work Connection in the trial court because of "dual representation of Commercial Associates during the relevant time period."¹⁰⁴ This mysterious footnote does not appear to be making a point, unless it is intended to disparage members of the firm.

¹⁰² T. 216-17.

¹⁰³ T. 274.

¹⁰⁴ Commercial Associates' Appellate Brief at p. 5, n. 1.

Whatever its purpose may be, the footnote is misleading and wrong. This firm represented Commercial Associates in unrelated matters in the past, and ceased doing so when this dispute arose shortly after Crandall's death. Wistrick testified at least three times that Gerald Duffy, a Siegel, Brill shareholder, was The Work Connection's lawyer as to the issues presented in this suit.¹⁰⁵ Greg Simpson, another Siegel, Brill shareholder, testified to information he discovered while representing The Work Connection.¹⁰⁶ Commercial Associates was forced to dismiss its third party claim for legal malpractice against the firm upon being told that such claims can only be made against one's own attorney. Any implication that there was improper dual representation is disproved by the record.

22. The Jury's Answers to Special Verdict Form Questions.

The trial court directed a verdict against The Work Connection on Commercial Associates' account claim because there was no challenge to the amount claimed. The Work Connection's position was, and is, that more money is owed to it than is owed to Commercial Associates. The jury was asked to answer special verdict questions on theories of fraud, negligent misrepresentation and breach of fiduciary duty. The trial court refused to submit The Work Connection's contract theory to the jury on the basis that in order to prove damages, evidence of the availability of insurance with a 19% credit would have to be shown. As no evidence had been introduced that it was possible to procure insurance at the price Crandall had quoted, the trial court believed direct damages could not be shown.

¹⁰⁵ T. 133, 188, 204.

¹⁰⁶ T. 378.

As to the secret commissions claim, the jury found:

- Crandall did not falsely represent that Commercial Associates was not taking commissions on policies procured for The Work Connection;
- Crandall failed to disclose that Commercial Associates was taking commissions on policies procured for The Work Connection in addition to the agency fee;
- Crandall's failure to disclose the commissions was negligent;
- The Work Connection did not sustain damages as a result of Crandall's negligence.
- Crandall did have a confidential or fiduciary relationship with The Work Connection;
- Crandall did not have special knowledge of a material fact that The Work Connection was unable to get;
- The Work Connection did not sustain damages as a result of Crandall's failure to disclose the commissions.

As to the ACE credit issue, the jury found:

- Crandall falsely represented that the ACE policy was to contain a scheduled credit;
- He didn't know it was false;
- He intended for The Work Connection to rely on his representation;
- The Work Connection justifiably relied on it;

- The Work Connection was not harmed as a direct result of relying on the false representation.
- Crandall supplied false information to The Work Connection about the ACE policy's schedule credit/debit;
- He failed to use reasonable care or competence in obtaining the information or communicating it to The Work Connection;
- The Work Connection justifiably relied on it;
- The Work Connection was not harmed by relying on the information.

The jury thus found that Crandall had acted negligently, but not intentionally, in failing to disclose the commissions and in failing to correctly represent the ACE policy. The jury found that The Work Connection did not sustain damages flowing from this negligence.

23. The Post Trial Motion.

On The Work Connection's post trial motion, the trial court found that there was sufficient evidence for each of the jury's special verdict findings, but that the question of the appropriate remedy for breach of fiduciary duty was one of law, not for the jury. The trial court then determined that the equitable remedy of disgorgement of fees flowed automatically from failure of a fiduciary/agent to disclose commissions received from a third party. The court ordered fee forfeiture in the amount of the agency fees paid by The Work Connection, \$483,000. However, the trial court declined to order disgorgement of the secret commissions taken by Commercial Associates on the basis that the commissions were compensation from a third party – the insurance company.

STANDARD OF REVIEW

I. Standard of Review for Disgorgement of Commissions Issue.

The trial court granted The Work Connection's post trial motion for the equitable remedy of disgorgement of compensation taken by Commercial Associates during the period it was breaching its fiduciary duties to The Work Connection. The jury had answered special verdict questions posed to it. The trial court accepted the jury's findings of fact and concluded that they compelled the equitable remedy of disgorgement of compensation taken by Commercial Associates.

Neither party challenges the findings of fact of the jury. The jury failed to find damages, but equitable claims are not triable to a jury as a matter of right.¹⁰⁷ Granting equitable relief is within the sound discretion of the trial court; only a clear abuse of discretion will result in reversal.¹⁰⁸ Although the granting of a motion for judgment notwithstanding the verdict is a pure question of law,¹⁰⁹ this case involves the trial court's grant of equitable relief based on the jury's findings that (1) Commercial Associates owed a fiduciary duty to The Work Connection and (2) Commercial Associates failed to disclose that it was taking commissions on policies of workers compensation insurance it procured for The Work Connection, on top of the annual risk management fee paid by

¹⁰⁷ *State by Humphrey v. Alpine Air Prods*, 490 N.W.2d 888, 895 (Minn. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

¹⁰⁸ *State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000); *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979); *Dain Bosworth, Inc. v. Goetze*, 374 N.W.2d 467, 471 (Minn. App. 1985); *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977).

¹⁰⁹ *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979).

The Work Connection. Thus, the trial court's grant of equitable relief can only be overturned only if the reviewing court determines it to be a clear abuse of discretion. As to factual matters, the reviewing court must give due regard to the trial court's superior opportunity to judge the credibility of the witnesses.¹¹⁰

II. Standard of Review for Refusal to Submit Contract Theory to Jury.

The trial court has a judicial duty to ensure that a case is presented based on all applicable law.¹¹¹ The trial court has broad discretion in instructing the jury as long as the law of the case is fully, fairly and correctly stated.¹¹² A party is entitled to a specific instruction on its theory of the case if there is evidence to support the instruction and it is in accordance with applicable law.¹¹³ A trial court's refusal to give a requested instruction setting forth a litigant's theory of the case, where there is evidence to support such theory, constitutes reversible error unless the substance of the requested instruction was covered by a general charge to the jury.¹¹⁴

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE EQUITABLE REMEDY OF FORFEITURE OF FEES.

Commercial Associates argues, in its appeal, that Judge Monahan erred by ordering it to disgorge the fees it had taken as compensation from The Work Connection

¹¹⁰ Minn. R. Civ. P. 52.01.

¹¹¹ *Christenson v. Argonaut Ins. Cos.*, 380 N.W.2d 515, 519 (Minn. App. 1986).

¹¹² *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 836 (Minn. App. 1985).

¹¹³ *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979).

¹¹⁴ *Oldendorf v. Eide*, 260 Minn. 458, 464, 110 N.W.2d 310, 314 (1961).

over the six years it acted as The Work Connection's insurance agent. Commercial Associates contends, first, that the jury's "five separate findings of no economic harm" are somehow inconsistent with the trial court's award of equitable relief based on the jury's findings that Commercial Associates was a fiduciary who failed to disclose that it was receiving compensation from another source. Second, Commercial Associates argues that some remedy short of total forfeiture would have been more appropriate. Neither argument has merit.

A. Total Forfeiture of Compensation is Mandatory Where a Fiduciary Breaches its Duty of Loyalty.

[T]he law has traditionally been unyielding in its assessment of penalties when a fiduciary, or trustee, or agent has breached any of his obligations. The underlying policy is a strong one. It recognizes that insuring absolute fidelity to the principal's (or beneficiary's) interests is fundamental to establishing the trust necessary to the proper functioning of these relationships.¹¹⁵

An agent's primary duty is loyalty to the principal.¹¹⁶ If an agent breaches its fiduciary duty, it is not entitled to compensation and its compensation is returned to the principal.¹¹⁷ Profits made in the course of the agency belong to the principal whether

¹¹⁵ *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982). See also *Lum v. McEwen*, 56 Minn. 278, 282, 57 N.W. 662, 662 (1894).

¹¹⁶ *Lum*, 57 N.W. at 662..

¹¹⁷ *Rice v. Perl*, 320 N.W.2d at 411; *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209, 213 (Minn. 1984).

they are the fruits of performance or violation of the agent's duty.¹¹⁸ An agent may not profit from the relationship nor engage in self-dealing without the principal's consent after full disclosure of facts which might affect the principal's decision.¹¹⁹ Thus, "an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation."¹²⁰

The agent is responsible for his gross profit rather than his net profit.¹²¹ The principal does not need to prove actual loss; the loss is inherent in the breach because the principal has not received the benefits of full loyalty and zealous advocacy.¹²² This rule serves not only to repair an injury to the principal; its primary purpose is to encourage agent loyalty.¹²³

B. Commercial Associates Was The Work Connection's Fiduciary.

Under Minnesota law, an "agency" relationship is a fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.¹²⁴ While the trial court could have directed a verdict on the issue of whether Commercial Associates

¹¹⁸ *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918, 925 (Minn. 1996) (quoting and citing *Doyen v. Bauer*, 211 Minn. 140, 300 N.W. 451, 454 (1941); *Carlson v. Carlson*, 363 N.W.2d 803, 805 (Minn. App. 1985); *Handy v. Garmaker*, 324 N.W.2d 168, 173 (Minn. 1982).

¹¹⁹ *Dahl*, 545 N.W.2d at 925

¹²⁰ *Rice v. Perl*, 320 N.W.2d at 411.

¹²¹ *Raymond Farmers Elevator Co. v. American Surety Co.*, 207 Minn. 117, 125, 290 N.W. 231, 235 (1940).

¹²² *Rice v. Perl*, 320 N.W.2d at 411; *Anderson v. Anderson*, 293 Minn. 209, 197 N.W.2d 720, 724 (1972).

¹²³ *Lum*, 56 Minn. at 282, 57 N.W. at 662-63.

¹²⁴ *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981).

was a fiduciary, since it was not seriously contested, it submitted that issue to the jury.

The jury correctly found that Commercial Associates was a fiduciary of The Work Connection.¹²⁵ The trial court approved this finding in its post trial decision.¹²⁶

Commercial Associates does not challenge the jury's findings on appeal.

C. Commercial Associates Breached its Duties.

A fiduciary owes his client a duty to disclose any information that affects the client's interests.¹²⁷ Failure of an agent to disclose that it is being paid by the other party in a transaction is always a breach of fiduciary duty. Cases involving the "duplicitous double agent" are legion, and all find the agent who secretly represents both sides of a transaction to be in breach of its duties owed to the deceived principal.¹²⁸

Adding specificity to the broad principle that a fiduciary must disclose material facts, Minnesota law expressly requires an insurance agent to make written disclosure of the full basis of its compensation for *each* contract of insurance it procures for a client:

No person shall charge a fee for any services rendered in connection with the solicitation, negotiation, or servicing of any insurance contract unless:

(1) before rendering the services, a written statement is provided disclosing:

(i) the services for which fees are charged;

(ii) the amount of the fees;

¹²⁵ CA's App. at A10-11.

¹²⁶ CA's App. at A5.

¹²⁷ *Klein v. First Edina Nat'l Bank*, 293 Minn. 482, 196 N.W.2d 619, 622 (1972).

¹²⁸ *E.g.*, *Anderson*, 197 N.W.2d at 724; *Handy*, 324 N.W.2d at 172-73; *Dahl*, 545 N.W.2d at 925; *Raymond*, 290 N.W. at 235; *Tarnowski*, 51 N.W.2d at 803; *Crump*, 46 N.W. at 142; *Doyen*, 300 N.W. at 455.

- (iii) that the fees are charged in addition to premiums;
- (iv) that premiums include a commission; and
- (2) all fees charged are reasonable in relation to the services rendered.¹²⁹

Judge Monahan allowed The Work Connection to introduce this evidence through Wistrucill, but refused to admit the statute itself.¹³⁰

The jury's finding that Crandall's failure to disclose commissions was negligent and not intentional is no defense: An agent who represents both sides of a transaction without disclosing it is guilty of fraud as a matter of law.¹³¹ The consequences of a breach of fiduciary duty follow regardless of the motives of the fiduciary.¹³²

D. The Breach was Material.

There is no more material breach of the duty of loyalty than the taking of a secret commission from the opposing party in a transaction. In *Tarnowski v. Resop*, the agent of the plaintiff secretly took a \$2,000 payment from the seller in a transaction.¹³³ The Supreme Court declared that the plaintiff had an "absolute right" to the commission. The court said the taking of a secret commission from the adverse party "was nothing more or less than the acceptance by the agent of a

¹²⁹ Minn. Stat. § 60K.46.

¹³⁰ T. 238.

¹³¹ *Doyen*, 300 N.W. at 455.

¹³² *Rice v. Perl*, 320 N.W.2d at 411.

¹³³ 236 Minn. 33, 51 N.W.2d 801 (1952).

bribe to perform his duties in the manner desired by the person who gave the bribe.”¹³⁴

E. The Jury’s Finding of no Damages Does Not Preclude Equitable Relief.

Commercial Associates argues that the fact that The Work Connection was not financially harmed as a result of its breach of fiduciary duty insulates it from the equitable remedy ordered by the trial court. The short answer to this is that the disgorgement/forfeiture remedy is not a jury issue, at least in cases involving secret commissions. As the court in *Tarnowski v. Resop* stated, the plaintiff has an “absolute right” to the compensation obtained by the faithless agent.¹³⁵ In *Raymond Farmers Elevator Co. v. American Surety Co.*,¹³⁶ the trial court had dismissed the jury partway through the trial. The supreme court said that because the relief sought from the agent, disgorgement of profits, was equitable, the jury was not necessary. The supreme court then determined that the agent was liable for gross profits. Similarly, the *Rice v. Perl* decision ordering forfeiture was decided as a matter of law, on motion for summary judgment.

The supreme court said, in *Rice v. Perl*:

This court has repeatedly stated that an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation. * * * Furthermore, “these consequences follow even though the principal, ignorant of the duplicitous agency, cannot prove actual injury to himself or that the agent committed an intentional fraud.”¹³⁷

¹³⁴ 51 N.W.2d at 803.

¹³⁵ 51 N.W.2d at 803.

¹³⁶ 207 Minn. 117, 125, 290 N.W. 231, 235 (1940).

¹³⁷ 320 N.W.2d 407, 411 (Minn. 1982).

Thus, the jury's findings of no damages flowing from its finding of a breach of fiduciary duty does not preclude disgorgement of Commercial Associates compensation.

F. *Gilchrist* Does Not Apply – the Scaling of Fees is Not Required.

Commercial Associates' primary argument is that the "inflexible, absolute disgorgement rule" of *Rice v. Perl* does not apply. Relying on *Gilchrist v. Perl*,¹³⁸ Commercial Associates argues that the trial court should have considered the factors relevant to awards of punitive damages in assessing the appropriate level of disgorgement. It is not clear how that would have helped Commercial Associates, since consideration of those factors would merely confirm that total fee forfeiture was appropriate. Nevertheless, this case does not fall into the *Gilchrist v. Perl* exception to the general rule requiring total fee forfeiture.

Gilchrist v. Perl does not overrule or limit *Rice v. Perl*. It holds that on the facts of that case, "when no actual fraud or bad faith is involved, when no actual harm to the client is sustained, and particularly when there are multiple potential plaintiffs," the trial court should consider the factors contained in the Minnesota statute governing awards of punitive damages.¹³⁹ But here, there are no other potential plaintiffs, Commercial Associates' conduct was in knowing violation of law, and The Work Connection was harmed by paying money to Commercial Associates that it was not entitled to. These

¹³⁸ 387 N.W.2d 412 (Minn. 1986).

¹³⁹ 387 N.W.2d at 417.

facts were not present in *Gilchrist v. Perl*, and the general rule from *Rice v. Perl* therefore controls.

Further, *Gilchrist* involved a fiduciary breach of an entirely different character than that of Commercial Associates. The fiduciary there, a lawyer, represented Dalkon Shield personal injury plaintiffs without disclosing that the insurance company's adjuster in those cases was on the law firm's payroll in connection with unrelated matters. The law firm was *not* simultaneously representing both sides of the same transaction, as Commercial Associates did here. A fiduciary's simultaneous but undisclosed representation of both sides of a transaction is fraud as a matter of law.¹⁴⁰

No Minnesota court decision has apparently ever required less than total forfeiture of compensation in a case like this one, involving an agent who secretly represents both sides of a transaction. Allowing Commercial Associates to keep any part of its compensation obtained while taking secret commissions would represent a radical change in Minnesota law, and an abandonment of more than 100 years of case law holding that forfeiture of compensation in such circumstances is automatic.

G. Consideration of the *Gilchrist* Factors Doesn't Help Commercial Associates.

Although *Gilchrist v. Perl* does not apply to this case, consideration of those factors would not change the result. The punitive damages factors are as follows:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the

¹⁴⁰ *Doyen*, 300 N.W. at 455.

duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.¹⁴¹

These factors weigh in favor of disgorgement of fees:

- **Seriousness of the hazard to the public arising from the defendant's misconduct.**

The hazard of an insurance agent taking secret commissions violates an important public policy, as evidenced by the fact that the legislature has expressly prohibited it.¹⁴²

As Wistrick testified, his license was suspended for failing to comply with the statute.

The dozens of judicial decisions on the topic of divided loyalties and secret commissions further evidence the harm to the public caused by an insurance agent, who has by his own reckoning two thousand customers, who does not disclose commissions.

- **Profitability of the misconduct to the Defendant.**

The misconduct was demonstrably very profitable to Commercial Associates – it received nearly half a million dollars in undisclosed commissions over a 6 year period from just The Work Connection.

¹⁴¹ Minn. Stat. § 549.20, subd. 3.

¹⁴² Minn. Stat. § 60K.46.

- **Duration of the misconduct and any concealment of it.**

The misconduct conduct occurred over a 6 year period. Commercial Associates went to great lengths to conceal it, including repeatedly telling The Work Connection it was not taking commissions, deleting references to commissions from annual insurance proposals presented to The Work Connection, and failing to give the written disclosures required by law.

- **Degree of the defendant's awareness of the hazard and of its excessiveness.**

Commercial Associates both knew about the statutory requirement that it disclose the basis of its compensation and knew that it was not complying with the statute. It knew that its practice of not disclosing commissions was illegal and could cause it to lose its license. Crandall prepared the annual written proposals to The Work Connection that failed to disclose the commissions; Wistrill testified he reviewed the proposals each year. Thus, both principals knew or should have known of the misconduct.

- **Attitude and conduct of the defendant upon discovery of the misconduct.**

Commercial Associates' made no effort to ameliorate the effects of its violation of fiduciary duties to The Work Connection. In fact, it sued The Work Connection for a much smaller amount it contended was owing to it.

- **Number and level of employees involved in causing or concealing the misconduct.**

While the number of employees involved in causing the misconduct was just one, Crandall, Wistrill reviewed the annual proposals that failed to disclose commissions and

effectively ratified the misconduct by testifying that in his opinion, Crandall's 1996 written disclosure to The Work Connection that an annual fee was being charged in lieu of commissions was in fact a disclosure that commissions were being taken. Instead of distancing himself from his partner's indefensible misconduct, Wistrick endorsed it. Both owners of Commercial Associates therefore approved of the misconduct.

- **The financial condition of the defendant.**

The financial condition of Commercial Associates at the time of trial was good: Wistrick testified its annual profits were \$2 million.

- **The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct.**

There are no other known lawsuits or claims against Commercial Associates for the same or similar conduct.

In summary, every factor listed weighs in favor of total disgorgement. This is not a case like *Gilchrist v. Perl*, where the fiduciary's misconduct was arguably a *de minimus* technicality, and the potential financial devastation to the defendant and corresponding windfall to the plaintiffs was out of all proportion to the misconduct. There was nothing *de minimus* or technical about what Commercial Associates did. In the face of a statute requiring disclosure of commissions, for six straight years Commercial Associates failed to disclose and actively concealed that it was taking commissions on top of the annual fees it charged The Work Connection. It removed that information from insuring proposals presented to The Work Connection. Commercial Associates doubled its compensation by representing both sides of the deal. It was an enormously profitable

practice that Commercial Associates knew violated the law and its fiduciary obligations. Wistrick had even had his license suspended for this very same conduct. If ever there was a case calling for total disgorgement of compensation, this is it.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING FORFEITURE OF COMMISSIONS.

In its cross appeal, The Work Connection argues that the trial court did not go far enough. Judge Monahan was of the view that “While it is clear that [Commercial Associates] has forfeited its right to compensation, it is not clear what this means in this case.”¹⁴³ He reasoned that the forfeiture rule would clearly encompass the fees Commercial Associates took from The Work Connection, in the amount of \$483,000. But he drew the line there. He characterized the \$485,070 that Commercial Associates secretly took as commissions as compensation from a third party that was not subject to the forfeiture rule.

This is not the law anywhere. In the duplicitous double agent scenario, commissions are always forfeited, no matter who pays them. As one court said:

Courts throughout the United States have been virtually unanimous in their enunciation and adoption of the rule that a secret fee-splitting agreement between brokers representing adverse parties in a transaction constitutes a breach of fiduciary duty and precludes either broker from recovering a commission. The fact that the principal is not actually injured does not prevent application of the rule, since the “secret profit” rule is not intended to be remedial of actual harm, but rather is intended to prevent fee-splitting agreements without the knowledge or consent of the principal and to secure fidelity in the discharge of fiduciary duties. The rule does not depend upon whether or not the principal is injured by the conduct of the agent. The wholesome rule is that the agent shall not put

¹⁴³ CA’s App. at A6.

himself in a position where he may be tempted to betray his principal, or to serve himself at the expense of his principal. A [fiduciary] is under a fiduciary duty to affirmatively disclose to his principal a commission splitting arrangement between himself and a purchaser of the principal's property, unless such principal has knowledge of the agreement prior to the closing.¹⁴⁴

Numerous cases hold that an agent who, without the knowledge and consent of its employer, secretly agrees to split its commission with an agent representing the opposing side in a transaction, is guilty of a violation of its fiduciary duty to its employer and is not entitled to a sales commission.¹⁴⁵

This also represents the law of Minnesota. The Supreme Court has said that

[T]he principle that all profits made by an agent in the course of an agency belonging to the principal, whether they are the fruits of performance or the violation of an agent's duty, is firmly established and universally recognized.¹⁴⁶

Thus, commissions are forfeited if the fiduciary violates its fiduciary duties.¹⁴⁷ Where there is a conflict of interest the principal's consent cannot be implied.¹⁴⁸

The trial court's characterization of the commissions as compensation from a third party is not accurate. The Work Connection paid the entire estimated premium to Commercial Associates. Commercial Associates then helped itself to the commission out

¹⁴⁴ *Myer v Preferred Credit, Inc.*, 117 Ohio Misc.2d 8, 766 N.E.2d 612 (2001).

¹⁴⁵ See *Hageman v. Colombet*, 198 P. 842, 843-44 (Cal. Dist. Ct. App. 1921); *Tracey v. Blake*, 118 N.E. 271, 272 (Mass. 1918); *Sweeney & Moore, Inc., v. Chapman*, 294 N.W. 711, 712-713 (Mich. 1940); *Ornamental & Structural Steel, Inc., v. BBG, Inc.*, 509 P.2d 1053, 1056-57 (Ariz. Ct. App. 1973); *Case v. Business Centers*, 357 N.E.2d 47, 50 (Ohio Ct. App. 1976).

¹⁴⁶ *Tarnowski v. Resop*, 236 Minn. 33, 51 N.W.2d 801, 802 (1952).

¹⁴⁷ *Real Estate Dynamics, Inc. v. Richards*, 392 N.W.2d 250, 252 (Minn. App. 1986); *Handy v. Garmaker*, 324 N.W.2d 168, 173 (Minn. 1982).

¹⁴⁸ *Real Estate Dynamics*, 392 N.W.2d at 252.

of that money and remitted the balance, net of commission, to the insurance company. So The Work Connection unknowingly paid the commissions to Commercial Associates, while under the misapprehension that Commercial Associates was transmitting the full amount to the insurer.

All profits gained by an agent in the course of representing the principal belong to the principal, whether they are fruits of performance or of violation of the agent's duty.¹⁴⁹ There is no rational basis to refuse to order disgorgement of a faithless fiduciary's commissions earned by breaching its duties to The Work Connection. The trial court must be reversed to this extent, and directed to order forfeiture of all compensation received by Commercial Associates, including both fees and commissions.

III. THE TRIAL COURT ERRED BY REFUSING TO SUBMIT THE WORK CONNECTION'S BREACH OF CONTRACT THEORY TO THE JURY.

The Work Connection's contract theory should have gone to the jury. A party is entitled to a specific instruction on its theory of the case if there is evidence to support the instruction and it is in accordance with applicable law.¹⁵⁰ A trial court's refusal to give a requested instruction setting forth a litigant's theory of the case, where there is evidence to support such a theory, constitutes reversible error unless the substance of the requested instruction was covered by a general charge to the jury.¹⁵¹

¹⁴⁹ *Tarnowski v. Resop*, 236 Minn. 33, 51 N.W.2d 801, 802 (1952).

¹⁵⁰ *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979).

¹⁵¹ *Oldendorf v. Eide*, 260 Minn. 458, 464, 110 N.W.2d 310, 314 (1961).

An insurance agent may be liable to its client on either a tort or breach of contract theory.¹⁵² The agent's duty is ordinarily limited to the duties imposed in any agency relationship, namely to act in good faith and follow instructions.¹⁵³ Absent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client.¹⁵⁴ Thus, an agent may be liable on a theory of breach of contract for failure to procure insurance as instructed.¹⁵⁵ The usual measure of damages for breach of contract is expectation damages – the amount that will place the nonbreaching party in the same situation as if the contract had been fully performed.¹⁵⁶

A legally enforceable contract requires an offer, acceptance and consideration.¹⁵⁷ The testimony at trial demonstrated (1) Commercial Associates offered to procure a contract of insurance with a 19% schedule credit; (2) The Work Connection accepted the offer and instructed Commercial Associates to procure the policy; (3) The Work Connection simultaneously agreed to pay, and did pay, an agency fee for Commercial Associates' services; (4) Commercial Associates in fact procured a policy with a 19% schedule debit; and (5) as a result, The Work Connection paid \$304,745 more than it would have paid had Commercial Associates procured the contract it promised, and was instructed, to get.

¹⁵² *Eddy v. Republic Nat'l Life Ins. Co.*, 290 N.W.2d 174, 177 (Minn. 1980).

¹⁵³ *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989)

¹⁵⁴ *Id.*

¹⁵⁵ *North Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F. Supp.2d 1140, 1151 (D. Minn. 2003).

¹⁵⁶ *Wilhelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 633, 268 N.W. 634, 636-37 (1936); *Peters v. Mutual Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. App. 1988).

¹⁵⁷ *S O Designs USA v. Rollerblade, Inc.*, 620 N.W.2d 48, 52 (Minn. App. 2000).

The elements of a claim for breach of contract were all proven at trial. The trial court's basis for not submitting the contract theory was its notion that The Work Connection did not prove that it was possible to procure a policy priced as Crandall had represented the ACE policy would be.

But on a *contract* theory, the usual measure of damages is loss of expectation – the amount necessary to put the plaintiff in the position it would have occupied had the contract been performed. The Work Connection contracted with Commercial Associates to go and procure a policy of insurance with a 19% credit. Commercial Associates failed to do that. It breached the contract, and must pay the difference between what it promised and what it produced.

Even if it was impossible to procure a policy with the price Crandall promised The Work Connection, that fact would not be a defense to a contract theory. One may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform.¹⁵⁸ Further, a promise that cannot be performed without the consent or cooperation of a third party is not excused because of the promisor's inability to obtain that cooperation.¹⁵⁹

Even on tort theories, courts have rejected the insurance agents' defense that the desired insurance was unavailable. The Fifth Circuit rejected such an argument because the broker's conduct "lulled the plaintiffs into believing that no further actions were

¹⁵⁸ *Standard Constr. Co. v. National Tea Co.*, 240 Minn. 422, 430-31, 62 N.W.2d 201 (1953).

¹⁵⁹ *St. Paul Dredging Co. v. State*, 259 Minn. 398, 407, 107 N.W.2d 717, 723-24 (1961); *Hokanson v. Western Empire Land Co.*, 132 Minn. 74, 155 N.W. 1043, 1044 (1916).

necessary.”¹⁶⁰ A Tennessee decision rejected a similar argument in a case involving a gap in coverage where “the agent’s failure to inform [the clients] of the change in coverage completely denied them any opportunity to explore other methods of protecting their property.”¹⁶¹ Here, there is no telling what The Work Connection would or could have done if Crandall had simply told them the truth: that the ACE policy had a debit in it. Crandall’s admitted concealment of his misrepresentation prevented The Work Connection from exploring what other insurance options it might have had as the market existed at that time.

On The Work Connection’s tort theories, the jury apparently failed to find causally related damages because nobody could say what would have happened had Crandall told the truth about the ACE debit. But that failure of proof is irrelevant to The Work Connection’s contract claim. On a contract claim, there is no need to prove that the product or service contracted for could be obtained elsewhere at the quoted price. The promisor in such a case must pay the amount needed to restore the promisee to the position it would have occupied had the contract been performed. In this case, that amount is \$304,745.

Commercial Associates promised to procure a policy of insurance for a certain price. It procured a policy with a higher price, and it must pay the difference. The Work Connection should have had a chance to argue its contract theory to the jury. The jury could have found a breach of contract and loss of expectation damages in a manner

¹⁶⁰ *Haueber v. Can-Do, Inc.*, 666 F.2d 275, 280 (5th Cir. 1982).

¹⁶¹ *Wood v. Newman, Hayes & Dixon Ins. Agency*, 905 S.W.2d 559, 564 (Tenn. 1995).

entirely consistent with its findings on the other theories. The case should be remanded for trial on the breach of contract theory only.

CONCLUSION

For the reasons stated herein, the trial court's order that Commercial Associates must forfeit its fees should be affirmed; the trial court's denial of The Work Connection's motion for disgorgement of the commissions secretly taken by Commercial Associates should be reversed; the trial court's denial of The Work Connection's motion for new trial on the contract claim should be reversed; and the case should be remanded for a retrial limited to The Work Connection's contract claims.

**SIEGEL, BRILL, GREUPNER
DUFFY & FOSTER, P.A.**

Dated: September 12, 2005



M. Gregory Simpson (#204560)
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 (facsimile)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).