

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 9th day of December, 2021.

Present: All the Justices

Colonna’s Ship Yard Incorporated, Appellant,

against Record No. 200949
Circuit Court No. CL18-2169

Virginia Natural Gas, Inc., Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that the decision below should be affirmed.

Colonna’s Ship Yard Incorporated (“the Shipyard”), located in Norfolk, is a busy dry-docking facility on the East Coast. It employs approximately 1500 people and contains numerous fixtures, including eleven piers, fifty-six buildings, and three major dry docks. The Shipyard operates with over 200 open flame and other ignition sources — above ground, below ground, and underwater. Virginia Natural Gas, Inc. (“VNG”) is a public service corporation engaged in the transportation, delivery, and sale of natural gas in Virginia. VNG filed an action to condemn a 30-foot permanent easement over a portion of the Shipyard property to construct, install, inspect, and maintain a pipeline. The pipeline in question is a 24-inch, 1250 PSI natural gas pipeline that runs approximately 85 feet underneath the Shipyard’s property for a length of approximately 190 feet.

The Shipyard claimed over \$37 million in damages to the residue of the property, citing safety concerns caused by the pipeline. Pretrial disclosures and depositions revealed that the Shipyard planned to present evidence through appraisers, environmentalists, and other experts that the pipeline was incompatible with the operation of a shipyard due to the risk of a pipeline rupture or leak. The Shipyard intended to show that as a result, many aspects of the shipyard

operations would need to be adjusted to avoid potential safety risks. For example, the Shipyard claimed that much of the “hot work” — work that produces flames or sparks — performed on the property would have to be moved to accommodate a 660 foot “buffer zone.” The Shipyard also intended to show that the risks associated with the pipeline caused a diminution in market value of the property because it made the property less desirable to potential buyers.

VNG filed a motion *in limine* to exclude evidence and argument based on the possibility of a leak or rupture in the pipeline.¹ VNG argued that such evidence was inadmissible for two reasons. First, it contended that the possibility of a leak or rupture in the pipeline was speculative and the Shipyard presented no evidence of the likelihood of such an event. Second, specifically citing Virginia Supreme Court Rule 2:403(a), VNG argued that any probative evidence of an explosion was unfairly prejudicial and likely to mislead the jury into believing that possible future tortious injuries should be encompassed in the damages award. The Shipyard opposed the motion, arguing that the risks associated with the pipeline were not speculative and were largely based on VNG’s own statements.²

After hearing argument, the circuit court entered an order on October 31, 2019 granting VNG’s motion *in limine* and excluding all evidence relating to the possibility of a rupture or leak in the pipeline. The court concluded that the evidence of damages to the residue was predicated on the speculative possibility of a gas leak. It held that since neither party designated a witness to testify to the likelihood of an explosion due to a leak or rupture, the “admittedly remote possibility of an explosion caused by a leak or a rupture” has “little probative value under Virginia law; and what value it may have is ‘outweighed by the danger of unfair prejudice, or its likelihood of confusing or misleading the trier of fact.’ Virginia Supreme Court Rule 2:403 therefore requires its exclusion.”

The Shipyard objected to the order on the ground that its evidence regarding pipeline safety was not speculative. The circuit court rejected the Shipyard’s objections and held a

¹ VNG filed other motions *in limine* that are not at issue in this appeal.

² For instance, the Shipyard planned to introduce the following into evidence: VNG’s reports submitted to the Pipeline and Hazardous Materials Safety Administration regarding leaks in pipelines, VNG’s statements to investors through SEC filings about the “inherent risk” of placing natural gas pipelines near open flames, and VNG’s public safety campaign warning the public to be alert to the smell of gas.

pretrial conference in February 2020 to clarify what issues remained for trial in light of the order. The circuit court allowed the Shipyard to supplement its expert disclosures to “assign a modified value to the severance damages based exclusively on admissible parts of the expert opinions.” VNG moved to exclude the revised reports, arguing they still relied on excluded evidence regarding safety issues (and other matters).

On March 12, 2020, the circuit court granted VNG’s motion and excluded the amended reports because the Shipyard failed to “provide a new opinion on damages that omitted the excluded safety evidence.” The circuit court also found that the revised opinions were based on stigma damages without an adequate foundation for the calculation of those damages. In this order, the court summarized its prior rulings. In relevant part, the order stated that the court had previously excluded:

Evidence based on or related to the possibility that the Pipeline would leak or rupture, “including any reference to ‘buffer zones,’ ‘impact zones,’ ‘potential impact radius,’ safety issues or risks related to the presence of the Pipeline,” as remote or speculative and unfairly prejudicial or likely to mislead the jury[.]

The parties agreed to forego a jury trial on damages “for the sake of judicial economy” and agreed to the entry of a stipulated final order which awarded the Shipyard \$38,000 for the value of the easement and no damages for the remainder of the property. This appeal followed.

We granted the Shipyard an appeal on the following assignment of error:

The trial court erroneously granted VNG’s motion in limine to exclude all of [the Shipyard’s] evidence on residue damages, including all of the evidence listed in [the Shipyard’s] 4-27-20 proffer. This evidence related to safety issues and their effect on the property’s value. This evidence included damaging admissions by VNG, expert testimony about the cost to adjust the site to account for the presence of a high-pressure gas line, and the diminution of the property’s value to prospective purchasers.

In its brief, the Shipyard challenges the circuit court’s ruling that its evidence was speculative. It does not address whether that evidence was properly excluded as unfairly prejudicial under Virginia Supreme Court Rule 2:403.

“[A] party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling.” *Manchester Oaks Homeowners Ass’n, Inc. v. Batt*, 284 Va. 409, 421-22 (2012). This Court will not disturb a judgment if the appellant does not assign error

to every ground upon which the lower court's ruling rests. Otherwise, the appellant could "avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged." *Id.* at 422.

At the threshold, VNG argues that we are precluded from reaching the merits of the Shipyard's argument because the circuit court's decision to exclude the Shipyard's evidence of damage to the residue rested on two grounds, and the Shipyard challenges only one of them. VNG takes the position that the circuit court excluded the Shipyard's evidence as speculative and, in addition, as unduly prejudicial. The Shipyard challenges only the first ground. Consequently, VNG argues, the circuit court's alternate ground of exclusion stands unchallenged. The Shipyard responds that the order excluding evidence is best read as resting on a single ground, *i.e.* that the evidence was excluded on the basis that it was speculative. We conclude that VNG has the better of the argument.

The most natural reading of the two orders at issue is that the circuit court rested its decision to exclude the Shipyard's evidence on two separate grounds: (1) the evidence was speculative *and* (2) whatever marginal probative value it might have must be excluded as unduly prejudicial. The circuit court ruled in October 2019 that the Shipyard's evidence was speculative and had "little probative value under Virginia law; and what value it may have is 'outweighed by the danger of unfair prejudice, or its likelihood of confusing or misleading the trier of fact.' Virginia Supreme Court Rule 2:403 therefore requires its exclusion." If the circuit court had limited its ruling to excluding the evidence as irrelevant because speculative, there would have been no reason for the court to add language addressing unfair prejudice and for the court to specifically cite the rule that distinctly addresses that concept. *See* 1 McCormick On Evid. § 185 (8th ed. 2020) (evidence that is speculative is irrelevant); Va. Sup. Ct. R. 2:403 (addressing the exclusion of relevant evidence if its prejudice outweighs its probative value). Additionally, the court's March 2020 order stated that it had previously excluded the Shipyard's evidence "as remote or speculative and unfairly prejudicial or likely to mislead the jury." It would make little sense for the circuit court to superfluously mention unfair prejudice if the only ground of exclusion had been that the evidence was speculative. The language following the "and" cannot be read any way other than as supplying alternate grounds of decision. Moreover, this conclusion is supported by the fact that VNG articulated two separate grounds upon which the circuit court should exclude the evidence, namely, that it was speculative and that this evidence

would unduly prejudice VNG. At oral argument on its motion to exclude the evidence, VNG again reiterated its point that the evidence should be excluded on the separate grounds of relevance and undue prejudice.

The Shipyard did not present any argument to challenge the circuit court's alternate ruling relying on undue prejudice. Faithful adherence to our decision in *Manchester Oaks* requires us to affirm the trial court's decision.

This order shall be certified to the Circuit Court of the City of Norfolk.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. P. P. P.", written in a cursive style.

Clerk