Opinion issued January 20, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00910-CV

JON A. MARSHALL, Appellant

V.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 358, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 810, 140

MEMORANDUM OPINION

This appeal arises from a condemnation proceeding initiated by appellee, Harris County Municipal Utility District Number 358 ("MUD 358"), to acquire property belonging to appellant, Jon A. Marshall, for the construction of an offsite

drainage channel. Marshall filed a motion to dismiss the condemnation proceeding contesting the authority of MUD 358 to condemn the property and objected to the findings of damages assessed by the appointed special commissioners. The trial court denied Marshall's motion, finding after a hearing that MUD 358 had authority to condemn the property. Valuation of the taking and damages to the remaining property caused by the taking were tried to a jury.

On appeal, Marshall argues that (1) the trial court erred by denying his plea to the jurisdiction; (2) the court reporter erred by failing to record the entire proceeding; (3) the trial court erred by concluding that MUD 358 had the authority to condemn the property; (4) the trial court erred by excluding Marshall's evidence relating to post-construction damages and inverse condemnation; and (5) the trial court erred by failing to submit certain jury questions in the trial on damages.

We conclude that the trial court had jurisdiction and properly denied Marshall's plea to the jurisdiction. We also conclude that the error, if any, in failing to record the entire proceedings is harmless because the missing portions of the record are not necessary for the resolution of this appeal. Furthermore, we conclude that the trial court's determination that MUD 358 had authority to condemn Marshall's property must be upheld because Marshall has not challenged all the grounds that could support that determination. Finally, we conclude that the

trial court did not err by excluding evidence or by refusing to submit Marshall's proposed jury questions. We affirm.

Background

MUD 358 was created on March 17, 1993 by order of the Texas Water Commission. The order recited that the Water Commission considered and granted a petition for creation of the municipal utility district pursuant to Chapter 54 of the Texas Water Code. *See* TEX. WATER CODE ANN. §§ 54.001–.813 (Vernon 2002 & Supp. 2010) ("Municipal Utility Districts"). MUD 358 covered 85.478 acres of land, described by metes and bounds in the order.

On September 17, 1993, MUD 358 entered into an "interlocal contract" with Harris County Municipal Utility Districts Numbers 322 and 354. The contract designated MUD 358 as the "Regional District" for the Fairfield Village Community. The stated purpose for the contract was:

> [T]he organization and operation of [MUD] 358 as a regional district to coordinate the planning, construction, and maintenance of, and charging for the use of, the regional water, sanitary sewer, and drainage facilities and services needed to serve Fairfield Village and other regional facilities and services . . . in order to (1) fairly and equitably share the cost of the facilities and services, (2) benefit from the efficiencies resulting from regionalization, and (3) promote the orderly development of the land within Fairfield Village.

In June and July 2003, Harris County Municipal Utility Districts Numbers 396 and 397 accepted the terms of the interlocal contract by each signing a one-page document incorporating the interlocal contract by reference.

On June 26, 2001, Marshall purchased a 67.988-acre tract of land in northwest Harris County for $340,000, or $5,000 per acre. It is undisputed that Marshall's property is located outside MUD 358's boundaries.

On February 3, 2004, MUD 358 filed a statutory condemnation suit to acquire 17.473 acres of Marshall's property for "a public project relating to the construction, operation, and maintenance . . . of an offsite drainage channel." Upon filing of the petition with the trial court, special commissioners were appointed to assess the damages resulting from the condemnation. The commissioners scheduled a hearing for March 18, 2004, but at Marshall's request the hearing was reset for April 22, 2004. Neither Marshall nor a representative on his behalf attended the hearing. The commissioners awarded compensation to Marshall in the amount of $200,940.

Marshall filed objections to the award of the special commissioners on May 7, 2004, converting the proceeding into a judicial case. Through amended objections to the award and a plea to the jurisdiction, Marshall contended that MUD 358 lacked the authority or jurisdiction to bring its condemnation case and that MUD 358 had failed to properly invoke the jurisdiction of the trial court. Additionally, Marshall contended that MUD 358 failed to negotiate in good faith prior to filing its condemnation petition and that the amount of compensation awarded was less than that to which Marshall was entitled. MUD 358 later

amended its pleading to reduce the amount of property to be condemned from 17.473 acres ("the larger tract") to 5.927 acres ("the smaller tract"). Marshall argued that MUD 358 abandoned the condemnation suit by reducing the amount of land and that it failed to comply with Chapter 21 of the Texas Property Code. *See* TEX. PROP. CODE ANN. §§ 21.001–.103 (Vernon 2000, 2004, & Supp. 2010).

The trial court held a hearing on Marshall's motion contesting MUD 358's authority to condemn his property and challenging the validity of the condemnation proceeding. Following the hearing, the court denied Marshall's motion to dismiss and issued findings of fact and conclusions of law.

The court held a jury trial on the valuation of the property taken and damage to Marshall's remaining property caused by the taking. The jury returned a verdict, finding the market value of the 5.927 acres taken to be $65,197 and the damage to the market value of the remaining property to be $13,743.

Jurisdiction

Within his first two issues, Marshall contends that the trial court erred by denying his "Plea in Abatement, Plea to the Jurisdiction, and Motion to Dismiss." Within the argument section of his brief pertaining to these issues, Marshall asserts the trial court erred by denying his plea to the jurisdiction or simply asserts that the trial court lacked jurisdiction. However, a review of Marshall's brief and of the record of the proceedings below shows that Marshall is challenging MUD 358's

authority to condemn his property. Marshall cites no statute, case law, or authority of any kind to support his position that MUD 358's purportedly wrongful condemnation of land outside of its boundaries deprives the trial court of jurisdiction. We have found no such authority in our independent research.

The one argument that Marshall makes concerning jurisdiction has been expressly rejected by the Texas Supreme Court. Marshall contends that the trial court lost jurisdiction when MUD 358 filed amended pleadings seeking only the smaller tract instead of the larger tract that the special commissioners considered. The Texas Supreme Court has rejected this argument. *See FKM P'ship v. Bd. of Regents of the Univ. of Houston*, 255 S.W.3d 619, 626 (Tex. 2008). In *FKM Partnership*, the University of Houston's Board of Regents decided to condemn approximately 47,008 square feet of FKM's property. *Id.* at 624. After special commissioner's determined FKM's damages, FKM timely objected to the commissioner's award and requested a trial de novo in the county court at law. *Id.* The University amended its petition twice before the county court at law; the second amended petition sought approximately 1,260 square feet. *Id.* at 625. FKM contended that when the University filed an amended pleading, drastically reducing the amount of land sought to be condemned, it deprived the trial court of jurisdiction because the trial court is limited to reviewing the issues raised before the special commissioners. *Id.* at 626. The Supreme Court rejected that view,

holding the trial court retained jurisdiction. *Id.* Because this issue has been decided by the Texas Supreme Court, we conclude the trial court did not err by denying Marshall's plea to the jurisdiction.

We overrule this portion of Marshall's first three issues.

Incomplete Reporter's Record

Within his first issue, Marshall contends that the court reporter failed to make a full record of the trial and he is, therefore, entitled to a remand for a new trial. Specifically, Marshall asserts that the trial court impermissibly restricted his counsel during voir dire and that "many of the bench conferences and orders" are not part of the record.

Under Texas Rule of Appellate Procedure 34.6(f), a party is entitled to a new trial if: (1) it timely requested a reporter's record; (2) without that party's fault, a significant portion of the court reporter's notes, records, or electronic recording has been lost or destroyed or is inaudible; (3) the lost, destroyed, or inaudible portion of the reporter's record is necessary to the appeal's resolution; and (4) the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties. TEX. R. APP. P. 34.6(f); *see Landry's Seafood House-Addison, Inc. v. Snadon*, 233 S.W.3d 430, 437 (Tex. App.—Dallas 2007, pet. denied). Here, the portions of the record Marshall contends are missing are the voir dire and "many bench conferences and orders." However, Marshall has not

raised an issue concerning reversible error occurring during voir dire or the unspecified "bench conferences and orders." Because he has not raised an issue contending that the trial court committed reversible error during any portion of the missing record, we conclude that the missing record is not "necessary to the appeal's resolution." *See* TEX. R. APP. P. 34.6(f)(3). Accordingly, we overrule this portion of Marshall's first issue. *See Landry's Seafood House*, 233 S.W.3d at 430 (holding missing testimony not necessary to resolution of appeal where missing testimony did not relate to purported errors asserted on appeal).

We overrule this portion of Marshall's first issue.

Authority to Condemn Marshall's Property

In his first three issues, Marshall generally asserts that the trial court erred in concluding that MUD 358 had the authority to condemn his property. Specifically, Marshall asserts that the trial court erred by denying his "Plea in Abatement, Plea to the Jurisdiction, and Motion to Dismiss." Within these three issues, Marshall asserts: (1) section 54.201(b)(3) of the Texas Water Code does not allow a district to condemn land outside of its boundaries; (2) MUD 358 impermissibly delegated its power of eminent domain; (3) the taking was not permitted because there was no "public use," and (4) MUD 358 violated the Texas Open Meetings Act because it did not pass a separate resolution authorizing the condemnation of the smaller tract.

In his first two issues, Marshall presents legal arguments, primarily concerning interpretation of statutes. We review matters of statutory construction de novo. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). In construing a statute, our objective is to determine and give effect to the Legislature's intent. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). "If a statute's meaning is unambiguous, we generally interpret the statute according to its plain meaning." *Id.* In determining legislative intent, we look at the entire act as a whole, rather than isolated portions. *Id.*

In his third issue, Marshall contends that the evidence is legally and factually insufficient to support the trial court's findings of fact. We review a trial court's findings of fact for legal and factual sufficiency of the evidence by the same standards applied to a jury verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). We review a trial court's conclusions of law de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

1. Authority to Condemn

Marshall first contends that the language of the Water Code does not authorize MUD 358 to condemn his property because it is outside of MUD 358's boundaries and it is not necessary for MUD 358's use. MUD 358 responds that the Interlocal Cooperation Contracts Act ("the Act"), Chapter 791 of the Government

Code, to support its actions as a regional district[1] acting on behalf of MUDs 396 and 397. *See* TEX. GOV'T CODE ANN. §§ 791.001–.033 (Vernon 2004 & Supp. 2010). The Act "allows political subdivisions to contract with one another to more efficiently share resources and responsibilities." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdiv. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 322 (Tex. 2006) (citing TEX. GOV'T CODE ANN. § 791.00 ("The purpose of this chapter is to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state."). "Under the Act, a local government may contract with another local government to perform authorized governmental functions and services." *Id.* (citing TEX. GOV'T CODE ANN. § 791.011(a), (b)). "Local governments under the Act include municipalities, special districts, counties, and other political subdivisions, as well as combinations of such entities." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist.*, 212 S.W.3d at 322 (citing TEX. GOV'T CODE ANN. § 791.003(4)).

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[1] In his brief, Marshall asserts that MUD 358 never received Water Commission Approval to act as a statutory regional district under chapter 59 of the Water Code. However, "Regional District" is also the term used in the interlocal contract entered into by MUD 358 and the other MUDs servicing Fairfield. The trial court's findings of fact and conclusions of law only mention the interlocal contract, not chapter 59 of the Water Code. Furthermore, in its appellee's brief, MUD 358 does not purport to have authority as a "regional district" under Chapter 59. We therefore address only the authority under the Interlocal Cooperation Contracts Act.

Here, the trial court made specific findings of fact relating to the interlocal contract. The court found:

> 4. That on March 1, 1992, the District entered into the Contract for Financing, Operation, and Maintenance of Regional Water, Sanitary Sewer, and Drainage Facilities for the Fairfield Village Community (the "Regional Contract") through which the District agreed to act as "Regional District' for the other municipal utility districts within Fairfield. Pursuant to the Regional Contract, the District is obligated to lease, acquire, construct and extend Regional Facilities for providing water, sanitary sewer, and drainage facilities, within the Service Area of the Regional District.
>
> . . . .
>
> 11. On June 17, 2003, Harris County Municipal Utility District No. 397 accepted the Contract for Financing, Operation, and Maintenance of Regional Water, Sanitary Sewer, and Drainage Facilities for the Fairfield Village Community.
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> 12. On July 29, 2003, Harris County Municipal Utility District No. 396 accepted the Contract for Financing, Operation, und Maintenance of Regional Water, Sanitary Sewer, and Drainage Facilities for the Fairfield Village Community.

The trial court also made the following conclusion of law:

> 4. The District was authorized to enter into the Contract for Financing, Operation, and Maintenance of Regional Water, Sanitary Sewer, and Drainage Facilities for the Fairfield Village Community and to file this condemnation action as Regional District under this contract on behalf of Harris County Municipal Utility District No. 396 and Harris County Municipal Utility District No. 397.

Marshall does not challenge these findings or conclusions on appeal. Marshall's opening brief does not mention these findings and conclusions or the Act at all. MUD 358's engineer, Cindy Albers, testified that the condemned property would be used to create an outfall drainage channel that would "serve properties within Harris County MUD No. 396 and Harris County MUD No. 397." An appellant must challenge all the bases for a trial court's ruling or judgment complained of on appeal. *See Britton v. Tex. Dep't of Tex. Crim. App. Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Midway Nat'l Bank v. W. Tex. Wholesale Supply Co.*, 453 S.W.2d 460, 460–61 (Tex. 1970)). Marshall has not done so in this appeal. Accordingly, we must uphold the trial court's determination that MUD 358 had the authority to condemn Marshall's property under the Act.

We overrule this portion of Marshall's first three issues.

2. MUD 358 Impermissibly Delegated its Eminent Domain Power

Marshall's brief on this issue states, in its entirety, as follows:

> Further the suit and engineering work are underwritten by Exxon Land Development, Inc./Friendswood for their private use for Fairfield. Marshall submits the substance over form of this pre-funding agreement, means this taking is a sale or impermissible delegation of the power and authority of [MUD 358] ([*see*] *Burch v. City of San Antonio*, 518 S.W.2d [540,] 543–45 [(Tex. 1975])), in violation of the Texas Constitution, enabling Order of the Water Commission Order [sic], Water Code, and Property Code. This pre-funding agreement, paying all costs and expenses coupled with appointing the Board essentially vested in Exxon Land Development,

> Inc./Friendswood the decision and discretion on what to take, what to build, what to offer to pay, who will offer to pay, what to pay, and when to proceed.

(Record references omitted.)

In *Burch*, the Texas Supreme Court held that the City of San Antonio could not delegate its power of eminent domain to its Water Works Board of Trustees without an express legislative grant of the power to do so. *Burch*, 518 S.W.2d at 545. In the words of the Supreme Court, "[T]he city council is the authority to exercise the power of eminent domain and must itself officially express the intention and necessity to condemn the land in question for the City's water system." *Id.* Here, it is undisputed that the Board, not "Exxon Land Development, Inc./Friendswood," passed a resolution declaring a public necessity to acquire Marshall's property for public use. The trial court made findings of fact, which are not challenged by Marshall in this appeal, that the Board determined that there was a public necessity to acquire Marshall's land for drainage purposes. MUD 358 filed the condemnation proceedings, not some other entity. In unchallenged findings, of fact, the trial court found that the Board authorized its agents to file the condemnation proceeding. Here, the Board itself took the necessary actions, unlike the situation in *Burch*, where the city council delegated the authority to the

board of trustees for the city's water system. *See id.* We, therefore, conclude that MUD 358 did not impermissibly delegate its power of eminent domain.[2]

We overrule this portion of Marshall's first three issues.

3. The Taking was not Authorized Because there was no Public Use

Within this portion of his first three issues, Marshall contends that the taking of the smaller tract was not for a public use and that there was no public necessity for taking the smaller tract.

A. Public Use

Whether a use is a "public use" is a question of law for the court. *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). However, a legislative declaration that a use is public is binding on this Court unless the use is "clearly and palpably" a private use. *Id.* at 266 (quoting *Hous. Auth. of the City of Dallas v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940)). The Legislature has declared drainage activities

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[2] At oral argument, Marshall raised the issue of whether MUD 358 could exercise the power of eminent domain on behalf of MUD 396 or MUD 397. However, as noted above, Marshall did not challenge the trial court's findings of fact or conclusions of law pertaining to MUD 358's authority under the Act. Furthermore, in Marshall's, argument quoted above, he asserts that MUD 358 impermissibly delegated its power of eminent domain to the developer, not that MUD 396 and MUD 397 delegated their power of eminent domain to MUD 358. Because it was not raised in Marshall's brief, we decline to address this argument. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error.").

engaged in by a municipal utility district a public use. *Id.* (citing TEX. WATER CODE ANN. § 54.201(a), (b)(3)).

Here, Marshall does not dispute that drainage is a public use, but instead asserts that MUD 358 can only serve the "public" located within its geographical boundaries. However, we have already held that under the interlocal contract, which Marshall has not challenged on appeal, MUD 358 was authorized to act on behalf of MUD 396 and MUD 397. MUD 358's engineer, Albers, testified that the condemned property would be used for drainage of property within MUD 396 and MUD 397. Furthermore, MUD 358 owned and operated retention and drainage lakes within the boundaries of MUDs 396 and 397, and the overflow from these lakes would drain over the condemned property. Condemnation for drainage under these circumstances is a public use. *Id.*

B. Public Necessity

"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Higginbotham*, 143 S.W.2d at 89, *quoted in FKM P'ship*, 255 S.W.3d at 630. A government agency's determination of public necessity is "presumptively correct, absent proof by the landowner of the agency's fraud or proof that the condemning authority acted arbitrarily or capriciously." *FKM P'ship*, 255 S.W.3d at 629.

Here, MUD 358's Board determined that there was a public necessity to condemn Marshall's property. The resolution passed by the Board concerning the condemnation of Marshall's property states, in pertinent part,

> [T]the Board of Directors of the District has determined that, in order to accomplish the public purposes for which the District was created and in order for the Regional District to effectively provide drainage services to the Service Area (as defined in the Regional Facilities Contract), it is necessary and in the best interests of the Regional District to construct an offsite drainage channel to drain stormwaters from within the Service Area to Little Cypress Creek; and
>
> [T]he District's Board of Directors has determined that there is a public necessity to acquire certain property on the north side of Schiel Road for such offsite drainage channel, specifically [Marshall's property], described in Exhibit "A" attached to this Resolution and incorporated for all purposes (the "Tract"); and
>
> [T]the District has been unable to negotiate the purchase of the Tract, and the public necessity requires that the Tract be acquired through the exercise of the District's power of eminent domain as provided in § 49.222, Texas Water Code . . . .

Once Again, Marshall does not dispute these facts, but instead argues that, because his property is 2.65 miles outside MUD 358's boundaries, the condemnation of his property is not necessary to drain the land of the public located inside MUD 358's boundaries. However, as noted above, the trial court determined that MUD 358 was authorized to act on behalf of MUD 396 and MUD 397 under the interlocal contract, and Marshall does not challenge that determination on appeal. Nor does Marshall dispute that MUD 358 owned and operated retention lakes within the boundaries of MUD 396 and 397. Marshall

also generally asserts that MUD 358's determination of public necessity was fraudulent, arbitrary or capricious. However, Marshall does not identify any evidence that supports this argument. We, therefore, presume MUD 358's determination of public necessity is correct. *See FKM P'ship*, 255 S.W.3d at 629.

4. Violation of the Texas Open Meetings Act

Marshall also contends that MUD 358 did not have authority to condemn the smaller tract because at the time it filed its amended petition seeking the smaller tract instead of the larger tract, MUD 358's Board had not passed a resolution in accordance with the Texas Open Meetings Act authorizing the taking of the smaller tract. Specifically, Marshall contends that because MUD 358's Board did not did not pass a separate resolution authorizing the condemnation of the smaller tract and did not give notice of intent to reduce the taking from the larger tract to the smaller tract, MUD 358 lacked authority to condemn the smaller tract.

Marshall does not cite any provision of the Texas Open Meetings Act that he claims was violated. According to his brief, he complains that the Board of MUD 358 decided to take the smaller tract instead of the larger tract—"an action taken without a corresponding posted Agenda item." *See* TEX. GOV'T CODE ANN. § 551.041 (Vernon 2004) ("A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body."). However, the Board was not required to hold a meeting and pass a separate

resolution reducing the amount of the taking. Although it was not addressing the Texas Open Meetings Act, the Texas Supreme Court addressed this issue in *FKM Partnership*. *See FKM P'ship*, 255 S.W.3d 619 at 630. In that case, the property owner asserted that the Board of Regents for the University of Houston "did not pass a separate resolution specifically authorizing condemnation of the smaller tract." *Id.* The Texas Supreme Court stated,

> We do not agree with FKM, however, that a separate Board resolution is necessary every time a condemnor decides to acquire less property than it originally sought. FKM does not reference a statutory or procedural requirement for its position, and a resolution authorizing condemnation of a whole tract of land necessarily authorizes condemnation of the separate parts that comprise the whole. We see no reason that the Board could not vote to condemn a tract of land for public use then depend on and allow its agents, subject to the Board's supervision and approval, to determine that less than the whole tract would suffice to fulfill the Board's purposes or would fit within the University's budget. And if the Board does so, then it could reasonably depend on the agents to negotiate for less than the whole tract or, if suit has been filed as in this case, amend its condemnation petition to seek a smaller tract.

Id. Because a separate action at a Board meeting was not required, no separate notice was required. *See* TEX. GOV'T CODE ANN. § 551.041 (requiring notice of "each meeting"); *see also id.* § 551.001(4)(a) (Vernon Supp. 2010) (defining "meeting" to include "a deliberation . . . during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action").

We overrule this portion of Marshall's first three issues.

Exclusion of Evidence

In his fifth and sixth issues, Marshall contends that the trial court erred by excluding evidence relevant to his counterclaim for inverse condemnation, his affirmative defenses to MUD 358's condemnation claim, and his post-construction damages.

1. Standard of Review

Evidentiary rulings are committed to the trial court's sound discretion. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). We review a trial court's decision to admit or exclude evidence for an abuse of that discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). "A trial court abuses its discretion when it acts without reference to any guiding rules and principles." *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998); *Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307, 317 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). "[I]n addition to showing an abuse of discretion, a party complaining of error in the exclusion of evidence must also show that the trial court's error was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment." *Madison v. Williamson*, 241 S.W.3d 145, 151

(Tex. App.—Houston [1st Dist.] 2007, pet. denied) (quoting *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995) and citing TEX. R. APP. P. 44.1(a)(1)).

2. Inverse Condemnation Evidence

"Inverse condemnation occurs when (1) a property owner seeks (2) compensation for (3) property taken for public use (4) without process or a proper condemnation proceeding." *Villarreal v. Harris County*, 226 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also City of Houston v. Texan Land & Cattle, Co.*, 138 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2004, no pet.) The proceeding is called "inverse" because the property owner, rather than the government, brings the suit. *Texan Land & Cattle, Co.*, 138 S.W.3d at 387.

Here, Marshall's theory concerning inverse condemnation is that, after the special commissioner's award of damages and MUD 358's deposit of those damages with the court and during the pendency of the trial de novo in the trial court, MUD 358 constructed drainage facilities on the smaller tract. The construction impaired the drainage of Marshall's remaining property and amounted to a taking of his property for public use without adequate compensation.

Marshall's specific argument is that the trial court abused its discretion

> in denying Marshall the opportunity to establish . . . his Counter-claim and violated his constitutional right to his full jury trial, Vernon's Ann. Tex. Constit. art. 1, Sec. 15. The Bill of Rights to our Constitution recites and it has been long held, that Marshall is entitled

> to trial by jury, *Cockrill v. Cox*, 65 Tex. 669, 672–73, [sic] [(]Tex. 1886).

Although Marshall contends that the trial court abused its discretion, Marshall does not address the trial court's expressed reason for not allowing evidence of Marshall's inverse condemnation claim before the jury. Marshall, in asking the trial court to allow his inverse condemnation claim to go forward, explained to the trial court that MUD 358 filed the condemnation suit in February 2004. After the commissioner's hearing, MUD 358 deposited the commissioner's award with the court. Marshall objected and the proceedings in the trial court began. Marshall further explained that it was not until June 2005 that MUD 358 amended its pleadings to reduce the amount of land sought to be condemned. In October 2005, MUD 358 presented Marshall with the preliminary construction plans. After the hearing on Marshall's "Plea in Abatement, Plea to the Jurisdiction and Motion to Dismiss" in March 2006, MUD 358 informed Marshall that construction began on July 31, 2006 and presented Marshall with the final plans in August 2006. Marshall filed his counterclaim for inverse condemnation on August 8, 2006. Marshall was unable to inform the trial court if the construction had been finished. The trial court ruled that it would not allow the inverse condemnation claim to proceed. The next day, Marshall asked the trial court to reconsider. The trial court explained, "[A]s a matter of law, given the nature of when the events occurred, which were outlined extensively by your co-counsel yesterday, there is no

constitutional takings claim that is [ripe] at this time." Marshall does not contend that the trial court erred in concluding that, because construction was not complete, no inverse condemnation claim could proceed. Both the trial court's statements and MUD 358's representations to the trial court leave open the possibility for Marshall to bring a separate inverse condemnation suit for the change in conditions on his property due to the construction. The trial court specifically stated that the inverse condemnation claim could not go forward "at this time." MUD 358 pointed out that Marshall's experts had only prepared reports concerning his damages as of May 2004, long before the construction began. Based on the record before us, we cannot conclude that Marshall has shown that the trial court abused its discretion in limiting the issues in this case to the damages caused by the taking of the smaller tract.

3. Affirmative Defense Evidence

Within his argument for his fifth and sixth issues, Marshall asserts, "Landowners are still allowed an opportunity to prove the taking is fraudulent, arbitrary, and capricious, *FKM Partnership*, 255 S.W.3d at 629–30." Marshall further states,

> Marshall is entitled to invoke his Constitutional right, art. 1 Sec. 17 and Sec. 19, to contest the takings and submit evidence that the taking is not for a public purpose, that this taking is fraudulent, arbitrary, or capricious, *FKM Partnership*, 255 S.W.3d at 629–30. The court refused to allow his evidence, this was harmful error and he was denied these rights.

These two excerpts are the entirety of Marshall's briefing on this issue. Marshall does not cite to any authority discussing what showing may be required to establish that a taking is "fraudulent, arbitrary, or capricious." Although his fifth and sixth issues deal with erroneously excluded evidence, Marshall does not identify the evidence that he contends was excluded nor attempt any analysis of how the excluded evidence is relevant to the issue of a "fraudulent, arbitrary, or capricious" taking. When an appellant cites to no authority, or only one or two irrelevant or inapposite authorities, and fails to provide any analysis or argument to support the contentions made on appeal, any error is waived due to inadequate briefing. *See Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 321–22 (Tex. App.—Houston [1st Dist.] 2010, pet. struck) (citing TEX. R. APP. P. 38.1(i); *Woodside v. Woodside*, 154 S.W.3d 688, 691 (Tex. App.—El Paso 2004, no pet.) (holding issue waived when only authorities cited were "a few irrelevant cases and statutes")); *see also Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.—Dallas 2007, no pet.) (holding issue is waived by brief that makes no attempt to analyze trial court's purported error within context of cited authority).

4. Damages Evidence

The evidence that Marshall identifies as being erroneously excluded is actually evidence concerning his inverse condemnation claim, that is, evidence of the impaired drainage after the construction. For example, in "Defendant's Bill

Exhibit 27," Marshall submitted photographs showing standing water, debris, and other damages from the drainage on his property. In his brief, Marshall asserts that these photographs show that the drainage channel "*as built* . . . has berms and barriers that prevent drainage and have turned Marshall's property as it adjoins the channel, into a mess, with standing water and debris."[3] (Emphasis added.) Similarly, Marshall asserts the trial court erred by striking testimony of his expert witness concerning the value of the property. The trial court, in sustaining MUD 358's objections, instructed the jury to disregard "the witness'[s] testimony regarding *drainage of the property*." (Emphasis added).

Marshall has not identified any excluded evidence of damages from the condemnation apart from evidence concerning drainage after construction.[4] Because we have already held that Marshall failed to show the trial court abused its discretion concerning the inverse condemnation claim caused by the construction, we conclude the trial court did not abuse its discretion in excluding the evidence identified by Marshall.

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[3] Marshall also asserts "[Witnesses] were precluded by the Judge, from giving the jury testimony on the damages *resulting from the construction*." (Emphasis added.)

[4] In addition to the evidence mentioned above, Marshall contends the trial court erred in striking some of his testimony. The testimony that Marshall identifies was his statement that there was no agreement between MUD 358 and himself allowing him to drain into the channel. Marshall also identifies testimony from his engineer, Atkinson, that was struck by the trial court. However, this testimony concerned drainage after construction.

We overrule Marshall's fifth and sixth issues.

Failure to Submit Marshall's Jury Charge

In his fourth issue, Marshall contends that the trial court erred by refusing to submit his proposed charge to the jury.

"The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. "The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence." TEX. R. CIV. P. 278. "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment . . . ." *Id.* "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." *Id.* In addition to the requirement that a party tender questions, definitions, or instructions it wishes to submit to the jury, the party must secure a ruling from the trial court on his proposed submissions. *See* TEX. R. CIV. P. 276 (providing trial court's endorsement of "refused" or "modified" on proposed question, definition, or instruction results in conclusive presumption party presented issue to trial court and preserved issue for appellate review). Although these rules contain technical

requirements for preserving error concerning the charge, the Texas Supreme Court has explained that the preservations is generally determined by "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43 (Tex. 2007) (quoting *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)).

Marshall filed a proposed jury charge with the trial court. Beneath each requested instruction, definition, or question there was a space for the trial court to endorse "given," "refused," or "modified." However, the trial court did not endorse any of the questions. Therefore, error with respect to the charge was not preserved in accordance with rule 276. *See* TEX. R. CIV. P. 276. During the charge conference, Marshall stated to the trial court that he agreed to the charge the trial court gave to the jury, but "reserved the right to make objections to the issues that weren't submitted to the jury." Concerning the objections, the record shows the following:

> THE COURT: Anybody who has anything to say about the charge, now come forth and do so because this is the charge that I intend to give to the jury.
>
> My understanding is that it is agreed to, but it is not exactly agreed to because there are some things that were omitted that Mr. Marshall's attorneys would like admitted.
>
> So at this time, go ahead and submit what you think should be in the charge and we'll look at it.
>
> . . . .

> [Marshall's Counsel]: We had submitted post questions regarding the taking and in the underlying case, there are certain things that the jury is entitled to hear. The questions on Page 7 of our submission was Harris County Municipal Utility District 358's decision to take the Marshall property was in bad faith or fraudulent.
>
> We were not allowed to present evidence to that effect, so I don't know that there's any evidence to present to the jury. So that question may well be moot
>
> . . . .
>
> THE COURT: I'm not going to submit your proposed question for all the reasons we talked about. There's no evidence submitted to the jury on that issue anyway, and this is going to be the charge of the Court.

As shown by the record excerpt above, Marshall's counsel identified a single page from his proposed jury charge. The submission Marshall brought to the trial court's attention asked whether MUD 358's decision to take Marshall's property was "arbitrary and capricious, made in bad faith, or fraudulent." On this page, Marshall also included proposed definitions for "arbitrary and capricious," "bad faith," and "fraudulent." The trial court responded stating it would not submit Marshall's "proposed question." Neither Marshall nor the trial court made any reference to other questions or proposed definitions or instructions. There is nothing in the record to show that the Marshall called any other questions, definitions, or instructions to the trial court's attention or that the trial court ruled upon any other proposed questions, definitions, or instructions. Therefore, with the

exception of the single question specifically brought to the trial court's attention, any error in failing to submit Marshall's proposed questions, definitions, or instructions is not preserved for our review. *See Ford Motor Co.*, 242 S.W.3d at 43.

With respect to the questions and definitions Marshall did bring to the trial court's attention, Marshall generally asserts that the trial court erred by refusing to submit them. Here, it is undisputed that the trial court did not allow any evidence concerning fraud, arbitrariness, and capriciousness, which Marshall raised as a separate complaint on appeal. *See* TEX. R. CIV. P. 278. Furthermore, Marshall does not assert or cite any authority to show that his requested question and definitions were "substantially correct." *See id.* Therefore, we hold that Marshall has not shown that the trial court abused its discretion in refusing his requested question and definitions concerning a fraudulent, arbitrary, or capricious determination of public necessity.

We overrule Marshall's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Sam Nuchia
Justice

Panel consists of Chief Justice Radack, Justice Massengale, and Justice Nuchia.[5]

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[5] The Honorable Sam Nuchia, Senior Justice, Court of Appeals for the First District of Texas, sitting by assignment.