LAVINE, J., dissenting. I respectfully dissent from the majority opinion and would affirm the judgment of the trial court. Although the trial court in its memorandum of decision did not articulate explicitly the standard of proof it applied to the claims of fraudulent conveyance alleged by the plaintiff, Bernadetta Kaczynski, it did so in the context of the hearing on the motion to reargue filed by the defendant, Dariusz Kaczynski. Because the colloquy between the court and counsel for the defendant, Jacqueline F. Barbara, makes it clear implicitly that the court applied the "clear and convincing standard," and that Barbara understood that to be the prevailing standard, I would affirm the judgment of the trial court.

Following a six day trial, the court rendered its judgment on July 3, 2006. On July 12, 2006, the defendant filed a motion to reargue. Section eight of the motion to reargue addressed the court's order regarding the marital home at 31 Winfield Drive, Shelton, and is six pages in length.[1] The first paragraph of section eight states: "The [c]ourt states in its findings that the [d]efendant artfully disguised his assets, that the evidence is replete with fraudulent transfers, false tax returns and property deeds that are devoid of truth. Additionally, the [c]ourt found that the [d]efendant was the sole cause for the breakdown of the marriage. There were sixty-nine exhibits that were entered during the six day trial. None of the exhibits supports the [c]ourt's findings that the [d]efendant disguised assets or that he is the sole cause for the breakdown of the marriage." The defendant took issue with the court's findings on the ground that they were not supported by the evidence. At no time did the defendant claim that the court had applied the wrong standard in reaching its decision that fraudulent transfers had occurred.[2] Moreover, with respect to the real property, the court did not order any remedies for fraud, e.g., rescission or reconveyance but, rather, considered the property transferred by the defendant to be part of the marital assets.

Kavarco v. *T.J.E., Inc.*, 2 Conn. App. 294, 478 A.2d 257 (1984), has informed my analysis of the issue. "The litigants and the factfinder must know at the onset of the trial what standard of proof is to be applied. . . . In the event that the memorandum of the trial court is silent as to the standard of proof used, it will be assumed that the one ordinarily applied in most civil cases, that of a fair preponderance of the evidence, was used. . . . If the trial court neither states *nor implies* that it is applying the proper standard of proof, it is impossible for an appellate court to determine whether the trial court, had it applied the required standard of proof, would still have rendered judgment as it did. . . .

Whether the trial court has held a party to a less exacting standard than that which the law requires is a question of law, and, as such, is reviewable." (Citations omitted; emphasis added.) Id., 297. The court's memorandum of decision in this case is particularly harsh in tone and language with respect to the defendant, which supports the inference that the court's findings were made on the basis of clear and convincing evidence.[3]

On August 16, 2006, the court held a hearing on the defendant's motion to reargue. Throughout her argument, Barbara stated that there was insufficient evidence that the defendant fraudulently conveyed certain real property. The following colloquy took place between counsel for the defendant and the court.

"[The Defendant's Counsel]: There is no evidence in this case, not one iota of *clear and convincing*, okay. That's the first basis. . . . [T]he party seeking to set aside a conveyance as fraudulent bears the burden of proving that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations. That's not the case here, Your Honor. It's not the case. You've got to first prove that. Now, the question becomes—

"The Court: Did he get something from his sisters?

"[The Defendant's Counsel]: He didn't get anything, Your Honor, from his sisters. Even if—even if he did—

"The Court: Come on, [counsel].

* * *

"[The Defendant's Counsel]: But fraud is a very serious allegation; that's why it's *clear and convincing*. You've got to prove it. . . . And if the facts, Your Honor, don't support it, it's clearly erroneous. . . .

"The Court: The court's got a job to do, and that's how I saw it." (Emphasis added.)[4]

Moreover, it is no secret to practicing lawyers that fraud must be proven by clear and convincing evidence. In fact, the transcript of the hearing on the motion to reargue makes it perfectly clear that Barbara was aware of the standard when she challenged the court's findings. Barbara stated that fraud was a serious allegation that had to be proven by clear and convincing evidence. The court stated that that was how it "saw it." As noted in footnote 2 of this opinion, the defendant never came out and asked the court to articulate the standard of proof that it applied. This court often has noted that an appellant may not choose one course of action at trial and take another turn on appeal if the trial court's decision is not to its liking. See *Larobina* v. *McDonald*, 274 Conn. 394, 402, 876 A.2d 522 (2005). "In the absence of an articulation, we presume that the trial court acted properly." (Internal quotation marks omitted.) *Champagne* v. *Champagne*, 85 Conn. App. 872, 879, 859 A.2d 942 (2004); see also *State* v. *Rosario*, 39 Conn. App.

550, 560, 665 A.2d 152 (1995) ("[w]e are entitled to presume that the issuing judge properly considered all the facts submitted for his consideration"), rev'd on other grounds, 238 Conn. 380, 680 A.2d 237 (1996).

In sum, the defendant's counsel argued to the court that there was no clear and convincing evidence of fraudulent conveyances, implicitly indicating that she recognized that this was the standard the court had in fact used. The court disagreed with the argument, responding, "that's how I saw it." All language is contextual. The language the court used in responding to Barbara's arguments makes it clear, implicitly, that the court had utilized the clear and convincing standard. See *Patrocinio* v. *Yalanis*, 4 Conn. App. 33, 36, 492 A.2d 215 (1985). Moreover, as the majority notes, "the court's findings are amply supported by the evidence." In my opinion, it elevates form over substance in this equitable proceeding to remand this case for another hearing because the court failed in its memorandum of decision to state explicitly the standard of proof applied, especially in the absence of a motion for articulation.

For the foregoing reasons, I respectfully dissent.

[1] Section eight of the motion to reargue is entitled: "Real Estate: The [defendant] shall quitclaim 31 Winfield Drive, Shelton, CT to the [plaintiff] within [thirty] days of [j]udgment."

[2] The fact that the defendant did not question the standard of proof used by the court in his motion to reargue leads me to question whether the issue has been preserved for appellate review. "[O]ur Supreme Court has made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. . . . This same principle requires parties to raise an objection, if possible, when there is still an opportunity for the trial court to correct the proposed error. . . . When we speak of correcting the claimed error, we mean when it is possible during that trial, not by ordering a new trial." (Internal quotation marks omitted.) *Macy* v. *Lucas*, 72 Conn. App. 142, 158, 804 A.2d 971, cert. denied, 262 Conn. 905, 810 A.2d 272 (2002). "[W]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006). I note that the defendant failed to ask the trial court to articulate the standard of proof it used in deciding the claims at issue. See Practice Book § 66-5.

[3] Examples of the court's language include, but are not limited to, the following excerpts from its memorandum of decision: "While the [defendant] would like to present the financial aspects as another straightforward wage earner case, the evidence belies and refutes this. After six days of trial, the court is satisfied that the [defendant] in complicity with his sisters sought to take financial advantage of the [plaintiff] by deceitfully clever means. Unfortunately, the [defendant] has artfully disguised his assets so that a substantial portion of his equitable estate has been reduced. The [plaintiff] has not made [the defendant's] sisters or his parents parties to this action, so this judgment may appear lopsided, but a close look at [the defendant's] machinations will make the result transparent. The nefarious dealings start with the 95 Park Avenue, Shelton, property. . . . The other transactions are less transparent. The court finds that the defendant and his two sisters lack credibility. . . . A review of all of the testimony shows an obvious manipulation of [the defendant's] assets with the connivance and assistance of his family. The evidence is replete with fraudulent transfers, false tax returns and property deeds that are devoid of truth."

[4] At the conclusion of the hearing on the defendant's motion to reargue, the court ordered the plaintiff to file a memorandum of law. In her memorandum of law, the plaintiff argued that there was clear and convincing evidence

that the defendant conveyed certain property fraudulently.