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A BETTER WAY WHOLESALE AUTOS, INC. *v.* BETTER BUSINESS BUREAU OF CONNECTICUT ET AL.
(AC 45180)

Bright, C. J., and Elgo and Vertefeuille, Js.

Syllabus

The plaintiff used car dealership sought to recover damages for, inter alia, defamation in connection with certain allegedly false statements that the defendant B had published on its website about the plaintiff's business. B, a nonprofit corporation, compiles consumer reviews of Connecticut businesses and provides ratings of and other information about those businesses on its website for the public's viewing. B composes its ratings by utilizing a computer software formula that was developed by the defendant C, which supervises B's activities. B's employees enter rating points into the software for various rating elements, which include complaints by consumers about a business and the business' practices. The software calculates the total rating points, and B then assigns the business a rating in the form of a letter grade. B publishes the letter grade on its website as well as the rating factors and information concerning consumer complaints about the business. The website also contains an express qualification that the letter grades reflect B's opinion about the business. In a fourteen count complaint, which included one count of defamation against each defendant, the plaintiff alleged that the defendants had issued biased and inaccurate letter grades and made false and defamatory statements that caused harm to its business. The defendants moved for summary judgment, claiming, inter alia, that the letter grade issued to the plaintiff, pursuant to the formula implemented by C, was an expression of opinion rather than a statement of fact. The trial court concluded that the plaintiff had failed to identify in its defamation counts what specific words were defamatory and when and by whom those words were uttered or published. The court also found that, even if the plaintiff had set forth cognizable defamation claims, no genuine issue of material fact existed as to whether the defendants were entitled to summary judgment because B's statements constituted expressions of opinion rather than statements of fact. Accordingly, the trial court granted the defendants' motion for summary judgment on all counts of the complaint and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff's claim that the trial court failed to consider each defamatory statement in its complaint was unavailing: the court's decision established that it expressly considered the allegations in the defamation counts that B had issued the plaintiff a suboptimal rating and that the plaintiff had failed to resolve the underlying causes of consumers' complaints, and, in light of the plaintiff's failure to seek an articulation of the court's decision, this court presumed that the trial court properly considered all of the allegations before it; moreover, contrary to the plaintiff's unsupported assertion, the court was not required to analyze each statement in the complaint's other twelve counts to determine whether summary judgment on the defamation counts was proper, as the determination of whether a genuine issue of material fact existed as to the defamation counts was properly limited to the alleged defamatory statements within those two counts; furthermore, the plaintiff failed to allege in its defamation counts or to incorporate therein by reference statements from other counts of the complaint that it deemed defamatory, which the plaintiff had ample opportunity to do, having filed eight versions of its complaint and, in its amended opposition to summary judgment on the defamation counts, having failed to direct the court to the other twelve counts.
2. The trial court properly concluded that the defendants were entitled to summary judgment on the plaintiff's defamation counts, the letter grade that B issued to the plaintiff having been a nonactionable expression of an opinion rather than a statement of fact: although the plaintiff claimed that the grade was a statement of fact because the formula C

developed required B to input only objective facts, the grade that B issued was an opinion because it was contingent on the weighing of factors with differing importance and was founded on the subjective input of both B's employees and the plaintiff's customers; moreover, in calculating the plaintiff's grade, B's employees utilized their discretion, experience and judgment when inputting into the software rating points for many rating elements, B's employees considered, among other things, subjective evaluations by customers, whether complaints were unanswered or unresolved, and various factors related to the business such as the type of business, the length of time it had been in business, the transparency of its practices, and licensing and governmental action against the business; furthermore, despite the plaintiff's claim that the rating B issued involved no subjective evaluation, the plaintiff's corporate representatives agreed in their affidavits submitted in opposition to summary judgment that the grading process was totally subjective and that B's grading system resulted in some businesses being perceived by the public as better than others, which a reasonable viewer of B's website would understand as resulting from subjective decisions that were not capable of being proven to be objectively true or false, and B's disclaimers on its website regarding the nature of its grades further supported the conclusion that the grades were expressions of opinion and not fact.

Argued April 4—officially released August 8, 2023

Procedural History

Action to recover damages for the defendants' alleged defamation, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Barbara M. Schellenberg, with whom, on the brief, was *Dennis J. Kokenos*, for the appellees (defendants).

Opinion

VERTEFEUILLE, J. The plaintiff, A Better Way Wholesale Autos, Inc., appeals from the summary judgment rendered by the trial court in favor of the defendants, the Better Business Bureau of Connecticut (BBB) and the Council of Better Business Bureaus (CBBB). On appeal, the plaintiff claims that the court improperly (1) failed to consider each defamatory statement contained in the plaintiff's complaint, and (2) determined that the rating issued by BBB to the plaintiff, in the form of a letter grade, was a nonactionable expression of an opinion, not a statement of fact. We disagree and, accordingly, affirm the judgment of the trial court.

The record before the court reveals the following facts, viewed in the light most favorable to the plaintiff as the nonmoving party, and procedural history. The plaintiff operates a used car dealership in Naugatuck. BBB is a nonprofit corporation with a mission to provide consumers with honest and accurate information about businesses in Connecticut. To accomplish this mission, BBB compiles consumer reviews about businesses, rates businesses based on various criteria, and publishes that information to consumers through BBB's website. CBBB is a nonprofit corporation that operates as an "umbrella organization" for the local Better Business Bureaus in each state and Canada. CBBB directs and supervises the activities of BBB, including BBB's compliance with CBBB's rules and regulations.

More specifically, CBBB developed a computer software "formula" that BBB uses to compose its ratings of Connecticut businesses. BBB's rating process begins with its establishment of a business profile on its website, detailing the basic background information about a business, including its name, address, telephone number, fax number, email address, and principals' names and titles, as well as the nature of the business. On the basis of the facts available to them, BBB employees utilize their discretion, experience, and judgment to input into the software "rating points" for many "rating elements" within the specific, allowable range set by the software. Each rating element has a different set range of allowable rating points that can be earned or deducted. These rating elements generally include consumer complaint volume, unanswered complaints, unresolved complaints, delayed resolution of complaints, failure to address complaint pattern, serious complaints, complaint analysis, type of business, time in business, transparent business practices, failure to honor BBB mediation or arbitration, competency licensing, governmental action against the business, advertising review, BBB trademark infringement, and clear understanding of business.[1] The software then calculates the total rating points for the business, and BBB correspondingly assigns the business a rating in the form of a letter grade, with A+ being the highest

grade of 100 rating points to F being the lowest grade of 59.99 rating points or fewer. In some cases, BBB will not rate the business if there is insufficient information or an ongoing review of the business' file.

BBB updates the rating points as it gathers more information about the business, which primarily derives from consumer reports or complaints to BBB and the business' responses, if any, to those complaints. When BBB receives a complaint or report about a business from a consumer, BBB contacts the business for more information about the consumer's complaint or report. If the business fails to comply with BBB's request for information, or if, in the opinion of BBB, the business fails to make a good faith effort to resolve the complaint or fails to timely respond to a consumer complaint, those failures would have an impact on the grade published by BBB, as reflected in the rating elements relating to consumer complaints.

BBB publishes on its website a business profile for each business that includes, inter alia, (1) the grade issued to the business, including the identification of the rating factors that lowered and/or raised the business' grade; (2) the consumer complaints regarding the business, the initial and final responses of the business to those complaints, as well as a consumer complaint summary detailing the statistics as to the type and number of complaints; and (3) any additional complaint information summarizing the content of complaints made by consumers. BBB also publishes on its website a rating system overview that details the manner in which BBB assigns grades to a business and the rating elements that it uses to calculate the grade, as well as an express qualification that the grades reflect BBB's opinion of a business.

In September, 2014, the plaintiff commenced the present action against the defendants, principally claiming that BBB unfairly issued the plaintiff biased and inaccurate letter grades on the basis of the formula developed by CBBB, which caused harm to the plaintiff's business. On January 21, 2021, the plaintiff filed the operative "amended, fifth revised complaint," which contained the two defamation counts at issue in this appeal, one count against each defendant.[2] Therein, the plaintiff alleged that BBB "currently" issued the plaintiff a B grade, "[i]n the recent past" issued the plaintiff a C-grade, and published these ratings on BBB's website for the public to view. In its defamation count against BBB (count one), the plaintiff alleged that BBB had made false, "defamatory statements regarding the plaintiff, in particular, the defamatory statements consist of statements by . . . BBB, including, but not limited to, the size of the plaintiff's business, information about and the number of ongoing complaints, information about and the number of unresolved complaints, information about and the number of complaints responded

to, and that the plaintiff failed to resolve underlying causes of customer complaints." In its defamation count against CBBB (count eight), the plaintiff incorporated the allegations it made in count one against BBB, and further alleged that BBB was acting as an agent of CBBB and that CBBB's rating system is maintained with no regard for accuracy. The plaintiff alleged that, as a result of these false statements and inaccurate letter grades, it has suffered reputational harm and has lost prospective and existing customers.

The defendants moved for summary judgment as to all fourteen counts of the plaintiff's complaint.[3] See footnote 2 of this opinion. In their memorandum of law in support, the defendants contended, inter alia, that they were entitled to summary judgment on the defamation counts against them on two principal grounds. First, the defendants argued that the plaintiff had failed to plead its defamation claims with the requisite specificity in accordance with *Stevens* v. *Helming*, 163 Conn. App. 241, 247 n.3, 135 A.3d 728 (2016). Second, the defendants argued that they cannot be held liable for defamation, as a matter of law, because the grade BBB issued to the plaintiff pursuant to the formula implemented by CBBB was an expression of opinion, not a statement of fact. In support of their motion for summary judgment, the defendants attached several hundred pages of exhibits, generally consisting of excerpts of the depositions of the plaintiff's corporate representatives, documents evincing CBBB's publicly available rating criteria, affidavits from BBB's corporate representatives, and more than 100 complaints filed by consumers regarding the plaintiff between 2012 and 2014 as well as the plaintiff's responses thereto, if any.

In its amended memorandum of law in opposition, the plaintiff contended that genuine issues of material fact existed as to its claims. With respect to the defamation counts, the plaintiff contended that it had "appropriately plead[ed] the purportedly defamatory statements with the requisite specificity required by law . . . ." The plaintiff further argued that "the defamatory statements made by the various defendants were mixed statements of opinion and fact and the defendants are liable as a matter of law [for] defamation." In support of its opposition, the plaintiff submitted, inter alia, affidavits by its corporate representatives, the full deposition transcripts of the defendants' corporate representatives, documents evincing its rating history on BBB's website, and screenshots from BBB's website.

On January 21, 2021, the court heard oral argument on the defendants' motion for summary judgment. The defendants argued that our Supreme Court's recent decision in *NetScout Systems, Inc.* v. *Gartner, Inc.*, 334 Conn. 396, 223 A.3d 37 (2020) (*NetScout*), which dealt with whether a rating of one company by another was an opinion or fact for purposes of a defamation claim,

was directly on point and mandated that summary judgment be rendered in their favor. The plaintiff responded that *NetScout* was not applicable because the ratings in that case were pure opinions, whereas the opinions issued by BBB were partially fact dependent. The parties otherwise reiterated the arguments made in their original summary judgment submissions.

On October 19, 2021, the court issued a memorandum of decision in which it rendered summary judgment in favor of the defendants on all fourteen counts of the plaintiff's complaint. The court stated in relevant part that it "has examined each of the specific 104 paragraphs in the two defamation counts in question in search of alleged statements that might be actionable as defamatory. This exercise has resulted in the court['s] identifying paragraph seventy-four of the first count as containing the following allegation: '. . . BBB made defamatory statements regarding the plaintiff, in particular the defamatory statements consist of statements by . . . BBB, including, but not limited to, the size of the plaintiff's business, information about and the number of ongoing complaints, information about and the number of unresolved complaints, information about and the number of complaints responded to, and that the plaintiff failed to resolve underlying causes of customer complaints.' Insofar as count eight against CBBB is concerned, other than alleging that CBBB is liable for any defamatory statements made by BBB on an agency theory, the heart of the plaintiff's claim against CBBB in this count is that '. . . CBBB's ranking of the plaintiff is inaccurate and there is no calculation available which describes the method . . . BBB used to arrive at that rating.' " Citing *Stevens* v. *Helming*, supra, 163 Conn. App. 247 n.3, the court held that "[t]he operative complaint in this action neglects to identify any specific words used, the date on which those words were uttered or published, or the specific individual or entity that employed the allegedly offending words. This failure entitles the moving defendants to summary judgment on the defamation counts." The court further held that, even if it were "to conclude that the allegations in the complaint did suffice to set forth a cognizable defamation claim because precise . . . allegations are not required to set forth a justiciable claim, the defamation counts must nevertheless fail because they are more properly characterized as protected expressions of opinion rather than actionable statements of fact" pursuant to *NetScout Systems*, *Inc.* v. *Gartner*, *Inc.*, supra, 334 Conn. 396. Additionally, the court stated that the documents submitted by the plaintiff in its opposition to summary judgment include "representations made by BBB on its website with respect to the nature of information it provides to consumers. Relevant to the disposition of this motion are BBB's express disclaimers that what it offers is 'a letter grade rating that [re]presents BBB's opinion of the business' respon-

siveness to customers' and that the 'ratings represent the BBB's opinion of how [a] business is likely to interact with its customers. The BBB rating is based on information BBB is able to obtain about the business and is significantly influenced by complaints received from the public.' " The court concluded that "there is no genuine issue of material fact that the defendants cannot be found liable for defamation and that summary judgment must enter in their favor on counts one and eight of the operative complaint." The plaintiff filed a motion to reargue the court's decision, and the court denied that motion. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly failed to consider each defamatory statement alleged in the complaint. Specifically, the plaintiff argues that the court ignored multiple, alleged defamatory statements within the defamation counts of the complaint and failed to consider allegations contained within the other counts of the complaint that did not sound in defamation.[4] We disagree.

We begin our analysis by setting forth the standard of review and relevant legal principles. Our review of the plaintiff's claim is plenary because it requires that we interpret the complaint and the court's memorandum of decision. See, e.g., *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016) (" '[t]he interpretation of a trial court's judgment presents a question of law over which our review is plenary' "); *BNY Western Trust* v. *Roman*, 295 Conn. 194, 210, 990 A.2d 853 (2010) (" '[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary.' ").

"As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Emphasis omitted; internal quotation marks omitted.) *Cimmino* v. *Marcoccia*, 332 Conn. 510, 522, 211 A.3d 1013 (2019).

"Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the

general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 128–29, 287 A.3d 1027 (2023). Although pleadings "are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Swain* v. *Swain*, 213 Conn. App. 411, 419, 277 A.3d 895 (2022).

Our analysis also is informed by well established summary judgment principles. "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." (Internal quotation marks omitted.) *Dunn* v. *Northeast Helicopters Flight Services, LLC*, 346 Conn. 360, 369–70, 290 A.3d 780 (2023). "A genuine issue of material fact must be one which the party opposing the motion is *entitled to litigate under his pleadings* and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment. . . . *The facts at issue* [*in the context of summary judgment*] *are those alleged in the pleadings*. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise." (Emphasis in original; internal quotation marks omitted.) *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 728–29, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

The plaintiff first argues that the court failed to consider multiple allegations within the defamation counts of the complaint that identified defamatory statements, including that BBB issued the plaintiff a C- grade and that the plaintiff failed to resolve underlying causes of

consumer complaints. A review of the court's decision, however, establishes that the court expressly considered both of these alleged defamatory statements. The court stated in its decision that the "essence" of the plaintiff's claim was that "it was unfair for BBB to rely on such complaints in formulating [the plaintiff's] *grade*. The plaintiff claims it was legally wronged and suffered damages as a result both of the unflattering *grades* assigned to it by BBB as well as the verbatim publication on the BBB website of the content of consumer complaints against [the plaintiff] that were registered with BBB." (Emphasis added.) The court began its analysis of the defamation counts by stating that it "has examined each of the specific 104 paragraphs in the two defamation counts in question in search of alleged statements that might be actionable as defamatory. This exercise has resulted in the court['s] identifying paragraph seventy-four of the first count as containing the following allegation: '. . . BBB made defamatory statements regarding the plaintiff, in particular, the defamatory statements consist of statements by . . . BBB, including, but not limited to . . . *that the plaintiff failed to resolve underlying causes of customer complaints*.' . . . These claims are predicated, at least in part, on allegations that the *grade* assigned by BBB to [the plaintiff] was arrived at in error because BBB failed to properly enter the correct size of [the plaintiff's] business into an algorithm used in formulating that *grade* and on unsubstantiated allegations that the plaintiff's failure to pay accreditation fees and sponsor BBB golf outings resulted in it[s] receiving a lower rating." (Emphasis added.)

After identifying these alleged defamatory statements, the court, relying on the standard established by *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 412–17, determined that BBB's statements amounted to an expression of opinion by BBB, not an actionable statement of fact. The court stated that the plaintiff "acknowledge[d] that the *letter grade* resulting from the algorithm used in creating that grade is 'subjective rather than objective,' " and that BBB's website had "express disclaimers that what it offers is 'a *letter grade* rating that presents BBB's opinion of the *business' responsiveness to customers*,' and that the '*ratings* represent the BBB's opinion of how [a] business is likely to interact with its customers. The BBB *rating* is based on information BBB is able to obtain about the business and is significantly influenced by complaints received from the public.' " (Emphasis added.)

In short, it is clear from the court's decision that it expressly considered the plaintiff's allegations within its defamation counts that BBB issued the plaintiff a suboptimal rating and that the plaintiff failed to resolve underlying causes of consumer complaints. In fact, the paragraph from count one of the complaint that the court cited in its decision was the same paragraph that

the plaintiff analyzed in its amended memorandum of law in opposition to summary judgment. The plaintiff's contention on appeal that "the court fail[ed] to address or even mention the allegation of the letter grade in its decision" is simply incorrect. If the plaintiff desired an independent analysis as to each of the alleged defamatory statements, it was its duty as the appellant to seek an articulation of the court's memorandum of decision. See, e.g., *In re Delilah G.*, 214 Conn. App. 604, 638 n.16, 280 A.3d 1168, cert. denied, 345 Conn. 911, 282 A.3d 1277 (2022); see also Practice Book § 66-5. The plaintiff having failed to do so, we presume that the court properly considered all of the allegations before it. See, e.g., *State* v. *Bruny*, 342 Conn. 169, 201–202 n.15, 269 A.3d 38 (2022). For these reasons, we reject the plaintiff's first argument.

The plaintiff next argues, without citing any authority in support, that the court failed to consider allegations outside the defamation counts of the complaint, including allegations of other counts of its complaint. In particular, the plaintiff directs our attention to a paragraph within the complaint's third count that alleged a tortious interference with a business expectancy claim against BBB. Therein, the plaintiff alleged that BBB published harmful statements on its website, including that the plaintiff was smaller in size than other used car dealerships, the plaintiff's vehicles were defective, the plaintiff made misrepresentations during the sales and financing of vehicles, the plaintiff failed to return deposits, as well as an advisement that consumers should file a complaint with the Department of Motor Vehicles. These specific allegations in count three were not incorporated by reference, or otherwise alleged, in either of the two defamation counts.

We disagree with the premise of the plaintiff's second argument, namely, that the court was required to analyze each statement in the other twelve counts of the complaint when considering whether summary judgment was proper on the two defamation counts. As set forth previously, a party's right to recover is limited to the allegations of its pleading; *Swain* v. *Swain*, supra, 213 Conn. App. 419; and, thus, a genuine issue of material fact for purposes of summary judgment must be one that a party is entitled to litigate under its pleadings. See *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, supra, 167 Conn. App. 728. Consequently, the court's determination of whether a genuine issue of material fact existed as to the defamation counts properly was limited to the defamatory statements alleged within the defamation counts. The court was not required to search the other twelve counts of the complaint for any additional defamatory statements and to analyze those statements to determine whether they were defamatory.

If the plaintiff intended to rely on the statements

alleged in its tortious interference with a business expectancy count in support of its defamation counts, it should have alleged, or specifically incorporated, those statements in its defamation counts. The plaintiff's failure to do so undermines the purpose of a complaint, which is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. See id., 728–29. The plaintiff had ample opportunity to include these additional allegations in the defamation counts because it filed eight different versions of the complaint. See footnote 2 of this opinion. Indeed, in its amended opposition to summary judgment on the defamation counts, the plaintiff did not direct the court to the other twelve counts of its complaint.[5] We thus reject the plaintiff's attempt on appeal to expand its defamation claim to include a new set of purportedly defamatory statements. See, e.g., *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014) (it is "patently unfair for a plaintiff to plead his claims under one theory of liability, only to shift to a new, alternative theory on appeal, well after the close of discovery, thus preventing or hindering the defendant from gathering facts relating to the plaintiff's new claims"). Therefore, we conclude that the trial court did not improperly fail to consider each defamatory statement contained in the complaint.

II

The plaintiff next claims that the trial court improperly determined that the grade issued by BBB to the plaintiff was a nonactionable expression of an opinion, not a statement of fact. Specifically, the plaintiff argues that the letter grade is a statement of fact because the formula developed by CBBB and used by BBB to arrive at the grade required BBB to input only objective facts and did not involve any subjective evaluation.[6] We disagree.

We begin our analysis by setting forth the standard of review and relevant legal principles. In *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 396, our Supreme Court recently determined whether a rating was a statement of fact or an expression of opinion for the purposes of a defamation claim. The court outlined the following legal principles relevant to its determination: "At common law, [t]o establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . . A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . ." (Internal quotation marks omitted.) Id., 410. "But it is

not enough that the statement inflicts reputational harm. To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion. . . . A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known. . . . In a libel action, such statements of fact usually concern a person's conduct or character. . . . An opinion, on the other hand, is a personal *comment* about another's conduct, qualifications or character that has some basis in fact. . . .

"It should surprise no one that the distinction between actionable statements of fact and nonactionable statements of opinion is not always easily articulated or discerned. . . . The difficulty arises primarily because the expression of an opinion may, under certain circumstances, reasonably be understood to imply the existence of an underlying basis in an unstated fact or set of facts." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 410–12. "Context is a vital consideration in any effort to distinguish a nonactionable statement of opinion from an actionable statement of fact. . . . [T]his distinction between fact and opinion cannot be made in a vacuum . . . for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the *context* that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . Thus, while this distinction may be somewhat nebulous . . . [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact. . . . A central feature of the analysis undertaken by virtually every court called on to distinguish opinion from fact involves a careful examination of the overall context in which the statement is made." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 412.

"[A]lthough no uniform test exists" to make this determination, our Supreme Court distilled the different factors considered by courts throughout the country into "three basic, overlapping considerations: (1) whether the circumstances in which the statement is made should cause the audience to expect an evaluative or objective meaning; (2) whether the nature and tenor of the actual language used by the declarant suggests a statement of evaluative opinion or objective fact; and (3) whether the statement is subject to objective verification." Id., 413–14. The application of these factors is guided by "the extensive case law from other jurisdictions involving speech that rates or reviews products, services or businesses." Id., 414. Relying on *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater*

St. Louis, Inc., 354 S.W.3d 234, 241 (Mo. App. 2011), our Supreme Court stated that "[c]ourts generally have held that claims for defamation based upon ratings or grades fail because [ratings or grades] cannot be objectively verified as true or false and thus, are opinion . . . . Liability for [defamation] may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, [firsthand] knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact. . . . The case law in this area also makes it clear that an opinion that is based on the opinions of others does not imply defamatory facts and, therefore, is not actionable." (Citations omitted; internal quotation marks omitted.) Id., 416–17. Whether the court properly rendered summary judgment on the ground that the statements at issue were factual, or an expression of opinion, is a question of law over which we exercise plenary review. See id., 417–18, 429–30.

Applying these principles, our Supreme Court in *NetScout* concluded, inter alia, that the rating within a public report composed by the defendant,[7] a technology research and advisory company, with respect to the plaintiff, a computer network monitoring and performance company, were not actionable statements of fact. Id., 400, 418–28. Our Supreme Court supported its conclusion with three reasons that are pertinent here. First, the court held that the rating was an opinion because it was composed by weighing varying subjective factors. Id., 418–19. Second, the court held that reasonable viewers generally understand that a rating, whether in the form of a letter grade or not, reflects the expression of evaluative opinion rather than variable fact. Id., 420. Third, the court held that a declarant's disclaimers regarding the subjective nature of the rating, although not automatically transforming a statement of fact into opinion, can render a rating incapable of being proven true or false. Id., 421–22.

Turning to the present case, we conclude that the grade issued by BBB to the plaintiff was a nonactionable opinion for the same three reasons articulated by our Supreme Court in *NetScout*. First, the grade is an opinion because it was formed on the basis of BBB's subjective evaluation of various criteria that were assigned relative importance and, in part, by considering the subjective evaluations of the plaintiff's customers. As outlined previously, BBB employees calculated the plaintiff's grade by utilizing their discretion, experience, and judgment to input into CBBB's software rating points for many rating elements within the specific, allowable range set by the software. These rating elements include consumer complaint volume, unanswered complaints, unresolved complaints, delayed res-

olution of complaints, failure to address complaint pattern, serious complaints, complaint analysis, type of business, time in business, transparent business practices, failure to honor BBB mediation or arbitration, competency licensing, governmental action against the business, advertising review, BBB trademark infringement, and clear understanding of business. The software calculated the total rating points for the plaintiff, and BBB correspondingly issued it a rating in the form of a letter grade: at one time a C- and currently a B. BBB updated the rating points for the plaintiff as it gathered more information, which primarily derived from the more than 100 consumer reports or complaints about the plaintiff to BBB and the plaintiff's responses, if any, to those complaints. When BBB received a complaint or report about the plaintiff from a consumer, BBB contacted the plaintiff for more information about the consumer's complaint or report. BBB's evaluation of the plaintiff's response, if any, to the consumer's report impacted the grade, as reflected in rating elements relating to consumer complaints.

Although the plaintiff on appeal contends that the grade involves "no subjective evaluation," the congruent affidavits of its president, John Gorbecki, and its vice president, Joseph Gorbecki, submitted in opposition to summary judgment aver: "[I]t is clear that the grading process is totally subjective. The grades fluctuate wildly and are not based on any objective computational formula or calculated accurately through quantitative analysis," and that "the algorithm provided lacks any mathematical basis or foundation and is merely a formula driven by human choice and subjective decisions . . . ." We agree with the plaintiff's corporate representatives that BBB's rating process is subjective. For example, the rating element dealing with the plaintiff's failure to address a complaint pattern necessarily required BBB's employees to evaluate the complaints made by the plaintiff's customers to BBB, to analyze the propriety of the plaintiff's actions, if any, to remedy those complaints, and to distill their assessment of the plaintiff's attempted remedy into a numerical rating within a set range. The subjectivity of BBB's grades is compounded by the fact that CBBB's formula contained at least thirteen unique rating elements, each with a disparate set of allowable rating points. Consequently, the grade issued by BBB is an opinion because it is contingent on the weighing of factors with differing importance and is founded on the subjective input of both BBB's employees and the plaintiff's customers. See, e.g., *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 419 (holding that rating was opinion because it was made on basis of "defendant's subjective evaluation of a variety of factors that were, in turn, assigned relative importance or 'weigh[t]' in accordance with the subjective preferences embedded in its evaluative process, and by considering the subjective evaluations

of the vendors' customers"), citing *ZL Technologies, Inc.* v. *Gartner, Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010) ("[t]he use of a rigorous mathematical model to generate a ranking . . . based upon [subjective evaluations by vendors and their customers] does not transform [the defendant's] opinion into a statement of fact that can be proved or disproved"), aff'd, 433 Fed. Appx. 547 (9th Cir.), cert. denied, 565 U.S. 963, 132 S. Ct. 455, 181 L. Ed. 2d 295 (2011), and *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater St. Louis, Inc.*, supra, 354 S.W.3d 241 (ratings and grades "cannot be objectively verified as true or false").[8]

Second, a reasonable viewer would understand that a rating, whether in the form of a letter grade or not, represents a subjective evaluation by the rating company. As our Supreme Court in *NetScout* explained, "[w]hether expressed using colorful jargon, numerical or letter grades, stars, or the standard terminology of 'good, better, best,' such ratings appear virtually any place a potential customer might look—in magazines and newsletters, television advertisements, billboards, waiting rooms, websites, and every other conceivable physical or electronic surface. Reasonable viewers . . . understand that these ratings normally rest, at bottom, on inherently and irreducibly subjective evaluations of value, quality and performance. This assumption does not mean that the speaker is at liberty to make false statements of fact merely by labelling them 'opinions,' but it does lead us to believe that the audience ordinarily recognizes that the context bespeaks caution, in the sense that most ratings of goods and services reflect an expression of evaluative opinion rather than verifiable fact." (Footnote omitted.) *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 420. There is nothing to suggest that this assumption is inapplicable here. BBB's grading elements and grading points were available on its website for the public to view. The plaintiff, in its summary judgment submissions, recognized that this is the precise perception that the public has of BBB's ratings. In particular, the plaintiff's president and vice president averred in their affidavits submitted in opposition to summary judgment that BBB's grading system results in businesses being "perceived by the general public as having higher standards of conduct and integrity and being a better business than other businesses." A reasonable person would understand that a rating of whether one business is "better" than another business is not capable of being proven as objectively true or false.

Third, BBB's disclaimers regarding the nature of its grades, although not automatically immunizing BBB from claims of defamation, further support the conclusion that its grades are expressions of opinion. As the trial court held in the present case, "relevant to the disposition of this motion are BBB's express disclaimers that what it offers is 'a letter grade rating that [re]pre-

sents BBB's opinion of the business's responsiveness to customers' and that the 'ratings represent the BBB's opinion of how [a] business is likely to interact with its customers. The BBB rating is based on information BBB is able to obtain about the business and is significantly influenced by complaints received from the public.' " These disclaimers are comparable to, but more comprehensive than, those made by the defendant in *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 420, in that BBB's " 'publication consists of the opinions of [its] research organization and should not be construed as statements of fact.' " Therefore, we conclude that the court properly determined that the grade issued by BBB to the plaintiff was a nonactionable expression of an opinion, not a statement of fact.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Over time, CBBB has updated the quantity of rating factors and the range of allowable rating points. For instance, the number of rating factors ranged from sixteen in 2012 to thirteen in 2019, and the maximum rating points allowable for each rating factor also changed from twenty and negative forty-one in 2012 to forty and negative forty-one in 2019.

[2] The plaintiff's amended, fifth revised complaint, which was the eighth iteration filed in the present case, contained fourteen counts—seven against each defendant—sounding in defamation, violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., tortious interference with a business expectancy, commercial disparagement, negligent misrepresentation, intentional misrepresentation, and commercial trade disparagement. On appeal, the plaintiff challenges only the court's rendering of summary judgment with respect to the defamation counts, which are counts one and eight, against BBB and CBBB, respectively.

[3] The parties' summary judgment briefing was extensive. On July 31, 2019, the defendants filed their original motion for summary judgment with respect to the plaintiff's fifth revised complaint, dated June 27, 2017, the plaintiff filed an opposition, the defendants filed a reply thereto, the plaintiff filed a surreply, and the defendants filed another reply. Subsequently, on January 21, 2021, the plaintiff filed its fifth amended, revised complaint. On June 10, 2021, the defendants filed a motion for summary judgment with respect to the plaintiff's fifth amended, revised complaint in which they incorporated their original summary judgment submissions. In response, the plaintiff filed an amended memorandum of law in opposition and an amended reply memorandum of law.

[4] In an argument subsumed within its first claim, the plaintiff also contends that the court had improperly rendered summary judgment on the additional ground that the plaintiff failed to adequately allege a cognizable defamation claim because the defendants failed to establish that this pleading deficiency could not be cured by repleading in accordance with *Larobina* v. *McDonald*, 274 Conn. 394, 401, 876 A.2d 522 (2005) (holding that "use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading"). The defendants aptly contend, and we agree, that the plaintiff has waived this argument because, prior to the court's rendering of summary judgment, it never objected before the trial court to the defendants' use of their motion for summary judgment to challenge the legal sufficiency of the complaint, and it never offered to amend its complaint if the court concluded otherwise. See id., 402; see also *Streifel* v. *Bulkley*, 195 Conn. App. 294, 303, 224 A.3d 539 (plaintiff waived claim challenging court's grant of summary judgment on legal sufficiency ground by failing "to object to the court's deciding the case through summary judgment instead of deciding the defendant's motion as a motion to strike or, in the alternative, to offer to amend the complaint if the court determined the allegations to be legally insufficient"), cert. denied, 335 Conn. 911, 228 A.3d 375 (2020).

[5] When pressed at oral argument before this court to specifically identify the statements made on BBB's website that supported the plaintiff's defama-

tion claim, its counsel relied on the letter grade BBB had issued and the statement that the plaintiff had failed to resolve underlying causes of consumer complaints.

[6] In light of our conclusion that summary judgment was appropriate on this ground, we do not address the plaintiff's challenge to the court's alternative basis for rendering summary judgment, particularly that the plaintiff failed to allege a cognizable defamation claim with the requisite specificity in accordance with *Stevens* v. *Helming*, supra, 163 Conn. App. 247 n.3. See, e.g., *Alvarez* v. *Middletown*, 192 Conn. App. 606, 611 n.2, 218 A.3d 124 (concluding that trial court properly rendered summary judgment on one ground and, thus, this court need not address challenge to alternative basis for summary judgment), cert. denied, 333 Conn. 936, 218 A.3d 594 (2019); *James* v. *Valley-Shore Y.M.C.A., Inc.*, 125 Conn. App. 174, 176 n.1, 6 A.3d 1199 (2010) (same), cert. denied, 300 Conn. 916, 13 A.3d 1103 (2011).

[7] The rating at issue in *NetScout* was the defendant's placement of the plaintiff in the " '[c]hallengers' " zone of a graphic rating chart, named "the Magic Quadrant," which designated the plaintiff as among those vendors "with a high rating for ability to execute and a low rating for completeness of vision . . . ." *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 401.

[8] The plaintiff on appeal extensively relies on Justice McDade's dissent in *Perfect Choice Exteriors, LLC* v. *Better Business Bureau of Central Illinois, Inc.*, 99 N.E.3d 541, 552 (Ill. App. 2018). Therein, Justice McDade concluded, in contrast to the majority, that the plaintiff had alleged sufficient facts to establish that the defendant's D- rating issued to the plaintiff company was factual and not an opinion because the defendant's grades implied a foundational assertion of fact capable of being proven true or false. Id.; contra *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 416, citing *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater St. Louis, Inc.*, supra, 354 S.W.3d 241, for the proposition that grades are opinion because they cannot be objectively verified as true or false unless the defendant represents that it has private, firsthand knowledge that substantiates opinions it expresses.

In the present case, the plaintiff does not identify any private, firsthand knowledge that BBB had, or expressed that it had, to compose its grades. Conversely, as explained herein, the grades issued by BBB are not founded purely on facts but, rather, are primarily based on complaints made by the plaintiff's customers and BBB's subjective evaluation of the plaintiff's responses, if any, to those complaints. Furthermore, we agree with the majority in *Perfect Choice Exteriors, LLC*, that, "[e]ven if [the plaintiff had] purported to offer an 'unbiased' opinion that was based in part on certain objectively verifiable facts, [the defendant] made clear that its rating was a subjective evaluation based upon the application of subjective criteria and a subjective interpretation of the facts. Thus, [the defendant's] rating of [the plaintiff] was a constitutionally protected opinion, not a verifiable statement of fact that support[s] a claim for defamation." *Perfect Choice Exteriors, LLC* v. *Better Business Bureau of Central Illinois, Inc.*, supra, 99 N.E.3d 550.