****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

ZARELLA, J., with whom SULLIVAN, C. J., joins, dissenting. The majority today reverses the judgment of the Appellate Court and concludes that the plaintiff, Nancy Weinstein, has proved by clear and convincing evidence that the defendant, Luke A. Weinstein, had defrauded her in two ways. First, the majority concludes the defendant committed fraud in his financial affidavit when he valued his 19.4 percent interest in Product Technologies, Inc. (Product Technologies), at $40,000 on April 17, 1998, the date of the close of the dissolution trial. That is so, the majority holds, because the defendant did not include the value of the software that Product Technologies owned in his $40,000 estimate or, alternatively, because the defendant's assessment of the June 15, 1998 offer of $2.5 million by ICL, Inc. (ICL), to purchase Product Technologies as ''too low'' proves that he knew, during the dissolution proceedings, that the company and his interest therein were worth far more than he represented. Second, the majority concludes that the defendant had a continuing duty to disclose the $2.5 million offer, and that his failure to make that disclosure constituted fraud in its own right. I disagree with the majority's conclusions and, accordingly, I respectfully dissent.

I begin this dissent in part I with an expanded rendition of the facts in order to place the majority opinion in its proper light and to set the backdrop for my analysis. In part II, I turn my attention to the majority's holding that the defendant committed fraud in his affidavit. I first conclude that the plaintiff has not proved by clear and convincing evidence that the defendant did not include what he perceived to be the worth of the software in his $40,000 estimate. I then review the trial court's finding that the defendant's characterization of the $2.5 million offer as too low had no correlation to his knowledge of the company's worth during the dissolution proceedings. Unlike the majority, I conclude that the court's finding is amply supported by the evidence. I explain that the majority, in rejecting this specific finding and the trial court's overall finding that the defendant did not fraudulently misrepresent the worth of his interest, departs from the deferential standard that long has guided our review of factual findings. Specifically, I observe that the majority: (1) affords no weight to the trial court's findings; (2) does not consider the evidence as a whole and does not apply every reasonable presumption in favor of those findings but, rather, considers only selected pieces of evidence; and (3) adopts the plaintiff's speculative inferences and substitutes them for the contrary and well supported findings of the trial court.

In part III, I review the majority's reasoning with

respect to the plaintiff's second claim, namely, that the defendant's nondisclosure of the $2.5 million offer constituted fraud in its own right. I begin in part III A with a review of the majority's conclusion that the defendant was obligated to inform the plaintiff of that offer because his duty to disclose continued until June 16, 1998, the date on which the dissolution court denied the defendant's motion for reconsideration of its financial orders. I reject the majority's new continuing disclosure rule because, in my opinion, it finds no support in the law and it directly contravenes the provisions of Practice Book § 13-15. Because the rules of practice expressly provide that a party's duty to disclose continues only through the conclusion of the trial; see Practice Book § 13-15; and the majority does not have the authority to modify that rule, I would hold that the defendant had no duty to disclose the offer. I note in part III B, however, that, even if the majority's new continuing disclosure rule could somehow be deemed valid, the defendant's failure to conform to it cannot support a finding of fraud because he could not possibly have known of its existence in light of the fact that it was first announced today. Finally, in part III C, I briefly review the defendant's alternative grounds for affirming the judgment of the Appellate Court because, in my view, they illustrate just how grossly unfair the majority opinion is to the defendant, the trial court and the Appellate Court, principally because the plaintiff never raised her continuing duty to disclose claim at trial.

I

The Facts

I begin my restatement of the facts with some background information about Product Technologies. Prior to its acquisition by ICL on October 1, 1998, Product Technologies was a small entrepreneurial business[1] that originally was founded in 1993 by William Mangino, Jr., to develop and to license Smart Card system software.[2] The defendant joined Product Technologies as an employee and shareholder shortly after its formation and contributed approximately $10,000 to acquire an ownership interest in the company. In 1996, two investors from Russia also became minority shareholders in the company.

Because Product Technologies was severely undercapitalized, the shareholders decided ''to try and grow the company as rapidly as possible, and either succeed quickly or die quickly.'' In order to pursue that strategy, the defendant and Mangino determined that they needed at least $5 million in new capital ''to survive . . . .'' In May, 1997, the company prepared its first private placement memorandum in an attempt to raise that capital from private investors.

The placement memorandum characterized the market for Smart Card products in 1997 as one involving

''an increasing number of market entrants who have developed or are developing a wide variety of products.'' Despite the uncertainty in that market, the memorandum indicated that Product Technologies' flagship product, which was known as ''SmartCity,'' was a unique product in that it was ''sufficiently flexible to meet [the] demands of various [S]mart [C]ard applications, unlike competing products which must be customized to the application.'' It also stated, however, that Product Technologies faced serious impediments to market acceptance of its products, most notably a reluctance by potential customers ''to integrate the [c]ompany's [S]mart [C]ard products into their systems unless the products [were] proven to be both reliable and available at a competitive price in an assured quantity.''

The memorandum further revealed that Product Technologies' chief competitors were ''subsidiaries of multinational companies and independent firms with established [S]mart [C]ard businesses who have longer operating histories, greater name recognition, larger customer bases and significantly greater financial, technical and marketing resources . . . .'' These competitors included, among others, American Express, International Business Machines or IBM, MasterCard International, Schlumberger Limited and Visa International. With respect to Product Technologies' finances, the memorandum disclosed that, in 1996, the company reported net income of $266,544. As of December 31, 1996, the company's working capital was $195,773, and stockholder's equity totaled $252,319.

In January, 1997, the defendant sold slightly less than one half of his shares to Mangino. In return, the defendant received $5000 and a $1000 increase in his monthly salary. Fourteen months later, in March, 1998, Product Technologies issued a revised placement memorandum that incorporated the company's financial results for 1997. During that year, working capital declined from a positive balance of $195,773 to a *deficit* of $58,152, while net income was only $18,673 for the entire year. As of December 31, 1997, stockholders' equity totaled $25,031, marking an annual decline of $227,288. Thus, there can be no question that, as of December 31, 1997, the company faced stiff, if not insurmountable, competition, its finances were spiraling downward and, in fact, it rapidly was approaching insolvency.[3] In addition, the placement memoranda had not lured even one investor.

Product Technologies' future was rendered even more tenuous in the spring of 1998, when ICL, which had partnered with Product Technologies to develop certain components of the SmartCity software, claimed that it owned the intellectual property rights to that software. On March 25, 1998, ICL terminated the parties' software licensing agreement and announced that it was ''coming'' to the United States[4] to compete with Product Technologies using the SmartCity system. At

the hearing on the plaintiff's request to open the judgment of dissolution (motion to open), the defendant explained that ICL's claim to the software encumbered Product Technologies with an ''anchor'' because no other company would be willing to invest in Product Technologies until that claim was resolved. Similarly, Dennis Rusconi, an investment banker, testified that Product Technologies ''would have been a very difficult company to sell if there were any litigation or any threatened litigation going on at the time.'' Thus, in the spring of 1998, Product Technologies' future was highly uncertain. Indeed, it was that uncertainty that rendered the defendant's interest in the company so difficult to value.

During the dissolution proceedings, Kenneth J. Pia, Jr., the plaintiff's financial expert, independently appraised the value of Product Technologies and the defendant's 19.4 percent interest therein. At the hearing on the motion to open, Pia explained that he used information that he had gleaned from his interview with the defendant, along with more than a ''trunk load'' of documents that the defendant had provided to him, in order to perform his appraisal. He applied three different valuation techniques, which collectively revealed that the defendant's interest in Product Technologies was worth between $35,000 and $68,000 as of the dissolution proceedings. Pia fixed his final estimate at $40,000 because it fell between the ranges of values generated by his models and was consistent with the value that the defendant had estimated. The plaintiff and the defendant stipulated to Pia's $40,000 valuation during the dissolution proceedings, and the defendant reported that value on his final affidavit. Thus, the majority's assertion ''that the plaintiff relied on the valuation in the defendant's affidavit when she agreed to stipulate that his interest was worth only the $40,000 value listed therein'' simply is not true. To the contrary, the plaintiff relied on the valuation performed by her own expert.

On May 12, 1998, the court, *Higgins, J.*, dissolved the marriage of the plaintiff and the defendant and issued financial orders in connection with the dissolution. The court ordered the defendant to pay to the plaintiff a property settlement of $100,000, alimony in the amount of $1000 per month and child support in the amount stipulated to by the parties. The judgment also provided that the defendant would retain his interest in Product Technologies and the plaintiff would retain her interest in a real estate partnership that was formed by her family.

On May 26, 1998, the defendant filed a motion for reconsideration in which he alleged that the aforementioned financial orders were inconsistent with the court's intentions, as expressed during the dissolution proceedings, namely, that the court was going to allow the defendant ''to keep his assets as they are'' and that

it was not going to ''strip him bare, giving it all to her . . . .'' (Internal quotation marks omitted.) In that motion, the defendant alleged that the court's financial orders were inconsistent with the court's stated goals because the orders required him to dispose of premarital assets, and ''[t]he court-ordered payments [would] leave the defendant with less than $1000 per month . . . to support himself and his daughter, whom he has with him 50 percent of the time.''

On June 12, 1998, while the motion for reconsideration was pending, Product Technologies received an unsigned memorandum of understanding from ICL. Although ICL expressed its intent to purchase all of the outstanding stock of Product Technologies, the memorandum contained *no purchase price or other financial terms*. The memorandum did, however, include the following clause: ''*Statements of intent or understandings in this [memorandum] shall not be deemed to constitute any offer, acceptance or legally binding agreement and do not create any rights or obligations for or on the part of any party to this [memorandum].*'' (Emphasis added.) The memorandum further provided that ICL would have an opportunity to perform a due diligence review of the business and financial condition of Product Technologies prior to its agreement to purchase the company. The defendant and his business partners did not respond to the memorandum.

On June 15, 1998, the dissolution court heard oral arguments from the parties without the presence of the defendant, regarding his motion for reconsideration of the court's financial orders. On that same day, Mangino and the defendant attended a meeting with representatives from ICL at which those representatives made an oral offer[5] to purchase Product Technologies for $2.5 million.[6] Both the defendant and Mangino were surprised that ICL expressed an interest in acquiring Product Technologies because they thought that the two companies were ''go[ing] to court . . . .'' The defendant and Mangino immediately declined the offer because they believed that it was a ploy to gain information about the SmartCity software, presumably under the guise of a due diligence review. The defendant described the events of that meeting at the hearing on the plaintiff's motion to open. He stated that the meeting lasted approximately forty-five minutes and ''ended in a huff.'' He further explained that ICL's representatives ''were fairly angry that [the defendant and Mangino] wouldn't negotiate, counteroffer, whatever, but [he] believed that there wasn't a lot of sincerity behind it . . . [and] [t]hat [ICL was] looking to find information, and [he] thought [ICL was] a competitor.''

On the next day, June 16, 1998, two events occurred. First, the dissolution court denied the defendant's motion for reconsideration. Second, Mangino and the defendant received a letter from Alan P. Wain, ICL's

vice president and general counsel, in which Wain maintained that the intellectual property rights to the SmartCity software were ''held and shared equally by the parties.'' Although Wain expressed ICL's hope that an acquisition would still occur, he also articulated ICL's expectations and intentions if it did not. In particular, Wain wrote: ''[I]f we are unable to conclude the acquisition, we expect that you will deliver to us a complete copy of all of the code[s], including source code[s], and all of the documentation. If you fail to do so, we will have no choice but to pursue our legal remedies.''

On June 17, 1998, the defendant wrote a letter to Wain on behalf of Product Technologies. In that letter, the defendant stated that Wain's position that ICL owned equal rights to the SmartCity software was flawed. That was so, the defendant wrote, because Product Technologies solely had developed many enhancements to SmartCity that fell outside of the purview of the parties' agreement. The defendant further wrote that Product Technologies ''would vigorously protect its rights under [the agreement] and would seek to recover damages [that Product Technologies] incurs as a result of any claim against it.'' Finally, the defendant closed the letter with the following passage: ''[Product Technologies] management clearly understood at the meetings on [June 15, 1998] that your position on [the intellectual property rights] is a major factor in the low valuation of [Product Technologies]. If this position is seriously flawed, then so is the valuation.''

Thereafter, additional discussions between Product Technologies and ICL ensued and, on July 1, 1998, the parties signed a nonbinding memorandum of understanding setting forth ICL's intent to acquire Product Technologies for $6 million, subject to a favorable due diligence review. On October 1, 1998, the parties signed an acquisition agreement and the sale was consummated. ICL's decision to acquire the company was precipitated by its desire to develop a Smart Card business, its view that the SmartCity software would fit optimally with its overall Smart Card strategy and its eagerness to resolve the dispute over the ownership of the intellectual property rights. Additional facts will be set forth as necessary.

II

Fraud in the Defendant's Financial Affidavit

The majority's conclusion that the defendant committed fraud in his financial affidavit rests on two alternate grounds. First, according to the majority, the $40,000 estimate that the defendant assigned to his business interest did not include the worth of the software that Product Technologies owned and, therefore, it was a ''blatant and deliberate misrepresentation.'' Second, the majority posits that, even if the defendant did include

the worth of the software in his $40,000 estimate, the statement that he made in his June 17, 1998 letter to Wain, namely, that the $2.5 million offer was too low, is equally convincing proof that he knew his shares in Product Technologies were worth far more than $40,000 on April 17, 1998. In so holding, the majority rejects the trial court's determination that the plaintiff did not prove by clear and convincing evidence that the defendant fraudulently had misrepresented the worth of his interest, and concludes that it is left with the ''definite and firm conviction'' that the trial court made a mistake. (Internal quotation marks omitted.)

Before I analyze the majority's reasoning as it pertains to the plaintiff's first claim, I set forth the highly deferential standard that long has guided our review of a trial court's factual findings. It is well settled that ''[w]e will overturn . . . a finding of fact only if it is clearly erroneous in light of *the evidence in the whole record*.'' (Emphasis added; internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 705, 741 A.2d 873 (1999). A court's factual finding ''is clearly erroneous only in cases in which the record contains *no evidence* to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a *mistake* has been made.'' (Emphasis added; internal quotation marks omitted.) *W.* v. *W.*, 256 Conn. 657, 661, 779 A.2d 716 (2001). When we review factual findings, we afford ''[*g*]*reat weight* . . . to the judgment of the trial court because of [its] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached.'' (Emphasis added; internal quotation marks omitted.) *In re Jeisean M.*, 270 Conn. 382, 397, 852 A.2d 643 (2004). Nor do we substitute a party's ''speculative inferences . . . for the contrary finding[s] of the trial court.'' *State* v. *Michael J.*, 274 Conn. 321, 347, 875 A.2d 510 (2005). We do, however, make ''*every reasonable presumption*'' in favor of the trial court's finding. (Emphasis added; internal quotation marks omitted.) *In re Jeisean M.*, supra, 397.

My analysis will reveal that the majority violates virtually every one of the foregoing principles. First, the majority affords no weight to the trial court's findings and makes no presumption in their favor. Second, the majority does not review the evidence of the record as a whole but, rather, confines its review to selected pieces of evidence and draws inferences therefrom that are undermined by other evidence in the record. Finally, the majority essentially adopts the plaintiff's speculative inferences and substitutes them for the contrary and well supported findings of the trial court.

A

Exclusion of the Worth of the Software from the $40,000 Estimate

The plaintiff first contends, and the majority agrees, that she has proved by clear and convincing evidence that the defendant did not include the worth of the software in the $40,000 estimate contained in his affidavit. The majority concludes that this misrepresentation automatically supports a finding of fraud, apparently under the principles announced in *Billington* v. *Billington*, 220 Conn. 212, 219–22, 595 A.2d 1377 (1991). I would reach a different result. Specifically, I would hold that the evidence, when viewed as a whole, does not provide clear and convincing proof that the defendant did not include the worth of the software in his affidavit. I therefore would reject the plaintiff's claim.

The majority's determination that the defendant's affidavit did not include the worth of the software rests entirely on the defendant's testimony that his $40,000 estimate was based on the ''book value'' of Product Technologies. It is from this isolated statement that the majority concludes that the financial affidavit contained a ''blatant and deliberate misrepresentation.'' I note, however, that the defendant did not explain what he thought ''book value'' meant but simply stated that $40,000 was a ''guesstimate'' of what he would receive ''if [Product Technologies] got distributed and broken up at the time.'' The plaintiff's counsel did not ask the defendant to explain the term ''book value,'' nor did she ask him to articulate the specific assets and liabilities that formed the basis of his estimate. Most importantly, the plaintiff's counsel did not ask the defendant whether his estimate included what he perceived to be the worth of the SmartCity software on April 17, 1998. Thus, the plaintiff's claim and the majority's determination are premised exclusively on the unproven assumption that the defendant defined ''book value'' in a manner consistent with the exclusion of intangible assets such as intellectual property rights. That assumption is flawed.

The placement memorandum that Product Technologies issued in March, 1998, shows that the actual book value of the entire company was only $25,031, which is $174,969 lower than the $200,000[7] value that the defendant assigned to the company at large. Similarly, the memorandum reported that the book value[8] for each of the 23,450 outstanding common shares was $1.07. In view of the fact that the defendant owned 4550 common shares, the memorandum indicates that the actual book value of his 19.4 percent interest was only $4868.50, or $35,131.50 less than the $40,000 estimate that he had reported in his affidavit. In short, the placement memorandum makes clear that the defendant's meaning of ''book value'' differed from the generally accepted accounting definition of that term. Thus, the majority's reliance on the defendant's testimony that he used ''book value'' as support for its determination that he did not include the worth of the software in his affidavit

is tantamount to its reliance on no evidence at all.[9]

The majority's determination also is undermined by the valuation performed by Pia, the plaintiff's expert. Pia explained that he performed a comprehensive analysis of the value of Product Technologies and arrived at a value for the defendant's shares that was comparable to the $40,000 estimate that the defendant had reported. Surely Pia, who has evaluated or appraised more than 300 companies in a broad range of industries, would have included the worth of the software in his appraisal.[10] There certainly is no evidence in the record that he did not. In fact, the record reveals that Pia specifically inquired about the intellectual property rights during his interview with the defendant, as evidenced by the following entries in his notes: (1) ''Patents—None''; and (2) ''[Product Technologies] has 2 trademarks: SmartCity granted 1996, 1997; Watch thing Bill Mangino 1994 . . . .''

Finally, I note that the defendant, and presumably Pia, reasonably could have concluded that the software did not have substantial value in April, 1998, even though Product Technologies had expended more than $1 million in development costs. At the hearing on the plaintiff's motion to open, the defendant testified that: (1) Product Technologies and ICL were posturing for litigation over the rights to SmartCity software in the spring of 1998; (2) the software was the ''lifeblood'' of Product Technologies; (3) ICL's pending claim to the software imperiled its worth; (4) no investors would be interested in Product Technologies until that claim was resolved; and (5) Product Technologies did not have the resources to engage in protracted litigation. Although the defendant did not state his belief that the software would be worthless once ICL asserted a legal claim, he did state, ''we were between a rock and a very big hard place.'' The majority, however, does not credit this testimony. Instead, it considers only the defendant's statement that his estimate was based on the ''book value'' of Product Technologies and draws inferences from that testimony in a way that undermines, rather than supports, the trial court's findings.

When the evidence is viewed as a whole, it is clear that the plaintiff has not proved by clear and convincing evidence that the defendant did not include the worth of the software in his affidavit. Moreover, the plaintiff's claim should be rejected for another reason, namely, because the plaintiff offered no evidence that the purported omission was made with the intent to deceive. The majority nevertheless seems to believe that the plaintiff does not need to do so. Implicit in the majority's analysis is the notion that *Billington* allows us to infer fraud automatically whenever a party to a dissolution proceeding makes a misrepresentation or omission. Because that assumption pervades the majority opinion, I pause for a moment to discuss *Billington*.

The primary issue in *Billington* was ''whether a party to a marital dissolution judgment must establish, in order subsequently to open the judgment based upon a claim of fraud, that she was diligent during the original action in attempting to discover this fraud.'' *Billington* v. *Billington*, supra, 220 Conn. 214. In answering that question in the negative, we concluded that the diligence prerequisite is inconsistent with the requirement of full and frank disclosure in marital actions; id., 220–21; and ''our strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine.'' (Internal quotation marks omitted.) Id., 221. In so concluding, ''we recognize[d] the need for finality of litigation and stability of judgments''; id., 222; but determined that the aforementioned policy goals ''sufficiently outweigh[ed] those interests of finality and stability in the marital litigation context so as to require the abandonment of the diligence requirement.'' Id. We further stated, however, that ''the need for finality and stability is adequately protected by the remaining limitations upon the granting of relief from fraud.'' Id.

As *Billington* makes clear, one of these remaining limitations is that ''[t]here must be *clear proof of the perjury or fraud*.'' (Emphasis added; internal quotation marks omitted.) Id., 218. Thus, unlike the majority, I do not read *Billington* to stand for the proposition that fraud should be inferred automatically, thereby relieving a plaintiff of his or her burden of proof, whenever a party makes a misrepresentation or omission concerning financial assets.

B

Assessment of $2.5 Million Offer as ''Too Low''

I now consider the majority's second ground on which it concludes that the defendant committed fraud in his affidavit, namely, that, even if the defendant did include the value of the software in his $40,000 estimate, his assessment of ICL's $2.5 million offer as too low also constitutes clear and convincing proof of fraud. The majority posits that, ''[i]f the defendant's valuation of $200,000[11] for the company had been an accurate assessment that included the worth of the intellectual property asset, then he could not have believed that ICL's $2.5 million valuation of the company was too low because it excluded the value of that asset.'' In light of this evidence, the majority concludes that ''the trial court *reasonably* could not have found a lack of correlation between the defendant's assessment of the $2.5 million offer as too low and his valuation of Product Technologies during the dissolution trial . . . .'' (Emphasis in original.)

The defendant's so-called assessment of the $2.5 million offer traces its origin to his June 17, 1998 letter to

Wain. As I noted previously, the defendant wrote that letter on behalf of Product Technologies in response to Wain's threat of litigation on the previous day. In that letter, the defendant asserted that ICL did not possess equal ownership of the software rights, as Wain contended, because Product Technologies had made many enhancements to the software that fell outside of the purview of the parties' agreement. He also asserted that Product Technologies would vigorously protect its rights under the agreement and would seek to recover damages if ICL asserted a legal claim. Finally, the defendant wrote: "[Product Technologies] Management clearly understood at the meetings on [June 15, 1998] that your position on [intellectual property rights] is a major factor in the low valuation of [Product Technologies]. If this position is seriously flawed, then so is the valuation." It is this latter passage that forms the basis of the majority's determination that the defendant committed fraud.

At the hearing on the motion to open, the defendant explained what he meant by his final statements to Wain. He testified that ICL was willing to pay $2.5 million for Product Technologies under the assumption that ICL owned all of the intellectual property rights to the SmartCity software; in the defendant's view, however, that offer was too low because Product Technologies owned some of those intellectual property rights exclusively. The defendant also testified that he and Mangino believed that ICL's offer was an insincere gesture designed to pilfer the software codes. The majority fails to consider the defendant's entire testimony concerning his statements to Wain and disregards the context in which they were made. The majority selectively relies on only the defendant's testimony that he had told ICL that its offer was too low.

When I view the defendant's letter to Wain in conjunction with his testimony, I do not believe that it provides any insight into the defendant's state of mind during the dissolution proceedings. Indeed, I read the final passage in that letter simply to be an aggressive negotiating tactic that was made in the heat of a contentious dispute with ICL. I also find the defendant's letter, when read in conjunction with Wain's letter, to be highly probative of the defendant's representation that he and Mangino believed that ICL was intent on gaining access to the software codes so that ICL could emerge as a competitor. I certainly would not consider it to be a thoughtful and deliberative "assessment" of the worth of Product Technologies in light of the context in which it was made. Thus, I would afford a presumption in favor of the trial court's finding and hold that the trial court correctly found no correlation between the defendant's assessment of the $2.5 million offer on June 17, 1998, and his knowledge of the company's value during the dissolution proceedings.

I note, moreover, that the majority fails to consider other evidence in the record that undermines its conclusion and supports the trial court's overall finding that the plaintiff has not proved by clear and convincing evidence that the defendant knew his interest in Product Technologies was worth more than $40,000. First, it is clear from the defendant's testimony at the hearing on the plaintiff's motion to open that he believed that Product Technologies' future looked rather bleak in April, 1998. He testified that the company's financial resources were limited, and its efforts to raise capital from investors had proven to be unsuccessful. He explained that Product Technologies' future was rendered even more uncertain by ICL's claim to the intellectual property rights. Indeed, the defendant stated that he thought no company would be interested in investing in Product Technologies until that claim was resolved, and he believed that the company did not have the resources to defend against that claim. This testimony supports the trial court's finding that the defendant reasonably could have believed that his interest in Product Technologies did not have significant worth during the dissolution proceedings.

Second, the defendant told Pia, during their interview, that he would be willing to agree to a ''tail,'' meaning that the plaintiff could retain an ownership interest in a certain percentage of the defendant's shares of Product Technologies for up to two years. Although the ''tail'' would have allowed the plaintiff to share in any gain that the company might have realized if it prospered or was acquired by another company, it also would have required her to assume the risk that she would receive nothing from this asset if Product Technologies was unsuccessful. Pia explained that he did not consider the ''tail'' option to be particularly attractive at that time. Although the majority acknowledges, in part III of its opinion, that the defendant agreed to offer the plaintiff a ''tail,'' it focuses on the grounds on which she supposedly declined that offer, which, in my view, simply do not matter. What does matter is the fact that the defendant actually agreed to make the offer because it negates the inference that he knowingly misrepresented the value of his interest in Product Technologies in his affidavit. In other words, if the defendant knew that his interest in Product Technologies was worth substantially more than $40,000, and was trying to hide that fact from the plaintiff, why would he agree to offer her a 20 or 30 percent interest in his shares, presumably for a nominal amount?[12] The majority does not consider the defendant's ''tail'' offer from that perspective, presumably because it would defeat proof of the scienter element that is essential to a finding of fraud. Again, the majority views the evidence in a light that undermines, rather than supports, the trial court's finding.[13]

Third, in January, 1997, the defendant sold slightly less than one half of his shares to Mangino in exchange for a reduced work schedule so that he could spend more time with his daughter. The price was $5000, plus a $1000 increase in his monthly salary.[14] From the time of that stock sale to the date of dissolution, the financial condition of the company only grew more precarious, as demonstrated by a comparison of the initial and revised private placement memoranda that Product Technologies issued in May, 1997, and March, 1998, respectively. In light of the foregoing evidence, I conclude that the trial court reasonably determined that the plaintiff had failed to prove by clear and convincing evidence that the defendant had misrepresented the value of his interest. In my view, the trial court's conclusion is far more reasonable than the one drawn by the majority, which is premised almost exclusively on the defendant's cryptic passage in his letter responding to ICL's threat of litigation.

The majority also contends that ''the huge disparity between the value that the defendant placed on Product Technologies in April, 1998, and the value that ICL placed on the company just two months later *compels* the conclusion [that] the defendant knew the company and his interest therein were worth more during the dissolution trial.'' (Emphasis in original.) I disagree. Even if ICL initially valued Product Technologies at $2.5 million on June 15, 1998, and subsequently raised its price to $6 million, that does not compel the conclusion that the company was worth that much during the dissolution proceedings. More importantly, however, even if I assumed that the company was worth millions of dollars during the dissolution proceedings, the plaintiff has not offered any credible evidence that the defendant had any reason to know it, nor does the majority cite any in its opinion. Rather, the majority simply imputes ICL's perceived worth of Product Technologies to the defendant and, in doing so, adopts the plaintiff's speculative inference and substitutes it for the contrary and well supported finding of the trial court.

If I were to rely on a third party's appraisal to ascertain whether the defendant could reasonably have thought his interest in Product Technologies was worth only $40,000 during the dissolution proceedings, I would look to Pia's valuation, which the majority completely ignores.[15] In my view, Pia's appraisal is particularly insightful because: (1) it was prepared in the spring of 1998 on the basis of the company's outlook at the time and without the benefit of hindsight; (2) it was made when there was no interest by anyone, including ICL, in purchasing Product Technologies;[16] and (3) it was based on essentially the same information that the defendant had available to him. Furthermore, neither party disputed Pia's qualifications or the comprehensiveness of his work. At the hearing on the plaintiff's

motion to open, Pia described his valuation approach. First, he interviewed the defendant and asked him a number of questions about Product Technologies, including: (1) ''[who] its competitors were''; (2) ''what its long-term prospects were''; (3) ''[what] its outlook [was] as of [the] date that [he was] looking to value the company''; and (4) ''what was happening in the current fiscal year.'' Pia further testified that the defendant had told him that if the company ''continued on the same pattern as it was at that point in time, it would have died a slow [death], so either [it was] going to grow quickly and die a quick death or be successful.'' Pia's notes contain additional details concerning the information that he gleaned during his interview with the defendant. With respect to the company's market position and financial status, Pia made notations that are consistent with the information contained in the private placement memoranda. Specifically, he wrote, ''Intense competition,'' ''Visa, MC, MCI,'' and ''Under capitalized . . . .'' He also wrote, ''3 largest customers all have ceased buying from [Product Technologies] . . . .'' Finally, he noted the defendant's stock sale to Mangino.

Pia also collected documents from the defendant and others that substantially filled a trunk and nine notebook binders. He relied on these data along with information that he had obtained from his interview with the defendant in utilizing three different valuation methods. Pia's analysis revealed that the defendant's shares in Product Technologies were worth between $35,000 and $68,000 at the time of the dissolution proceedings, and he fixed his appraisal at $40,000. In my view, if Pia believed that the company was worth only $40,000 in April, 1998, then so, too, could the defendant. I also find it significant that Pia did not testify at the hearing on the motion to open whether, in retrospect, he would have performed his appraisal differently in light of his newfound knowledge of the $2.5 million offer and the subsequent $6 million sale. Nor did the plaintiff's counsel ask him that question. That omission is telling in its own right.

In sum, the plaintiff's claim, as well as the majority's analysis of it, is based entirely on hindsight and gross speculation. The plaintiff has not offered any credible evidence, much less clear and convincing evidence, that the defendant *knew* or even *should have known* that his interest in Product Technologies was worth more than $40,000 in April, 1998. I therefore would sustain the trial court's conclusion that the plaintiff had not met her burden of proving that the defendant had fraudulently misrepresented the value of his interest in Product Technologies in his financial affidavit.

III

Nondisclosure of the $2.5 Million Offer as Fraud

I now turn to the majority's second ground for rever-

sal, namely, that the defendant's failure to disclose the $2.5 million offer constituted fraud in its own right. In reaching that conclusion, the majority reasons that: (1) the defendant's duty to disclose information affecting his finances continued until June 16, 1998, the date on which the dissolution court denied his motion for reconsideration; (2) the defendant therefore should have disclosed the $2.5 million offer that Product Technologies had received from ICL on June 15, 1998; and (3) his failure to make that disclosure automatically constituted fraud.

A

Duty to Disclose

I first consider the majority's new continuing disclosure rule, which rests on three interrelated propositions. First, the duty to disclose necessarily must continue until the date of dissolution because, in *Sunbury* v. *Sunbury*, 216 Conn. 673, 676, 583 A.2d 636 (1990), we held that the date of dissolution is the proper time to value the marital assets. Second, our decision in *Billington* essentially mandates that we further extend the duty to disclose until the judgment is final. See *Billington* v. *Billington*, supra, 220 Conn. 217–18, 222. Third, the rule of *Killingly* v. *Connecticut Siting Council*, 220 Conn. 516, 526, 600 A.2d 752 (1991), extends that duty even further because, in *Killingly*, we determined that a motion for reconsideration suspends the finality of a judgment until the court acts on that motion. The majority applies these three principles to the facts of the present case and holds that the defendant was obligated to disclose ICL's $2.5 million offer on June 15, 1998, more than one month after the dissolution of marriage was final. I disagree.

First, *Sunbury* had absolutely nothing to do with a party's duty to disclose changes to his or her financial status during a marital dissolution proceeding. Rather, the issue in *Sunbury* was whether the marital estate should be valued as of the date of dissolution or the date of the subsequent hearing that was conducted following our remand of the case to the trial court. See *Sunbury* v. *Sunbury*, supra, 216 Conn. 674–75. In concluding that it was the date of dissolution, we relied on General Statutes § 46b-81 (a)[17] and on ''well recognized principles regarding the finality of actions.'' Id., 677. We did not, however, discuss the parties' duty to disclose because it was not at issue in *Sunbury*.

Nor did we address in *Billington* the date on which a party's duty to disclose terminates. As I explained previously, we considered whether a party in a marital dissolution action must prove that he or she was diligent in uncovering the other party's fraud during the dissolution proceedings ''in order subsequently to open the judgment based upon a claim of fraud . . . .'' *Billington* v. *Billington*, supra, 220 Conn. 214. In answering

that question in the negative, we recognized the need for full and frank disclosure in marital actions; id., 219–22; but did not state that the duty to disclose continued until the judgment was final. I note, however, that, even if *Billington* could be read to stand for that proposition, the judgment in this case was final on May 12, 1998, the date on which the court entered the divorce decree and issued its financial orders. At that point, there is no question that the parties' marriage was dissolved and the defendant's obligation to make the court-ordered payments came into force.

The defendant's filing of a motion for reconsideration did not affect the finality of the dissolution judgment, and, contrary to the majority's assertion, *Killingly* v. *Connecticut Siting Council*, supra, 220 Conn. 516, does not alter that conclusion. In *Killingly*, we explained that the filing of a motion for a rehearing before an administrative agency may preclude a party from appealing that decision to the Superior Court while the motion for a rehearing is pending. Id., 523–24, 526. Even if I were to assume that the defendant's filing of a motion for reconsideration in this case also delayed his ability to file an appeal, I nonetheless would conclude that such a delay has no bearing on the issue in this case.

It is important to remember that this case involves the valuation of a marital asset, specifically, the defendant's 19.4 percent interest in Product Technologies. In *Sunbury*, we made it clear that marital assets should be valued as of the dissolution date. *Sunbury* v. *Sunbury*, supra, 216 Conn. 676. Integral to the *Sunbury* rule is the notion that the valuation will take into account events that bear on the value of assets up until the dissolution date but will exclude those that occur thereafter. See id. In other words, because *Sunbury* fixes the valuation date of marital property as the date of dissolution, events that occur thereafter are irrelevant with respect to a motion for reconsideration. Indeed, if the rule were otherwise, there never would be an end to litigation between estranged marital partners. I note, furthermore, that a motion for reconsideration does not present a dissatisfied litigant with the opportunity to try to force a revaluation and reallocation of the marital assets simply because subsequent events reveal that an asset has a higher value than that which it was assigned on the dissolution date. Rather, a motion for reconsideration is merely a request that the court reconsider its original decision on the basis of the facts that were known on the date of judgment. See, e.g., *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001). It does not change the valuation date, and that is true regardless of whether the motion delays the parties' ability to file an appeal. In the present case, Product Technologies received the $2.5 million offer more than one month after the valuation of the parties' assets was fixed on May 12, 1998, the date of the dissolution judgment. In light of that fact, I do not understand how

the majority can conclude that the defendant had a duty to disclose that offer because such a disclosure would have served no useful purpose.

I also note that the majority's new continuing disclosure rule violates Practice Book § 13-15, which provides in relevant part: "If, subsequent to compliance with any request or order for discovery and *prior to or during trial*, a party discovers additional or new material or information previously requested and ordered subject to discovery or inspection or discovers that the prior compliance was totally or partially incorrect or, though correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment, that party shall promptly notify the other party, or the other party's attorney, and file and serve . . . a supplemental or corrected compliance." (Emphasis added.) Thus, under the express provisions of Practice Book § 13-15, a party's continuing duty to disclose information that affects the financial information reported in his or her affidavit terminates at the conclusion of the trial. I assume, without deciding, that the term "trial" could be construed to extend to the date on which the court renders its judgment, which, in the present case, was May 12, 1998. Such a reading would be compatible with *Sunbury* because the parties' duty to disclose would terminate on the same date that the assets are valued.

In holding that the duty to disclose continues after trial and extends until the court acts on a motion for reconsideration, the majority essentially amends Practice Book § 13-15. The majority, however, does not have the authority to make such an amendment because that authority is vested in the judges of the Superior Court. See General Statutes § 51-14 (a); cf. *Kupstis* v. *Michaud*, 215 Conn. 435, 437, 576 A.2d 152 (1990) (observing that "[t]he problem illuminated by [the] litigation [in that case] call[ed] for a change in the rules of practice that this court [could not] enact"). I therefore dispute the validity of the majority's new rule.

Unlike the majority, I would reject the new continuing disclosure rule advocated by the plaintiff because it violates our precedent and the rules of practice. I simply would hold that Practice Book § 13-15 governs the defendant's duty to disclose in this case. Because that provision makes clear that such a duty terminates at the conclusion of the dissolution trial, and because Product Technologies received ICL's $2.5 million offer after the trial had concluded, the defendant had no duty to disclose it.

B

The Majority's Finding of Fraud

Even if the majority's new continuing disclosure rule can somehow be deemed valid, the defendant's failure to conform to it cannot possibly support a finding of

fraud. In order for the defendant to have committed fraud by virtue of his failure to disclose the $2.5 million offer, he must have *known* that he had a duty to disclose it. I certainly did not know before today that the defendant had such a duty and, therefore, I cannot imagine how the defendant, a nonlawyer, possibly could have possessed that knowledge. Even if the defendant was clairvoyant, that does not relieve the plaintiff of her burden of proving that his failure to disclose ICL's offer on June 15, 1998, was calculated to deceive. The plaintiff offered absolutely no evidence to support such a finding. Indeed, we do not even know if the defendant was aware that his attorney was appearing in court on June 15, 1998, to argue his motion for reconsideration, nor do we know whether the defendant's meeting with ICL ended before the close of court on June 15, 1998. This lack of evidence is the direct result of the plaintiff's failure to raise this fraud claim at the hearing on her motion to open. See part III C of this opinion.

The majority nonetheless ignores this evidentiary void and determines that the defendant committed fraud because he ''must have *known* that he bore a duty to disclose this information because such a duty is *inherent* in the nature of the request [that] he made before the court in his motion for reconsideration.'' (Emphasis in original.) That is so, the majority informs us, because the defendant's situation ''is akin to the defendant going before the court and asking it to reduce his child support obligations because he was unemployed and could barely support himself, while concealing the fact that he had a lucrative job offer . . . .'' This argument misses the mark because the majority fails to recognize that there is a fundamental distinction between a motion for modification of child support or alimony and a motion for reconsideration, namely, that a party's changed financial circumstances are relevant to the former but not the latter. That is because a motion for reconsideration is merely a request that the court reconsider its original ruling on the basis of the evidence that was before it when that ruling was made. See *Opoku* v. *Grant*, supra, 63 Conn. App. 692–93. It does not involve the presentation of new evidence. See id. Thus, contrary to the majority's assertion, Product Technologies' receipt and rejection of the $2.5 million offer on June 15, 1998, was not ''directly pertinent and material'' to the defendant's motion for reconsideration as it pertained to the court-ordered alimony and child support payments. All of this is irrelevant, however, because this case is not about alimony or child support and, therefore, the majority's analogy is nothing more than a red herring. This case involves the valuation of a marital asset. Because the party's assets were valued on May 12, 1998, the $2.5 million offer would not have been relevant to the defendant's motion for reconsideration of the court-ordered property division. Thus, the court's decision to grant or to deny that motion would

not have been influenced by Product Technologies' receipt and rejection of the $2.5 million offer. Consequently, even if the defendant had disclosed that offer to the court, it would not have changed the outcome in this case. The plaintiff therefore was not harmed by the defendant's failure to disclose the offer.

The majority nevertheless asserts that the plaintiff indeed was harmed because, if the defendant had ''timely disclosed the $2.5 million offer . . . the plaintiff would have been well within the four month period during which the plaintiff would have been permitted to file a motion to open the judgment, subject only to review as to whether the court acted unreasonably or in clear abuse of its discretion.'' In other words, the plaintiff would not have been ''saddled'' with proving fraud. In response to that argument, I note the following. First, the majority assumes that the plaintiff's motion to open would have been granted automatically if it had been filed within the four month window. I disagree with that assumption. A motion to open, like a motion for reconsideration, is not an opportunity for a dissatisfied litigant to get a second bite at the apple by seeking a revaluation and reallocation of the assets due to postdissolution events. Because the $2.5 million offer was a postdissolution event, I believe that the plaintiff would have needed to prove that the defendant intentionally had misrepresented the value of his interest in Product Technologies *as of the dissolution date* in order to prevail on her motion to open. That takes us right back to where we started, that is, with the plaintiff's first claim of fraud that stems from the defendant's misrepresentation in his affidavit. Thus, the only thing that the majority has accomplished in its convoluted and circular reasoning is to confuse the law governing the valuation of marital assets and the duty to disclose. Second, in light of the majority's holding, I believe that it is likely that we will see far more dissatisfied marital litigants filing motions for reconsideration because it will impose on the opposing party a continuing duty to disclose any changes to that party's assets while the motion is pending. In my view, that will undermine the need for ''finality of litigation and stability of judgments . . . .'' *Billington* v. *Billington*, 220 Conn. 222. Third, the majority's new continuing disclosure rule will be confusing to litigants, attorneys and the lower courts because its contours are completely undefined. For example, the majority does not indicate whether a party now must report normal appreciation in the value of real estate and other assets while a motion for reconsideration is pending. Nor does it enlighten us as to whether a party who owns publicly traded stocks now must disclose increases and decreases in the value thereof.

C

Defendant's Alternative Grounds for Affirmance

Finally, I note that the defendant urges us to affirm the judgment of the Appellate Court on two alternative grounds, namely, that the plaintiff failed: (1) to preserve her claim pertaining to the defendant's continuing duty to disclose the $2.5 million offer; and (2) to raise that claim in her motion to open. The majority rejects both grounds, concluding that they lack merit. I disagree and, therefore, briefly discuss them because, in my view, they illustrate the unfairness that inures to the detriment of the defendant, the trial court and the Appellate Court by virtue of the majority's decision to allow the plaintiff to advance her continuing duty to disclose claim on appeal.

In the plaintiff's motion to open, she essentially claimed that the defendant knew that the $40,000 value reported in his affidavit was false because Product Technologies and ICL were engaged in sales negotiations or discussions *during the dissolution proceedings* and he failed to disclose that information to the plaintiff, thereby inducing her to rely on the value that he had reported in his affidavit.[18] Indeed, the plaintiff conceded that this was her claim at the hearing on the motion to open when the court posed the following question to her attorney: ''[I]n order for you to prevail . . . don't you have to . . . show that the seeds, at least the seeds of this acquisition, were planted and well watered before the trial [which concluded on April 17, 1998]?'' The plaintiff's counsel responded: ''Yes, Your Honor. I do need to show that.''

The plaintiff focused principally on the actual sale of Product Technologies as evidence of fraud at the hearing on her motion to open. The plaintiff's counsel also elicited testimony from the defendant concerning the reasons why Product Technologies rejected ICL's $2.5 million offer and why the defendant characterized that offer as too low. She did not, however, elicit testimony from the defendant or any other witnesses that would establish a record on which a court could decide her continuing duty to disclose claim.

During closing argument at the hearing on the motion to open, the court asked the plaintiff's counsel whether she thought that the defendant's duty to disclose extended beyond the conclusion of the evidentiary portion of the dissolution trial on April 17, 1998. She responded that, in her view, the defendant's duty to disclose extended to June 16, 1998, the date on which the court denied the defendant's motion for reconsideration. During closing argument, counsel for the defendant briefly commented that she was unaware of any legal authority that would support the assertion of the plaintiff's counsel that the defendant's duty to disclose extended beyond April 17, 1998.

The trial court denied the plaintiff's motion to open and issued a thirty-nine page decision in support of its

findings and conclusions. The court found that, ''as of the time of [the dissolution] trial, April 16 and 17, 1998, there was no sale pending, no offer to purchase had been made, and . . . no negotiations or discussions regarding [the] sale of the business had taken place.'' The plaintiff therefore could not prevail on her fraud claim asserted in her motion to open. The court also found that Product Technologies' rejection of the $2.5 million offer as too low did not support an inference that the defendant knew that the company was worth that amount or more during the dissolution proceedings. The court did not address the belated assertion of the plaintiff's counsel that the defendant's duty to disclose extended beyond the conclusion of the dissolution trial.

The plaintiff thereafter filed a motion for reconsideration of the denial of her motion to open. In that motion, the plaintiff distinctly claimed, for the first time, that the defendant's duty to disclose information affecting the value of his assets extended to June 16, 1998, and, therefore, that he should have reported the $2.5 million offer that ICL had made to purchase Product Technologies on June 15, 1998. The court rejected that claim, however, because it contradicted the plaintiff's counsel's earlier representation that the allegations contained in the motion to open required the plaintiff to prove that the sales negotiations had commenced well before the conclusion of the dissolution proceedings on April 17, 1998. The court therefore ruled that the plaintiff's claim was ''beyond the scope of her pleading.'' The court further observed that there was no legal support for the proposition that the defendant's duty to disclose extended beyond the close of the dissolution trial.

The plaintiff appealed from the trial court's denial of her motion to open to the Appellate Court, which affirmed the trial court's ruling in all respects. *Weinstein* v. *Weinstein*, 79 Conn. App. 638, 649, 830 A.2d 1134 (2003). Like the trial court, the Appellate Court did not consider the plaintiff's continuing duty to disclose claim even though the plaintiff fully briefed it on appeal to the Appellate Court. When the plaintiff asserted that claim on appeal to this court, the defendant responded with two alternative grounds for affirmance. First he argued that the plaintiff did not preserve that claim at trial. Second, he argued that the plaintiff's counsel conceded that she did not plead it. Although I believe that both alternative grounds have merit, I focus my attention on the first ground advanced by the defendant.

''We have stated repeatedly that we ordinarily will not review an issue that has not been properly raised before the trial court. See, e.g., *Santopietro* v. *New Haven*, 239 Conn. 207, 219–20, 682 A.2d 106 (1996) (court not required to consider any claim that was not

properly preserved in the trial court); *Yale University* v. *Blumenthal*, 225 Conn. 32, 36 n.4, 621 A.2d 1304 (1993) (court declined to consider issues briefed on appeal but not raised at trial) . . . .'' (Citations omitted; internal quotation marks omitted.) *Gordon* v. *Tobias*, 262 Conn. 844, 846 n.1, 817 A.2d 683 (2003). That well settled rule is rooted in Practice Book § 5-2, which provides in relevant part: ''Any party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief . . . or state the question distinctly to the judicial authority on the record *before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question*. . . .'' (Emphasis added.)

In the present case, the plaintiff did not brief her claim to the trial court. Although she alleged that the defendant rejected the $2.5 million offer as too low, she did not present any legal argument in support of her claim that the defendant had a continuing duty to disclose that offer. Nor did she distinctly raise that claim at any time during the proceedings on the motion to open. Rather, as I noted previously, she merely alluded to that claim during closing argument, in response to questions by the court. It is clear that this brief reference by the plaintiff's counsel to the claim that the plaintiff now seeks to advance on appeal does not satisfy the requirement that a claim be distinctly raised at trial before closing argument. Practice Book § 5-2; see *Swerdloff* v. *AEG Design/Build, Inc.*, 209 Conn. 185, 188, 550 A.2d 306 (1988) (''a claim 'briefly suggested' is not 'distinctly raised' ''). Indeed, the fact that the trial court did not address this claim in its memorandum of decision bolsters my conclusion that the plaintiff did not distinctly raise it at the hearing on the motion to open. So, too, does the fact that there is virtually no evidence in the record to support it. If this claim had been distinctly raised, I submit that one or both of the parties would have elicited testimony that would have proved or disproved, inter alia, whether the defendant knew he had a continuing duty to disclose, whether he knew that his attorney was appearing in court on June 15, 1998, the day on which arguments were held for the defendant's motion for reconsideration of the financial orders, and what time of day the meeting with ICL occurred. I note, moreover, that the plaintiff's belated attempt to raise this new claim in her motion for reconsideration does not rectify her failure to raise it at the hearing on the motion to open because it is well established that ''[a] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple . . . .'' *Opoku* v. *Grant*, supra, 63 Conn. App. 692–93. In my view, it is grossly unfair to the defendant for the majority to decide this claim on appeal because he could not foresee it and, therefore,

was denied the opportunity to present evidence in defense of it.

The majority disagrees and contends that the defendant was not ''ambushed'' by the plaintiff's continuing duty to disclose claim because counsel for the defendant ''defended against that claim in his closing argument, raising the same arguments against it that [the defendant] raises in his brief to this court.'' Footnote 9 of the majority opinion. That is wrong for two reasons. First, the plaintiff's counsel's brief reference to this claim in her closing argument followed the evidentiary portion of the trial. The defendant therefore did not have an opportunity to present factual evidence in defense of that claim because he had no notice of it. Second, the majority's assertion cannot be squared with the record. The following excerpts from the transcript, which reflect the entirety of the defendant's counsel's closing remarks pertaining to the continuing duty to disclose claim, demonstrate that the defendant's counsel was confused by the plaintiff's belated claim. Specifically, the defendant's counsel stated: ''Your Honor, just to clarify, we discussed the date of the trial versus the date of the judgment. I don't believe there's any case on point which stretches anything to the date of the judgment. However, I don't think it's—that's terribly much at issue because there's—there was no activity that was dealt with between those times. But as far as the motion for reconsideration, since that was denied, I believe that strongly pushes that date back.'' In other words, counsel for the defendant claimed that the principal issue was whether the duty to disclose ended as of the close of the evidentiary portion of the trial or as of the date of the dissolution judgment. With respect to the motion for reconsideration, I interpret the defendant's counsel's remarks to mean that she believed that the dissolution court's denial of that motion reaffirmed that the judgment was final on May 12, 1998. She did not even broach the linchpin of the plaintiff's claim, namely, that the filing of a motion for reconsideration continues the duty to disclose while the motion is pending.[19] Thus, contrary to the majority's assertion, counsel for the defendant did not have an opportunity to raise the same arguments at trial that the defendant now makes on appeal. In light of the foregoing, it is clear that the majority's decision to review the plaintiff's claim is grossly unfair to the defendant. It also is unfair to the trial court and the Appellate Court, both of which, appropriately, declined to review this claim.

Finally, I find the majority opinion to be confusing because of the absence of any direction to the trial court on remand. The majority rejects the trial court and Appellate Court decisions on separate grounds, each of which appears to establish a different date for valuing the marital assets. The first ground is that the defendant committed fraud in his affidavit. Presumably, the date of revaluation on remand under this theory is

May 12, 1998, the date of dissolution. The second ground of fraud, however, is predicated on the defendant's failure to disclose the $2.5 million offer pursuant to the majority's new continuing disclosure rule. Under this theory, the assets must be revalued as of June 16, 1998, the date on which the dissolution court denied the defendant's motion for reconsideration and on which the defendant's duty to disclose finally terminated. Otherwise, there would be no purpose for the majority's new rule. The question then becomes: What is the trial court to do?

That inquiry is not insignificant because the trial court's choice of a valuation date could vary the disposition of this case greatly. That is so because the value of a business at any point in time depends on then-existing market conditions. On May 12, 1998, there was only one possible buyer for Product Technologies, which was ICL. At that time, however, ICL was not interested in acquiring the company but, rather, was planning to litigate and to compete. The market conditions changed in a pronounced fashion in June, 1998, when ICL decided to acquire Product Technologies and placed an offer on the table. Thus, as a factual matter, the value of the defendant's interest in Product Technologies on May 12, 1998, differed markedly from its value on June 16, 1998.[20] The choice of a valuation date, therefore, will be critical.

Despite that fact, the majority does not even acknowledge that the two theories underlying its opinion give rise to different valuation dates. Rather, the majority simply offers us two insights. First, it states that ''[t]he trend [in valuing marital assets] appears to be moving away from mandating a specific date for valuation and toward a flexible approach [under which] the court has discretion to assign the date of valuation . . . .'' (Internal quotation marks omitted.) Footnote 25 of the majority opinion, quoting 2 A. Rutkin, Family Law and Practice (2005) § 13.04 [1], p. 13-67. I refer the majority to General Statutes § 46b-81 (a); see footnote 17 of this opinion; and our interpretation of that statute in *Sunbury* v. *Sunbury*, supra, 216 Conn. 676, both of which make crystal clear that marital assets should be valued as of the dissolution date. If this state is to move to a ''flexible approach'' pursuant to which courts can select the valuation date, that is a decision for the legislature, not this court. Second, the majority suggests that I am overreacting because trial courts wrestle with these types of issues all the time. See footnote 28 of the majority opinion. In response, I simply note that, in my view, it is unacceptable for this court to issue an opinion that essentially is a quagmire and to expect that the trial court will ''sort it out'' on remand.[21]

In closing, I note that the majority is able to reach its decision today only by systematically disregarding the amply supported facts found by the trial court, the

strictures of our rules of practice, our well settled law regarding proof of fraud and our long-standing rule that we do not allow plaintiffs to advance claims on appeal that have not been fairly raised or preserved at trial. The majority's actions, in my view, are unwarranted even under the guise of ''doing justice,'' which is the only motivation that I can charitably attribute to the majority opinion. The unfortunate irony is that it fails to accomplish even that goal.

For all of the foregoing reasons, I dissent.

[1] The defendant testified at the dissolution trial that Product Technologies had ten full-time employees and one part-time employee.

[2] See footnote 2 of the majority opinion for a description of ''Smart Cards'' and the particular software that Product Technologies developed in connection therewith.

[3] As of December 31, 1997, the company had outstanding liabilities of $484,232, while assets totaled only $499,960.

[4] The placement memorandum stated that ICL ''is a $4.5 billion majority owned subsidiary of Fujitsu Limited of Japan . . . [and] is a major player in the European financial services marketplace.''

[5] Throughout this opinion, I refer to ICL's $2.5 million preliminary sales price as an ''offer.'' I note, however, that the June 12, 1998 memorandum of understanding makes clear that the establishment of a preliminary sales price does not ''*constitute any offer, acceptance or legally binding agreement and [does] not create any rights or obligations for or on the part of any party* . . . .'' (Emphasis added.) Thus, the $2.5 million offer is not an ''offer,'' as that term is commonly used.

[6] The record does not indicate the time of day that the June 15, 1998 meeting occurred. Nor does it indicate whether the defendant knew that his attorney would be arguing his motion for reconsideration on that day.

[7] This number is obtained by dividing the $40,000 estimate reported on the defendant's affidavit by the 19.4 percent interest that the defendant owned in the company, and rounding the quotient to $200,000.

[8] The placement memorandum defined book value per share as ''the total amount of assets less total liabilities, divided by the number of Share[s] of Common Stock outstanding . . . .''

[9] Indeed, the majority admits as much when it states: ''We recognize the testimony that the book value of Product Technologies was extremely low . . . .'' Footnote 11 of the majority opinion. In that same footnote, the majority also contends that I do not explain how the defendant could have thought that ICL's $2.5 million offer was too low unless the defendant believed that the value of the software could yield a higher price. I do address that issue in the text of this opinion.

[10] The majority states: ''The dissent suggests that because Pia was an expert in valuing businesses, he should have either independently assessed the worth of the intellectual property asset or asked more questions concerning its worth.'' Footnote 12 of the majority opinion. The majority then notes that my purported view is inconsistent with *Billington* v. *Billington*, supra, 220 Conn. 222, in which we abandoned the due diligence requirement. Either the majority misunderstands my argument or it is overreaching. I merely assert that Pia's appraisal provides a reliable benchmark precisely because he *likely was diligent* in including the worth of the software. In other words, because Pia is an experienced appraiser, he likely considered the worth of the software when he performed his appraisal and arrived at a value that was comparable to the defendant's estimate.

The majority also states that ''Pia's valuation necessarily was limited by the information disclosed by the defendant.'' Footnote 12 of the majority opinion; see also footnote 14 of the majority opinion. Once again, the majority's assertion is unsupported by the record. At the hearing on the motion to open, Pia did not testify that he was denied any information concerning the intellectual property rights. Indeed, the only document that Pia thought he should have received but did not was the private placement memorandum. It is noteworthy that Pia did not testify, and was not asked, whether his valuation would have differed if he had been given the placement memorandum. Despite this fact, the majority posits that the placement memorandum was ''the only document that evidenced the . . . potential'' marketability of the source codes from the SmartCity software. Footnote 13 of the majority

opinion. The majority's assertion is incorrect. One need only look to the exhibits in this case to find a comprehensive sales brochure that describes the asset's potential. It is called, "SmartCity *fashioning the industry* . . . ." (Emphasis in original.)

[11] See footnote 7 of this opinion.

[12] Since the defendant valued his shares in the company at $40,000, the plaintiff presumably could have obtained a 20 to 30 percent interest for $8000 to $12,000.

[13] This observation prompted the majority to write: "The obvious answer to the dissent's query of why the defendant would consider offering the plaintiff a 'tail' . . . is that he clearly colored that offer by representing to the plaintiff that Product Technologies had virtually no future and no sale or investment prospects." Footnote 26 of the majority opinion. There is absolutely no evidence in the record that the defendant misrepresented Product Technologies' uncertain future to either the plaintiff or Pia. Moreover, the trial court specifically found that there were no sales negotiations underway during the dissolution proceedings, and, therefore, the defendant did not know that an offer would be made two months later. Even the plaintiff does not challenge that finding on appeal. Thus, the majority's reasons for failing to consider the defendant's willingness to offer a "tail" as evidence tending to disprove scienter are unfounded.

[14] The majority essentially writes that this stock sale is not credible evidence of the defendant's knowledge of the worth of the company at the close of the dissolution proceedings because the defendant's strategy for developing the asset's potential may not have existed when the sale occurred in January, 1997. See footnote 13 of the majority opinion. First, there is no evidence in the record to support the majority's assertion. Second, the majority fails to realize that the significance of the stock sale lies in the undisputed fact that the company's finances worsened substantially between the date of the stock sale and the date of dissolution. Third, Pia, who is an experienced business appraiser, thought it was significant to his valuation. In fact, Pia testified that one of his valuation techniques involved the extrapolation of information from that stock sale to determine the value of the defendant's interest in Product Technologies.

[15] The majority concludes that Pia's appraisal is not reliable because he did not have accurate information on which to base his estimate of the worth of the intellectual property asset. See footnote 14 of the majority opinion. As I explained in footnote 10 of this opinion, the majority's conclusion contradicts the record.

[16] As I previously noted, ICL was threatening to pursue legal action against and compete with Product Technologies in the United States at this time.

[17] General Statutes § 46b-81 (a) provides in relevant part: "*At the time of entering a decree annulling or dissolving a marriage* . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other. . . ." (Emphasis added.)

[18] The gravamen of the plaintiff's fraud claim appears in the following paragraphs in her motion to open: "5. At the time of trial, [the] defendant submitted a financial affidavit, placing a value on his interest in [Product Technologies at $40,000]. . . .

"7. Based on [the] defendant's representations, the parties agreed on a value of [$40,000] as the defendant's interest in his business. . . .

"9. Several months after the trial, and after the decision, [the] defendant's business was sold for [$6 million]. . . .

"11. In spite of diligent efforts on the part of the plaintiff to discover the true value of the defendant's interest in his business, *the defendant did not disclose to the plaintiff that any negotiations or discussions regarding [the] sale of [Product Technologies] were transpiring during the pendency of the divorce, and so the defendant misrepresented the value of his business*." (Emphasis added.)

[19] In support of its conclusion that the plaintiff raised this claim at trial, the majority cites another part of the defendant's counsel's closing argument in which she stated that the defendant would not have filed a motion for reconsideration if he "had thought ICL was going to come along and offer him a lot of money or any money . . . . And the fact that that motion was denied again strongly pushes that the date that we need to look at back to the time of trial . . . ." (Internal quotation marks omitted.) Footnote 9 of the majority opinion. The majority, however, fails to refer to the next sentence of the defendant's counsel's argument, as it appears in the transcript. Specifically, she states: "So they—in order to prevail, they need to clearly show that, before April, they had an offer." This sentence makes clear that the

closing remarks cited by the majority do not pertain to the plaintiff's continuing duty to disclose claim. Instead, they were made in defense of the claim that the plaintiff actually pleaded in her motion to open, namely, that the defendant knew that sales negotiations were underway during the dissolution proceedings and failed to disclose that information to the plaintiff in order to induce her into relying on the $40,000 estimate that the defendant had reported in his affidavit.

[20] The events described in footnote 15 of the majority opinion are perfectly consistent with this observation.

[21] The majority, in footnote 28 of its opinion, fails to explain with cases, statutes and rules of practice what valuation date the trial court must use on remand.