Circuit Court for Garrett County
Case No. C-11-CV-18-000014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1787

September Term, 2019

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GESTAMP WIND NORTH AMERICA, INC., ET AL,

v.

ALLIANCE COAL, LLC, ET AL.

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Fader, C.J.,
Kehoe,
Beachley,

JJ.

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Opinion by Kehoe, J.

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Filed: August 16, 2021

Gestamp Wind North America, Inc. and Roth Rock Wind Farm, LLC (collectively "Gestamp") appeal from a judgment of the Circuit Court for Garrett County that resolved their claims against Mettiki Coal, LLC and its affiliates[1] in Mettiki's favor. Gestamp raises two issues on appeal, which we have reworded: [2]

> 1. Did the circuit court err in granting Mettiki's motion for partial summary judgment as to Gestamp's claim for recovery of damages for obstruction of wind flow?
>
> 2. Did the circuit court abuse its discretion when it granted Mettiki's motion in limine to exclude evidence proffered by Gestamp to prove damages for future turbine cleaning costs and related remedial actions as impermissibly speculative?

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[1] The other appellees are: Alliance Resource Management, GP, LLC; Alliance Resource GP, LLC; Alliance Resource Partners, LP; Alliance Resource Operating Partners, LP; Alliance Holdings GP, LP; Alliance GP, LLC; and Alliance Coal, LLC. Gestamp's operative complaint alleges that Mettiki operates a coal processing facility as the agent for the other appellees.

[2] Gestamp frames its appellate contentions as follows:

> 1. Did the Circuit Court err in granting Mettiki's Motion for Partial Summary Judgement [sic] regarding Gestamp's claim for recovery of wind flow economic damages on the ground that Maryland law does not recognize a cause of action to prevent obstruction of wind flow when Gestamp pleaded causes of action well-recognized under Maryland law and genuine disputes of material fact existed as to its causes of action?
>
> 2. Did the Circuit Court err in granting Mettiki's Motion *In Limine* To Preclude Evidence Of Turbine Cleaning Costs and its exclusion of Gestamp's evidence concerning future damages on the grounds that the claimed damages were not causally related and merely speculative when the evidence shows that the claimed future damages are reasonably certain to mitigate the impact of the refuse?

The answer to both questions is no. We will affirm the judgment of the circuit court.

## BACKGROUND

### *Mettiki's coal processing operation*

Since 1977, Mettiki has operated a coal cleaning and processing plant near Oakland, Maryland. The plant was originally built to serve mines operated by Mettiki that were located in Maryland, but the last of these closed in 2007. Currently, product from a Mettiki mining operation in West Virginia is trucked to Mettiki's plant for processing. The material from the West Virginia mine is a mixture of coal, rock, clay, and other substances. As relevant to the issues in this appeal, at its Maryland site, Mettiki separates the usable coal from the other materials, which the parties refer to as "refuse." The usable coal is shipped to customers. The refuse is stored permanently on site in an immense pile. Refuse is transported unto the pile by conveyor belt and it is then sculpted by bulldozers into a series of horizontal terraces and diagonal slopes. After the process is completed, Mettiki is required to cover the slopes with topsoil and appropriate vegetation.[3]

Mettiki's activities at its coal processing facility are performed pursuant to a permit issued by the Maryland Bureau of Mines, which is part of the Maryland Department of the Environment. Among other things, the MDE regulates the maximum height of the refuse

[3] The visual effect is similar to a very large and horizontally elongated ziggurat.

pile. In 2000, the MDE granted Mettiki's application to increase the height of its refuse pile to an elevation of 3,203.5 feet.[4] In 2012, Mettiki applied for permission to increase the maximum height of its pile by twenty-five feet to an elevation of 3,285 feet. At that time, Gestamp's predecessor-in-interest was in the process of building its wind farm on an adjacent tract of land. Gestamp's predecessor did not oppose the application. The application was also approved in 2016. In 2017, Mettiki applied for permission to increase the elevation of its refuse pile by thirty-seven feet to a maximum elevation of 3,322 feet. Gestamp filed comments with the MDE opposing this application. As of the date of oral argument in this case, the MDE had not acted on the application.

*The Roth Rock wind energy project*

In 2009, Gestamp's predecessors-in-interest, Synergics Wind Energy, LLC and Synergics Roth Rock Wind Energy (collectively "Synergics") applied to the Maryland Public Service Commission for a certificate of public convenience and necessity for the construction and operation of a wind farm at a location called Roth Rock, which is near the crestline of Backbone Mountain and on land located adjacent to, and to the west of, Mettiki's operation. In its application, Synergics stated that there were "large, active, un-reclaimed, and reclaimed coal strip mines" along the easterly side of Backbone Mountain

[4] We gather that these elevations are measured from sea level. In its operative complaint, Gestamp asserts that the refuse pile is about 216 feet high (presumably when measured from a notional ground level).

adjacent to the project site. The application also stated that the view to the east from the project site "is dominated by coal mining operations and tailings mounds, some of which have reached heights of 3000 [feet]," which we take to be a reference to Mettiki's operation. The Commission approved the application in November 2009.[5]

In 2009, Mettiki entered into an easement agreement with Synergics that granted the latter rights-of-ways across portions of its properties for construction and access purposes. The terms of the easement agreement are relevant to Gestamp's negligence claim and we will discuss them in more detail later in this opinion.

The wind farm project eventually consisted of 20 wind turbines with associated infrastructure. Construction began in 2010. In 2011, Gestamp acquired Synergics' interest in the wind farm project and started operations in July 2011. In 2017, Gestamp received notice of Mettiki's pending application with the MDE to increase the permitted elevation of the refuse facility by 37 feet. Thereafter, Gestamp notified Mettiki that its refuse pile impeded the flow of wind into their turbines and that dust from Mettiki's refuse facility was damaging their equipment. Additionally, as we have related, Gestamp filed an opposition to Mettiki's application to the MDE to increase the height of its refuse pile.

[5] The Commission's decision noted that what was then codified as Md. Code, Pub. Util. Cos. § 7-201(c) limited the scope of the Commission's review of wind energy projects of the type proposed by Synergics to interconnection and reliability issues and that its approval "cannot be read as blessing the project from a health, safety or environmental perspective." Former § 7-207.1(c) is now subsection (d) of the statute.

*The present action*

In January 2018, Gestamp filed the current action. The operative complaint in this case is Gestamp's second amended complaint. In summary, the second amended complaint alleges that there are two aspects of Mettiki's operations that injure Gestamp.

The first is that Mettiki's refuse pile "has substantially increased" both in height and area. Because of these changes, the refuse pile "has significantly diminished the amount of wind passing through to the Wind Farm's turbines" with the result that the net energy production of the wind farm has been "substantially reduced," negatively affecting Gestamp's ability to provide power to its customers. We will refer to this theory of recovery as Gestamp's "wind interference claim."

Gestamp's second theory of recovery is that excessive amounts of fugitive coal dust from Mettiki's operations migrate onto the wind farm and have damaged, and will continue to damage, the blades and cooling units of six of the twenty wind turbines at Roth Rock. Gestamp asserts that this has necessitated additional cleaning and maintenance efforts, which will result not only in increased costs but also in a reduction of revenue because the turbines are not operating during repair and maintenance periods. Additionally, alleges Gestamp, the coal dust accumulation has "substantially reduced the average life span of the equipment." Gestamp alleged that the damages caused by fugitive coal dust have worsened over time as the size of Mettiki's refuse pile has increased and because Mettiki removed trees and other vegetative cover on its property. We will refer to this bundle of allegations as Gestamp's "coal dust damages claims."

The second amended complaint pled causes of action for negligence, trespass, and nuisance. All counts sought economic damages arising out of Gestamp's wind interference claim and its coal dust damage claim. Gestamp also requested injunctive relief.

Before the close of discovery, Mettiki filed a motion for partial summary judgment as to Gestamp's wind interference claim. After a hearing, the circuit court granted the motion because "nowhere in Maryland or in this country is there an expressly recognized cause of action relating to the impeding of airflow over property." In response to a question from counsel, the court clarified that it was not granting summary judgment on claims for damages "due to coal dust."

After the close of discovery, Mettiki filed a second motion for summary judgment on Gestamp's coal dust damage claims. The circuit court denied the motion after a hearing. Mettiki then filed motions in limine which sought to exclude parts of the evidence that Gestamp proposed to present at trial. The substance of each motion was that the evidence in question was either speculative or was of such a nature that it could be introduced only through the testimony of an expert witness, or both. In response, Gestamp withdrew all but two of its claims for damages. After a hearing, the trial court granted the remaining motions in limine. At the conclusion of the hearing, Mettiki renewed its motion for summary judgment as to the coal dust damage claims. Gestamp's counsel conceded that, in light of the court's rulings on the motions in limine, his client would be unable to prove damages. The court then granted judgment in Mettiki's favor on all claims.

## TWO STANDARDS OF REVIEW

The circuit court granted Mettiki's motion for partial summary judgment on Gestamp's wind interference claims. In reviewing a court's decision to grant summary judgment, we review the record considered in the light most favorable to the non-moving party to decide whether there are disputed issues of material fact. *Wells Fargo Home Mortgage v. Neal*, 398 Md. 705, 714, 922 A.2d 538 (2007). In determining whether there are such disputes, we construe reasonable inferences arising from the facts in favor of the non-moving party. *Educational Testing Service v. Hildebrant*, 399 Md. 128, 140 (2007).

To avoid summary judgment, the non-moving party must establish the existence of a genuine dispute of material fact. *Beatty v. Trailmaster Products*, 330 Md. 726, 737 (1993). To be "genuine" in this context, the dispute must be more than hypothetical or conjectural. "[T]he mere existence of a scintilla of evidence in support of the [non-moving party's] claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Id*. at 738. Put another way, "when a movant has carried its burden, the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts.'" *Id*. (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986)).

We apply a different standard as to the parties' contentions of the trial court's disposition of the motions in limine. In reviewing a court's ruling on such motions, appellate courts "are generally loath to reverse a trial court unless the evidence was plainly improperly admitted or excluded under law, or there is a clear showing of an abuse of

discretion." *CR-RSC Tower I v. RSC Tower I*, 202 Md. App. 307, 337 (2011) (cleaned up), *aff'd*, 429 Md. 387 (2012). A court abuses its discretion "when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo v. Gerstman*, 245 Md. App. 168, 201 (2020) (cleaned up).

## ANALYSIS

### THE WIND INTERFERENCE CLAIM

Gestamp asserts that the circuit court made two errors when it granted Mettiki's motion for partial summary judgment as to its wind interference claim.

First, says Gestamp, the circuit court was wrong when it concluded that Maryland does not recognize a cause of action for damages caused by impeding wind flow across a neighbor's property. Gestamp asserts that decisions by this Court and the Court of Appeals establish that an affected landowner has a remedy in nuisance. Additionally, Gestamp contends that it has a viable negligence claim against Mettiki because the latter owes a special duty to it arising out of the easement agreement between Mettiki and Gestamp's predecessor-in-interest. In support of these contentions, Gestamp points to policy considerations which in its view warrant our recognizing a cause of action for interference with wind flow.

Second, Gestamp argues that the circuit court erred because it did not address disputes as to issues of material fact. Gestamp argues that if the court had assessed the facts in the light most favorable to Gestamp as the non-moving party, the court would have denied Mettiki's motion.

Mettiki disagrees. It argues that Maryland courts have never "recognize[d] the right to the free flow of light and air across adjoining lands." Gestamp's negligence claim fails because the easement agreement does not create a special duty on Mettiki's part to preserve the existing wind flow patterns on Gestamp's property.[6]

We will affirm the decision to grant the motion for summary judgment. We will address the nuisance and negligence claims separately.

A

Nuisance is a cause of action that provides property owners protection from "substantial interferences with the possession of land." *Blue Ink, Ltd. v. Two Farms, Inc*., 218 Md. App. 77, 92 (2014) (citing, among other authorities, *Wietzke v. Chesapeake Conference Ass'n,* 421 Md. 355, 373–74 (2011)). As we explained in *Blue Ink*, Maryland has adopted the conceptual approach set out in section 821D of the Restatement (Second) of Torts (1965), which defines nuisance as "a nontrespassory invasion of another's interest

[6] Without further elaboration, both parties characterize their respective rights to conduct their activities as "vested." Neither Gestamp nor Mettiki explains why this would matter in the context of their appellate assertions and we express no opinion on the matter.

in the private use or enjoyment of land." *Id.* (citing *Rosenblatt v. Exxon*, 335 Md. 58, 80 (1994); and *Exxon Corp. v. Yarema*, 69 Md. App. 124, 147 (1986)). To be actionable, the invasion must cause an "unreasonable and substantial" interference with the plaintiff's property rights. *Blue Ink*, 218 Md. App. at 93–94 (citing *Exxon Mobil Corp. v. Albright* (*Albright I* ), 433 Md. 303, 409–11, modified on other grounds, *Exxon Mobil Corp. v. Albright* (*Albright II*), 433 Md. 502 (2013); and *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 485–86 (2013)). Deciding whether an asserted interference in the plaintiff's property rights rises to the level of an actionable nuisance requires "a balanc[ing] of the competing property interests at stake." *Wietzke*, 421 Md. at 382–83.

Gestamp's nuisance claim is based on the premise that Mettiki's refuse pile has caused changes to the velocity of the wind that crosses its wind farm. Gestamp asserts that, if the refuse continues to expand at its present rate, the wind flow at the Roth Rock facility will continue to be reduced. Nonetheless, we conclude that Gestamp does not have a cause of action for nuisance based on the facts before the circuit court. The current state of the law in Maryland is that, absent an agreement between the parties or a government regulation, a property owner has no right to prevent a neighbor from altering its property in ways that affect air and light on the plaintiff's property. This has been the settled Maryland law since at least 1857, when the Court of Appeals refused to apply the English common law rule of "ancient lights"—that property owners could acquire negative prescriptive easements over neighboring properties for access to air and light—because the doctrine was "not reasonably applicable to our rapidly growing towns and cities." *Cherry v. Stein*, 11 Md. 1,

7 (1858). Although they are not numerous, the decisions of the Court of Appeals and this Court in the intervening years have been consistent with *Cherry*. *See Macht v. Department of Assessments of Baltimore City*, 266 Md. 602, 605 (1972) ("[T]he owner of land in fee holds all the complex elements of a single right, a bundle of sticks, if you will, which include not only the right to use the surface, but so much of the superjacent airspace as he can use, as well as the subjacent reaches below."); *Friendship Cemetery v. City of Baltimore*, 197 Md. 610, 621-622 (1951) ("It is true that if a landowner is to have full enjoyment of his land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."); *see also, Homewood Realty Corp. v. Safe Deposit & Tr. Co. of Baltimore*, 160 Md. 457, 472 (1931); *Kulbitsky v. Zimnoch*, 196 Md. 504, 508 (1950); *cf., Stansbury v. MDR Development*, 161 Md. App. 594, 609 (2005), *aff'd*, 390 Md. 476 (2006) (holding that an owner of bottom land had a property interest in the air space above her subaqueous property and that interest included the right to build and maintain a drawbridge).

Of these decisions, *Kulbitsky* is particularly instructive because it involved a request by property owners for an injunction to require a neighbor to remove a newly-constructed shed because it partially blocked the sunlight in their backyard. 196 Md. at 507. The Court of Appeals affirmed the judgment of the circuit court denying the injunction because the shed was constructed according to a permit issued by the local zoning office and the shed complied with the applicable height requirements set out on the zoning ordinance. The

Court concluded that, although an injunction might be available to remedy a violation of a zoning ordinance, "the doctrine of ancient lights and prescriptive easements of light and air is not recognized in Maryland[.]" In a manner analogous to the shed in *Kublitsky*, Mettiki's coal processing facility is conducted pursuant to a permit issued by the MDE and Gestamp does not assert that Mettiki operations violate any statute, regulation or permit condition.

B

Gestamp's arguments that the circuit court erred in granting Mettiki's motion for summary judgment on its negligence claim are also unpersuasive.

"In Maryland, in order to establish a cause of action for negligence, a plaintiff must prove: a duty owed to the plaintiff or to a class of which the plaintiff is a part; a breach of that duty; a causal relationship between the breach and the harm; and damages suffered." *Walpert v. Katz*, 361 Md. 645, 655 (2000) (cleaned up). In cases such as the present one, where the only damages claimed are economic, Maryland courts require an "intimate nexus [between the tortfeasor and the injured party] as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent." *Id.* at 658. Gestamp argues there is an "intimate nexus" between itself and Mettiki because they are in privity of contract, the contract being the 2009 easement agreement between Mettiki and Gestamp as the successor-in-interest to Synergics. We do not agree.

In this context, the term "duty" is shorthand for "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."

*Gourdine v. Crews*, 405 Md. 722, 745 (2008) (quoting W. Page Prosser *et al*., Prosser And Keeton On The Law Of Torts § 53 at 356 (5th ed.1984)). In other words, "the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts of the defendant." *Gourdine*, 405 Md. at 745. "The existence of a duty is a question of law, to be decided by a court." *Doe v. Pharmacia & Upjohn Co., Inc*., 388 Md. 407, 414 (2005).

In the present case, the duty that Gestamp seeks to impose upon Mettiki is a duty to do nothing that will interfere with the efficiency of its wind turbines. There is nothing in the easement agreement that suggests that, in signing it, Mettiki agreed to such an obligation.

In the easement agreement, Mettiki granted Synergics: (1) a permanent easement to construct, operate, and maintain power lines across a portion of Mettiki's property to the wind farm site, (2) a permanent easement to construct, use, and maintain a road across another part of the property for access to the wind farm, and (3) a temporary easement to use a third portion of Mettiki's property as a staging area for construction purposes. The three areas are depicted on plats attached to the easement agreement and are defined as the "premises" in the agreement. None of these areas include any part of Mettiki's refuse pile. Section 3.4 of the agreement states that Mettiki

> shall not interfere with Grantee's use of the Premises or allow any uses of the Property[7] immediately adjacent to the Premises that would interfere with its use by Grantee as contemplated herein.

The easement agreement certainly imposes duties upon Mettiki but the agreement is clear that the scope of those duties was limited to the parcels that were described in the easement agreement. The easement does not purport to restrict Mettiki's use of any other portion of its property, including the refuse pile. "While a contract may serve to define the nature of the obligation undertaken, and thus serve to identify the allocation or assumption of duties among various parties, it will not create a legal duty where one does not exist." *Council of Co-Owners Atlantis Condominium v. Whiting-Turner Contracting Company*, 308 Md. 18, 32 (1986). The easement agreement does not restrict Mettiki's use of those portions of its property that are not subject to the easement. Nor does the easement purport to restrict the uses that Mettiki can make of those parts of its property that aren't subject to the easement. Therefore, in our view the easement agreement cannot be a basis for a legal conclusion that Mettiki was under a duty to restrict the scope of its operations so as to not interfere with the wind flow to Gestamp's facility.[8]

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[7] The easement agreement defines "Property" by referring to the same plats that depict the areas subject to the easement of the power line, the easement for the access road and the easement for the staging area.

[8] Gestamp also asserts that whether there is an intimate nexus is a question of fact and that there is a "genuine dispute of material fact" as to this issue. However, Gestamp does not identify any material facts that are in dispute as to the question of duty. It has therefore

C

Gestamp also directs our attention to decisions from other jurisdictions to support its wind interference claim. First, it cites to *Romero v. Bernell*, 603 F. Supp. 2d 1333, 1335 (D. N.M. 2009), and *Contra Costa Water District v. Vaquero Farms*, 58 Cal. App. 4th 883, 893–95 (1997). These cases hold that, under New Mexico law (*Romero*) and California law (*Contra Costa*), the right to use wind to generate energy is a severable property interest. In order to resolve the parties' appellate contentions, we do not have to decide whether the right to use wind for generation purposes is a severable property interest under Maryland law. This is because the answer to that question has no bearing on the relevant legal issue before us, which is whether the owner of one property (Mettiki) has a legal duty to a neighbor (Gestamp) to restrict the former's lawful use of its property so as not to affect the latter's ability to use wind to generate electricity.

Gestamp argues that the court's analysis in *Choctaw, O. & T. R. Co. v. True*, 35 Tex. Civ. App. 309 (1901), supports its wind interference claim. In that case, the appellant railroad constructed a thirty-foot high embankment on a portion of Mrs. True's farm. *Id.* She filed a trespass action, claiming damages caused by the railroad's intrusion upon her property. The railroad then filed what today would be termed a counterclaim, asserting that it possessed the power of eminent domain, conceding that it had taken a portion of Mrs.

waived the issue. *See* Md. Rule 8-504(a)(6); *HNS Development, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 459 (2012)).

True's farm, and asking the jury to award damages for the taking. The case was tried only on that theory. *Id.* at 309–10. A witness testified that the embankment "impeded the wind . . . as to damage or impair the use of a windmill" on the property. *Id.* Without further explanation, the appellate court held that the testimony was admissible "in development of all the circumstances proximately resulting in the aggregated damages" claimed by the plaintiff. *Id*.

*True* was decided 120 years ago. In the intervening years, it does not seem to have been cited for the proposition that there is a cause of action against a neighboring property for impairment of wind flow. (This isn't surprising because the embankment at issue in the case wasn't located on a neighboring property but on Mrs. True's farm.) *True* provides at best negligible support for Gestamp's position.[9]

In its brief, Gestamp also points to policy considerations, such as the importance of wind energy in reducing Maryland's dependence upon fossil fuels, that suggest that this Court should adopt a different approach for actions brought by wind generation facilities

[9] Finally, at oral argument, Gestamp directed our attention to *Prah v. Maretti*, 108 Wis. 2d 223 (1982). Without delving too deeply into the facts of the case and the state of Wisconsin private nuisance law in 1982, it is sufficient to say that the Wisconsin Supreme Court held that a private nuisance action could provide a remedy to a property owner whose solar heating unit was partially blocked by a home built on a neighboring property, even though the neighbor's house complied with subdivision covenants and the local building code. *Id.* at 240. Among the problems with *Prah* from Gestamp's perspective is that the reasoning of the Wisconsin Supreme Court is flatly inconsistent with that of our Court of Appeals in *Kulbitsky*.

for interference with wind flow. The short answer to this argument is that we are bound by the decisions of the Court of Appeals that we have cited in our analysis.

D

Returning to the case before us, the undisputed evidence before the circuit court was that the height, location, and operation of Mettiki's refuse pile complied with the relevant provisions of the MDE permit. While Gestamp holds easements on certain portions of Mettiki's property, the easement agreement does not obligate Mettiki to conduct its operations in a manner that will not interfere with the passage of wind across its property. We are not persuaded by Gestamp's argument that the easement agreement creates a legal duty on Mettiki's part to conduct its business only in ways that do not affect the flow of wind. The Court of Appeals' holding in *Kulbistky* is controlling. The circuit court did not err in granting judgment in Mettiki's favor as to the wind interference claim.

THE COAL DUST DAMAGES CLAIMS

As we have related, after the close of discovery, Mettiki filed a motion for summary judgment on Gestamp's coal dust damages claims. The circuit court denied the motion. Mettiki then filed five motions in limine that sought to exclude various aspects of the evidence Gestamp proposed to introduce to prove its coal dust damages claims. The motions pertained to the admissibility of evidence regarding: (1) the source of dust found at the Roth Rock wind farm, (2) future revenue losses associated with additional maintenance and repairs caused by dust from Mettiki's operations, (3) increased

maintenance expenses caused by dust from Mettiki's operations, (4) future dust damage to control mechanisms in each wind turbine and (5) future expenses associated with cleaning and maintaining the wind turbine blades to alleviate coal dust damage. The circuit court scheduled a hearing on the motions about a week prior to trial. Prior to the hearing, Gestamp withdrew the first three claims. At the hearing, Gestamp conceded that it could not present evidence as to the fourth.

This left Gestamp's claim for future cleaning and maintenance expenses. At the in limine hearing, Gestamp's counsel explained to the circuit court that there were two components to his client's claim for damages:

First, Gestamp was seeking damages for "the cost of additional labor and materials needed to remove the particulate matter . . . from the blades on an ongoing basis." Counsel conceded that although periodic cleaning of wind turbines "should be performed," Gestamp was required "to go over and above that to remove the particulate matter" that would adhere to the blades of the wind turbines as a result of Mettiki's operations. In addition to its direct cleaning costs, Gestamp sought compensation for lost revenue for the periods that the turbines were not operating while the blades were being cleaned as a result of the accumulation of coal dust from Mettiki's operation.

Second, Gestamp sought compensation for future costs that would be incurred by periodic treatments of the turbine blades with a hydrophobic solution that, according to Gestamp, would "retard . . . in part, the adhesion of the particulate matter" emanating from

Mettiki's operations. Doing this would reduce the down time and cleaning expenses that would otherwise occur because of the coal dust from Mettiki's operations.

The critical witness for these parts of Gestamp's case would have been Aday Mederos Sosa, an employee[10] of Gestamp.

As to Gestamp's claim for additional blade cleaning expenses, Sosa would have testified that particulate matter adhered to the blades of wind turbines and that, over time, the accumulation of such material decreased the aerodynamic efficiency of the turbine blades. Therefore, turbine blades have to be periodically cleaned. Sosa would have told the jury that the interval between cleaning turbine blades was three years in what he termed "regular" wind farms. He would have explained that he considered two wind farms operated by Gestamp in Nebraska to be regular wind farms. Sosa would have related that the blades on the Roth Rock turbines needed to be cleaned more frequently than those on "regular" wind farms because excessive amounts of coal dust and other types of particulate matter from Mettiki's operation were adhering to the blades on the Roth Rock wind turbines. Finally, he would have presented information to the jury as to why the turbine blades at Roth Rock would have to be cleaned frequently, the expenses incurred by

[10] In its motion in limine, Mettiki identified Sosa as an "employee" of Gestamp without further elaboration. In its brief, Gestamp asserts that, during the periods relevant to the litigation, Sosa was initially Gestamp's Technical Director and was later promoted to Manager of Technology. Mettiki argues that, because this information was not presented to the circuit court, it is not a basis for reversing the court's judgment. As we will explain later in our analysis, we agree.

Gestamp in cleaning them, and the revenue lost to Gestamp while the blades were being cleaned.

As to Gestamp's claim that it was entitled to damages for applying hydrophobic solutions to the blades of the Roth Rock turbines, Sosa would have testified that ice can accumulate on turbine blades and, when this occurs, the blades are less aerodynamically efficient, resulting in a reduction of electricity generated by the turbine. To ameliorate this problem, manufacturers market hydrophobic, that is, water repellent, compounds that are applied to wind turbine blades to reduce ice build-up. Before the solution can be applied, the blades must be cleaned. Sosa would have testified that in 2017, Gestamp cleaned three turbine blades at Roth Rock and then applied a hydrophobic coating to them. This was done so that Gestamp could evaluate the product's effectiveness. Sosa would have told the jury that, in the process of evaluating the effectiveness of the coating over time, he came to the serendipitous realization that the coating was also effective in slowing particulate (including coal dust) adhesion. Sosa would have told the jury that Gestamp would apply hydrophobic coating to turbine blades whenever they were cleaned to protect against coal dust damage but would not apply the coatings to prevent ice accumulation. Just as with Gestamp's claim for cleaning the turbine blades, Sosa would have presented evidence as to how frequently the hydrophobic product would have to be applied to the turbine blades at Roth Rock to counteract the destructive effects of the coal dust and other particulates emanating from Mettiki's operations.

Sosa's analysis and his conclusions were set out in a report titled: "Roth Rock Wind Farm LLC, Technical Documentation, Coal Mine Impact on Operations and Maintenance Activities" (the "technical documentation report"). In pre-trial discovery, Gestamp did not identify Sosa as an expert witness.

Mettiki filed a motion in limine to bar the admission of most of this evidence. In its motion, and as developed at the in limine hearing, Mettiki presented three lines of attack: The first was that Sosa's proposed testimony was impermissibly speculative and was therefore inadequate as a matter of law to support a damages award. The second was that critical parts of Sosa's anticipated testimony were inconsistent with concessions made by Keifer Jennings, Gestamp's corporate designee for purposes of discovery, during the latter's deposition. The third was that Gestamp had not identified Sosa as a possible expert witness. This was important, argued Mettiki, because Sosa would be testifying about matters such as industry standards for maintenance and cleaning of wind turbines and the efficacy of hydrophobic solutions to reduce the accumulation of coal dust particles on the blades of Gestamp's turbines, topics typically reserved for expert witnesses.

Mettiki based its arguments on the following:

(1) In his deposition, Sosa acknowledged that it was standard industry practice to periodically clean the blades of wind turbines to maintain their efficiency and effective life. He calculated Gestamp's additional cleaning costs that would be caused by dust from Mettiki's operation by comparing cleaning costs at Roth Rock to those experienced by "regular wind farms," a concept that he equated to the industry standard. However, Sosa

explained that by "regular wind farms," he meant Gestamp's two wind farms located in Nebraska. Sosa could point to nothing to support his assumption that conditions in Nebraska were standard for the industry or that they were sufficiently similar to conditions at Roth Rock to form a valid basis for comparison.

(2) Keifer Jennings, Gestamp's corporate designee, acknowledged in his deposition that Gestamp had no data as to how long it takes to clean turbines in Garrett County and surrounding areas because it did not attempt to obtain this information to determine whether cleaning and other maintenance costs at Roth Rock exceed those of other regional wind farms.

(3) Even though Gestamp proposed to use its Nebraska wind farms to establish industry norms, Sosa conceded that he didn't know how long it would take to clean turbine blades at its Nebraska wind farms because Gestamp had never cleaned them. Although the technical documentation report stated that it took twenty-four hours to clean a turbine blade at a regular wind farm, Sosa acknowledged that Gestamp had never cleaned a turbine blade at its Nebraska facilities and that the twenty-four hour figure referenced in the report was based on the time needed to repair a turbine blade at one of Gestamp's Nebraska wind farms.

(4) Sosa testified that it is standard industry practice to clean turbine blades once every three years but that Gestamp had not cleaned any of the turbine blades at Roth Rock during the first six years of operation. Jennings, its corporate designee, testified that, after Gestamp filed its lawsuit, it hired a third-party contractor to clean the blades on three of twenty wind

turbines at Roth Rock. Gestamp has not scheduled any further blade cleanings at Roth Rock.

(5) Sosa testified that the blades of the three turbines were cleaned in order to apply a hydrophobic de-icing solution to the turbine blades. Gestamp cleaned only nine blades in eight years of operation, none of which were cleaned because of excessive dust. Gestamp did not schedule any further blade cleanings.

(6) Sosa conceded that no manufacturer of hydrophobic coatings recommended their use for slowing down the accumulation of dust on turbine blades. Sosa did testify that he had reached that conclusion but the record before the circuit court did not contain any information as to what in his educational or professional experience qualified him to make such a conclusion.

Mettiki attached excerpts of the relevant portions of Sosa's deposition as an exhibit to its motion. These excerpts represented 15 pages of the 257 page transcript of the deposition. Neither party introduced the entire deposition transcript.

Gestamp opposed the motion. In pertinent part,[11] it asserted that Sosa's damage calculations were based on

> among other things, data acquired from cleaning 9 turbine blades at [Roth Rock], data collected from [Gestamp's] two wind farms in Nebraska . . .

[11] Gestamp also argued that all of the motions in limine should be denied because they were not timely filed and that they simply rehashed arguments previously rejected by the circuit court at earlier stages of the litigation. The circuit court did not agree. Gestamp does not make these arguments on appeal.

> various turbine manufacturer's service manuals . . . data collected during blade[] repairs, and reported industry standards (which require blade cleanings every three years).

Gestamp's response did not specifically address any of Mettiki's arguments as to why Sosa's analysis was flawed. Gestamp further argued this "underlying data" was the basis for Sosa's conclusion that hydrophobic coatings "generally retards adhesion of all materials thereby making its application reasonable and appropriate with regard to particulate matter."[12] Like Mettiki, Gestamp attached relevant portions of Sosa's deposition. These totaled nine pages of the 257 pages of the deposition.

Although the circuit court granted both parts of Mettiki's motion, it did so for different reasons. As to Gestamp's claim for damages for future applications of hydrophobic solutions, the court concluded that the evidence proffered by Gestamp was impermissibly speculative. The court stated:

> I'm going to grant the motion in limine to preclude evidence of turbine cleaning costs with this hydrophobic solution. They are speculation, at best, given the fact that only nine of 60 turbine [blades at Roth Rock] have been cleaned to date. None of those costs have been attributed to the accumulation of the coal dust on those blades. The only recognized use for this hydrophobic solution is for de-icing. There are no studies, and there is—it's not a recognized use to keep particulate matter from accumulating on the blades

[12] In support of this contention, Gestamp cited to two pages of Sosa's deposition. On those pages, Sosa did not discuss any "underlying data," *i.e.*, the "turbine manufacturer's service manuals," "data collected during blade repairs," or "reported industry standards" referenced by Gestamp in its response. Sosa did refer to his conclusion that was based on his personal observations of the effect of the water-repellant coating applied on one occasion to some of the turbine blades at Roth Rock.

> of these turbines, and I think that the Plaintiff has failed to prove, with any certainty, that the causation of the damage was from this failure to place this hydrophobic solution, so the motion's granted.

As to Gestamp's claim for compensation for future cleaning expenses, the court concluded that, if he were permitted to testify as to those topics, he would be testifying as a *de facto* expert witness. The court was concerned that "the testimony that would be given by this undisclosed expert may be given far more weight than it deserves since there is no recognized industry standard."

To this Court, Gestamp argues that the circuit court abused its discretion in granting the motion in limine. As to the court's ruling on its argument that it was entitled to damages for future applications of hydrophobic solutions to its turbine blades, Gestamp asserts that "[o]nce a party has made a motion in limine requesting that certain evidence be kept from the jury, the appropriate response by the opposing party is a proffer of the evidence that it seeks to introduce." We have no quarrel with this proposition, at least in the context of this case. At this point, however, we part company with Gestamp.

Instead of focusing on the record presented to the circuit court on Mettiki's motion, which included a total of 24 excerpt pages of Sosa's deposition, Gestamp included the entirety of his 257-page deposition in the record extract. Gestamp utilizes significant portions of this additional material to support its appellate contention that the circuit court abused its discretion in granting the motion in limine. In its brief, Gestamp does not distinguish between information contained in the excerpts presented to the circuit court and information derived from the remainder of the transcript. In effect, Gestamp asks us to

reverse the judgment of the circuit court based on information and arguments that were not presented to the circuit court in the first place.

In response, Mettiki asserts, "That is not how the appellate process works." Mettiki is correct. *See Cochran v. Griffith Energy Serv., Inc.*, 191 Md. App. 625, 662–63 (2010) ("Parties to an appeal are not entitled to supplement the record by inserting into the record extract . . . such foreign matter as they may deem advisable." (cleaned up) quoting *Rollins v. Capital Plaza Assocs.,* 181 Md. App. 188, 200 (2008)). In *Cochran*, we explained:

> This restriction is inherent in the scope of review prescribed by Rule 8–131, which generally limits the task of an appellate court to deciding only those issues that "plainly appear by the record to have been raised in or decided by the trial court." Md. Rule 8–131(a). Facts outside the record cannot be argued to or considered by the trial court, and thus have no influence on its judgment. Accordingly, an appellate court must confine its review to the evidence actually before the trial court when it reached its decision.

191 Md. App. at 663 (cleaned up) (citing *Hamilton v. State*, 127 Md. 312, 314 (1916)).

In its reply brief, Gestamp attempts to salvage its argument by asserting that excerpts from Sosa's deposition were attached as exhibits to Mettiki's motion in limine regarding the claim for turbine cleaning costs. This is correct, but there is nothing in that material that supports Gestamp's appellate contention that the circuit court abused its discretion in granting the motion. Gestamp also points to extracts from Sosa's deposition that were exhibits to other motions and responses by the parties at various times in the litigation. However, our focus is on what the parties presented to the court and argued to the court in the in limine hearing at issue in this appeal. Because Gestamp's appellate contentions are

based almost entirely on facts outside of the record, most of its arguments as to why and how the circuit court erred are not properly before us.

Focusing on what was properly before the circuit court, we will first address its ruling on Gestamp's contention that periodic application of hydrophobic compounds was necessary to prevent future coal dust damage to the wind turbine blades. Sosa conceded in his deposition that no manufacturer of those compounds recommended their use to retard particulate accumulation. Sosa did testify that it was his belief that hydrophobic coatings had just that effect, but the information that might have provided some validation to that conclusion, namely, his professional experience and educational background, was not presented to the circuit court. Based on what was before it, we cannot say that the court's conclusion that Gestamp's evidence was unduly speculative was "clearly against the logic and effect of facts and inferences before the court." *Gizzo*, 245 Md. App. at 201.

We reach the same conclusion as to the court's ruling on Gestamp's claim that it is entitled to compensation for cleaning its turbine blades more frequently to avoid coal dust damage. Sosa's proposed testimony as to the standards of the wind industry for cleaning turbine blades and how long it would take Gestamp to clean blades at Roth Rock as opposed to "regular" wind farms, would have been based in large part on his knowledge of industry practices and inferences drawn from information contained in service manuals for wind turbine blades. Because this testimony would have been "based upon specialized knowledge, skill, experience, training or education," it could only be presented to the jury through an expert witness. *Ragland v. State*, 385 Md. 706, 725 (2005). The circuit court's

conclusion that, if Sosa were permitted to testify to these matters, he would have done so as a *de facto* expert witness and that such testimony might have been "given far more weight than it deserves" was not one that was "clearly against the logic and effect of facts . . . before the court." *Gizzo*, 245 Md. App. at 201.

**THE JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.**