CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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

[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.

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

[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.

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

[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.

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' 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.' " 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.

[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

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).

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).

"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.

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

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

[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.

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 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. 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]

[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

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

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.

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]presents 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.

MARIO MATA *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 45598)

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

Syllabus

The plaintiff, who had been arrested for, inter alia, operating a motor vehicle while under the influence of intoxicating liquor, appealed to the trial

court from the decision of the defendant, the Commissioner of Motor Vehicles, suspending the plaintiff's motor vehicle operator's license pursuant to statute (§ 14-227b). The arresting officer, L, was dispatched to a motor vehicle accident in front of the plaintiff's home. When L arrived on the scene, the plaintiff was standing next to a vehicle that was lodged on top of the stone retaining wall that bordered the plaintiff's property. Another officer, T, who had arrived shortly before L, identified the plaintiff to L as the operator of the motor vehicle and told L that he had assisted the plaintiff out of the vehicle. The plaintiff had difficulty standing, his eyes were bloodshot, and he was slurring his words. L administered three field sobriety tests to the plaintiff, who failed all three tests. Following the plaintiff's arrest, L attempted to administer a Breathalyzer test to the plaintiff three times, but the plaintiff repeatedly failed to follow L's instructions and never provided an adequate breath sample. On the basis of the plaintiff's behavior, L determined that he was attempting to manipulate the testing procedures and deemed the plaintiff's conduct a refusal to perform the test. After an administrative hearing before the defendant's hearing officer, at which L was the only testifying witness, the hearing officer found that there was substantial evidence to determine that L had probable cause to arrest the plaintiff, the plaintiff refused to submit to a Breathalyzer test, and the plaintiff was operating the motor vehicle. On the basis of these findings, the defendant ordered that the plaintiff's license be suspended for a period of forty-five days and that an ignition interlock device be installed in the plaintiff's vehicle for two years. On the plaintiff's appeal to the trial court from the defendant's decision, he claimed that there was not substantial evidence in the record to support the hearing officer's determinations pursuant to § 14-227b that the plaintiff was the operator of the vehicle and that he refused to take the Breathalyzer test. The trial court rejected the plaintiff's claims and dismissed the appeal. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly concluded that there was substantial evidence to support the hearing officer's finding that the plaintiff operated his motor vehicle pursuant to § 14-227b: L's testimony and written report were consistent that T had identified the plaintiff as the operator of the motor vehicle and assisted the plaintiff out of the vehicle, and it was reasonable to infer that T identified the plaintiff as the operator of the vehicle because the plaintiff was in the vehicle when T arrived; moreover, the plaintiff was the registered owner of the vehicle, and a photograph admitted into evidence taken at the scene of the accident showed the vehicle with its front driver's side door open, its headlights on, and its dashboard and center console screen lit, from which it was reasonable to infer that the vehicle was being operated by someone at the time it hit the retaining wall, and, because the plaintiff was the only person other than responding officers present at the scene when T and L arrived, these

facts, taken together, reasonably supported an inference that the identity of the operator was the plaintiff; furthermore, the plaintiff made a statement to L at police headquarters that indicated that he knew he would be in trouble if he took the Breathalyzer test, from which it was reasonable to infer that he had been operating his vehicle while intoxicated because a positive test for an elevated blood alcohol content would not have been inculpatory unless he also had operated his motor vehicle while he was intoxicated.

2. The plaintiff could not prevail on his claim that the trial court improperly concluded that there was substantial evidence in the record to support the hearing officer's determination that he refused to submit to a Breathalyzer test: although the plaintiff verbally indicated a willingness to take the Breathalyzer test, he also made a statement indicating that he would be in trouble if he took the test, which reasonably supported an inference that the plaintiff had a motive and intent to prevent an accurate reading of his blood alcohol content by performing the test improperly, L testified regarding his observations of the plaintiff's behavior and his determination based on those observations that the plaintiff was attempting to manipulate the testing procedures by intentionally inhaling rather than exhaling when placing his mouth on the mouthpiece, and the hearing officer could reasonably infer from the plaintiff's noncompliance with L's instructions, especially in light of his admission that he would be in trouble if he performed the test, that he had refused to take the Breathalyzer test.

Argued May 16—officially released August 8, 2023

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Devin W. Janosov, with whom was *Donald A. Papcsy*, for the appellant (plaintiff).

John M. Russo, *Jr.*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Rosemarie Weber*, deputy associate attorney general, and *Anthony C. Famiglietti*, assistant attorney general, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Mario Mata, appeals from the judgment of the trial court rendered in favor of the defendant, the Commissioner of Motor Vehicles (commissioner), dismissing his administrative appeal from the decision of the commissioner to suspend his motor vehicle operator's license for forty-five days pursuant to General Statutes § 14-227b.[1] On appeal to this court, the plaintiff claims that the trial court improperly concluded that the administrative record contained substantial evidence to support the hearing officer's findings that he (1) operated the motor vehicle and (2) knowingly refused to submit to a Breathalyzer test. We affirm the judgment of the court.

The following facts and procedural history are relevant to the plaintiff's appeal. On June 25, 2021, at approximately 1:56 a.m., Officer Steven Luciano was dispatched to 24 Taylor Avenue in Norwalk, the residence of the plaintiff, for a motor vehicle accident.[2] Luciano arrived on the scene within a few minutes of being dispatched.[3] When Luciano arrived, the plaintiff stood next to a Jeep Wrangler that was lodged on top of the stone retaining wall that borders the plaintiff's property. The plaintiff was the registered owner of the Jeep. Officer Tejada, who had arrived at the scene shortly before Luciano, "identified" the plaintiff to Luciano as the operator of the Jeep and told him that he had assisted the plaintiff out of the Jeep. The plaintiff had difficulty standing, his eyes were bloodshot, and

[1] Although § 14-227b has been amended by the legislature since the events underlying this appeal; see, e.g., Public Acts 2022, No. 22-40, § 14; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] The Norwalk police received a call from an individual who reported the incident at approximately 1:56 a.m.

[3] Luciano testified that he "most likely" arrived at 24 Taylor Avenue before 2 a.m.

he was slurring his words. Before Luciano had the opportunity to ask the plaintiff any questions, the plaintiff stated that he was "borracho," which means "drunk" in Spanish.[4]

Luciano assessed the scene to determine how the accident occurred. Luciano concluded that the plaintiff had been operating the Jeep at a high rate of speed. When the plaintiff attempted to turn into his driveway, he lost control of the Jeep. The Jeep struck a vehicle that was legally parked along the side of the street in front of the plaintiff's residence, causing minor damage to the parked vehicle. The Jeep also hit the stone retaining wall located at the perimeter of the plaintiff's residence, at which point the Jeep became airborne from the impact and landed on the top of the retaining wall. Luciano observed grass and dirt on the sidewalk in front of the retaining wall, which indicated to Luciano that the plaintiff had attempted to drive the Jeep off of the retaining wall. The retaining wall sustained significant damage as a result of the accident.

After assessing the scene, Luciano asked the plaintiff if he would perform standardized field sobriety tests. The plaintiff agreed to do the tests, and Luciano administered three field sobriety tests. The plaintiff failed all three tests. As a result, Luciano arrested the plaintiff for, inter alia, operating a motor vehicle under the influence of liquor in violation of General Statutes § 14-227a and transported him to police headquarters.[5]

At police headquarters, Luciano advised the plaintiff of his *Miranda* rights,[6] completed an A-44 form,[7] read

[4] Luciano is bilingual and understood the meaning of "borracho."

[5] Luciano also arrested the plaintiff for operating a motor vehicle without a license in violation of General Statutes § 14-36a and failure to maintain the proper lane in violation of General Statutes § 14-236.

[6] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] "The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." (Internal quotation

him an implied consent advisory, and provided him with the opportunity to contact an attorney. Luciano then asked the plaintiff to take a Breathalyzer test. The plaintiff agreed to take the test but stated, in Spanish, that "I'm fucked . . . if I do the test, I know I'm fucked."

Luciano proceeded with the Breathalyzer test and instructed the plaintiff, in both English and Spanish, on how to take the test. Luciano instructed the plaintiff "to inhale prior to putting his mouth on the mouthpiece and then to continue to blow [into the mouthpiece] until he was advised to stop, which means until the machine indicates that enough breath was given in order to submit to a proper test." The plaintiff stated that he understood Luciano's instructions but inhaled after putting his mouth on the mouthpiece, resulting in an invalid test. Luciano testified that the plaintiff "would act like he was taking an inhale but really wouldn't do anything, and as soon as [Luciano] put the tube in [the plaintiff's mouth] he would inhale . . . ." Luciano reinstructed the plaintiff on how to properly take the test two additional times after the first failed attempt. Despite the repeated instructions, the plaintiff repeatedly failed to follow Luciano's directions and would initially inhale rather than exhaling into the mouthpiece. The plaintiff never provided an adequate breath sample. On the basis of the plaintiff's behavior, Luciano determined that he was attempting to manipulate the testing procedures by intentionally inhaling rather than exhaling when given the mouthpiece. Luciano deemed the plaintiff's conduct a refusal to perform the test.

On June 29, 2021, the commissioner sent a notice to the plaintiff to inform him of the suspension of his

marks omitted.) *Nandabalan* v. *Commissioner of Motor Vehicles*, 204 Conn. App. 457, 461 n.5, 253 A.3d 76, cert. denied, 336 Conn. 951, 251 A.3d 618 (2021).

license pursuant to § 14-227b.[8] On September 14, 2021, an administrative hearing was held before a hearing officer, the commissioner's designee, pursuant to § 14-227b (g) to determine whether the plaintiff's license should be suspended. The administrative hearing concluded on October 5, 2021. During the hearing, the hearing officer admitted into evidence, without objection,

[8] General Statutes § 14-227b provides in relevant part: "(e) (1) Except as provided in subdivision (2) of this subsection, upon receipt of a report submitted under subsection (c) or (d) of this section, the commissioner may suspend any operator's license or operating privilege of such person effective as of a date certain, which date certain shall be not later than thirty days from the later of the date such person received (A) notice of such person's arrest by the police officer, or (B) the results of a blood or urine test or a drug influence evaluation. Any person whose operator's license or operating privilege has been suspended in accordance with this subdivision shall automatically be entitled to a hearing before the commissioner to be held in accordance with the provisions of chapter 54 and prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that such person's operator's license or operating privilege is suspended as of a date certain and that such person is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the Department of Motor Vehicles not later than seven days after the date of mailing of such suspension notice. . . .

"(g) (1) If such person contacts the department to schedule a hearing, the department shall assign a date, time and place for the hearing, which date shall be prior to the effective date of the suspension, except that, with respect to a person whose operator's license or operating privilege is suspended in accordance with subdivision (2) of subsection (e) of this section, such hearing shall be scheduled not later than thirty days after such person contacts the department. At the request of such person, the hearing officer or the department and upon a showing of good cause, the commissioner may grant one or more continuances.

"(2) A hearing based on a report submitted under subsection (c) of this section shall be limited to a determination of the following issues: (A) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug, or both; (B) was such person placed under arrest; (C) did such person (i) refuse to submit to such test or nontestimonial portion of a drug influence evaluation, or (ii) submit to such test, commenced within two hours of the time of operation, and the results of such test indicated that such person had an elevated blood alcohol content; and (D) was such person operating the motor vehicle. . . ."

the A-44 form.[9] Attached to the A-44 form were Luciano's incident report and narrative supplements. Luciano stated in the narrative supplement that, "[u]pon approaching the scene I made contact with the operator who was standing next to the vehicle and identified by Officer Tejada as the operator." Luciano was the only witness who testified at the hearing. Luciano testified that Tejada "identified" the plaintiff as the operator and that Tejada, at the very least, was present when the plaintiff got out of the Jeep.

Although the plaintiff did not testify, the plaintiff's counsel introduced into evidence photographs of the scene of the accident and affidavits from Ena Julissa Lopez and Christian Toomey. Neither individual had witnessed the accident, but they averred that the accident occurred as a result of the Jeep being improperly parked at the top of the plaintiff's sloped driveway, rolling down the driveway, and crashing into the

[9] We note that "§ 14-227b-19 (a) of the Regulations of Connecticut State Agencies, which has the force and effect of a statute . . . provides . . . that a police officer's report concerning the arrest of a drunk driving suspect shall be admissible into evidence at [a license suspension] hearing if it conforms to the requirements of subsection (c) of [§] 14-227b of the . . . General Statutes. . . . Subsection (c) of § 14-227b itself provides that the report, to be admissible, must be submitted to the department within three business days, *be subscribed and sworn to by the arresting officer under penalty of false statement*, set forth the grounds for the officer's belief that there was probable cause to arrest the driver, and state whether the driver refused to submit to or failed a blood, breath or urine test." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 668, 200 A.3d 681 (2019).

In the present case, the narrative portion of the A-44 form contains the electronic signature of Luciano but is missing the signature of the supervising officer, and Section I of the A-44 form does not contain any indicia that Luciano signed the form under oath because it is missing the name and signature of the individual who administered the oath. The plaintiff, however, did not object to the admission of the A-44 form or documents attached to it. Therefore, the plaintiff has waived any claim that the A-44 form was insufficiently reliable and should not have been admitted into evidence. Moreover, Luciano testified under oath to the truth and accuracy of the information within the A-44 form and its attachments.

retaining wall.[10] The plaintiff's counsel argued that there was a lack of substantial evidence that the plaintiff operated the motor vehicle and refused to take a Breathalyzer test.

The hearing officer, acting on behalf of the commissioner, subsequently made the following determinations pursuant to § 14-227b (g): "(1) [Luciano] had probable cause to arrest the [plaintiff] for a violation [of § 14-227a]. . . . (2) The [plaintiff] was placed under arrest. . . . (3) The [plaintiff] refused to submit to such test or analysis. . . . (4) [The plaintiff] was operating the motor vehicle. . . ." The hearing officer also made the following subordinate factual findings: "Section F of [Luciano's] A-44 indicates that the breath test was chosen by [Luciano]. Section H indicates that the [plaintiff] refused the breath test through his conduct. The refusal was witnessed and subscribed to in Section H of the A-44 by [another Norwalk police officer]. [Luciano] credibly testified that when the [plaintiff] was asked to participate in breath testing, [he] state[d] in Spanish . . . 'I'm fucked if I do the test.' Then, despite being shown three different times as to how to perform the test, [he] inhaled first and then was unable to provide a sample. [Luciano] testified that he believed that the [plaintiff] was intentionally manipulating the test. The [plaintiff's] attorney's argument that the [plaintiff] was

[10] Lopez stated in her affidavit: "[1] On the night of June 25, 2021 on or around 1:30 AM, I heard a vehicle come into the driveway next to my house, where [the plaintiff] lives. [2] On or around that time, I heard a man that I know to be [the plaintiff] speaking to another male individual in the same area where I heard the car come in. [3] Shortly thereafter, I heard a crashing sound and it appeared that the car had rolled down the driveway, into the wall and onto the lawn area."

Toomey stated in his affidavit: "[1] On the night of June 25, 2021 on or around 1:00 AM, I drove [the plaintiff's] Jeep to his home from where we were prior, and left his Jeep parked at the top of his driveway before proceeding home myself. [2] There was no accident involving the Jeep at that time, and the Jeep was parked at the top of his steep driveway before my departure."

too drunk to perform the test is not persuasive. There is substantial evidence to infer [that] the [plaintiff] refused the breath test through his conduct. [Luciano] also credibly testified that when he arrived on the accident scene, [Tejada] told him that upon [Tejada's] arrival, he [had] assisted the [plaintiff] out of the vehicle and that the [plaintiff] was the owner of the vehicle. The [plaintiff's] attorney presented affidavits from two people who did not witness the accident. There is substantial evidence to find that the [plaintiff] was the operator of the vehicle." On the basis of these findings, the commissioner ordered that the plaintiff's license be suspended for a period of forty-five days and that an ignition interlock device be installed in the plaintiff's vehicle for two years.

Pursuant to General Statutes § 4-183,[11] the plaintiff appealed to the Superior Court from the decision of the commissioner. The plaintiff claimed that there was not substantial evidence in the record to support the hearing officer's determinations pursuant to § 14-227b that the plaintiff (1) was the operator of the vehicle and (2) refused to take a Breathalyzer test. The court rejected the plaintiff's claims and dismissed the appeal. This appeal followed.

We begin by setting forth the relevant standard of review and legal principles. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether

[11] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"Section 14-227b, commonly referred to as the implied consent statute, governs license suspension hearings." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Motor Vehicles*, 172 Conn. App. 380, 386, 160 A.3d 410 (2017). Section 14-227b (g) (2) provides that the hearing shall be limited to a determination of the following issues: "(A) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug, or both; (B) was such person placed under arrest; (C) did such person (i) refuse to submit to such test . . . and (D) was such person operating the motor vehicle."

"In the context of a license suspension under the implied consent law, if the administrative determination of the four license suspension issues set forth in § 14-227b [g] is supported by substantial evidence in the record, that determination must be sustained. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and . . . provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . The United States Supreme Court, in defining substantial evidence . . . has said that it is something less than the weight

of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Motor Vehicles*, supra, 172 Conn. App. 387.

I

The plaintiff first claims that the court improperly concluded that there was substantial evidence to support the hearing officer's finding that the plaintiff operated his motor vehicle pursuant to § 14-227b.[12] We are not persuaded.

The following legal principles are relevant to the plaintiff's claim. "The absence of [eye]witnesses to the plaintiff's operation of the vehicle is not dispositive on the issue of operation." *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 347, 757 A.2d 561 (2000). Circumstantial evidence of operation may be sufficient to establish that there is substantial evidence to support a hearing officer's finding that the plaintiff operated the

[12] We note that the plaintiff's brief is not a model of clarity. Specifically, it is unclear whether he is attempting to raise a claim that the hearing officer improperly admitted evidence pertaining to Tejada's identification of the plaintiff as the operator of the vehicle as set forth in the A-44 form or as described by Luciano in his testimony at the hearing. Although the plaintiff refers to this evidence without distinction as being unreliable and not probative, he engages in no analysis in his principal appellate brief that pertains to whether this evidence was properly admitted at the hearing. Additionally, the plaintiff did not object to the admission of these statements when they were admitted as a part of the A-44 form or when Luciano originally testified that Tejada had identified the plaintiff at the scene as the operator of the vehicle. To the extent that the plaintiff is attempting to raise such a claim, it is both unpreserved and inadequately briefed, and, therefore, we decline to review it on its merits. See *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 801–802, 256 A.3d 655 (2021) (argument unsupported by legal authority was inadequately briefed); see also *Adams* v. *Commissioner of Motor Vehicles*, 182 Conn. App. 165, 176, 189 A.3d 629 ("[a] plaintiff cannot raise issues on appeal that he failed to present to the hearing officer below"), cert. denied, 330 Conn. 940, 195 A.3d 1134 (2018).

vehicle. See *Finley* v. *Commissioner of Motor Vehicles*, 113 Conn. App. 417, 427, 966 A.2d 773 (2009) ("operation may be proven by direct or circumstantial evidence").

Given the cumulative effect of the evidence in the record, there was substantial evidence to support the hearing officer's finding that the plaintiff operated the motor vehicle. Luciano testified at the hearing that Tejada "identified" the plaintiff as the operator. Luciano testified: "When I arrived on [the] scene, [the plaintiff] was standing on the sidewalk, and he was . . . identified by Officer Tejada, who was there prior to my arrival, as the operator of [the] motor vehicle." Luciano's testimony was consistent with the statement in his narrative report that Tejada identified the plaintiff as the operator.[13]

Luciano also testified that Tejada informed him that he had assisted the plaintiff out of the car after the accident. Although Luciano stated during cross-examination that he was "assuming" that Tejada had assisted the plaintiff in getting out of the vehicle, upon further cross-examination Luciano reiterated, in essence, that Tejada was present, at the very least, when the plaintiff got out of the vehicle. The hearing officer found Luciano's testimony that Tejada assisted the plaintiff out of the vehicle to be credible. See *Santiago* v. *Commissioner of Motor Vehicles*, 134 Conn. App. 668, 673, 39 A.3d 1224 (2012) ("[i]n administrative hearings . . . the hearing officer is the arbiter of the credibility of evidence").

[13] Although Luciano did not testify to the precise manner in which Tejada communicated his "identification" of the plaintiff as the operator of the vehicle to Luciano, and the report attached to the A-44 also does not include this information, it is reasonable to infer that Tejada did so verbally or through other nonverbal means intended to communicate that information. See Conn. Code Evid. § 8-1 (1) ("'[s]tatement' means (A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion"). Indeed, it was more than reasonable for the hearing officer to conclude that Tejada told Luciano that the plaintiff was the operator of the vehicle.

Considering Luciano's testimony that Tejada identified the plaintiff as the operator and that Tejada was present at the scene of the accident when the plaintiff got out of the vehicle, it is reasonable to infer that Tejada identified the plaintiff as the operator of the vehicle because the plaintiff was in the Jeep when Tejada arrived.

The fact that the plaintiff operated the vehicle also can be reasonably inferred from Luciano's observations of the accident and the photograph of the Jeep at the scene of the accident. Luciano testified that he arrived at 24 Taylor Avenue shortly after being dispatched and that, at that time, the plaintiff was the only individual, apart from the responding officers, at the scene of the accident. The plaintiff was the registered owner of the Jeep that was lodged on top of the retaining wall in front of the plaintiff's residence. On the basis of his observations at the scene of the accident, including the manner in which the Jeep struck a parked vehicle and landed on top of the retaining wall, Luciano testified that the accident occurred as a result of the plaintiff operating the Jeep at a high rate of speed and losing control of the Jeep when he attempted to turn into his driveway. As a result, it hit the retaining wall and became airborne. Luciano's incident report stated that the grass and dirt on the sidewalk indicated that the plaintiff had also operated the Jeep in an attempt "to get the vehicle off the wall."

Moreover, the plaintiff's counsel also had admitted into evidence a photograph of the Jeep at the scene of the accident. The photograph shows the Jeep with its front driver's side door open, its headlights on, and its dashboard and center console screen lit. From this evidence, it is reasonable to infer that the Jeep was being operated by someone at the time it hit the stone wall. Because the plaintiff was the only person present at the scene when Tejada and Luciano arrived, these facts, taken together, reasonably support an inference

that the identity of the operator was indeed the plaintiff.[14]

The plaintiff also made a statement to Luciano at police headquarters that indicated his consciousness of guilt. When asked to take a Breathalyzer test, the plaintiff stated that he was "fucked" if he did the test. A reasonable inference to be drawn from his statement is that he had been operating his Jeep while intoxicated because a positive test for an elevated blood alcohol content would not have been inculpatory unless he also had operated his motor vehicle while he was intoxicated.

Despite the evidence in the record, the plaintiff makes three additional arguments as to why there was a lack of substantial evidence to support the hearing officer's finding that the plaintiff operated the vehicle. First, the plaintiff argues that there was no evidence in the record to establish a "temporal nexus" between operation and intoxication. This argument lacks merit for the following reasons.

A hearing pursuant to § 14-227b (g) is "limited to a determination of the following issues: (A) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug, or both; (B) was such person placed under arrest; (C) did such person . . . refuse to submit to such test . . . and (D) was such person operating the motor vehicle." General Statutes § 14-227b (g) (2). It is important to note that the plaintiff has not challenged the hearing officer's determination, under subsection (g) (2) (A), that Luciano had probable cause to arrest the plaintiff. Although a temporal nexus

[14] This evidence is also plainly inconsistent with the plaintiff's "theory," based on the two affidavits he filed at the hearing, that the Jeep had been parked in his driveway and had rolled unattended and without an operator down his driveway.

between operation and intoxication is certainly relevant to whether Luciano had probable cause to arrest the plaintiff for operating a motor vehicle *while* under the influence of intoxicating liquor, such a determination is not relevant to the discrete issue, under subsection (g) (2) (D), of whether the plaintiff operated the motor vehicle.

Moreover, even if a temporal nexus between operation and intoxication were necessary, under subsection (g) (2) (D) of § 14-227b, to support the hearing officer's finding that the plaintiff operated the vehicle, the evidence in the record clearly supports such a connection. Luciano was dispatched to a motor vehicle accident at 24 Taylor Avenue at approximately 1:56 a.m. and arrived at the scene within minutes. At the time that Luciano arrived, the plaintiff was the only individual apart from the responding officers at the scene of the accident, and he could hardly stand, smelled of alcohol, and failed all three field sobriety tests that Luciano administered. Luciano testified that Tejada was present when the plaintiff got out of the Jeep. Thus, it is reasonable to infer that the plaintiff was intoxicated at the time he operated the Jeep.

Second, the plaintiff argues that the hearing officer improperly failed to rely on the affidavits he offered into evidence to support his theory that the accident was caused by the Jeep rolling down the driveway rather than the plaintiff operating the vehicle. The hearing officer, however, considered the affidavits and was free to find them unpersuasive for several reasons.

To begin, the affidavits were not provided by actual eyewitnesses to the accident. Rather, Toomey left the plaintiff's residence before the accident occurred, and Lopez attested only that she "heard a crashing sound and it *appeared* that the [Jeep] had rolled down the driveway . . . ." (Emphasis added.) The plaintiff did

not produce Toomey or Lopez as witnesses and, therefore, neither individual was subject to cross-examination regarding the statements made in their affidavits. Furthermore, the facts attested to in the affidavits were patently inconsistent with other facts in the record. Lopez stated that the Jeep rolled into the retaining wall and into the lawn area but does not explain how the Jeep got onto the top of the retaining wall. Toomey stated that he drove the plaintiff's Jeep home and parked it at the top of the driveway at 1 a.m., but an individual called to report the accident at 1:56 a.m. Finally, the facts in the affidavits were inconsistent with each other. Lopez stated that she heard the plaintiff and another individual pull into the driveway at 1:30 a.m., but Toomey stated that he and the plaintiff arrived at the plaintiff's residence at 1 a.m. For all the foregoing reasons, it was not improper for the hearing officer to conclude that the facts set forth in the affidavits were not worthy of reliance.

Finally, the plaintiff argues that *Carlson* v. *Kozlowski*, 172 Conn. 263, 267, 374 A.2d 207 (1977), supports his position that hearsay statements made by Tejada identifying him as the operator of the Jeep were not substantial evidence. In *Carlson*, our Supreme Court stated: "If hearsay evidence is insufficiently trustworthy to be considered substantial evidence and it is the only evidence probative of the plaintiff's culpability, its use to support the agency decision would be prejudicial to the plaintiff, absent a showing . . . that the appellant knew it would be used and failed to ask the commissioner to subpoena the declarants." (Internal quotation marks omitted.) Id. *Carlson*, however, is inapplicable to the present case. As we previously stated, Tejada's identification of the plaintiff as the operator was not the only evidence probative of the plaintiff's operation of the Jeep. Accordingly, in light of all of the evidence in the record, we must conclude that there was substantial

evidence in the record to support the hearing officer's finding that the plaintiff operated the vehicle.

II

The plaintiff also claims that the court improperly concluded that there was substantial evidence in the record to support the hearing officer's determination that the plaintiff refused to submit to a Breathalyzer test in violation of § 14-227b. We do not agree.

The following legal principles are relevant to this claim. "The determination of whether the plaintiff's actions constituted a refusal to submit to a Breathalyzer test is a question of fact for the hearing officer to resolve." *Wolf* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 76, 81, 797 A.2d 567 (2002). "[D]ifficulties [are] inherent in ascertaining when a person is refusing to submit to the breath test. Refusal is difficult to measure objectively because it is broadly defined as occurring whenever a person remains silent or does not otherwise communicate his assent after being requested to take a blood, breath or urine test under circumstances where a response may reasonably be expected." (Internal quotation marks omitted.) *Fernschild* v. *Commissioner of Motor Vehicles*, 177 Conn. App. 472, 477, 172 A.3d 864 (2017), cert. denied, 327 Conn. 997, 175 A.3d 564 (2018). "This court has held that an operator's refusal to [submit to a chemical alcohol test] pursuant to § 14-227b need not be express and that a hearing officer may consider the operator's conduct in determining whether [the operator] refused to take the test. Refusal to [submit to a chemical alcohol test] can occur through conduct as well as an expressed refusal." (Internal quotation marks omitted.) *O'Rourke* v. *Commissioner of Motor Vehicles*, 156 Conn. App. 516, 525, 113 A.3d 88 (2015).

There was substantial evidence in the record to support the hearing officer's finding that the plaintiff

refused to submit to a Breathalyzer test. Although the plaintiff verbally indicated a willingness to take the Breathalyzer test, he also stated, "I'm fucked . . . if I do the test, I know I'm fucked." This statement reasonably supports an inference that the plaintiff had a motive and intent to prevent an accurate reading of his blood alcohol content by performing the test improperly.

This inference was further supported by what happened next. Luciano instructed the plaintiff, in both English and Spanish, "to inhale *prior* to putting his mouth on the mouthpiece and then to continue to blow [into the mouthpiece] until he was advised to stop . . . ." (Emphasis added.) The plaintiff stated that he understood Luciano's instructions but inhaled *after* putting his mouth on the mouthpiece. Luciano testified that the plaintiff "would act like he was taking an inhale but really wouldn't do anything" and instead inhaled after putting his mouth on the mouthpiece. Luciano reinstructed the plaintiff to inhale prior to putting his mouth on the mouthpiece two additional times after his first failed attempt. Despite the repeated instructions, the plaintiff continued to initially inhale rather than exhaling into the mouthpiece and never provided an adequate breath sample.

On the basis of Luciano's observations of the plaintiff's behavior, Luciano determined that he was attempting to manipulate the testing procedures by intentionally inhaling rather than exhaling when placing his mouth on the mouthpiece. The hearing officer could reasonably infer from the plaintiff's noncompliance with Luciano's instructions, especially in light of his admission that he was "fucked" if he did the test, that he had refused to take the Breathalyzer test.

The plaintiff relies on *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 715–18, 692 A.2d 834 (1997), in arguing that there was not substantial

evidence that the plaintiff refused the Breathalyzer test.[15] In *Bialowas*, this court held that an arresting officer's mere conclusion that a plaintiff "refused to be tested by not furnishing sufficient breath samples" was not substantial evidence to support the hearing officer's conclusion that the plaintiff had refused the test. Id., 715. In that case, however, the record was devoid of any information to support the arresting officer's inference that the plaintiff had refused the test. This court stated: "The police officer did not include in the police report or the narrative supplement adequate information about his observations to support his conclusion that the plaintiff's failure to provide sufficient breath was, in fact, a refusal to take the test. Such information, if it existed, could have been provided through testimony or other evidence such as the narrative supplement and might have described the officer's observations of the effort the plaintiff made in providing breath samples and in following the officer's instructions, or other conduct of the plaintiff that would bear on whether his actions were intentional." Id., 716–17.

The present case is clearly distinguishable from *Bialowas*. Luciano testified regarding his observations of the plaintiff's behavior, and these observations supported his conclusion that the plaintiff intentionally frustrated the proper testing procedure. Luciano's observations of the plaintiff's behavior were also documented in his incident report. The facts in the record

[15] The plaintiff also argues that his high level of intoxication should have been considered and weighed against concluding that his conduct was a refusal. This argument is without merit. "[R]egardless of the ostensible reason for the plaintiff not submitting to the chemical test, *any failure to submit to the test* constitutes a refusal pursuant to . . . [§ 14-227b (g)]." (Emphasis in original; internal quotation marks omitted.) *O'Rourke* v. *Commissioner of Motor Vehicles*, supra, 156 Conn. App. 526. Furthermore, the fact that the plaintiff was able to understand and appreciate the consequence of taking the test permits an inference that he was not so intoxicated that he did not understand what he was doing while performing the test.

amply support the reasonable inference that the plaintiff's conduct constituted a refusal. Accordingly, there was substantial evidence in the record to support the hearing officer's finding that the plaintiff refused to take a Breathalyzer test.

The judgment is affirmed.

In this opinion the other judges concurred.

RAUL OCHOA *v.* KATHLEEN BEHLING
(AC 45242)

Alvord, Clark and Keller, Js.

Syllabus

The plaintiff father appealed from the trial court's order permitting the intervening defendant, K, the minor child's maternal grandmother who now has sole legal and physical custody of the child, to continue to claim a federal income tax dependency exemption for the child. In October, 2012, the father brought a child custody action against the defendant mother, seeking sole custody of their minor child. The court granted K's motion to intervene in the proceeding and subsequently rendered a stipulated judgment in accordance with an agreement between the father and K that provided that the father and K would share joint legal custody of the child and that allocated the federal income tax deduction for the child between the father and K. In December, 2021, K filed motions requesting, inter alia, that she be entitled to claim the child as her dependent exemption for all tax years beginning in 2021. After a hearing held later that month, the trial court issued orders providing that, inter alia, as long as the father remained up to date with his child support and any arrearage payment schedule, the stipulated judgment with regard to tax deductions would remain in effect. The father did not file a motion for reconsideration or otherwise object to the court's orders. The father appealed to this court, alleging that the trial court erred in adopting the prior court order that allowed K, a custodial nonparent, to take federal child dependency tax exemptions for the child because the trial court lacked the authority to do so and claiming that states cannot allocate federal tax liability because doing so is within the "exclusive province of the United States Congress." *Held* that this court declined to review the plaintiff father's claim challenging the trial court's authority to allocate federal tax liability because he failed to raise it before the trial court: this court is not bound to

consider a claim unless it is distinctly raised at the trial or arose subsequent to the trial, and, in this case, the father had multiple opportunities before the trial court to raise his claim challenging that court's authority to allocate federal tax liability, such as filing an objection to K's motion that she be permitted to take the child tax exemption for all years going forward, objecting to the proposed orders that K filed in advance of the December, 2021 hearing, or raising the court's alleged lack of authority to issue K's requested order at the hearing, but he failed to do so.

Argued May 31—officially released August 8, 2023

Procedural History

Application seeking sole custody of the parties' minor child, brought to the Superior Court in the judicial district of Litchfield, where the court, *Gallagher*, *J.*, granted the motion to intervene as a defendant filed by Joan Behling; thereafter, the court, *Pickard*, *J.*, rendered judgment in accordance with a stipulated agreement entered into by the plaintiff and the intervening defendant; subsequently, the court, *Lobo*, *J.*, granted, inter alia, the intervening defendant's motion to claim a certain dependent exemption for the minor child for federal income tax purposes, and the plaintiff appealed to this court. *Affirmed.*

Jose L. DelCastilloSalamanca, for the appellant (plaintiff).

James D. Hirschfield, for the appellee (intervening defendant).

Opinion

CLARK, J. In this child custody action, the plaintiff father, Raul Ochoa, appeals from the trial court's order permitting the intervening defendant, Joan Behling, the minor child's maternal grandmother who has sole legal and physical custody of the child,[1] to continue to claim a federal income tax dependency exemption for the

[1] The minor child's mother, Kathleen Behling, was also a defendant in the underlying action. She, however, did not participate in this appeal. Therefore, all references to the defendant in this opinion are to Joan Behling only.

child.[2] On appeal, the plaintiff claims that the trial court erred "in adopting [a] prior court order" that allowed the defendant, a custodial nonparent, to take certain federal child dependency tax exemptions for the child because the court lacked the authority to do so. In his view, "states cannot allocate federal tax liability, as doing so is within the exclusive province of the United States Congress." We decline to review the plaintiff's claim on appeal because it was not raised before the trial court.

The following procedural history is relevant for present purposes. On October 10, 2012, the plaintiff brought this action against the child's mother, Kathleen Behling, seeking sole custody of their minor daughter. On February 4, 2013, the trial court, *Gallagher*, *J.*, granted a motion to intervene filed by the defendant, the child's maternal grandmother. The parties subsequently entered into an agreement that provided, inter alia, that the plaintiff and the defendant would share joint legal custody of the child. The agreement also provided that the defendant "shall be allowed to take the tax deduction for the minor child for every two out of three years, commencing with the 2015 tax year" and that

[2] On December 30, 2022, after the plaintiff filed his appeal from the court's tax credits order, the plaintiff filed a separate appeal from the trial court's November 18, 2022 decision granting the defendant's March 1, 2022 motion for contempt. The Office of the Appellate Clerk treated that appeal as an amendment to the present appeal pursuant to Practice Book § 61-9. Although the plaintiff filed his initial appellate brief on September 20, 2022, which was before the filing of the amended appeal, he never sought permission to file a supplemental brief addressing the issues in his amended appeal. Because the plaintiff has not briefed any issues related to the trial court's decision granting the defendant's motion for contempt, we deem any claims related to the contempt order abandoned. See, e.g., *Gray* v. *Gray*, 131 Conn. App. 404, 411, 27 A.3d 1102 (2011) ("We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.)).

the plaintiff "shall be able to take a tax deduction once every third year, commencing the 2014 tax year." On April 10, 2014, the trial court, *Pickard*, *J.*, rendered a stipulated judgment in accordance with the agreement.

On April 13, 2021, the defendant filed a postjudgment motion for modification, requesting that she be allowed to relocate to Wisconsin with the child. Specifically, she alleged that "I'm now retired and can't afford the rent in [Connecticut]. [I would] like to move back to [Wisconsin] where my family lives. Rents are cheaper and [I would] have help."

On December 7, 2021, before any hearing on the motion for modification was held, the defendant also filed a "motion for order," which explained that the plaintiff was "currently receiving" a 2021 child tax credit for the child even though the defendant "[was] entitled to claim [the child] as her dependent exemption in 2021" pursuant to the stipulated judgment. The defendant requested that the court order the plaintiff "to unenroll from the child tax credit program for 2021 so that [she] can enroll for the child tax credit and be entitled to claim same on her 2021 income tax returns." The defendant also sought an order that she be "entitled to claim the minor child as her dependent exemption for all tax years from 2021 forward for so long as the child is available to be taken as a dependent exemption."

On December 15, 2021, the defendant filed a second "motion for order" in which she requested that she be awarded "sole legal and physical custody" of the child. She argued, inter alia, that if her motion for modification were granted, which would permit her to live in Wisconsin with the child, it would "make communication with the plaintiff even more difficult" and that she "needs to be in a position to be able to make decisions relating to significant issues pertaining to [the child's] medical,

educational, religious, social and/or emotional development . . . ."

On December 22, 2021, the court held a hearing on the defendant's motion for modification. The court also permitted argument on some of the other related pending motions, including, inter alia, the defendant's December 7, 2021 motion for order, which requested that the court order the plaintiff to unenroll from the child tax credit program for 2021 and that the defendant be entitled to claim the minor child as a dependent for all tax years going forward. The plaintiff's counsel argued that, because the plaintiff "is no longer employed at his place of employment, there's no monthly [or] weekly payment of the advanced child credit because he's no longer working. So, there's no need to unenroll for something that doesn't exist." The plaintiff's counsel clarified, however, that "[i]f it's something that is corresponding to 2021, then it's entitled to [the defendant]." He indicated that he would look at the issue and work with opposing counsel to resolve it. The plaintiff's counsel, however, opposed the defendant's proposed order that she be entitled to claim the federal tax dependency exemption for all years going forward. He argued that the plaintiff would be able to provide child support and that those benefits should be a function of the child support orders, instead of something separate and apart.

On December 23, 2021, the trial court, *Lobo*, *J.*, granted the defendant's April 13, 2021 motion for modification, stating that the "[defendant] may relocate with the child to Wisconsin," and granted the defendant's motion for "sole legal and physical custody" of the child.[3] On that same day, the court also issued an order

[3] The plaintiff has not challenged the court's orders granting the defendant's motion for modification or its order granting the defendant sole legal and physical custody of the child.

on the defendant's December 7, 2021 motion for order, which provided in relevant part: "Provided [that] the plaintiff . . . remains up to date with his child support and consistent with any arrearage payment schedule, the stipulation agreement . . . for tax deductions pertaining to the minor child shall remain in effect. If plaintiff father is not in compliance with child support orders or any arrearage payments, [the defendant] shall claim the plaintiff's . . . child tax deduction for that year so long as the child is available to be taken as a dependent exemption. . . . The plaintiff is ordered to unenroll from the child tax credit program for 2021, by January 31, 2022, so that [the defendant] can enroll for the child tax credit and be entitled to claim same on her 2021 income tax returns."[4] The plaintiff did not file a motion for reconsideration or otherwise object to the court's order. This appeal followed.

Because the plaintiff failed to raise the present claim before the trial court, we decline to review it on appeal. It is well known that this court is not "bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial

[4] The order further provided that the "plaintiff . . . shall sign up the minor child for any and all Social Security benefits to which she is entitled by the end of January, 2022. . . . The plaintiff shall provide proof to the defendant of stimulus money received as calculated pertaining to the minor child. The plaintiff shall reimburse [the defendant] for [60 percent] of the stimulus check money received attributed to the minor child by the end of February, 2022, or establish an arrearage payment regarding same during the family support magistrate hearing scheduled for January, 2022."

court and the opposing party." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 618, 64 A.3d 1251 (2013); see also *Cunniffe* v. *Cunniffe*, 150 Conn. App. 419, 441, 91 A.3d 497 (same), cert. denied, 314 Conn. 935, 102 A.3d 1112 (2014).

Our review of the record shows that the plaintiff had multiple opportunities before the trial court to raise the present claim that the court lacked authority to adopt a prior court order that allowed the defendant to take certain federal child dependency tax exemptions but never did so. First, the plaintiff did not file an objection to the defendant's motion for order that requested, among other things, that the defendant be permitted to take the child tax exemption for all years going forward. Second, the plaintiff did not file an objection to the proposed orders that the defendant filed on December 15, 2021, in advance of the parties' December 22, 2021 hearing. Those proposed orders once again requested that the court, inter alia, allow the defendant "to claim the minor child as her dependent exemption for all tax years commencing 2021 and going forward for so long as the child is available to be taken as a dependent . . . ." Third, when the issue regarding the tax exemption arose at the December 22, 2021 hearing, the plaintiff failed to raise the court's alleged lack of authority to issue the defendant's requested order.[5] Accordingly, we decline to review the plaintiff's claim. To do so "would result in a trial by ambuscade of the trial judge." *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 265, 828 A.2d 64 (2003).

The judgment is affirmed.

In this opinion the other judges concurred.

[5] We note that, at oral argument before this court, the plaintiff's counsel specifically was asked whether he raised this argument in the trial court. The plaintiff's counsel conceded that "[i]t wasn't raised, Your Honor."

OFFICE OF CHIEF DISCIPLINARY COUNSEL *v.* ROBERT O. WYNNE (AC 44763)

Elgo, Suarez and Seeley, Js.

Syllabus

The plaintiff, the Office of Chief Disciplinary Counsel, appealed from the judgment of the trial court approving two applications to become supervising attorneys to the defendant, a deactivated attorney. The defendant had been placed on interim suspension from the practice of law in January, 2021, until further order of the court. In February, 2021, L, an attorney, filed an application to become the defendant's supervising attorney pursuant to the applicable rule of practice (§ 2-47B). In March, 2021, the court heard argument on the threshold issue of whether Practice Book § 2-47B prohibited the defendant from having any communication with clients or third parties regarding matters that were the subject of representation by the supervising attorney or his firm. In its memorandum of decision, the court concluded that, pursuant to Practice Book § 2-47B, a court may expressly permit, by written order, a deactivated attorney who is employed by a supervising attorney in the role of paralegal or legal assistant to communicate with clients and third parties regarding matters that are the subject of representation by the supervising attorney or his or her firm, provided that the communication does not amount to engaging in the practice of law. Thereafter, the court held a hearing on the application itself. L testified that the defendant would initially work remotely and that he could not give a date by which the defendant would be physically present in the office with him. Shortly after the hearing, D, another attorney, also filed an application to become a supervising attorney. The court approved both applications and thereby appointed L and D to serve as supervising attorneys for the defendant. The plaintiff filed this appeal in June, 2021. In July, 2022, however, L and D filed a motion to terminate their supervising attorney relationships with the defendant, and the trial court granted the motion in November, 2022. In light of this development, this court, sua sponte, ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed as moot. In their briefs, both parties argued that this case should not be dismissed as moot because the issues raised by the plaintiff qualify for the "capable of repetition, yet evading review" exception to the mootness doctrine. *Held* that the plaintiff's appeal, claiming that the trial court improperly approved the supervising attorney applications and improperly held that a court may expressly permit a deactivated attorney who is employed by a supervising attorney in the role of paralegal or legal assistant to communicate with clients and third parties regarding matters that are the subject of representation by

the supervising attorney or his or her firm, provided that the communication does not amount to engaging in the practice of law, was moot: there was no practical relief that could be afforded to the plaintiff, as the defendant was neither being supervised remotely nor was he employed as a paralegal with the ability to communicate with clients or third parties, and, therefore, there existed no live controversy; moreover, the plaintiff's claims were not properly subject to appellate review under the "capable of repetition, yet evading review" exception to the mootness doctrine, as the effect of the challenged court order, namely, the remote supervision of the defendant and his role as a paralegal with the court's written permission to communicate with clients and third parties was not, by its very nature, of limited duration because the defendant's suspension would conclude only upon further order of the court, and, as such, the defendant's suspension was still ongoing and theoretically "indefinite"; furthermore, the controversy between the parties was not durationally limited by the very nature of the claim or circumstances but rather became moot due to an external factor, namely, the supervising attorneys' choice to terminate their relationship with the defendant, that was not inherently present in every case similar to the one before this court, so there was no "insurmountable time constraint" inherent to this type of dispute that would render the substantial majority of these challenges moot in the future; accordingly, this court lacked subject matter jurisdiction to consider the plaintiff's claims.

Argued February 6—officially released August 8, 2023

Procedural History

Presentment by the plaintiff for alleged professional misconduct by the defendant, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Sheridan*, *J.*; judgment suspending the defendant from the practice of law on an interim basis until further order of the court; thereafter, the court, *Sheridan*, *J.*, granted applications to become supervising attorneys filed by Sergei Lemberg et al., and the plaintiff appealed to this court; subsequently, the court, *Cobb*, *J.*, granted the motion to terminate their supervising attorney relationships with the defendant filed by Sergei Lemberg et al. *Appeal dismissed.*

Leanne M. Larson, first assistant chief disciplinary counsel, for the appellant (plaintiff).

Patrick Tomasiewicz, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, the Office of Chief Disciplinary Counsel, appeals from the judgment of the trial court approving two applications to become supervising attorneys to the defendant, Robert O. Wynne, a deactivated attorney.[1] On appeal, the plaintiff argues that the court improperly (1) approved the applications to become the defendant's supervising attorneys in light of their proposal to supervise the defendant remotely and (2) held that, pursuant to Practice Book § 2-47B, a court may expressly permit, by written order, a deactivated attorney who is employed by a supervising attorney in the role of paralegal or legal assistant to communicate with clients and third parties regarding matters that are the subject of representation by the supervising attorney or his or her firm, provided that the communication does not amount to engaging in the practice of law. During the pendency of this appeal, however, the trial court granted a motion to terminate the supervising attorney relationships at issue. As such, we ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed as moot. In their briefs, the parties argue that the appeal is not moot under the "capable of repetition, yet evading review" exception to the mootness doctrine.[2] We are not persuaded that

[1] Pursuant to Practice Book § 2-47B (a) (1), "[a] 'deactivated attorney' is an attorney who is currently disbarred, suspended, resigned, or on inactive status."

[2] In its supplemental brief on appeal, the plaintiff also asserts that this appeal should not be dismissed as moot because it qualifies for the "collateral consequences" exception to the mootness doctrine. "[T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not." *Putman* v. *Kennedy*, 279 Conn. 162, 169, 900 A.2d 1256 (2006). In the present case, the plaintiff does not allege that it will suffer any collateral consequences from a dismissal. Instead, it focuses on potential harm to the public, in particular, clients of other lawyers. Such concerns properly are considered when determining whether the claim is capable of repetition, yet evading review. Consequently, the plaintiff's

this exception applies and, therefore, dismiss this appeal for lack of subject matter jurisdiction.

The following undisputed facts are relevant to the resolution of the plaintiff's appeal. The defendant was placed on interim suspension from the practice of law on January 27, 2021, until further order of the court. On February 24, 2021, Attorney Sergei Lemberg filed an application to become the defendant's supervising attorney (application) pursuant to Practice Book § 2-47B. On March 19, 2021, the court heard argument on the threshold issue of whether Practice Book § 2-47B (a) (3) (F) and (b) (1) and (2) (A) and (B) prohibit the defendant from having any communication with clients or third parties regarding matters that are the subject of representation by the supervising attorney or his or her firm.

In its March 25, 2021 memorandum of decision, the court concluded that, "pursuant to Practice Book § 2-47B, a court may expressly permit, by written order, a deactivated attorney who is employed by a supervising attorney in the role of paralegal or legal assistant to communicate with clients and third parties regarding matters that are the subject of representation by the supervising attorney or his or her firm, provided that the communication does not amount to engaging in the practice of law."

Thereafter, on May 26, 2021, the court held a hearing on the application itself. Lemberg testified that the defendant would initially work remotely and that he could not give a date by which the defendant would be

collateral consequences claim is without merit. Furthermore, the plaintiff does not provide specific examples of the public or clients suffering prejudicial collateral consequences. Therefore, we conclude that the plaintiff's argument amounts to mere conjecture. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) ("speculation and conjecture . . . have no place in appellate review" (internal quotation marks omitted)).

physically present in the office with him. On May 27, 2021, Attorney Mark Dubois also filed an application to become a supervising attorney. By order dated May 27, 2021, the court approved both applications and thereby appointed Lemberg and Dubois to serve as supervising attorneys for the defendant. The plaintiff filed this appeal on June 7, 2021.

Following the commencement of this appeal, both supervising attorneys, on July 18, 2022, filed a motion to terminate the supervising attorney relationship with the defendant. On November 22, 2022, the trial court granted the motion. In light of this development, this court, sua sponte, ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed as moot. In their briefs, both parties argue that this case should not be dismissed as moot because the issues raised by the plaintiff qualify for the capable of repetition, yet evading review exception to the mootness doctrine.

We first set forth the relevant legal principles governing whether a claim on appeal is moot. "Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot . . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary."

(Internal quotation marks omitted.) *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, 132 Conn. App. 757, 762, 34 A.3d 1001 (2012).

We conclude that the plaintiff's appeal is moot because no practical relief can be afforded to the plaintiff. As the facts currently stand, the defendant is neither being supervised remotely nor is he employed as a paralegal with the ability to communicate with clients or third parties. Therefore, there exists no live controversy, and the plaintiff's appeal is moot.

We next set forth the relevant principles of the capable of repetition, yet evading review exception to the mootness doctrine on which the parties rely. "Our cases reveal that for an otherwise moot question to qualify for review under the 'capable of repetition, yet evading review' exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995).

We conclude that the first requirement is dispositive. Our Supreme Court has held that "[t]he first requirement of the foregoing test 'reflects the functionally insurmountable time constraints present in certain types of disputes. . . . Paradigmatic examples are abortion cases and other medical treatment disputes.'

. . . 'The basis for the first requirement derives from the nature of the exception. If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced. Thus, there is no reason to reach out to decide the issue as between parties who, by hypothesis, no longer have any present interest in the outcome.' " (Citation omitted.) *Wendy V.* v. *Santiago*, 319 Conn. 540, 546, 125 A.3d 983 (2015).

The plaintiff's appeal fails to meet this first prong and, therefore, does not fall within the capable of repetition, yet evading review exception.[3] The effect of the challenged court order, namely, the remote supervision of the defendant and his role as a paralegal with the court's written permission to communicate with clients and third parties is not, by its very nature, of limited duration. The record reflects that the trial court did not set a durational limitation on the defendant's interim suspension; instead, the defendant's suspension will conclude only upon further order of the court.[4] As such, the defendant's suspension is still ongoing and theoretically "indefinite." Indeed, the only durational limitation to this appeal was created by the supervising attorneys' choice to terminate their supervisory relationships with the defendant. Therefore, the controversy between the parties was not durationally limited by the very nature

[3] The defendant concedes in his supplemental brief that "the issue in this matter is not of short duration. The order entered by the court had an indefinite term."

[4] During oral argument before this court, the attorney for the plaintiff represented that, although the pending suspension terminated in January, the defendant must appear before a standing committee and a three judge panel in order to be reinstated but currently cannot do so due to other pending disciplinary matters.

of the claim or circumstances but, rather, became moot due to an external factor that is not inherently present in every case similar to the one before us.[5] In light of the foregoing, we conclude that there is no "insurmountable time constraint" inherent to this type of dispute that would render the substantial majority of these challenges moot in the future.

Accordingly, we conclude that the controversy between the parties does not fall within the capable of repetition, yet evading review exception to the mootness doctrine and, therefore, we dismiss the appeal for lack of subject matter jurisdiction.

The appeal is dismissed.

In this opinion the other judges concurred.

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[5] In its supplemental brief, the plaintiff argues that, although it "does not possess statistics regarding the number and length of suspensions imposed by the courts," the duration of such suspensions is typically limited to three years. Similarly, the plaintiff asserts that, because a supervising attorney can terminate the relationship at any time, this creates a limited duration during which claims such as the present one can be asserted. We find these arguments unpersuasive in light of the relevant fact that the defendant's suspension is not limited to a set period of time and, therefore, there is no durational limitation inherent in the defendant's suspension or the supervisory relationships.