INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-340

AMERIPRISE FINANCIAL, INC.,
Third-Party Defendant Below, Petitioner

v.

Charles E. Vallandingham,
Third-Party Plaintiff Below, Respondent.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 10-C-221

BRIEF OF THE PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to enter judgment for the Petitioner on the Respondent's sole claim for fraudulent concealment despite correctly ruling the Petitioner, as a franchisor, had no duty to disclose to the Respondent, as a franchisee.

2. The Circuit Court erred by admitting, considering, and crediting evidence regarding post-transaction matters, a wholly unrelated class action, FINRA Rules, expert opinion testimony, and unrelated litigation and regulatory issues, all irrelevant to the Respondent's fraudulent concealment claim and otherwise unduly prejudicial.

3. The Circuit Court erred by awarding damages that were excessive, speculative, and unsupported by competent evidence to a reasonable degree of certainty and by awarding emotional distress damages.

II. STATEMENT OF THE CASE

This is a case that went off the rails, resulting in a *$1.3 million* fraudulent concealment verdict entered against a third party, the Petitioner, Ameriprise Financial, Inc. ["Ameriprise"],[1] *over a decade after a bench trial concluded*, arising from a *$75,000* deal between the Respondent, Charles E. Vallandingham ["Vallandingham"], and one of his colleagues, Kenneth Beck ["Beck"]. Vallandingham, a sophisticated independent financial advisor with Series 7, 63, and 65 licenses,[2] Beck and Marc Arnold ["Arnold"] were Ameriprise financial advisor franchisees. Vallandingham's Ameriprise franchise agreement provided Ameriprise could not reasonably withhold consent for a financial advisor's transfer of interest to another *but could condition such consent on the release of any claims against Ameriprise*.[3] Ameriprise financial advisors like

[1] Indeed, Ameriprise is a third-party defendant in this case. App. 310.

[2] App. 961.

[3] App. 153.

Vallandingham, Beck, and Arnold were designated as "independent contractor[s]" under their franchise agreements, and franchisees (1) agreed Ameriprise *assumed no fiduciary duties*; (2) waived punitive damages; and (3) agreed any recovery would be limited to actual damages.[4] Additionally, the franchise agreement provided that Ameriprise could terminate it based on an advisor's failure to meet their financial planning standards with a one-year cure period.[5]

On January 7, 2008, Ameriprise advised Beck that he was in default of his agreement and gave him one year to cure his default. On January 7, 2009, after he failed to cure, Ameriprise terminated Beck's franchise agreement,[6] which afforded Beck 90 days to find an approved buyer to purchase his business book.[7] Beck negotiated with fellow franchisees Vallandingham and Dale Goff ["Goff"], with the former offering $75,000 and the latter offering $70,000.[8] Before closing the deal, Vallandingham met with Beck, who told him he had been terminated for failing to comply with the financial planning standard under their franchise agreement.[9] He was provided a copy of Beck's practice reports and termination letter.[10] Vallandingham also contacted Ameriprise executive William C. Cupach ["Cupach"],[11] who had tried to assist Beck in curing his productivity default.[12] Cupach confirmed that (1) Beck had been terminated for failing to generate business;[13] (2) Beck did not have any financial planning or recurring revenue;[14] and (3) *Beck's business was*

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[4] App. 166, 169.

[5] App. 160.

[6] App. 1935.

[7] App. 1936.

[8] App. 574.

[9] App. 1384, 1473.

[10] App. 1473-1474, 2169.

[11] *Id.* Vallandingham explained that he contacted Cupach because "He is in charge of growth of the advisors and try to get us to grow our business." App. 1473.

[12] App. 1066-1067, 1108-1118, 1145-1146.

[13] App. 1473 (Cupach "said he [Beck] was being released for lack of five financial plans").

[14] App. 2171.

not worth $75,000: "He [Cupach] told me that he *didn't think it was worth what I was paying …*"[15]

Vallandingham, however, believed it was an excellent time to purchase Beck's business (1) due to its low price and (2) the Dow Jones industrial average hovering around 6,000 during the middle of a severe recession.[16] Vallandingham testified that he asked Cupach if there was anything else he needed to know about the transaction and that Cupach responded negatively.[17] This alleged "failure to disclose" forms the sole basis for Vallandingham's fraud claim, but the law and the evidence demand that it be rejected.

One reason Vallandingham approached Cupach after speaking with Beck about the prospective transaction was that Vallandingham considered Beck to be sloppy and lazy,[18] prone to behave erratically,[19] and known to be volatile and confrontational.[20] Although Vallandingham knew this about Beck, his acquisition of Beck's practice would almost double Vallandingham's client base from 208 to 409.[21] Moreover, to give the Court some idea of why this would be a "buyer beware" transaction, Vallandingham was purchasing 205 customers with $13 million in customer assets for $75,000 or *.006% of its face value*,[22] which would be like buying a $2.6 million Lamborghini Countach for $15,000. Critically, Vallandingham could not obtain Beck's compliance history and report from a source besides Beck himself before he consummated a

[15] App. 2171 (emphasis supplied). This undisputed fact is critical and undermines Vallandingham's theory because if Cupach intended to induce Vallandingham to purchase Beck's business fraudulently, why would he discourage Vallandingham?

[16] App. 2171

[17] App. 1474.

[18] App. 2205.

[19] App. 2206-2207.

[20] App. 2208.

[21] App. 2193-2194.

[22] App. 2221.

transaction.[23] Yet, he never asked Beck for his compliance history,[24] nor did he ask Cupach for any information regarding Beck's compliance history.[25] Perhaps one reason Vallandingham adopted a "don't ask" approach is that he had his own issues, including a personal bankruptcy filing in 2005 and a federal tax lien filed in 2007.[26] The evidence is undisputed that these issues prevented Vallandingham from acquiring the Beck practice independently.

On February 26, 2009, Vallandingham, Arnold, and Beck executed a buy/sell agreement drafted by Vallandingham.[27] $20,000 of the $75,000 purchase price would be paid in two installments, with the balance of $55,000 paid over time.[28] Vallandingham paid none of the $20,000 from his funds but borrowed them from Arnold.[29] Critically, the buy/sell agreement Vallandingham drafted has the following provision: "Neither Seller nor Buyer have made any representations or warranties regarding this transaction. *Buyer is purchasing the Business and Assets 'as is.'*"[30] The parties also signed a practice transfer information sheet ["Practice Transfer"] that Ameriprise approved on March 12, 2009.[31] Finally, Vallandingham, Arnold, Beck, and Ameriprise executed a consent to Transition Agreement and Release of Claims ["Consent and Release"] with Beck identified as the "Transferring Advisor" and Arnold and Vallandingham

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] App. 2009 ("I was sued for over $500K … regarding a physical confrontation that resulted in injuries … This bankruptcy is a direct result of the attempt in my part to finance my civil defense and settle the matter"); 2010 ($42,931.70 state tax lien and $22,263.02 federal tax lien).

[27] App. 1939.

[28] *Id.*

[29] App. 11, 1470.

[30] App. 1939 (emphasis supplied). It is not insignificant that before the Beck transaction, Arnold and Vallandingham purchased the financial services practice of another Ameriprise financial advisor, Gary Enoch ["Enoch"], who operated from a Huntington office. App. 1945. Unlike the Beck buy/sell agreement, which Vallandingham drafted, the Enoch agreement did not have an "as is" provision but rather memorialized specific representations made by Enoch to Arnold and Vallandingham. App. 1945-1950.

[31] App. 1943.

identified as an "Acquiring Advisor."[32] Again, it contained a "buyer beware" provision:

> Transferring Advisor and Acquiring Advisor each acknowledges that he/she has independently entered into the Transition Agreement, that each has conducted any due diligence or investigation he/she deems appropriate, has made an independent assessment of the Transition Agreement, and *has not relied upon any representation or action by Ameriprise in deciding to enter into the Succession Agreemen*t. Transferring Advisor and Acquiring Advisor each acknowledge that Ameriprise is not a party to the Transition Agreement, and that Ameriprise's consent to the Transition Agreement pursuant to the Franchise Agreement does not constitute an adoption or approval of the terms of the Transition Agreement.[33]

In addition, the Consent and Release insulated Ameriprise from liability:

> *In consideration of Ameriprise's consent to the Transition Agreement*, Acquiring Advisor *hereby releases all rights or claims, known or unknown, he/she has or may have now to any relief of any kind from Ameriprise* in any company related to or affiliated with Ameriprise either present or past, Ameriprise's present or past officers, directors, employees, and any person who acted on behalf of Ameriprise or on instructions from Ameriprise, *related to or arising from the negotiation of*, execution of, implementation of, or performance by any Transferring Advisor of any obligation under *the Transition Agreement*. Notwithstanding the previous sentence, nothing in this paragraph *shall constitute a release of any claim that any Acquiring Advisor has or may have against Transferring Advisor relating to or arising out of the Transition Agreement*.[34]

In other words, using the Lamborghini analogy, Vallandingham, as purchaser, acknowledged in the sales agreement that he was purchasing Beck's business "as is" and the certificate of title that had to be signed by someone with a lien on the vehicle, and that Vallandingham was releasing both the lienholder, Ameriprise, and the seller, Beck, after Vallandingham could have asked both about whether the vehicle's history, but did not.

In addition to the transaction documents, Ameriprise had an Acquisition Manual available to its franchisees.[35] The Acquisition Manual states that a financial advisor must ask appropriate

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[32] App. 1945.

[33] *Id.* (emphasis supplied).

[34] App. 1948 (emphasis supplied).

[35] App. 1952.

questions to fully understand what is being purchased.[36] Those questions include "*Have there been any complaints*?" "*Does the seller have a compliance history*?" and "*What was the selling advisor's most recent CSS[37] score*?"[38] The manual further provides that (1) the buyer can request the compliance history report; (2) Ameriprise cannot legally provide a buyer the seller's compliance history without a request by the seller; (3) the compliance history may impact the overall value of the practice and the buyer's ability to service the practice; (4) it is the buyer's and seller's responsibility to understand the dynamics of the practice, including compliance history and complaints that may impact client transitions; and (5) the current size of the buyer's practice may significantly impact the transition and retention of clients because, if the buyer does not have the appropriate infrastructure in place, client attrition may lower the value of the practice.[39]

As noted, the undisputed record evidence demonstrates that Vallandingham *failed to follow the manual's policy and procedure*, including (1) not asking Beck if he had any complaints, (2) not asking Beck or Ameriprise for Beck's compliance history, and (3) not requesting a compliance history report from Beck or Ameriprise. Moreover, as noted, the undisputed record evidence further establishes that Cupach would have advised Vallandingham that he could have a copy of the compliance history report had Beck authorized it. It is also significant that Vallandingham was getting $13 million in customer assets for $75,000, or *.006% of their face value*, in March 2009 because the country was in a severe recession with devastated financial markets.[40] He understood that he would not retain all of Beck's clients, and his general inquiry of Cupach as to whether there

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[36] App. 1956.

[37] CSS stands for "Customer Service Satisfaction." *See, e.g., Barber v. Cellco P'ship*, 2018 U.S. Dist. LEXIS 167664, *40, 2018 WL 4680211 (N.D. Ala.) ("His customer satisfaction score shows that he was able to balance this workload and succeed.").

[38] App. 1956 (emphasis supplied).

[39] *Id.*

[40] App. 905-906, 1495.

was anything else he needed to know was not a specific request to be advised of any client complaints or Beck's compliance history. Moreover, the undisputed record evidence is that Cupach was prohibited from sharing that information without Beck's consent.

Not only did Vallandingham understand the "as is" nature of his transaction with Beck and Ameriprise's minimal role, but Arnold also knew that Beck had problems as an Ameriprise franchisee, that he was not in good standing, that he had a poor reputation, and was known to "stretch the rules."[41] Arnold was also well aware of the process for obtaining Beck's compliance history from Ameriprise.[42] The record evidence is undisputed that if Vallandingham had requested his compliance history and Beck had consented, they would have learned that (1) Ameriprise sent Beck a preventative caution letter in 2004; (2) Beck received a reprimand letter and a $2,000 fine in February 2007; (3) Beck received a reprimand letter in October 2007; (4) Beck received a compliance letter in February 2008; (5) Beck received a deficiency letter in March 2008; (6) Beck received a letter of caution in April 2008; (7) Beck received notice of an internal investigation finding in August 2008 that he was experiencing financial problems; (8) Beck received a September 2008 letter requesting mail and check logs; (9) Beck received a December 2008 reprimand letter with a $500 fine for failing to follow corporate policies; and (10) Beck received an enhanced supervision action plan in December 2008.[43]

The Beck sale took place in March 2009, and soon after that, Vallandingham developed buyer's remorse and *did not remit a single installment payment*.[44] For example, two of Beck's clients brought complaints to Vallandingham, although neither paid Beck fees, who, as a result,

[41] App. 2259-2260.
[42] App. 2259, 2267.
[43] App. 983-991.
[44] App. 77.

had no fiduciary relationship with them.[45] Ameriprise had well-established protocols for addressing client complaints, including a prohibition against financial advisors encouraging clients to file written complaints about other Ameriprise advisors, a requirement that client complaints be referred to the financial advisor's registered principal, and a prohibition on financial advisors drafting client complaints.[46] The record evidence is uncontroverted that Vallandingham violated these protocols as (1) in April 2009, only a month after he acquired Beck's business, he drafted a complaint for one client against Beck,[47] and (2) in August 2009, he encouraged another client to write a complaint letter about Beck.[48] Vallandingham did this to ensure that even though these were now his clients, his name would not be mentioned in these customer complaints.

Despite these bumps in the road, which Vallandingham should have anticipated based on his knowledge of Beck's many issues, Vallandingham's book of business value rose from $24.4 million at the end of 2008 to $40.5 million at the end of 2009 and then to $41.7 million at the end of 2010.[49] Also, the market value of total assets under Vallandingham's management rose from $22.7 million at the end of 2008 to $37.9 million at the end of 2009 and then to $39.6 million at the end of 2010.[50] Vallandingham's earnings moved from $144,589.00 at the end of 2008 to $135,573.00 at the end of 2009 and then to $197,583.00 at the end of 2010.[51] New business commissions rose from $100,272.00 at the end of 2009 to $141,508.00 at the end of 2010, a substantial 41% increase.[52] Client service commissions rose from $38,873.00 at the end of 2009

[45] App. 2669-2671 and App. 2709-2711.
[46] App. 1025-1026.
[47] App. 742-745.
[48] App. 746-752.
[49] App. 1662.
[50] *Id.*
[51] *Id.*
[52] *Id.*

to $48,320.00 at the end of 2010, an increase of 24%. These performance data points demonstrate a successful transition by Vallandingham between March 2009 and the end of the calendar year 2010. Notably, Vallandingham's net profit from his practice product mix rose more than 50% from $49,385.00 at the end of 2009 to $102,002 at the end of 2010.[53] Thus, the record evidence is undisputed that Vallandingham's practice was profitable after seven fiscal quarters following the transaction. Despite this, he refused to comply with his payment obligations to Beck, who instituted a suit against Vallandingham and Arnold in February 2010.[54] Vallandingham then filed a third-party complaint against Ameriprise in July 2010, asserting miscellaneous claims.[55]

He alleged that Ameriprise violated NASD Conduct Rule 3010,[56] was negligent in supervising Beck,[57] breached some unidentified contract,[58] and was unjustly enriched by his dealing with Beck's mess.[59] The only fraud he alleged was against Beck.[60] Eventually, Ameriprise filed a motion for summary judgment, noting that Vallandingham had released all the claims outlined in his third-party complaint.[61] Eventually, the trial court dismissed all but Vallandingham's fraud and negligence claims, permitting discovery on those claims.[62] After that, Beck's counsel withdrew,[63] and Beck's claims were dismissed after he failed to appear.[64] At that point, although Vallandingham had paid nothing for Beck's business and Beck's suit to collect the

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[53] App. 1665.
[54] App. 0001.
[55] *Id.*
[56] App. 0013.
[57] *Id.*
[58] App. 0014.
[59] App. 00015.
[60] App. 0011-0012.
[61] App. 0041-0043.
[62] App. 0064.
[63] App. 0074-0075.
[64] App. 0076-0082.

balance of the sales price was dismissed with prejudice, he continued to pursue his claims against Ameriprise, filing an amended third-party complaint asserting the Rule 3010, negligence, breach of contract, and unjust enrichment claims that had been dismissed.[65] Accordingly, Ameriprise filed essentially the same summary judgment it previously filed, noting that Vallandingham had released those claims.[66] Vallandingham's response contained several legally erroneous arguments that later contaminated the case, warranting setting aside the judgment.[67]

Although his response references "fraud,"[68] the Court will search his amended complaint in vain for a fraud claim. Instead, he argued that because Ameriprise was allegedly negligent in its supervision of Beck, he should be able to recover against Ameriprise, for example, due to Rule 3010 violations, even though he acknowledged that no private cause of action exists for such violations.[69] Moreover, Vallandingham maintained that he should be permitted to present evidence of these *non-actionable* violations to demonstrate Ameriprise's motivation for not volunteering Beck's issues.[70] More absurdly, Vallandingham sought to offer proof of Ameriprise's factually inaccurate failure to report Beck's violations to FINRA,[71] having nothing to do with whether it fraudulently concealed information. Notably, the expert report attached to Vallandingham's response supported no fraud claim but was couched in terms of negligence: "Ameriprise was either negligent in not knowing of the problems with the book … or was complicit in the execution of this fraudulent transaction through their lack of disclosure to Mr. Vallandingham."[72]

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[65] App. 0094-0098.
[66] App. 0115-0132.
[67] App. 0217.
[68] App. 0218.
[69] *Id.*
[70] App. 0219.
[71] App. 0220.
[72] App. 0286.

On October 15, 2013, the trial court held a pretrial motions hearing.[73] Ameriprise noted that Vallandingham was attempting to flip his burden to Ameriprise by collaterally attacking Beck's termination, claiming that it had not been motivated by his lack of production, which was undisputed in the record[74] and the reason given for his termination, but was the product of some secret conspiracy to make Beck the scapegoat for Ameriprise's alleged failure to supervise him,[75] ignoring the undisputed evidence that Ameriprise repeatedly investigated, reprimanded, fined, and reported to FINRA when required of Beck's issues. What the trial court permitted to occur was to place a "fraudulent concealment" coat on Vallandingham's Rule 3010, negligence, unjust enrichment, and breach of contract claims, that Vallandingham abandoned on the eve of trial.[76]

During the hearing, Vallandingham relied on documents generated by Ameriprise's compliance department, with which Cupach had no connection,[77] ignoring that Vallandingham knew the compliance department was prohibited from sharing its information with Vallandingham unless Beck consented. Although conceding no cause of action exists under Section 3010, Vallandingham nevertheless argued that he should be permitted to not only present lay testimony but expert testimony "to show the signs or bad intent of Ameriprise in covering up the malfeasance of themselves and Mr. Beck."[78] Whether Ameriprise had committed Section 3010 violations (highly disputed per the evidence at trial) when Cupach failed to volunteer information he either did not have or was precluded from volunteering and which Vallandingham could have

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[73] App. 0570.

[74] App. 582 ("The very fact that he was in default of his franchise agreement, no dispute there. He was not compliant with its terms, and specifically, as stated in the termination letter, Exhibit B to our filing, he was not compliant with what he was required to do annually with respect to financial planning.").

[75] App. 0578-0579.

[76] App. 0579 ("By virtue of the response the summary judgment filing I have now and the Court recently received, we have an abandonment of these claims in an effort to put forth a fraud case.").

[77] App. 0598.

[78] App. 0603.

secured with Beck's permission as part of his investigation is irrelevant. Moreover, Vallandingham's theory makes no sense. Both he and Arnold personally knew about Beck's multiple issues, that Ameriprise had terminated his agreement, and that he was selling his book of business for a tiny fraction of its face value. Ameriprise knew that once it approved the transfer, Vallandingham would inherit whatever benefits and burdens came with the book of business, including any compliance issues. Ameriprise would receive not a dime from the transaction other than its share of whatever Vallandingham could generate from the book and would have to deal, as the broker, with any FINRA reporting.

Although the trial judge initially resisted Vallandingham's argument that he could try whether Ameriprise was a good company, Vallandingham successfully argued that "Little old ladies in our community that invested their life savings … were worthless," resulting in a "class action lawsuit" filed *thirteen years* earlier "in 2000."[79] Of course, this was only about *a decade before the Beck transaction and had nothing to do with it*. Still, the trial judge admitted, considered, and relied on this irrelevant evidence[80] over Ameriprise's strenuous objections.[81]

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[79] App. 0605-0606.

[80] In one of the more bizarre moments in the case, when Ameriprise objected to Vallandingham's factual representations having no basis in the record and noting that there was no expert report, deposition transcript, or affidavit supporting them, Vallandingham's counsel offered to call Vallandingham to the stand during the pretrial conference. App. 608 ("Mr. Vallandingham, who is sitting right here with me. If you would like for me to put him on to take that evidence, I will right now.").

[81] Ameriprise filed motions in limine to exclude Vallandingham's FINRA expert, App. 0625, Vallandingham's damages expert, App. 0630, evidence of unrelated litigation and administrative actions, App. 0635, evidence of FINRA reporting requirements, App. 0645, evidence of unrelated class action litigation, App. 0648, evidence of post-transaction compliance matters, App. 0651, testimony by Beck's former clients inherited by Vallandingham, App. 0654, testimony about a class action against American Express, a completely different company, App. 0702, testimony about an unrelated FINRA administrative action, App. 0718, and testimony about an unrelated wrongful termination case, App. 0723. The trial court denied these motions on the morning of the trial. App. 0789 (denying the motion to exclude Vallandingham's FINRA expert), App. 0794 (denying the motion to exclude Vallandingham's damages expert), App. 811-812 (denying motions to exclude evidence of unrelated litigation and administrative actions, FINRA reporting requirements, unrelated class action litigation, post-transaction compliance

Over a decade ago, on October 21, 2013, the case proceeded to a *nine-day* trial with many unresolved issues.[82] Eventually, after discussing various jury issues at length,[83] Vallandingham said he was withdrawing his opposition to a bench trial.[84] The case then proceeded from opening statements forward, not as a fraudulent concealment case, but as a negligence case, with Vallandingham's argument not that Ameriprise had a duty to disclose Beck's compliance history upon his general inquiry but that Ameriprise was liable to Vallandingham because, according to Vallandingham, it inadequately supervised Beck.[85] Again, Vallandingham's sole fraudulent concealment complaint, as his attorney acknowledged during his opening statement, was "They chose not to tell him"[86] about Beck's compliance history. During that argument, which shortly followed the in-limine rulings discussed, Vallandingham's attorney essentially tried to resurrect the withdrawn negligence claim, stating, "[W]hile we've plead negligence cause of action … our belief is that this is intentional concealment."[87] Because the trial court erroneously permitted Vallandingham to prosecute a negligence case under the banner of fraudulent concealment, almost all the evidence presented had nothing to do with fraudulent concealment.

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matters, Beck's former clients, a class action against an unrelated company, an unrelated FINRA action, and an unrelated wrongful termination case because they were "business records"), App. 0831.

[82] App. 0755.

[83] Indeed, prospective jurors had been called for the trial. App. 0785.

[84] App. 0780.

[85] App. 0860 ("Ameriprise is responsible to comply with the rules of the industry … and also to see to it that their advisors are in compliance"); App. 0861 ("They are required to investigate … to report … publicly to FINRA"); App. 0862 ("these rules are there to protect … people, including persons like Mr. Vallandingham"); *id.* ("In 2004 … Ameriprise was made aware that Mr. Beck made an improper placement of an annuity … squared away by Ameriprise and the damages were … $847"); *id.* ("In April of '04, there was a violation of Class B share policy … Ameriprise investigated that. Found that Mr. Beck should be fined the amount of $1,500 and he received a letter of reprimand"); App. 0865 ("In the consent decree that was entered, Ameriprise agreed that … it had failed to establish, maintain and enforce a supervisory system").

[86] App. 0869.

[87] App. 0871.

For example, the first witness was Pearl Watts, one of Beck's clients.[88] Watts testified that she purchased a life insurance policy from Beck *sixteen years earlier*, in 1997, and that it might lapse.[89] She blamed Beck for this, and after she complained to Vallandingham, he drafted a complaint letter for her despite the contractual prohibition.[90] Not only did this have nothing to do with Vallandingham's fraudulent concealment claim, but she admitted that the reason the complaint letter Vallandingham drafted her produced no results was that she was part of a class action that addressed her complaint.[91] Moreover, Watts conceded that until Vallandingham drafted the complaint letter, she had never had contact with anyone at Ameriprise.[92]

The second witness was Judy Keller, another Beck client.[93] Her relationship with Beck started *thirty years earlier*, in 1983, when she also purchased a life insurance policy from Beck.[94] Like Watts, Keller testified that Vallandingham advised her that her policy "was in danger of lapsing."[95] Also, like Watts, Keller admitted that she was part of a prior class settlement,[96] rendering her testimony nothing more than "Ameriprise is a bad company,"[97] which has nothing to do with Vallandingham's fraudulent concealment claim.

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[88] App. 0877.

[89] App. 0893. Watts' life insurance policy was subject to market fluctuations, and its balance was used to pay premiums until its balance was exhausted, in which case she would need to make premium payments to prevent it from lapsing.

[90] App. 0894.

[91] App. 0896.

[92] App. 0911.

[93] App. 0916.

[94] App. 0916-0919.

[95] App. 0921. Like the Watts policy, the Keller policy was subject to market fluctuations. Indeed, Keller admitted that she made the investment decisions relative to the financial services product she purchased from Beck. App. 0929 ("The decision would be made by us.").

[96] App. 0924, 0946-0947.

[97] Despite her complaint that her monthly premium had increased from $300 to $600, App. 0933, she was still an Ameriprise customer at the time of trial, App. 0935.

The next witness was Cupach, who did not join Ameriprise until 2005[98] and was not responsible for generally supervising West Virginia until mid-2008.[99] Cupach was not responsible for compliance but for market development,[100] not field risk or compliance management, performed by someone else.[101] Moreover, Cupach explained that he was not Beck's field advisor.[102] Indeed, Cupach explained that in his marketing role, he had no reason and had not reviewed Beck's compliance records, as that was not his responsibility.[103] In addition to being asked questions about areas outside his responsibility, the trial court permitted Cupach to be asked about complaints in 2004,[104] 2006,[105] and 2007[106] before he had any involvement in West Virginia. He was asked about FINRA broker check reporting, implying that Ameriprise had failed to comply with its obligations, again having nothing to do with Vallandingham's fraudulent concealment claim, but he explained that none of the complaints identified by Vallandingham's counsel were required to be reported.[107] Cupach was asked extensively about the compliance records that were Vallandingham's to review if he had only requested them and Beck had consented and explained how none of them were reportable.[108] Like Watts and Keller, Cupach was repeatedly asked "Ameriprise is a bad company" questions because the trial judge had overruled evidentiary objections, such as "Should the public be able to trust Ameriprise?"[109] Eventually, once

[98] App. 0956.
[99] App. 0957.
[100] App. 0959.
[101] App. 0961.
[102] App. 0980. It was those field advisors who investigated compliance issues regarding Beck. *Id.*
[103] App. 01065.
[104] App. 1073 ("Obviously, this document precedes my time with the firm.").
[105] App. 1085 ("This was received in 2006 prior to me taking over this part of the region.").
[106] App. 1086.
[107] App. 1094 ("the fine amount would not be a reportable offense on the CRD."
[108] App. 1089-1106, 1123 ("Not every complaint is reportable to FINRA.")
[109] App. 0969.

Vallandingham's counsel asked Cupach questions regarding the sale of Beck's book of business, he explained that because Arnold was providing the funds, Cupach viewed Arnold, not Vallandingham, as the acquiring transferee.[110] "Whether Marc Arnold and Mr. Vallandingham," Cupach testified, "had another agreement after that is between them … Why would I care who services the clients? The book is being sold to Mr. Arnold."[111] As Cupach noted, "Mr. Vallandingham was ineligible to buy it on his own."[112]

Cupach explained that Beck's termination letter did not reference his compliance issues because he was terminated for production not compliance issues.[113] Cupach also noted that Beck's termination letter could not reference multiple compliance issues about which he was asked, over Ameriprise's objections, that were not reported until after Beck was terminated.[114] Cupach testified in response to multiple questions over Ameriprise's objections about compliance issues resolved by a class action settlement.[115] After Vallandingham's counsel completed his examination of Cupach without asking him a single question regarding his interactions with Vallandingham concerning the Beck transaction requiring no examination by Ameriprise's counsel,[116] the trial court personally examined Cupach for *thirty-six pages of transcript*, none of which addressed fraudulent concealment but Vallandingham's negligence claim.[117]

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[110] App. 1140.

[111] App. 1140, 1165. Cupach further noted that Ameriprise was not a party to the agreement between Vallandingham and Arnold that would determine which clients, if any, would be assumed by Vallandingham. App. 1169.

[112] App. 1166.

[113] App. 1152.

[114] App. 1154 ("We received the customer complaint on 6-1-2009 after Mr. Beck was gone from the firm."); App. 1155 ("Signed settlement offer was received on February 25th, 2010.").

[115] App. 1175 ("So it was covered under a class action lawsuit.").

[116] App. 1176.

[117] App. 1176-1211. Vallandingham's counsel then assumed reexamining Cupach. App. 1211.

The next witness was Kia Thomas, again over Ameriprise's objections.[118] She testified by deposition regarding her role as compliance manager[119] even though she had no evidence to offer regarding Vallandingham's fraudulent concealment claim. She was asked about FINRA regulations,[120] variable annuities,[121] a financial advisor's duties to clients,[122] registered principals' supervision of financial advisors, companies' supervision of registered principals,[123] audit protocols,[124] and client file reviews.[125] Relative to Ameriprise's supervision of Beck, Thomas testified that each transaction complaint was investigated and resolved.[126] Thomas also rejected Vallandingham's theory that Ameriprise had failed to report Beck's compliance issues, explaining that "It depends on whether it meets the criteria as stated by FINRA"[127] and "A verbal complaint would only be filed on it if it becomes a written complaint."[128]

Beck was the next witness whose deposition testimony was presented.[129] He confirmed that Ameriprise did not terminate him over compliance issues, but regarding production issues[130] and that he had no outstanding compliance issues at the time of his termination.[131] As to complaints lodged after he sold his business to Vallandingham, Beck testified that Vallandingham encouraged

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[118] App. 1219-1220.

[119] App. 1221.

[120] App. 1224.

[121] *Id.*

[122] *Id.*

[123] App. 1231.

[124] App. 1232.

[125] App. 1233.

[126] App. 1241-1248.

[127] App. 1250. For example, Thomas explained why post-transaction complaints of less than $5,000 would not be reportable to FINRA. App. 1256.

[128] App. 1251.

[129] App. 1363.

[130] App. 1372.

[131] *Id.*, App. 1374 ("That was the only reason").

them to "undermine me" and that "most people did not want to deal with" Vallandingham.[132] Again, over Ameriprise's strenuous objections,[133] the trial court permitted extensive evidence on alleged compliance issues post-dated the Beck/Arnold/Vallandingham sale because there were business records and could be relevant "as to the type of oversight"[134] Ameriprise was providing relative to Beck, ignoring the fact that Vallandingham had withdrawn his negligence and related claims and that Ameriprise could not have fraudulently concealed facts that did not exist at the time of its communications with Vallandingham.

Ameriprise compliance analyst Jeffrey Helms was the next witness by deposition transcript, again over Ameriprise's objections.[135] Helms explained that he was not involved in Beck's supervision and in sole circumstance in which he was engaged with Beck in 2008 resulted in a resolution with Beck's client.[136] Helms also explained why some of Beck's other clients may have been included in a class action settlement having nothing to do with Beck's sale of his business to Arnold and Vallandingham.[137]

Vallandingham was finally called as a witness.[138] He admitted that he and Arnold had

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[132] App. 1373.

[133] App. 1388-1389.

[134] App. 1390. The trial court even admitted exhibits over Ameriprise's objections relative to these post-transaction complaints without any witness, based on the request of Vallandingham's attorneys. App. 1399-1400. Similarly, the trial court admitted Ameriprise customer complaints from entirely different states, wholly unrelated to anything in the case, because they were "public documents" and "could relate to something that is alleged in this case about the oversight of the franchisee" even if the franchisee had nothing to do with this case. App. 1402-1404.

[135] App. 1408-1409.

[136] App. 1417.

[137] App. 1423-1424, 1442-1445. Like other witnesses, Helms was asked questions regarding complaints of which he had no personal knowledge or involvement, and which post-dated the Beck sales transaction. App. 1446-1449. Helms also confirmed that Vallandingham could have obtained information regarding Beck's compliance history only with Beck's permission. App. 1426, 1441.

[138] App. 1452.

previously teamed up to purchase another Ameriprise advisor's business.[139] He did not dispute that Beck advised him that Beck was selling his business because he had been terminated for production issues.[140] He described Beck as "lazy," "sloppy," and "erratic," and appeared to have a strong financial motivation to sell his practice.[141] He admitted to having been provided with Beck's termination letter,[142] discussing the circumstances of the termination with Beck,[143] knowing that Beck had three months to find a buyer for his business,[144] Cupach telling him "he didn't think it was worth what I was paying,"[145] rejecting Cupach's advice because "I thought it was worth more,"[146] that he knew he was accepting risk under the terms of the buy/sale agreement he drafted,[147] that he knew he was purchasing Beck's business "as is,"[148] that Ameriprise's written policy placed the burden on him to ask the appropriate questions, including whether Beck had any complaints or a compliance history,[149] that the written policy permitted him to ask for Beck's compliance report, which he failed to do,[150] that the written policy precluded Ameriprise from sharing Beck's compliance history without Beck's permission,[151] and that he had certified to Ameriprise that he had conducted due diligence in exchange for its approval of the transaction.[152]

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[139] App. 1470-1471.

[140] App. 1472 ("[H]e said that he was being terminated for … not selling five financial plans.")

[141] App. 2205-2206. Despite this, Vallandingham admitted to not asking Beck for his compliance history. App. 2207. Arnold also confirmed that he knew that Beck "had problems" and "did not consider him in good standing." App. 2259.

[142] App. 2169.

[143] *Id.*

[144] App. 2170.

[145] *Id.*

[146] App. 2171.

[147] App. 2179.

[148] *Id.*

[149] App. 2217.

[150] App. 2219.

[151] App. 2220-2221.

[152] App. 2199.

He excused this by saying, "I couldn't have known … they were going to use this against me,"[153] which would be a convenient excuse to any party to a contract seeking to avoid its provisions.

Critically, Vallandingham testified that he only asked Beck about the quality of his book and understood that Cupach was not responsible for compliance but "is in charge of growth of the advisors and try[ing] to get us to grow our business."[154] Vallandingham confirmed that, like Beck, Cupach told him that Beck had been terminated for production issues[155] and that if he wanted more details about Beck's business, he would need to secure them from Beck.[156] Indeed, this is the entire scope of Vallandingham's interaction with Cupach relative to the proposed Beck transaction:

> A. I don't remember exactly what he said. I know it was like well, maybe we are getting serious about the financial plan. I don't know. But what I do remember him telling him, I said, "Well, is there a [termination] letter that he can" – no, he said, "There is a letter. If Beck wants to show it to you, you can see it." I said okay, and I asked him, "Is there anything else I need to know regarding this transaction?" And he said –
>
> Q. What did he say?
>
> A. -- no.[157]

Again, it is undisputed in the record that neither Cupach nor Ameriprise could disclose Beck's compliance history, but Vallandingham would have to secure Beck's permission for that disclosure. Indeed, when asked by his attorney, "Q. … one advisor cannot look into another advisor's compliance record or internal compliance record[?]" Vallandingham responded, "Absolutely that it is my understanding."[158] Consistent with his focus on the financial quality of Beck's business, Vallandingham independently conducted his own investigation, including a

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[153] *Id.*

[154] App. 1473.

[155] *Id.*

[156] App. 1474.

[157] *Id.*

[158] App. 1475.

telephone conference with Beck,[159] a personal meeting with Beck,[160] a review of Beck's termination letter,[161] a review of Beck's compensation statement,[162] discussions with Arnold about Beck's business,[163] and a review of Beck's Broker Check record.[164] Of course, the preceding is fatal to Vallandingham's fraudulent concealment claim as (1) he knew that Ameriprise or Cupach could not disclose Beck's compliance record without Beck's consent; (2) he later conducted an independent investigation of Beck's compliance history; and (3) he never asked Beck to consent to the disclosure of his compliance history.

To bolster Vallandingham's withdrawn negligence claims, he called William McGinnis, over Ameriprise's objections,[165] to testify regarding various industry standards.[166] Indeed, he was offered to testify regarding "the products that were sold" and "the duties under FINRA" relative to brokers and advisors vis-à-vis clients.[167] Specifically, he testified regarding Rules 2111, 3010, and 4530 addressing investment supervision, suitability, and reporting.[168] He testified extensively regarding what he believed were deficiencies in Beck's conduct and Ameriprise's supervision and reporting of Beck's conduct.[169] Critically, McGinnis identified *no legal duty by Ameriprise to disclose to Vallandingham Beck's compliance history, which the undisputed evidence, including*

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[159] App. 1472.

[160] App. 1473.

[161] App. 1474.

[162] App. 1477.

[163] App. 1477.

[164] App. 1475.

[165] Ameriprise objected to McGinnis's testimony as he held no Series 63 license, held no Series 65 license, was not a registered financial analyst, was not a registered financial advisor, was not a broker-dealer, was not a FINRA panel arbitrator, and was only a charter financial analyst requiring no licensure. App. 1548-1550. He also admitted that he had never been employed in any compliance capacity. App. 1564.

[166] App. 1536.

[167] App. 1565.

[168] App. 1577, 1579.

[169] App. 1579-1625.

from Vallandingham's testimony, was precluded from disclosing without Beck's consent, which Vallandingham never requested. Indeed, even McGinnis agreed this was "confidential information."[170] Despite this, McGinnis testified, *relying on nothing outside his own subjective opinion*, as follows:

> Ameriprise didn't provide full and fair disclosure to Mr. Vallandingham as is standard in this business with dealing with customers, *and I do understand this point Mr. Vallandingham wasn't a customer, but this is an industry that is built on full and fair disclosure.*[171]

That testimony, in a nutshell, is where the trial court allowed this case to go awry, allowing Vallandingham to essentially prosecute a negligence claim under the banner of a fraudulent concealment claim arising from a single interaction between Vallandingham and Cupach, whom Vallandingham knew was not in compliance and could not disclose Beck's compliance history without Beck's consent, which Vallandingham never sought, in which Vallandingham merely asked Cupach, "Is there anything else I need to know regarding this transaction?" and McGinnis extrapolating Ameriprise's unrelated disclosure obligations to customers to Vallandingham, a non-customer. Vallandingham's fraudulent concealment claim collapses, and Ameriprise is entitled to have the judgment set aside, and the case remanded for entry of judgment in its favor.

At the close of Vallandingham's case-in-chief, Ameriprise moved for judgment as a matter

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[170] App. 1627.

[171] *Id.* (emphasis supplied). McGinnis further testified, "Ameriprise had a duty to their customers. They have a duty to protect their customers … The code of conduct says something to the effect of we act in the best interest of our clients." App. 1629. McGinnis also attempted to couch his testimony in terms of some unspecified and untethered alleged "fiduciary duty" flowing from a franchisor, Ameriprise, to its franchisee, Vallandingham, which is wrong as a matter of law but admitted on cross-examination that he had no legal basis for that characterization. App. 1768-1769. Indeed, when pressed, he defended his testimony citing, "The duty to protect your customers … Fiduciary duty is a broad, sweeping term that is designed to protect the public and customers," App. 1769, even though Vallandingham was Ameriprise's franchisee, not its customer. And, to place a final nail in the coffin of this fiduciary duty fiction, McGinnis testified as follows: "*Q. Do you believe a fiduciary duty applies to the franchisor/franchisee relationship between Ameriprise and Mr. Vallandingham? A. I do not. Q. So you concede that the duty does not apply to the franchisor/franchisee relationship? A. I do."* App. 1770 (emphasis added).

of law for the reasons stated in this brief,[172] but the trial court denied it, identifying absolutely no source of any duty on the part of Ameriprise to voluntarily disclose information it had indicated in writing and Vallandingham conceded it was precluded from disclosing without Beck's consent.[173] Although Ameriprise placed additional evidence in the record after that, reaffirming these points, the case should have ended at the close of Vallandingham's evidence. Regarding the issue of some alleged duty on the part of Ameriprise to voluntarily disclose Beck's confidential compliance history, John West, a financial services industry expert whose experience included supervising large numbers of financial advisors for decades[174] and serving as a FINRA arbitrator,[175] testified (1) "there's no requirement for a brokerage firm to audit the practice of an advisor who's attempting to sell that practice,"[176] (2) "I've never done it. I've never seen it done,"[177] (3) "That transaction is left to the two individuals without the firm being involved in auditing,"[178] (4) "they do not have that duty … that's reflected in their own transfer manual,"[179] (5) "they had no duty" to "disclose any internal surveillance or investigation of Mr. Beck prior to … approval of the Beck transfer" because "that's confidential information related to the particular financial advisor."[180]

Regarding Vallandingham's alleged economic damages in purchasing Beck's business, the trial court permitted him to testify as if he were an expert, using advisor performance statistics to argue that he was somehow deprived of earnings.[181] He then called Ross Dionne, a certified public

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[172] App. 2325-2332.
[173] App. 2332-2333.
[174] App. 2642.
[175] App. 2650-2652.
[176] App. 2674.
[177] *Id.*
[178] *Id.*
[179] App. 2675.
[180] *Id.*
[181] App. 1512-1513.

accountant, to use those performance statistics and postulate two models of what Vallandingham allegedly lost.[182] Dionne admitted that Vallandingham's performance outperformed his peers immediately after the acquisition, but in 2010, Vallandingham began performing under his alleged peers.[183] Although Dionne made no effort to analyze any other factors that may have, for example, made Vallandingham more or less productive vis-à-vis his peers both before and after the Beck acquisition,[184] that caused him, for example, to have tax liens beforehand and motivated him to acquire Beck's business, he attributed the entire differential to the Beck transaction, despite admitting that he did not analyze the performance of Beck's book after Vallandingham acquired it.[185] Dionne offered evidence of past damages of $246,518[186] and future damages of $613,492 to $974,276,[187] again based on Beck's business, *for which Vallandingham paid nothing to Beck.*[188] Ameriprise's expert, Paul Taylor, managing partner of Plante Moran's forensic and valuation services group,[189] explained the fallacies in Dionne's methodology and that the accepted standard would be to compare what Vallandingham paid for Beck's business against what he should have paid for the business based on the loss of clients as a result of any compliance issues.[190] Indeed, Taylor concluded that the Beck book transitioned successfully to Vallandingham as reflected in

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[182] App. 1854.

[183] App. 1858.

[184] Vallandingham admitted that his compensation was impacted by marketing conditions, payout rate fluctuations, and client attrition, App. 2239-2242, none of which was analyzed by Dionne. Also, Vallandingham admitted that he sold a bundle of Beck's clients to another advisor in 2011, App. 2243-2244, also disregarded by Dionne.

[185] App. 1888-1889 ("Isn't it true, sir, that a no time … have you isolated the Beck book of business on its own and performed any … financial or damage analysis? … I have done no detailed analysis of it.")

[186] App. 1875.

[187] App. 1876.

[188] Vallandingham admitted he paid nothing to Beck but testified that he was "making payments to Mr. Arnold" of an unspecified amount "and I'm expected to pay him back." App. 2235-2236.

[189] App. 2852.

[190] App. 2868-2869, 2876.

the "substantial jump" in Vallandingham's actual earnings in 2010[191] and an increase in Vallandingham's assets under management from $22.7 million in 2008 to $39.6 million in 2010.[192]

After the bench trial concluded, the court ordered the parties to submit proposed findings of fact and conclusions of law by January 17, 2014.[193] Eventually, *over a decade later*, the trial court rendered its decision.[194] As noted, it completely ignored the franchisor/franchisee relationship between Ameriprise and Vallandingham, and the lack of any duty on the part of Ameriprise to disclose to Vallandingham the confidential compliance history of Beck voluntarily. Instead, the trial court's decision focuses on Ameriprise's duties and responsibilities "toward its clients,"[195] "customer service,"[196] and "their clients on products suitable to them."[197] The trial court extensively relied on Vallandingham's complaint from Beck's customers[198] and discussed a class action settlement over a decade earlier,[199] which had nothing to do with Vallandingham's fraudulent concealment claim. The trial court relied on the testimony of McGinnis regarding the legal scope of the irrelevant class action settlement,[200] again having nothing to do with Vallandingham's fraudulent concealment claim. The trial court further relied on McGinnis's testimony – ignoring the franchisor/franchisee relationship between Ameriprise and Vallandingham – that "the Beck clients were in significant peril … and deserved special care and

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[191] App. 2879.

[192] App. 2880.

[193] App. 2926.

[194] App. 3032. No explanation was ever offered regarding why it took the trial court *over a decade* to decide that Vallandingham had substantiated his fraudulent concealment claim by *clear and convincing evidence*.

[195] App. 3033.

[196] *Id.*

[197] App. 3034.

[198] App. 3038-3045.

[199] App. 3040-3041.

[200] App. 3041.

remediation by Ameriprise"[201] that somehow transferred to Vallandingham even though he never asked Beck for his compliance history and knew that Ameriprise could not disclose it.

The trial court's order identifies not a single legal authority in support of the proposition that a franchisor, like Ameriprise, had any duty to disclose to a franchisee, like Vallandingham, negative information regarding another franchisee, like Beck, whose business a franchisee was contemplating a purchase. Instead, the trial court erroneously concluded that because Cupach knew "there were numerous and various issues with Beck's business"[202] that Cupach did not voluntarily disclose, Ameriprise was liable for fraud. Incredibly, this was the trial court's reasoning:

> *Though Cupach and Ameriprise were under no duty to disclose confidential information contained in Beck's internal compliance file*, Cupach was nonetheless asked a simple question which he could have refrained from responding to, yet he chose to answer, and in doing so, misrepresented the status of the Beck business.[203]

Obviously, on its face, as a cause of action for fraudulent concealment requires a "duty to disclose," the trial court's decision is erroneous and must be reversed as a matter of law. Finally, ignoring the law and the evidence regarding damages for lost profits, the trial court awarded $246,518 in past lost profits, $974,276 for future lost profits, and $100,000 for humiliation, reputational injury, anguish, and anxiety, for a total award of $1,320,794.[204]

III. SUMMARY OF ARGUMENT

First, there was insufficient evidence, as a matter of law, to deny Ameriprise's motion for summary judgment on Vallandingham's suit for fraudulent concealment based solely on Cupach's alleged failure to voluntarily share information which (1) he had no legal obligation to share and (2) he was prohibited from sharing. *Second*, the trial court erred by crediting evidence regarding

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[201] App. 3050.

[202] App. 3059.

[203] App. 3060 (emphasis supplied).

[204] App. 3062.

post-transaction matters, a wholly unrelated class action, FINRA Rules, expert opinion testimony, and unrelated litigation and regulatory action, none of which was remotely relevant to Vallandingham's fraudulent concealment claim. *Finally*, the trial court erred by awarding damages that were excessive, speculative, and unsupported by evidence to a reasonable degree of certainty and awarding emotional distress damages.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under R. App. P. 20 is appropriate as this appeal involves (1) issues of first impression regarding a franchisor's obligation to disclose confidential information when a franchisee is selling his business to another franchisee and (2) issues of fundamental importance regarding evidentiary issues and the award of $1.3 million in damages on a $75,000 transaction.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for denying a motion for summary judgment is *de novo*.[205] Generally, the standard of review for evidentiary rulings is abuse of discretion.[206] In an appeal from a bench trial, the circuit court's factual findings are reviewed under a clearly erroneous standard, and the ultimate disposition is under an abuse of discretion standard.[207] Finally, whether there was a sufficient evidentiary basis for the award of lost profits is reviewed *de novo*.[208]

B. THE CIRCUIT COURT ERRED BY FAILING TO ENTER A FRAUDULENT CONCEALMENT JUDGMENT DESPITE RULING THERE WAS NO DUTY TO DISCLOSE BETWEEN A FRANCHISOR AND A FRANCHISEE.

The Circuit Court's rulings are *irreconcilably inconsistent*. On the one hand, it concluded

[205] Syl. pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co*., 213 W. Va. 80, 576 S.E.2d 807 (2002).
[206] Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).
[207] Syl. pt. 1, *Public Citizen, Inc. v. First Nat'l Bank*, 198 W. Va. 329, 480 S.E.2d 538 (1996).
[208] *Cell, Inc. v. Ranson Investors*, 189 W. Va. 13, 427 S.E.2d 447 (1992).

that *Ameriprise owed no duty of disclosure to Vallandingham* but *entered a $1.3 million judgment against Ameriprise for fraudulent concealment* on the other. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it."[209] Here, as noted, there was no evidence that Ameriprise made a materially fraudulent statement to Vallandingham with the intention that he rely upon it to his detriment. Instead, Vallandingham's theory is based solely on Cupach's alleged failure to share information voluntarily (1) that he had no legal obligation to share, (2) that he was prohibited from sharing without Beck's consent, and (3) that Vallandingham could have ascertained by a reasonable inquiry.

"Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, *and a duty to disclose*, coupled with an intention to mislead or defraud."[210] Critically, "For plaintiffs to recover damages for fraudulent concealment, plaintiffs must demonstrate that defendant *took some action affirmative in nature* designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry."[211] Moreover, where someone, like Vallandingham, performs their own "independent investigation" of facts that are "easily ascertainable," they "cannot later complain of detrimentally relying upon fraudulent misrepresentations or concealment by the defendant."[212] For example,

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[209] Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

[210] *Trafalgar House Constr. v. Zmm, Inc*., 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002) (emphasis supplied).

[211] *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (1998) (emphasis supplied, and quotation marks and citation omitted).

[212] *Trafalgar, supra* at 584, 567 S.E.2d at 300.

when a party "undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller."[213] Applying these standards to the evidence establishes Ameriprise's entitlement to judgment.

First, Ameriprise had no legal duty to disclose to Vallandingham any information beyond what it disclosed relative to Beck's book of business. Vallandingham was an independent contractor vis-à-vis Ameriprise.[214] No fiduciary duties arise from an independent contractor relationship, a proposition with which even Vallandingham's expert witness agreed.[215] Accordingly, multiple courts have held that no duty to disclose generally arises from an independent contractor relationship.[216] Similarly, multiple courts have held that no duty to disclose

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[213] Syl. pt. 5, *Jones v. McComas*, 92 W. Va. 596, 115 S.E. 456 (1922); *see also* Syl. pt. 5, *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996).

[214] *See, e.g., Raymond James Fin. Servs., Inc. v. Boucher*, 2023 U.S. Dist. LEXIS 189160, *1-2, 2023 WL 6966074 (S.D. Cal.) ("The Agreement established a relationship between Petitioner as broker and Respondent as financial advisor with rights to operate as an independent contractor under Petitioner's brand."); *Werts v. Cabot Lodge Sec., LLC*, 2023 U.S. Dist. LEXIS 217367, *1, 2023 WL 8272055 (D. Colo.) ("Plaintiffs are financial advisors who were previously affiliated with Defendant Cabot Lodge Securities, LLC … The terms of Plaintiffs' relationships with Cabot Lodge were memorialized in a pair of Financial Advisor Independent Contractor Agreements (the Agreements) drafted by Cabot Lodge.").

[215] App. 1770 ("Do you believe that fiduciary duty applies to the franchisor/franchisee relationship between Ameriprise and Mr. Vallandingham? … I do not.").

[216] *See, e.g., Seattlehaunts, LLC v. Thomas Family Farm, LLC*, 2020 U.S. Dist. LEXIS 166730, *22, 2020 WL 5500373 (W.D. Wash.) ("Thomas Family's counterclaim does not allege facts that, taken as true, lead to a reasonable inference of a special relationship that would trigger a duty to disclose once Seattlehaunts' relationship with Thomas Family became that of an independent contractor."); *Miller v. French Pastry Sch. LLC*, 2019 U.S. Dist. LEXIS 233951, *14-15, 2019 WL 10836067 (N.D. Ill.)("the independent-contractor relationship here did not give rise to a duty to disclose"); *James v. j2 Cloud Servs.,* 2018 U.S. Dist. LEXIS 198790, *13, 2018 WL 6092461 (C.D. Cal.) ("Plaintiff, however, fails to plead any specific facts or cite any California law establishing either that defendants were under a duty to disclose or that an independent contractor agreement creates a fiduciary relationship."); *PHL Variable Ins. Co. v. Mahler,* 2018 U.S. Dist. LEXIS 103370, *14-15 (E.D. N.Y.) ("Without a contractual term explicitly creating a 'special relationship' of trust and confidence, such as a fiduciary relationship, the allegation that one party possesses particular expertise is insufficient to create a duty to disclose information. … An independent contractor relationship is not one which creates a relationship of trust and confidence, nor is that of insurer and the insured.") (citations omitted); *West Pac. Elec. Co. Corp. v. Dragados*, 2018 U.S. Dist. LEXIS 76007, *17, 2018 WL 2088276 (E.D. Cal.) ("no fiduciary duty to disclose exists in the context of an arm's length, independent contractor relationship.") (quotation marks and citation omitted); *Nat'l Am.*

arises from a franchisor/franchisee relationship.[217] Indeed, as noted, the trial court in this case expressly held, "***Cupach and Ameriprise were under no duty to disclose confidential information contained in Beck's internal compliance file***."[218] Because Ameriprise's employee, Cupach, had no duty to disclose anything in response to Vallandingham's general question regarding whether there was anything else he needed to know before consummating his "as is" transaction with Beck, Ameriprise was entitled to judgment as a matter of law.

Second, Vallandingham does not allege that Ameriprise "took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim."[219] Instead, Vallandingham relies solely on Cupach's allegedly negative response to the generic question, "Is there anything else I need to know regarding this transaction?" Moreover, there was no evidence that Cupach's negative response, particularly in his known role in production, not compliance, was designed or intended to prevent Vallandingham from

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Ins. Co. v. Constructors Bonding Co., 272 Neb. 169, 176, 719 N.W.2d 297, 303 (2006) ("Having concluded that CBI was an independent contractor, we must determine whether CBI had any duty to disclose to NAICO the information about Welshiemer … As a general rule, a party to a transaction does not have a duty to disclose facts to the other unless there is a fiduciary relationship between the parties … The record does not establish that a fiduciary relationship existed between NAICO and CBI, and there is no allegation that CBI's conduct was fraudulent or that the information it furnished to NAICO was false.") (citations omitted).

[217] *See, e.g., Tryp Hotels Worldwide, Inc. v. Sebastian Hotel, LLC*, 2024 U.S. Dist. LEXIS 56867, *18, __ F.Supp.3d __ (D. N.J.) ("Around the country, courts have generally held there is no duty to disclose in the context of an arms-length franchisor-franchisee relationship. *See Topline Solutions, Inc. v. Sandler Sys., Inc*., 2017 U.S. Dist. LEXIS 70384, 2017 WL 1862445, at *34-35 (D. Md. May 8, 2017) (applying Maryland law); *Long John Silver's Inc. v. Nickleson*, 923 F. Supp. 2d 1004, 1021-22 (W.D. Ky. 2013) (applying Kentucky law); *Brock v. Baskin Robbins, USA, Co*., 2003 U.S. Dist. LEXIS 3840, 2003 WL 21309428, at *3 (E.D. Tex. Jan. 17, 2003); *Ahmed v. Getty Petroleum Mktg. Inc*., 2003 N.Y. Misc. LEXIS 649, 2003 WL 21262131, at *3 (N.Y. Sup. Ct. May 14, 2003) (applying New York law); *Interim Healthcare of Ne. Ohio, Inc. v. Interim Servs., Inc*., 12 F. Supp. 2d 703, 712 (N.D. Oh. 1998) (applying Ohio law); *Barnes v. Burger King Corp*., 932 F. Supp. 1420, 1430 (S.D. Fla. 1996) (applying Florida law); *O'Neal v. Burger Chef Sys., Inc*., 860 F.2d 1341, 1350 (6th Cir. 1988) (applying Tennessee law); *Vaughn v. Gen. Foods Corp*., 797 F.2d 1403, 1414 (7th Cir. 1986) (applying Illinois law)"); *Mercedes-Benz USA, LLC v. Carduco, Inc*., 583 S.W.3d 553, 562 (Tex. 2019) (holding relationship between franchisor and prospective franchisee is not "special or fiduciary one," so former had no duty to disclose).

[218] App. 3060 (emphasis supplied).

[219] *Kessel, supra* at 128, 511 S.E.2d at 753.

discovering Beck's compliance history. Moreover, the evidence is undisputed that Cupach's negative response in a telephone conversation did not prevent Vallandingham from discovering Beck's compliance history, particularly as Vallandingham admitted that Ameriprise's acquisition manual advised him to ask those questions and provided a roadmap for obtaining that information.

Third, Vallandingham and Arnold knew that Ameriprise had terminated Beck's relationship, had independent knowledge of Beck's many issues and inadequacies, and conducted an investigation, including (1) meeting with Beck, (2) reviewing Beck's practice reports, (3) reviewing Beck's termination letter, and (4) contacting Cupach who confirmed that (a) Beck had been terminated for failing to generate business, (b) Beck did not have any financial planning or recurring revenue, and (c) Beck's book, in Cupach's opinion, was not worth $75,000. Vallandingham knew from the Acquisition Manual that he needed to ask Beck about (1) complaints, (2) compliance history, and (3) customer service satisfaction score. Vallandingham also knew that (1) he could request a copy of the compliance report, (2) Ameriprise was prohibited from providing him with the compliance report without Beck's approval, (3) the compliance report was important to evaluating a contemplated acquisition, and (4) it was his responsibility to investigate a contemplated acquisition adequately. Because Vallandingham conducted his own investigation and the information he now claims should have been disclosed would have been readily ascertainable, Ameriprise is entitled to judgment.

Finally, Vallandingham executed two documents precluding him from claiming the transaction was precipitated by fraudulent concealment: (1) the buy/sell agreement in which he affirmed (a) he was "purchasing the Business and Assets 'as is'" and (b) he "has not relied upon any representation or action by Ameriprise in deciding to enter into the Succession Agreement" and (2) the Consent and Release in which he "hereby releases all rights or claims, known or

unknown, he/she may have now to any relief of any kind from Ameriprise … related to or arising from the negotiation of … the Transition Agreement." Although an "as is" clause does not automatically relieve one from a claim of fraudulent concealment,[220] where a party entered "as is" transaction without a special relationship, they may not later claim it.[221]

Accordingly, the trial court erred in denying Ameriprise's summary judgment motion, which this Court should set aside and remand with directions to entry judgment for Ameriprise.

C. THE CIRCUIT COURT ERRED BY CREDITING EVIDENCE REGARDING POST-TRANSACTION MATTERS, AN UNRELATED CLASS ACTION, FINRA RULES, EXPERT OPINION TESTIMONY, AND UNRELATED LITIGATION AND REGULATORY MATTERS, ALL IRRELEVANT TO THE FRAUDULENT CONCEALMENT CLAIM.

Vallandingham claimed that Cupach should have volunteered information about Beck's

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[220] *But see Affiliated FM Ins. Co. v. Walker Parking Consultants/Engineers, Inc.,* 2023 U.S. Dist. LEXIS 116791, *49, 2023 WL 4406307 ("The plaintiff claims that the 'as is' language in the Purchase Agreement should not preclude its fraudulent concealment claim because, under Kentucky law, a party 'cannot contract against his own fraud.' … But the Court rejected that same argument in granting LNR's motion to dismiss, explaining that Kentucky courts have enforced 'as is' provisions so long as the plaintiff was aware of the disclaimer and was not forced to sign the contract.") (citations omitted); *Macpherson v. Aglony*, 2022 Tex. App. LEXIS 7105, *42-43, 2022 WL 4374998 ("By purchasing the home 'As Is,' MacPherson agreed to make his own appraisal of the bargain and to accept the risk as to the quality of the Property and any resulting loss … Because the 'As Is' clause here negated causation in MacPherson's … fraud claims, we conclude that legally sufficient evidence supports the trial court's Conclusion of Law #3 that no evidence or insufficient evidence supported a finding of liability against Aglony on MacPherson's claims against Aglony.") (footnotes and citation omitted); *Liderazgo v. Wheelhouse Props*., 2022 Ariz. Super. LEXIS 793, *3 (Ariz. Super. 2022) ("Seguridad also cannot maintain misrepresentation-based claims, including … fraudulent concealment … The purchase contract's 'as is' provision states … Under this provision, Seguridad expressly agreed that it accepted the premises "without representation or warranty of any kind." The plain purpose of this provision is to contract away any misrepresentation claim once Seguridad closed on the property. If it was concerned about the condition of the property or the brevity of its inspection, it had the option to not close. Having closed, Seguridad accepted the premises 'without representation.'").

[221] *See, e.g., Moore v. Pendavinji*, 2024 IL App (1st) 231305, 2024 Ill. App. LEXIS 2330 (rejecting a fraudulent concealment claim by "as is" purchaser of a used car in the absence of a fiduciary or special relationship); *ORO BRC4, LLC v. Silvertree Apts., Inc*., 2021 U.S. Dist. LEXIS 9235, 2021 WL 184686 (S.D. Ohio) (rejecting a fraudulent concealment claim by "as is" purchaser of four residential apartment communities in the absence of fiduciary or special relationship); *see also Montgomery v. Vargo*, 2016-Ohio-809, 60 N.E.3d 709, ¶ 7 (8th Dist.) ("In the absence of evidence of fraudulent representation or fraudulent concealment, an 'as is' clause in a real estate contract and the principle of caveat emptor preclude a buyer from recovery for claims arising from latent defects.")

issues in a single telephone conversation instead of responding "no" when asked if there was anything else Vallandingham needed to know. Vallandingham knew that to sustain that claim, he had to establish some legal duty on Cupach's part to disclose those issues. Of course, there were multiple problems with that theory, including (1) Vallandingham's franchise agreement stipulated that Ameriprise owed him no fiduciary duty, (2) Vallandingham knew Beck had been terminated and had independent knowledge of Beck's issues, (3) Vallandingham knew that he and Arnold were acquiring a $13 million book for $75,000, (4) Vallandingham knew Beck's compliance history was confidential and he could obtain it from Ameriprise solely with Beck's consent, (5) Vallandingham never asked Beck about his compliance history, but was satisfied with his own independent investigation, (6) Vallandingham could have obtained Beck's compliance history from Ameriprise with Beck's consent, (7) Vallandingham agreed that he was purchasing Beck's business "as is," (8) Vallandingham agreed that he "has not relied on any representation or action by Ameriprise" relative to the transaction, (9) Vallandingham agreed that he "releases all rights or claims, known or unknown, he/she has or may have now to any relief of any kind from Ameriprise … related to or arising from the negotiation of … the Transition Agreement," (10) Ameriprise's acquisition manual, of which Vallandingham was aware, advised him to ask appropriate questions before purchasing another franchisee's business, including "Have there been any complaints?" "Does the seller have a compliance history?" and "What was the selling advisor's most recent CSS score?" and Vallandingham had done none of this; and (11) the acquisition manual notified Vallandingham that he could request a compliance report that Ameriprise could not legally provide without a request by the seller, which he did not do.

To avoid the inevitable conclusion that any issues with Beck's book were Vallandingham's sole responsibility and that Cupach had no legal duty to disclose matters which were fully available

to Vallandingham had he merely requested them and Beck consented, the trial court erroneously admitted, considered, and credited evidence wholly irrelevant to Vallandingham's fraudulent concealment claim, which allowed him to effectively prosecute a negligent supervision claim vis-à-vis the entirely different relationship and duties between Ameriprise and its advisors' customers, much of which found its way into the trial court's decision, including (1) "NASD and FINRA set industry standards and regulations that apply to Ameriprise's dealings with its clients,"[222] (2) "Ameriprise adopted its own Code of Conduct, which outlines Ameriprise's … duties as a broker-dealer … [in] providing customer service,"[223] (3) "a continuing duty to review and give advice to their clients,"[224] (4) "assure the products are suitable for the client,"[225] (5) "Vallandingham … noticed problems with Beck's client records,"[226] (6) "Ms. Dawson wanted to know if Vallandingham had the $500.00 she had loaned Beck,"[227] (7) "Mr. Kaczkowski decided not to continue paying the premium and let the policy lapse,"[228] (8) "Ameriprise has consistently used that class action settlement to state it has no further liability from a suitability standpoint,"[229] (9) "The Court takes judicial notice of these pleadings filed in … Civil Action No. 00-1980. A review of these documents makes it abundantly clear that that … the only matter released … were acts taking place prior to the settlement,"[230] (10) "In Mr. McGinnis's professional opinion … a

[222] App. 3033.

[223] *Id.*

[224] App. 3034.

[225] *Id.*

[226] App. 3038.

[227] *Id.* This an excellent example of Vallandingham's throw spaghetti against the wall approach as there was no evidence that anyone at Ameriprise, including Cupach, knew of this or many of the other issues referenced in the trail court's decision.

[228] App. 3040. Again, there was no evidence that anyone at Ameriprise, including Cupach, were aware of Kaczowski.

[229] *Id.*

[230] App. 3040-3041.

significant number of clients were kept in the same unsuitable product,"[231] (11) "Ameriprise … contacted Vallandingham and advised him that it was contrary to Ameriprise's policy to 'advise clients to write complaint letters,'"[232] (12) "As Vallandingham describes it, Ameriprise had a culture of 'they have got to find it on their own,"[233] (13) "Vallandingham made them [the Fischers] aware that their policies were no longer solvent,"[234] (14) "Mrs. Keller testified that she would not have purchased the policy if Beck had informed her of this risk,"[235] (15) "Vallandingham arranged a meeting with Ms. Watts … to explain the bad news that her life insurance was lapsing,"[236] (16) "The same sort of issues were present in Frieda and Jesse Hall's life insurance policies,"[237] and (17) "Beck client Lonnie Gribble complained to Vallandingham that Beck represented to him that he could access an annuity and take funds from it without penalty, which was not true."[238] Again, other than Kaczkowski, for whom Ameriprise reversed his annuity before the Vallandingham transaction,[239] none of these issues were known to Ameriprise at the time, and one cannot conceal information one does not possess. What exacerbates the trial court's error in considering this post-transaction evidence is that Ameriprise addressed not only Kaczkowski's issue, which included fining Beck $847,[240] but issues regarding Holt[241] and Clark.[242] Ameriprise also sent Beck a letter

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[231] App. 3041.

[232] *Id.*

[233] App. 3042.

[234] *Id.* Significantly, the Fischers opted out of the class action and Ameriprise resolved their issues. App. 3043.

[235] App. 3044.

[236] *Id.*

[237] *Id.*

[238] App. 3045.

[239] App. 3046.

[240] App. 3047.

[241] *Id.* ("Beck was fined and received a reprimand by Ameriprise").

[242] *Id.* ("Ameriprise issued Beck a reprimand and fined him $2,000.00").

of reprimand and fined him $500 for failing to follow corporate policies.[243] This demonstrates that Ameriprise was actively supervising Beck and disciplining him where appropriate, but the trial court relied on McGinnis's testimony that because of Ameriprise's duties not to Vallandingham, but to Beck's clients, "Ameriprise should have advised of the problems embedded in Beck's book of business,"[244] citing absolutely no legal authority and despite the trial court's opposite holding that Ameriprise, as a franchisor, owed no such legal duty to Vallandingham, a franchisee.

Critically, Ameriprise filed extensive motions in limine to exclude evidence entirely irrelevant to Vallandingham's fraudulent concealment claim or Ameriprise's defenses. Moreover, the trial court's erroneous denial of those motions in limine was prejudicial as it relied on that evidence in entering a $1.3 million judgment against Ameriprise.

Under R. Evid. 401, "Irrelevant evidence is not admissible." It has been noted:

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.[245]

Moreover, relative to the extensive R. Evid. 404(b) evidence considered by the trial court, this Court "review[s] *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose" and "review[s] for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403."[246] Finally, "The trial court has an obligation to all parties to ensure that the trial is conducted in a fair manner."[247] In

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[243] App. 3050.

[244] *Id.*

[245] Syl. pt. 9, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

[246] *State v. LaRock*, 196 W. Va. 294, 310-311, 470 S.E.2d 613, 629-630 (1996).

[247] Syl. Pt. 3, in part, *State v. Delorenzo*, 247 W. Va. 707, 885 S.E.2d 645 (2022).

this case, applying these standards, the trial court committed reversible error when it denied Ameriprise's motions in limine regarding the testimony of McGinnis,[248] other litigation and administrative actions,[249] FINRA reporting requirements,[250] unrelated class action litigation,[251] post-transaction compliance matters,[252] and post-transaction customer complaints.[253]

Although Vallandingham argued that this evidence was relevant to Ameriprise's potential motive for not violating its confidentiality agreement and volunteering Beck's compliance history even though Vallandingham never requested it despite being directed to do so in the Acquisition Manual, evidence of motive is irrelevant unless a causal nexus was established connecting Cupach's "no" response to Vallandingham's "Is there anything else I need to know regarding this transaction?" question.[254] The Court will search the record in vain for evidence connecting the testimony of McGinnis, other litigation and administrative actions, FINRA reporting requirements, unrelated class action litigation, post-transaction compliance matters, and post-transaction client complaints to Cupach's "no" response. Indeed, most of it predated Cupach's involvement or post-dated his "no" response. Instead, the trial court allowed Vallandingham to tar-and-feather Ameriprise with this evidence to justify finding fraudulent concealment in the acknowledged absence of any fiduciary relationship and, therefore, any duty to disclose.

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[248] App. 625.

[249] App. 635.

[250] App. 645.

[251] App. 648.

[252] App. 651.

[253] App. 654.

[254] *See, e.g., Wood v. United States*, 2018 U.S. Dist. LEXIS 29188, *20, 2018 WL 1037636 (D. Me. 2018) ("Any motive resulting in the making of a false representation for the purpose of gaining advantage by inducing another to act or rely upon it is sufficient."); *Hill v. United States DOL*, 65 F.3d 1331, 1337, 1995 U.S. App. LEXIS 27556, *16, 1995 FED App. 0296P (6th Cir.), 11, 11 I.E.R. Cas. (BNA) 16 (6th Cir. 1995) ("The critical question is not whether concealment of motives alone constitutes fraudulent concealment, but whether the defendant's alleged fraudulent conduct concealed from the plaintiff facts respecting the accrual or merits of the plaintiff's claim.") (citation omitted).

Accordingly, to the extent this Court does not remand for entry of judgment in favor of Ameriprise as a matter of law, the trial court's evidentiary rulings relative to these issues should be overturned, and the case should be remanded for a new trial excluding evidence that is either irrelevant or whose probative value is far outweighed by its unfairly prejudicial effect.

D. THE CIRCUIT COURT ERRED BY AWARDING DAMAGES THAT WERE EXCESSIVE, SPECULATIVE, AND UNSUPPORTED BY COMPETENT EVIDENCE TO A REASONABLE DEGREE OF CERTAINTY AND BY AWARDING EMOTIONAL DISTRESS DAMAGES.

As noted, Ameriprise repeatedly moved to exclude Vallandingham's damages expert, including filing a motion in limine.[255] As pointed out in the motion and raised during the trial, the expert did not examine Beck's book of business, disregarded that Vallandingham paid nothing for the book, and ignored that Vallandingham voluntarily sold a portion of the book to another advisor. Under West Virginia law, damages for lost profits "must be established with reasonable certainty and not be speculative or conjectural in character or amount."[256] "Loss of profits cannot be based on estimates which amount to mere speculation and conjecture but must be proved with reasonable certainty."[257] "A new business may recover lost profits in a breach of contract action, but only if the plaintiff establishes the lost profits with reasonable certainty; lost profits may not be granted if they are too remote or speculative."[258] "[D]amages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like."[259]

Here, Vallandingham offered no evidence that a single Beck account lost value after his

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[255] App. 630; *see also* App. 790-793.

[256] *Rubin Res., Inc. v. Morris*, 237 W. Va. 370, 379, 787 S.E.2d 641, 650 (2016).

[257] Syl. pt. 5, *State ex rel. Shatzer v. Freeport Coal Company*, 144 W.Va. 178, 107 S.E.2d 503 (1959).

[258] Syl. pt. 2, *Cell, Inc. v. Ranson Investors*, 189 W. Va. 13, 427 S.E.2d 447 (1992).

[259] *Given v. Field*, 199 W. Va. 394, 398, 484 S.E.2d 647, 651 (1997) (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 352, cmt. b (1981)).

purchase. As Ameriprise's expert testified, "There was no analysis in Mr. Dionne's work regarding the specific performance of the Beck Book."[260] The Beck customers who testified offered no evidence regarding any loss in value, and both were still Ameriprise customers when they testified at trial. Although they were available to him, the expert did not analyze Vallandingham's tax returns, claiming they would not be helpful because "there is a lot of passive income on his tax return like dividends and interest and things not relevant to the losses of a business,"[261] even though that income could be isolated. Instead, the expert's opinion was based solely on "peer data,"[262] ignoring direct and available evidence of Vallandingham's earnings and the financial performance of the Beck accounts post-acquisition. Moreover, much of it contradicted even relative to peer data instead of supporting the expert's conclusions. For example, in 2007 and 2008, Vallandingham, before the Beck purchase, Vallandingham underperformed his peers by 13% and 5%, respectively.[263] In 2009, after the Beck purchase, Vallandingham outperformed his peers by 5%.[264] At the end of 2010, Vallandingham's expert conceded that he had "a substantial increase in earnings … for the end of calendar year 2009 to the end of calendar year 2010"[265] and "another increase in earnings from the end of calendar year 2010 to the end of calendar year 2011."[266]

Consistent with the applicable law relative to these cases, Ameriprise's expert testified that "the appropriate measure of damages is the difference in price between what Mr. Vallandingham paid and what he would have paid … had he known about the unfavorable activity … And the difference between those two measurement points equals the appropriate measure of economic

[260] App. 2882.
[261] App. 1902.
[262] App. 1857.
[263] App. 1858.
[264] *Id.*
[265] App. 1891-1892.
[266] App. 1892.

damages in this case, and in my experience, all other transaction disputes."[267] Using that appropriate measure, Vallandingham's damages could not exceed $74,999, assuming he still would have offered $1 to Beck.[268] Moreover, as the expert explained, Vallandingham's earnings grew about $53,000 between 2008 and 2010, after he purchased Beck's business, which indicates "A successful transfer of the book of business."[269] "The general rule in actions for fraud and deceit is that one injured thereby is entitled to recover such damages as will compensate him for the loss or injury actually sustained, and as will place him in the same position that he would have occupied had he not been so defrauded."[270] Here, the trial court erred in awarding damages for lost profits that were excessive, speculative, and unsupported by competent evidence. The trial court also erred in awarding $100,000 in emotional distress damages, which are not recoverable, as a matter of law, in a suit for fraudulent concealment arising from a contract.[271]

VI. CONCLUSION

Based on the record evidence, this Court should set aside the judgment and remand for entry of judgment as a matter of law for the Petitioner, Ameriprise Financial, Inc. Alternatively, this Court should set aside the judgment and remand for a new trial, excluding irrelevant evidence, limiting the award of damages to those established by a reasonable degree of certainty, and striking any claim for non-economic damages.

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[267] App. 2876.

[268] App. 2877.

[269] App. 2880-2881.

[270] Syl. pt. 2, *Dunn v. Stump & Copenhaver*, 107 W. Va. 406, 148 S.E. 382 (1929).

[271] *Walsh v. Ingersoll-Rand Co*., 656 F.2d 367, 371 (8th Cir. 1981) ("no recovery is allowed for mental suffering in fraud cases, absent physical injury, unless the tortfeasor acted willfully or maliciously"); *Zeigler v. Fisher-Price, Inc*., 261 F. Supp. 2d 1047 (N.D. Iowa 2003) (damages for emotional distress are not recoverable in a fraudulent concealment case).

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CERTIFICATE OF SERVICE

I certify that on October 30, 2024, I served the preceding "BRIEF OF THE PETITIONER" using the E-Filing system:

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