LAVINE, J., dissenting. I respectfully dissent from the majority opinion because it is in derogation of our rules of practice regarding motions for summary judgment; see Practice Book § 17-44 et seq.; and misapprehends the substantive law of fraudulent concealment. See General Statutes § 52-595. At trial, the summary judgment issue was framed by the pleadings, particularly the special defense and the amended reply thereto. The burden was squarely on the defendants, Larry Sax and Cohen, Burger, Schwartz & Sax, LLC (firm), to demonstrate that there was no genuine issue of material fact regarding a fiduciary relationship with the plaintiff, Arthur Iacurci. In the plaintiff's opposition to the motion for summary judgment, the trial court found that the plaintiff successfully demonstrated that there was a fiduciary relationship between the parties, but improperly placed the burden on the plaintiff to demonstrate that the defendants were guilty of fraudulent concealment. The majority, however, has reached out to consider an issue not raised by the parties on appeal,[1] has made a factual determination in the absence of any supporting evidence, has misapplied the law of fraudulent concealment and consequently has deprived the plaintiff of his right to litigate a material issue in this case. I would reverse the summary judgment rendered by the trial court and remand the matter for further proceedings.

I

FACTS

The following facts and procedural history are relevant to the issue raised by the plaintiff on appeal. The plaintiff commenced this action on November 10, 2009, alleging that the defendants were guilty of negligence and accounting malpractice for making a material change in his income tax filing status without disclosing that fact and its implications to him. More specifically, the plaintiff alleged that, for a number of years, Sax had prepared tax returns for him and Barbara Iacurci[2] on behalf of the firm. For the tax years 1999 through 2002, Sax "portrayed" the plaintiff as a real estate investor when filing his tax returns. For the tax years 2003 through 2005, Sax "portrayed" the plaintiff as an individual engaged in the business of real estate. The plaintiff alleged that Sax arbitrarily changed his tax filing status, which resulted in the plaintiff's having to pay more taxes than he had previously. The plaintiff alleged that in 2007 he "disassociated professionally" from the defendants and retained another accounting firm to prepare his tax returns. The new firm noted the change in the plaintiff's tax filing status and filed amended tax returns for the years 2003 through 2005 indicating that the plaintiff's tax filing status was that of a real estate

investor. Following an audit, the Internal Revenue Service upheld the plaintiff's filing status as a real estate investor. The plaintiff alleged against both Sax and the firm one count of malpractice and one count of negligence.

On December 31, 2009, the defendants answered the complaint, denying its material allegations, and alleged a special defense that the action was barred by the statute of limitations, General Statutes § 52-577.[3] The plaintiff filed a reply denying the special defense on January 27, 2010.

On June 11, 2010, the defendants filed a motion for summary judgment on the ground that the plaintiff's claims are time barred under § 52-577. The defendants submitted a memorandum of law in support of the motion for summary judgment,[4] Sax's affidavit and copies of the engagement letters signed by the parties. The defendants claimed that summary judgment should be rendered in their favor because their last act performed on behalf of the plaintiff, filing his 2005 income tax return, was completed on April 17, 2006, and the plaintiff's action was not commenced until more than three years later. The plaintiff's action, the defendants contended, therefore was barred by § 52-577.

On July 11, 2010, the plaintiff filed an amended reply to the defendants' special defense,[5] alleging that there was a fiduciary relationship between the parties and that the statute of limitations was tolled by operation of the fraudulent concealment statute, General Statutes § 52-595.[6] On July 28, 2011, the plaintiff filed an objection to the motion for summary judgment on the ground that genuine issues of material fact exist as to whether § 52-595 applies to toll the running of § 52-577. In support of his objection, the plaintiff filed a memorandum of law,[7] his own affidavit[8] and an affidavit from Robert Walsh,[9] a licensed financial planner.[10]

On October 1, 2010, the defendants filed a reply to the plaintiff's objection to summary judgment, arguing that § 52-595 does not apply to claims of accounting malpractice and negligence, and, if it does, the plaintiff has not presented facts necessary to trigger tolling of § 52-577. The defendants, however, presented no evidence to counter Walsh's attestation that the defendants owed the plaintiff a fiduciary duty to disclose the change in his tax returns.

Counsel for the parties appeared before the court at short calendar on January 3, 2011, to argue the defendants' motion for summary judgment.[11] Counsel for the defendants argued that portions of Walsh's affidavit were not admissible as evidence and that the plaintiff had not established the three elements necessary to prove fraudulent concealment as set forth in *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281

Conn. 84, 108, 912 A.2d 1019 (2007).[12] The defendants argued, but again presented no evidence, that they did not owe the plaintiff a fiduciary duty. In response to that legal argument, counsel for the plaintiff quoted from our Supreme Court's decision in *Falls Church Group, Ltd.*: "We have not, however, defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other." (Internal quotation marks omitted.) Id., 108.

The court issued a memorandum of decision granting the defendants' motion for summary judgment on March 25, 2001. The court first addressed the defendants' objection to Walsh's affidavit. The court determined that Walsh was an expert and that his affidavit provided information that would be useful to a jury, as "[t]he details of tax preparation for real estate investors falls beyond the ken of the average juror . . . ."[13]

The court then framed the issue before it as follows: "The plaintiff objects to the motion for summary judgment on the ground that there is a genuine issue of material fact as to whether the tolling provision of § 52-595 applies. The plaintiff argues in his memorandum in opposition that § 52-577 does not govern here. He argues that § 52-595 applies to this case because it involves: '(1) professional negligence arising in the context of a fiduciary relationship; (2) nondisclosure by the defendants of their negligent acts when the defendants, under the circumstances, had a clear fiduciary duty to make such disclosure; and (3) no knowledge or discovery of the defendants' undisclosed negligent acts by the plaintiff until late January, 2007 . . . .' In the defendants' reply memorandum, they respond that § 52-595 does not apply in this situation, and if it did, the plaintiff has not presented the facts necessary to trigger tolling of this statute."

As to the substance of the defendants' motion for summary judgment, the court found that there was no genuine issue of material fact that the plaintiff had not commenced the action within three years of the last act completed by the defendants on the plaintiff's behalf. That is, the plaintiff had not commenced the action within three years of the defendants' filing of the plaintiff's 2005 tax returns in April, 2006.

The court then erroneously concluded that the burden shifted to the plaintiff to demonstrate that an issue of fact exists as to whether § 52-595, the fraudulent concealment statute, applies in this case to toll the applicable statute of limitations. The court cited the elements of fraudulent concealment as set forth in *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 105. See footnote 12 of this opinion. The court found that the plaintiff had not met his burden

to demonstrate that the defendants knew that the material change in the plaintiff's tax filing status was incorrect, that the plaintiff had overpaid his tax obligation or that he had a cause of action. It also found that the plaintiff had not demonstrated facts that the defendants delayed the plaintiff's filing of the action, that is, that the defendants kept information from him in order to delay the commencement of the lawsuit.

As to the element that the defendants intentionally concealed these facts from the plaintiff, the court stated, "our appellate courts '[have] not yet decided whether affirmative acts of concealment are always necessary to satisfy the requirements of § 52-595.' *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 107. The Connecticut Supreme Court has recognized that federal case law exists 'suggesting that although fraudulent concealment generally requires an affirmative act of concealment, nondisclosure is sufficient *when the defendant has a fiduciary duty to disclose material facts*.' [Id.]" (Emphasis added.) The court also noted that our Supreme Court has not defined a fiduciary or confidential relationship " 'in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.' [Id., 108.]"

The court concluded that the plaintiff had met his burden of creating a genuine issue of material fact as to one of the elements of fraudulent concealment. In his affidavit, the plaintiff attested that he relied on the defendants as tax experts with superior knowledge and skill when compared to his own knowledge of tax matters. He trusted the defendants to prepare his taxes for seventeen years. Walsh attested that the defendants owed the plaintiff a fiduciary duty and that the change in the plaintiff's tax filing status was a material fact that should have been disclosed. The court concluded, therefore, that the plaintiff had submitted sufficient evidence to establish that the defendants had a fiduciary relationship with the plaintiff and their failure to disclose his changed status on his tax returns as a breach of their duty to disclose material facts to the plaintiff.

The court found that the plaintiff had established that the defendants owed him a fiduciary duty, and, therefore, failure to disclose material facts satisfied the element of fraudulent concealment of intentionally concealing facts. The court found, however, that the plaintiff had not met his burden as to the other two elements of fraudulent concealment.[14] He therefore failed to demonstrate a genuine issue of material fact as to whether § 52-595 tolls the statute of limitations, and the court granted the defendants' motion for summary judgment.

The plaintiff appealed, claiming that the court improperly placed the burden on him to demonstrate

fraudulent concealment. The plaintiff relies on *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999). In their argument to this court, the defendants' sole response to the plaintiff's claim is that the claim is not reviewable because the plaintiff did not bring the *Martinelli* case to the attention of the court or specifically argue that it was the defendants' burden to prove the absence of intentional concealment by the defendants.[15] Following oral argument in this court, with my objecting, the majority sua sponte ordered the parties to submit supplemental briefs on the following issue: "Did the trial court properly determine as a matter of law by motion for summary judgment that the plaintiff submitted sufficient evidence to establish that the defendants had a fiduciary relationship with the plaintiff?"

II

SUMMARY JUDGMENT

"Summary judgment procedure is designed to dispose of actions in which there is no genuine issue as to any material fact." *Rathkopf* v. *Pearson*, 148 Conn. 260, 263, 170 A.2d 135 (1961). The well-known procedure governing motions for summary judgment is set forth in our rules of practice. "In any action, except administrative appeals . . . any party may move for a summary judgment . . . ." Practice Book § 17-44. "A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like. . . . Any adverse party shall at least five days before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence." Practice Book § 17-44. "The standards governing [an appellate court's] review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, *the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue* [*of*] *material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law* . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Summary judgment may be granted where the claim is barred by the statute of limitations. . . .

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the

party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Altfeter* v. *Naugatuck*, 53 Conn. App. 791, 800–801, 732 A.2d 207 (1999). The moving party must demonstrate that no genuine issue of material fact exists before the nonmoving party has the burden to show otherwise. *Rockwell* v. *Quintner*, 96 Conn. App. 221, 228, 899 A.2d 738, cert. denied, 280 Conn. 917, 908 A.2d 538 (2006).

"The purpose of a complaint [or counterclaim] is to limit the issues at trial, and it is calculated to prevent surprise. . . . It must provide adequate notice of the facts claimed and the issues to be tried. . . . In order to surmount a motion for summary judgment, a party must demonstrate that there exists a genuine issue of material fact. . . . Demonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue." (Citations omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244–45, 659 A.2d 1226, cert. denied, 235 Conn. 915, 665 A.2d 609 (1995). "The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Internal quotation marks omitted.) Id., 245.

"Equally well settled is that the trial court *does not sit as the trier of fact* when ruling on a motion for summary judgment. . . . [T]he trial court's function is not to decide issues of material fact, but to *determine whether any such issues exist*." (Emphasis added; internal quotation marks omitted.) *Field* v. *Kearns*, 43 Conn. App. 265, 270, 682 A.2d 148, cert. denied, 239 Conn. 942, 684 A.2d 711 (1996); see also *McColl* v. *Pataky*, 160 Conn. 457, 459, 280 A.2d 146 (1971).

III

ANALYSIS

On the basis of the law of summary judgment, and the pleadings and the evidence submitted by the parties with respect to the defendants' motion for summary judgment, I conclude that the court improperly granted the defendants' motion for summary judgment. The

court found that Walsh was an expert witness whose testimony would assist a jury. See footnote 10 of this opinion. On appeal, the defendants have not challenged that determination. Although the plaintiff alleged that he had a fiduciary relationship with the defendants in his amended reply to the defendants' special defense, the defendants failed to present any evidence to raise a genuine issue of material fact as to the nature of the relationship between the parties. Because the defendants bore the burden to demonstrate the absence of material facts, that circumstance alone was sufficient for the court to deny the defendants' motion for summary judgment. "The party seeking summary judgment has the burden of showing the absence . . . [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . ." (Citation omitted; internal quotation marks omitted.) *Altfeter* v. *Naugatuck*, supra, 53 Conn. App. 800–801.

"[A]lthough fraudulent concealment generally requires an affirmative act of concealment, nondisclosure is sufficient when the defendant has a fiduciary duty to disclose material facts." (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 107. The plaintiff attested in his affidavit that the defendants failed to inform him of the change in his tax filing status and its implications. In this case, the court failed to adhere to the rule that, if the plaintiff establishes the existence of a fiduciary relationship, it becomes "the defendant's burden to disprove that it breached its fiduciary duty, hence disproving that it fraudulently concealed plaintiff's cause of action." *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Sup. 2d 138, 144 (D. Conn. 1998), aff'd in part, vacated and remanded in part, 196 F.3d 409 (2d Cir. 1999).

Our Supreme Court has stated that rule repeatedly. "The Connecticut Supreme Court has recently reiterated its rule that where an allegation of fraud, self-dealing, or conflict of interest is made against a fiduciary, the burden shifts to the fiduciary to prove that it acted fairly . . . ." *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 196 F.3d 420, quoting *Murphy* v. *Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998). The law with respect to the obligations of a fiduciary is well settled. "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Citations omitted; internal quotation marks omitted.) *Dunham* v. *Dunham*, 204 Conn. 303, 322–23, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New*

Haven, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996). "Proof of a fiduciary relationship, therefore, generally imposes a twofold burden on the fiduciary. First, *the burden of proof shifts to the fiduciary*; and second, the standard of proof is clear and convincing evidence." (Emphasis added; internal quotation marks omitted.) *Murphy* v. *Wakelee*, supra, 400.

Here, the court concluded that the plaintiff had demonstrated that the plaintiff and the defendants had a fiduciary relationship, but determined that the plaintiff had not met his burden to establish that the defendants had actual knowledge that changing the plaintiff's income tax filing status was incorrect, that the plaintiff had overpaid his tax obligation or suffered any injury or that the plaintiff had a cause of action, which information the defendants kept from him to delay the commencement of a cause of action.[16] Our law of fraudulent concealment does not place the burden on the plaintiff when the defendant is a fiduciary. I conclude that the court improperly placed the burden on the plaintiff to show an absence of material fact as to the elements of fraudulent concealment. The plaintiff's burden was to demonstrate a genuine issue of material fact.

The majority has taken the position that the plaintiff and the defendants did not have a fiduciary relationship. It is unclear to me how the majority reaches that conclusion on the record before us. Only the plaintiff presented evidence with respect to the nature of his relationship with the defendants. Our Supreme Court has stated, "under our case law, the fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. [E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations." (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 108–109.

Our Supreme Court "has refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations . . . [and it has] recognized that not all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Citations omitted; internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 38, 761 A.2d 1268 (2000). The determination of a fiduciary relationship is fact specific and depends on the circumstances present in each case. "Rather than attempt to define a fiduciary relationship in precise detail and in such a manner to exclude new situations, we have

instead chosen to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting . . . influence on the other. . . . *Dunham* v. *Dunham*, [supra, 204 Conn. 320], quoting *Harper* v. *Adametz*, 142 Conn. 218, 225, 113 A.2d 136 (1955)." (Internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 99, 752 A.2d 1037 (1999) (*Berdon*, *J.*, concurring in part and dissenting in part).

Whether there was a fiduciary relationship between the parties in this action is a question of fact to be determined by the trier of fact in light of all circumstances present. It is not one to be decided prematurely pursuant to a summary judgment motion. The plaintiff met his burden of demonstrating a genuine issue of material fact by means of his own affidavit and one from Walsh. The defendants presented no opposing evidence. In ruling on a motion for summary judgment, the role of the trial court is to determine whether a genuine issue of material fact exists, not to decide such questions. See *Fleet Bank*, *N.A.* v. *Galluzzo*, 33 Conn. App. 662, 666, 637 A.2d 803, cert. denied, 229 Conn. 910, 642 A.2d 1206 (1994). By the same rule, appellate courts should not decide questions of fact. *Bayer* v. *Showmotion*, *Inc.*, 292 Conn. 381, 405 n.10, 973 A.2d 1229 (2009) (function of appellate court is to review findings of fact, not make factual findings). It is axiomatic that appellate courts do not decide questions of fact. "Appellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion." (Internal quotation marks omitted.) *Votto* v. *American Car Rental*, *Inc.*, 273 Conn. 478, 483, 871 A.2d 981 (2005). Here, the majority has not only made a factual determination, but it also has overturned the finding of the trial court that the defendants owed the plaintiff a fiduciary duty that was supported by Walsh's affidavit, in the absence of any contrary evidence whatever. An appellate court "may reject a factual finding if it is clearly erroneous, in that as a matter of law it is unsupported by the record, incorrect, or otherwise mistaken." (Internal quotation marks omitted.) *Korsgren* v. *Jones*, 108 Conn. App. 521, 526, 948 A.2d 358 (2008). In this case, the court had two affidavits on which it could, and did, properly rely.

I also take issue with the majority opinion because it has injected into this case an issue not raised by the parties on appeal. The issue stated by the plaintiff appellant is "whether the trial court erred in granting the defendants' motion for summary judgment . . . ." The plaintiff's claim is based on the single proposition that the court erred when it failed to impose on the defendants the burden to prove the absence of facts necessary to establish fraudulent concealment. The plaintiff argued that the court misallocated the burden by wrongly placing it on him. The shifting of the burden, the plaintiff contends, is reversible error. He raised no other argument. Equally important, the defendants did

not claim that the court improperly determined that the plaintiff had met his burden of demonstrating that they were fiduciaries. Our Supreme Court stated quite recently that "while the burden at issue in the present case concerns adjudication at the trial level, it is at the very least clear that this court will not make arguments on behalf of parties that have declined to make any." *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 337, 50 A.3d 841 (2012).

The majority's decision creates the unfortunate impression that this court may ignore the limited framework within which evidence is presented in support of, or in opposition to, summary judgment, and retroactively vitiates a perfectly reasonable determination by the court that the Walsh affidavit should be considered. An appeal from a rendering of summary judgment provides this court with the opportunity to determine whether a trial court properly determined that no genuine issue of material fact exists that supports proceeding to trial; Practice Book § 17-49; not to engage in a wholesale review of every ruling made by a judge that another judge might have decided differently. Evidence submitted at the summary judgment stage is limited and fragmentary in light of the circumscribed nature of the proceeding. Rulings made are narrow and must be viewed in their procedural context. They do not supplant the need for a full trial. Attorneys do not submit everything available to them at the summary judgment stage; they submit only sufficient evidence to attempt to demonstrate to the court that a genuine issue of material fact exists.

A party's right to a full trial after fragmentary evidence is presented in opposition to summary judgment was made clear by our Supreme Court in *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 306 Conn. 304. "In reaching its conclusion, the trial court reasoned that the plaintiff [physician] had presented sufficient information to demonstrate material issues of fact concerning whether the [defendant hospital's] actions culminating in the summary suspension had satisfied [42 U.S.C. § 11112 (a) (2) and (3)], and that the defendant [hospital] had failed to present evidence establishing immunity under [42 U.S.C. § 11112 (c)]. These determinations, however, were made without the benefit of the evidence subsequently presented at trial and therefore offer little insight into the question of whether the defendant [hospital] was entitled to judgment as a matter of law on the basis of all the evidence presented in the case." Id., 337–38.

At the short calendar argument in this case, counsel for the defendants argued that no fiduciary relationship existed, but only the plaintiff submitted evidence to support the existence of a fiduciary relationship. I conclude that, on the limited record before it and the complete absence of any evidence whatever rebutting the

Walsh affidavit, the court reasonably could have come to only one conclusion: that a genuine issue of material fact existed as to whether a fiduciary relationship existed.

When litigants bring an appeal, except in the most unusual and compelling circumstances, they are entitled to have the court decide the case based on the issues as defined and presented by them and in accordance with the normal rules of procedure. A high degree of judicial restraint is necessary. In this case, I believe that restraint is lacking.

For the foregoing reasons, I respectfully dissent. I would decide the case based on the issue originally presented in this appeal. I would reverse the judgment of the trial court and remand the case for further proceedings.

[1] On appeal, the plaintiff claimed that the court erred in granting the defendants' motion for summary judgment and argued that, under Connecticut law, it was the defendants' burden to prove the absence of facts necessary to establish fraudulent concealment.

[2] Barbara Iacurci, the plaintiff's wife, is not a party to this action.

[3] General Statutes § 52-577 provides: "No action founded upon tort shall be brought but within three years from the date of the act or omission complained of."

[4] In their memorandum of law in support of their motion for summary judgment, the defendants argued that the action was untimely and that the continuing representation doctrine does not apply to accounting malpractice actions.

[5] The plaintiff's amended reply alleges: "The plaintiff hereby denies the applicability of . . . § 52-577 as a bar to his claims in this case, and hereby asserts the applicability of the tolling provisions of . . . § 52-595, Connecticut's fraudulent concealment statute, in that: (a) at all times, a fiduciary relationship existed between the plaintiff and the defendants; (b) the defendants never disclosed to the plaintiff the specific acts on the part of the defendants which are alleged in plaintiff's complaint to constitute negligence; (c) at all times, the defendants had a fiduciary duty to make such disclosure to the plaintiff; and (d) said negligent acts of the defendants were not discovered by the plaintiff until late January of 2007, after he had retained a new tax specialist to replace the defendants."

[6] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

[7] In his memorandum of law in opposition to the defendants' motion for summary judgment, the plaintiff argued that he and the defendants had a fiduciary relationship and cited *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 108, 912 A.2d 1019 (2007); *Dunham* v. *Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996); *Harper* v. *Adametz*, 142 Conn. 218, 225, 113 A.2d 136 (1955); *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, 989 F. Sup. 110, 117 (D. Conn. 1997).

[8] The plaintiff attested, in part, that for seventeen years he employed the defendants "to handle all of [his] tax work and to formulate and file [his] tax returns." Prior to 2002, the defendants utilized tax form schedule D to report his gains and losses on Florida real estate investments. For the tax years 2003 through 2005, the plaintiff believed that the defendants were "still reporting [his] income and losses on real estate investments as capital gains . . . ." The plaintiff further attested that in 2007, he terminated his relationship with the defendants and "hired new tax specialists to handle [his] taxes." After hiring his new tax specialists, the plaintiff discovered that the defendants "had materially changed the way they reported [his] tax status, reporting [his] real estate investment gains and losses as ordinary income on [tax form] [s]chedule C, rather than as capital gains on [s]chedule D . . . ." (Internal quotation marks omitted.) The plaintiff further attested

that the defendants never disclosed to him the change in his tax filing status for the years 2003 through 2005. The plaintiff also attested that he trusted the defendants, he "knew that, in tax matters, their knowledge, skill and expertise was clearly superior to [his], and [he] believed, at all times, that, in preparing [his] tax returns, they were proceeding in [his] best interests." Moreover, he attested, if the defendants had disclosed the change in the plaintiff's tax filing status and "the attendant implications of such a change, [he] would never have agreed to have [the defendants] handle [his] tax affairs and file [his] returns for the tax years 2003, 2004 and 2005." As a result of the change in his tax filing status, the plaintiff "was required to pay approximately $177,000.00 more in taxes over those three years than [he] should have."

[9] Pursuant to Practice Book § 13-4, the plaintiff disclosed Walsh as an expert witness expected to provide testimony as set forth in his affidavit.

[10] Walsh attested that he is a financial planner licensed in Connecticut and for the past twelve years has been "engaged in the business of providing to clients advice and assistance in financial and tax matters." Part of his business includes the preparation of "tax returns for clients." He prepares, on average, "thirteen hundred tax returns per year."

He attested that he has personal knowledge of the facts in the affidavit. The plaintiff hired him in January, 2007, to prepare his 2006 tax return. At that time, he reviewed the tax returns prepared for the plaintiff by the defendants. Walsh attested that he noted an error in the "manner in which [the defendants] had reported [the plaintiff's] Florida real estate investment income for the tax years" 2003 through 2005. The defendants utilized schedule C, rather than schedule D, to report income from the plaintiff's real estate investments. Walsh opined that the plaintiff's income from his Florida real estate investments should have been reported as capital gains, rather than as ordinary income. Walsh calculated that the plaintiff had "grossly overpaid his taxes for the tax years, 2003, 2004 and 2005 in the total approximate amount of $177,000.00." The plaintiff informed Walsh that in prior years the defendants had reported his income as capital gains and that they did not inform him that they had changed his tax reporting status from that of "real estate investor to that of an individual engaged in the real estate business . . . ." (Internal quotation marks omitted.) Walsh opined on the basis of his knowledge and experience as a tax preparer, "given the lengthy time period of the relationship between [the plaintiff] and Sax, and the nature and scope of the tax services [the defendants] rendered, [the defendants] had a special, fiduciary relationship with [the plaintiff], and a fiduciary duty and responsibility, as [the plaintiff's] tax advisers and tax preparers, to disclose to [the plaintiff] any decision on their part to materially change his tax status for reporting his Florida real estate investment income." Walsh also attested that by not disclosing the change in the plaintiff's tax status, "and the likely adverse effects of such change, [the defendants] breached a fiduciary duty they owed to [the plaintiff] to make full disclosure of material changes in their tax reporting methods."

[11] In its memorandum of decision, the court stated that the defendants did not object to the plaintiff's amended reply to their special defense. Pursuant to Practice Book § 10-60, the court ruled that "the 'Amended Reply' is deemed consented to and is the operative pleading."

[12] Under our case law, to prove fraudulent concealment, the plaintiff must show that the defendants "(1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiff['s] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the plaintiff['s] part in filing a complaint on [the] cause of action. *Bartone* v. *Robert L. Day Co.*, 232 Conn. 527, [533], 656 A.2d 221 (1995)." *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 105.

[13] The defendants did not raise that issue as an alternate ground on which to affirm the judgment of the trial court. See Practice Book § 63-4 (a) (1) (A). As the majority correctly notes, the issue of whether the court properly relied on Walsh's affidavit is not before this court.

[14] The court found that the plaintiff had not met his burden to demonstrate that the defendants knew of the plaintiff's cause of action and that they concealed it from the plaintiff for the purpose of delaying the bringing of a cause of action.

[15] The defendants did not brief the merits of the plaintiff's claim that the court improperly placed the burden of establishing facts regarding fraudulent concealment on him after concluding that there was a fiduciary relationship between him and the defendants.

[16] The only burden on the plaintiff was to demonstrate a genuine issue of material fact. "[A] party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact

together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 202, 663 A.2d 1001 (1995).