Missouri Court of Appeals
Southern District
Division One

CITY OF NIXA,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD31410
	)	
KAREN KEEVER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY

Honorable Mark E. Orr, Circuit Judge

Before Burrell, P.J., Rahmeyer, J., and Lynch, J.

ORDER

AFFIRMED

PER CURIAM. This Court determines that the judgment appealed from is supported by substantial evidence, is not against the weight of the evidence, and no error of law appears in the above cause. This decision is unanimous, and all judges believe that no jurisprudential purpose would be served by a written opinion. Accordingly, the judgment of the Circuit Court of Christian County, in its case numbered 10CT-CC00111, is unanimously affirmed in compliance with Rule 84.16(b)(1) and (5).

The parties have been furnished with a written statement, for their information only, which sets forth the reason for this Order.

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STATEMENT

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT. THIS STATEMENT SHALL BE ATTACHED TO ANY MOTION FOR REHEARING OR APPLICATION FOR TRANSFER TO THE SUPREME COURT FILED WITH THIS COURT.

Karen Keever appeals the trial court's judgment in favor of the City of Nixa ("City") enjoining her from blocking a stormwater-drainage pipe that traverses her

property and denying damages and further relief sought in her counterclaim. Finding no merit in any of her points, we affirm.

Factual and Procedural Background

Keever purchased a residence and lot located at 405 East Lynn Street in Nixa, Missouri, in May 2008. Lynn Street is a public street and thoroughfare owned and maintained by City.

Before the construction of Keever's residence in 1988-89 by one of her predecessors in title--the developer of this immediate area--the natural topography of the property surrounding what is now Keever's residence was such that surface-water runoff flowed northward over Keever's property and the lots on each side of it. The runoff drained into a sinkhole that once existed in the area where Keever's residence and a home east of hers were later built. After the property was subdivided into three separate lots by the developer, the sinkhole was filled, and a slight berm was created along the south end of the three lots to elevate the ground for building sites. In addition, a retention pond was constructed on the northern half of Keever's lot.

Apparently as a consequence of the berm construction, surface-water runoff could no longer flow across the properties and drain into the retention pond as intended by the developer. Instead, runoff collected in the street and along the southern portion of Keever's lot. At some unknown point in time, but well before Keever's purchase, corrugated piping was installed underground and traversed a significant distance along the western property line on Keever's property. There was no evidence as to who installed it or the circumstances under which it was installed. The pipe extended in a northerly direction with the inlet positioned in a drainage ditch on Keever's southern property line along Lynn Street and terminated in the retention pond in Keever's back

yard. For some time, this pipe directed surface-water runoff that collected in the drainage ditch north of Lynn Street to the retention pond in the back and alleviated some of the flooding that frequently occurred on Lynn Street and in Keever's front yard during small rain events.

Shortly after Keever moved in, she experienced flooding in her front and back yards during minor rainfalls, while heavier rains caused flooding into and under the crawl space of her home. Keever contacted various city officials, but no remedy was forthcoming from City.

In February 2009, Keever sealed the inlet and terminus openings of the drainage pipe "with foam," which obstructed the drainage of surface-water runoff through the pipe into the retention pond in the back of her yard and resulted in increased flooding on Lynn Street. When Keever was directed by City's code enforcement officer to unplug the pipe, she declined to do so.

In February 2010, City filed the underlying action seeking injunctive relief to require that Keever remove the material obstructing the drainage pipe and enjoin her from further obstructing the pipe. City alleged that the obstruction of the drainage pipe resulted in increased flooding on a public street, which created a dangerous and hazardous condition and accelerated the degradation of the roadway.

Keever counterclaimed, alleging in part that City violated and failed to enforce subdivision and building regulations, resulting in diminution of market value of her residence and other damages. Keever sought damages for negligence, prevarication, continuing recurring trespass, recurring temporary nuisance, and harassment.

Following a bench trial on January 19, 2011, the trial court ruled in favor of City and entered a permanent injunction against Keever, ordering that she remove any obstruction from the drainage pipe. Finding that she failed to prove the necessary elements of her claims, the trial court denied all relief sought by Keever in her counterclaim. Keever timely appealed.

Discussion

Keever presents ten points, which, for ease of analysis, we address out of order and group into four categories—exclusion of hearsay, grant of injunction, denial of counterclaim, and trial court conduct.[1]

I. Exclusion of Hearsay

Keever's first point is directed to the trial court's exclusion of certain evidence. Keever claims that the trial court erred when it sustained City's hearsay objections to the admission of an expert witness's written report and testimony from that report. Keever further contends that the trial court "misappli[ed] the law regarding hearsay" and its ruling sustaining City's objections to testimony from her expert "denied her right to present viable, relevant testimony and evidence" and was unjust.

Keever contends that the trial court erred because:

> 1) Experts are not refrained from the use of hearsay; 2) Documents are not required to be certified to be included in an expert's report or testimony; 3) Evidence an expert relies on in forming his or her opinion need not be independently admissible; 4) Experts can rely on hearsay

[1] City filed a motion to dismiss this appeal for Keever's failure to comply with briefing requirements. Keever filed suggestions in opposition and a motion for leave to correct/amend. "While it is within our discretion to dismiss an appeal for failure to comply with Rule 84.04, '[w]e will not exercise our discretion to dismiss an appeal for technical deficiency under Rule 84.04 unless the deficiency impedes disposition on the merits.'" Moran v. Mason, 236 S.W.3d 137, 139-40 (Mo.App. 2007) (quoting Gray v. White, 26 S.W.3d 806, 815 (Mo.App. 1999)). The deficiencies in Keever's brief do not present such an impediment. All pending motions are denied.

All rule references are to Missouri Court Rules (2011), unless otherwise indicated.

> information provided that those sources are not offered as independent substantive evidence but rather serve only as a background for expert's opinion; 5) General objection to "lack of foundation" will not preserve alleged errors because it fails to direct trial court's attention to specific foundational element considered deficient; 6) The stated objection did not give [Keever] reasonable grounds upon which to rephrase the question[.][2]

The admission or exclusion of evidence is a matter of trial court discretion that we review only for a manifest abuse of discretion. ***IMR Corp. v. Hemphill***, 926 S.W.2d 542, 546 (Mo.App. 1996). "A ruling within the trial court's discretion is presumed correct[,] and the appellant bears the burden of showing the trial court abused its discretion and that [appellant has] been prejudiced by the abuse." ***Id.*** According to our standard of review, on a claim that admissible evidence was erroneously excluded, we examine whether the trial court abused its broad discretion in excluding such evidence, rather than whether the evidence was admissible. ***Copeland v. Mr. B's Pool Ctrs., Inc.***, 850 S.W.2d 380, 381 (Mo.App. 1993). We find abuse of discretion only when the trial court's ruling is "'clearly against the logic of the circumstances before it and so arbitrary and unreasonable that the ruling shocks the sense of justice and indicates a lack of careful deliberation.'" ***Eltiste v. Ford Mtr. Co.***, 167 S.W.3d 742, 750 (Mo.App. 2005) (quoting ***Nelson v. Waxman***, 9 S.W.3d 601, 604 (Mo. banc 2000)).

At trial, Keever called Richard Stalzer, Sr., a professional civil engineer, to testify as an expert witness. Mr. Stalzer testified that he was retained by Keever to investigate

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[2] Rule 84.04(e) provides that an appellant's "argument shall be limited to those errors included in the 'Points Relied On.'" Here, Keever's point relied on is directed only to the trial court's rulings on objections to her expert witness's testimony based on hearsay. However, in her argument, Keever includes complaints of the trial court's rulings to objections based upon lack of foundation, an objection that the witness was reading from a report that had not been admitted, and another objection to Keever herself testifying during examination of her witness. These complaints are extraneous and will not be reviewed because Keever directs her challenge in her point relied on only to the trial court's rulings on objections based on hearsay. Arguments not raised in the point relied on need not be considered on appeal. *Eliste v. Ford Mtr. Co.*, 167 SW.3d 742, 750 (Mo.App. 2005).

and identify the cause of the flooding on Lynn Street and around Keever's home. To that end, Mr. Stalzer prepared and submitted a written report to Keever that contained his expert opinion and included copies of various documents upon which he relied in making his assessments. Some of these documents were acquired from Keever. When Keever moved to admit the report and supporting documents, which she identified as Exhibit No. 4, counsel for City objected "to relevancy" and on the bases that the report was hearsay and no foundation had been laid. The trial court sustained City's objections and stated, "You can ask . . . him all about . . . his report. His report itself is generally not admissible just as an exhibit."

Upon further examination, Mr. Stalzer testified that in preparing his report, he reviewed various documents, including minutes of board of aldermen meetings spanning some twenty-two years. He opined that "numerous omissions, misapplications, nonapplications of city ordinances [or] regulations[,]" the fact that the home was built over a sinkhole, plus a contractor's failure to follow a grading plan in preparation of the building site contributed to cause the flooding problem. Mr. Stalzer later referenced a January 16, 1989, letter from a consulting engineer to City's administrator, which he had included with his report. When he attempted to read excerpts from this letter, City's counsel objected to the witness reading from the exhibit, stating that the exhibit was not in evidence and no foundation had been laid "as to its authenticity." Before the trial court ruled on the objection, Keever continued her examination, asking Mr. Stalzer how he obtained the letter, to which the witness responded that Keever had provided it. As Keever began to explain to the court how she obtained the letter, counsel for City objected, saying, "It sounds like she's getting ready to testify." Keever continued to

explain that she obtained the letter from City, to which the trial court responded, "[Y]ou are not doing the things that you need to get it into evidence. You might be able to get it through your testimony. I don't see how you can ever get it through his testimony." Next, Keever questioned the witness regarding a "drainage report" that was included with Mr. Stalzer's report, but again counsel for City objected to the witness testifying regarding the contents of the report that had not been admitted. Keever stated, "[T]hat's why I wanted to put the whole report into evidence, Your Honor, so I wouldn't have to enter each . . . document one at a time." The trial court sustained the objection. When Keever directed another question in reference to the information contained in the drainage report, counsel for City objected to the witness testifying to the document without its admission into evidence. When Keever attempted to admit the drainage report, counsel objected on the bases that it was hearsay and because no foundation had been provided. His objections were sustained.[3]

Keever asked her witness if he had reached any conclusions upon review of the documents contained in his report, to which Mr. Stalzer responded, without objection:

> I came to the same conclusions that the . . . two other engineering reports arrived at, . . . that the homes were built too low . . below what would be considered flooding situations from two to five years to the hundred year storm.
>
> And, secondly, that the homes were actually built -- at least [Keever's] home -- is actually built over a sinkhole. And I believe . . . that the ordinance calls for a 35-foot setback from a sinkhole to build a residence.

"The admission of expert testimony is governed by section 490.065." ***Scott v. Blue Springs Ford Sales, Inc.***, 215 S.W.3d 145, 173 (Mo.App. 2006). Section

[3] Counsel for City continued to object to the witness testifying to "things that occurred that he doesn't have personal knowledge of[,]" to Keever reading from the report provided by the witness, and to further references to information contained in the previously referenced drainage report.

490.065.3, RSMo 2000, provides that "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable."

Mr. Stalzer's report included his curriculum vitae, a written report containing his findings, commentary, recommendations, and an appendix. Contained within the appendix were copies of plats, sinkhole maps, photos, newspaper articles, city ordinances passed and approved, minutes of board of aldermen meetings, and engineering reports, all obtained from various sources. Mr. Stalzer testified that he reviewed these documents and utilized the information in them to form an expert opinion. While section 490.065 addresses the admissibility of his opinion, it does not address the admissibility of his report or any of the documents attached to his report.

Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is generally not admissible because the statement is not offered under oath, it is not subject to cross-examination, and the fact-finder has no opportunity to assess the demeanor of the person to whom the hearsay statement is attributed. ***State ex rel. Mo. Hwy. & Transp. Comm'n v. Buys***, 909 S.W.2d 735, 738 (Mo.App. 1995). While "the evidence experts rely on in forming their opinions 'need not be independently admissible,'" hearsay sources upon which the expert relies may serve only as a background for the expert's opinion and cannot be offered as independent substantive evidence. ***Peterson v. Nat'l Carriers, Inc.***, 972 S.W.2d 349, 354 (Mo.App. 1998) (quoting ***State v. Candela***, 929 S.W.2d 852, 866 (Mo.App. 1996)). "An unsworn ex parte

written report introduced to prove the truth of the matter it asserts is hearsay." ***McKenna v. McKenna***, 928 S.W.2d 910, 912 (Mo.App. 1996).

The trial court did not abuse its discretion and did not err in sustaining the City's hearsay objection and in excluding Mr. Stalzer's report, the documents attached to that report, and Mr. Stalzer's testimony concerning those documents because each constituted inadmissible hearsay. Point I is denied.

II. Grant of Injunction

In five separate points (II, III, V, VI, and VII), Keever complains that the trial court erred in granting an injunction against her and in favor of City. Under her second point, Keever alleges that the doctrine of unclean hands barred City from obtaining an injunction. In her third point, Keever essentially challenges the trial court's finding that no adequate remedy at law existed. Keever claims, in her fifth point, that the continuing use that will result from the grant of the injunction constitutes a taking of private property for public use without compensation. In her sixth point, Keever alleges that the injunction violates Rule 92.02(e). And finally, in her seventh point, similar to her claim in point V, Keever asserts that the trial court misapplied the law in granting an injunction because City provided no evidence of its legal right to use her property.

"An action seeking injunction is an action in equity." ***City of Greenwood v. Martin Marietta Materials, Inc.***, 311 S.W.3d 258, 263 (Mo.App. 2010). "The standard of review in a court-tried equity action is the same as for any court-tried case; the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." ***Id.*** "To the extent that a trial court's grant of injunctive relief involves weighing the evidence

presented, determining the credibility of witnesses, and formulating an injunction of the appropriate scope, this court reviews for abuse of discretion." ***Id.*** "Questions of law are reviewed *de novo*, and no deference is given to the trial court." ***Id.***

A. Unclean Hands not Asserted as an Affirmative Defense

In Keever's second point, she contends that the doctrine of unclean hands bars City from obtaining relief. Keever alleges that City issued a building permit for her residence based on approval of a plat by the planning and zoning commission absent approval of the board of aldermen, which is in violation of statute and in excess of the commission's authority. Thus, Keever contends, City is not entitled to equitable relief.

"A litigant with unclean hands generally is not entitled to equitable relief such as an injunction[.]" ***Purcell v. Cape Girardeau Co. Comm'n***, 322 S.W.3d 522, 524 (Mo. banc 2010). The doctrine of unclean hands is an affirmative defense that must be raised in a responsive pleading. ***Ferguson v. Strutton***, 302 S.W.3d 239, 245 (Mo.App. 2010). *See also* Rule 55.08. Keever did not raise this defense before the trial court, nor was the issue tried by implied consent. This defense will not be considered on appeal. *See* ***Wallace v. Grasso***, 119 S.W.3d 567, 575 (Mo.App. 2003) (addressing defenses of waiver or abandonment of restrictive covenants). Keever's second point is denied.

B. No Adequate Remedy at Law

In her third point, Keever asserts that the trial court lacked jurisdiction[4] to grant an injunction in favor of City because City "has been vested with the power of eminent domain in that the need for drainage is that of a public use." Further reading of her

[4] The trial court had both subject-matter jurisdiction and personal jurisdiction over the parties involved. *See J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252-53 (Mo. banc 2009). In this context, we read Keever's and the pre-*J.C.W.* cited cases' use of the word "jurisdiction" as a reference to the trial court's legal authority to make a particular ruling, rather than its constitutional grant of jurisdiction.

argument under this point clarifies this claim to some extent: "the trial court lacked jurisdiction to grant equitable relief because [City] had an adequate remedy at law through condemnation proceedings." Thus, Keever is essentially challenging the trial court's finding that City "has no adequate remedy at law to seek redress for the damage done to it, particularly because of the recurrent nature of the flooding." Keever premises her argument on one statement: "Storm water drainage is a public use." Keever proposes that City could have exercised its power of eminent domain and condemned her property in lieu of obtaining an injunction enjoining her from blocking or obstructing the drain pipe running across her property.

"Under Missouri law, if an adequate remedy at law exists, the trial court lacks jurisdiction[5] to enter an injunction." ***Williams Pipeline Co. v. Allison & Alexander, Inc.***, 80 S.W.2d 829, 834 (Mo.App. 2002). "To obtain injunctive relief, a party must prove: (1) that the party has no adequate remedy at law; and (2) that irreparable harm will result if the injunction is an extraordinary and harsh remedy and should not be granted when there is an adequate remedy at law." ***City of Kansas City v. N.Y.-Kan. Bldg. Assocs., L.P.***, 96 S.W.3d 846, 855 (Mo.App. 2002). "Irreparable harm can be found when pecuniary remedies fail to provide adequate reimbursement for improper behavior[.]" ***Id.*** The lack of an "'[a]dequate remedy at law' generally means that damages will not adequately compensate the plaintiff for the injury or threatened injury, or that the plaintiff would be faced with a multiplicity of suits at law.'" ***Burney v. McLaughlin***, 63 S.W.3d 223, 234 (Mo.App. 2001) (quoting ***Walker v. Hanke***, 922 S.W.2d 925, 933 (Mo.App. 1999)). Keever cites us to no authority that alters this

[5] *See* footnote 4.

principle merely because a claimant is a political subdivision with the power to exercise the right of eminent domain.

City sought an injunction to prevent future flooding on Lynn Street due to Keever's blockage of the historic and natural flow of stormwater runoff. "Irreparable harm" was addressed during direct examination of City's witnesses who testified that flooding will continue to occur during small rain events and that continued flooding of the street will result in further damage to the roadway bed and constant repairs, as well as a continuing public-safety issue, i.e., pedestrian and vehicular traffic having to maneuver through the flooded areas. There was testimony from a neighbor that flooding in the street had increased in both frequency and duration since Keever obstructed the pipe.

The trial court found that Keever "has acted unreasonably in blocking and obstructing both the inlet and terminus of the Subject Pipe." It further found that "[the] water cast on Lynn Street constitutes a recurring nuisance[,]" and that the damage caused "is irreparable because of its recurrent nature." Therefore, City "has no adequate remedy at law to seek redress for the damage done to it, particularly because of the recurrent nature of the flooding."

"The granting of an injunction to abate a nuisance is an equitable remedy." ***Hulshof v. Noranda Aluminum, Inc.***, 835 S.W.2d 411, 420 (Mo.App. 1992). To be entitled to an injunction, City "had to show that substantial future injury was 'actually threatened, not merely anticipated; and [was] practically certain, not merely probable.'" ***Id.*** 419. "'Equity will interfere to prevent or abate an alleged nuisance only where it appears that the resulting injury is or will be irreparable[.]'" ***Id.*** (quoting 66 C.J.S. Nuisances § 114a (1950)). "'Equity will grant relief against an alleged nuisance where

the right is clear, the injury certain or at least probable, and an injunction is necessary in order to prevent multiplicity of suits or suppress interminable litigation.'" ***Hulshof***, 835 S.W.2d at 419 (quoting 66 C.J.S. Nuisances § 114b). Furthermore, "[a] party who creates a continuing nuisance 'is under legal obligation to remove, change, or repair the structure or thing complained of, and thereby terminate the injury to his neighbor.'" ***Hulshof***, 835 S.W.2d at 418 (quoting ***Kelly v. City of Cape Girardeau***, 338 Mo. 103, 89 S.W.2d 41, 44 (1935)). Keever's third point is denied.

C. No Inverse Condemnation

Keever contends in her fifth point that the grant of the injunction constitutes a taking of private property for public use without compensation. Keever raises a similar claim under her seventh point, contending that the trial court's grant of an injunction misapplies the law because City produced no evidence of any legal right to use her property as part of City's stormwater-drainage system. Keever claims that City produced no evidence that it has an easement over any portion of her property, without which City failed to support any legal claim for the use of her property.

Keever is essentially claiming inverse condemnation. This claim was not raised in Keever's amended counterclaim. A claim for inverse condemnation was raised in her initial "Answer, Affirmative Defenses and Counterclaim" and again in her "First Amended Counter-Petition," which Keever voluntarily dismissed on July 27, 2010. Keever did not include this claim in her counterclaim subsequently filed January 10, 2011. "Once an amended pleading is filed, any prior pleadings not referred to or incorporated into the new pleading are considered abandoned and receive no further

consideration in the case for any purpose." ***State ex rel. Bugg v. Roper***, 179 S.W.3d 893, 893 (Mo. banc 2005).

"The issue of whether there has been a taking of a person's property is a constitutional issue[,]" which must be raised at the first available opportunity. ***So. Star Cent. Gas Pipeline, Inc. v. Murray***, 190 S.W.3d 423, 430 (Mo.App. 2006). "'[U]nless raised at the earliest possible opportunity consistent with orderly procedure[,]'" such a claim is waived and is not preserved for review on appeal. ***Id.*** (quoting ***Smith v. Shaw***, 159 S.W.3d 830, 836 (Mo. banc 2005)). Keever's fifth and seventh points are denied.

D. Injunction Does not Violate Rule 92.02(e)

In her sixth point relied on, Keever contends that the injunction against her violates Rule 92.02(e), in that it seeks to enjoin persons and parties not included in the action. Here, the trial court entered a "mandatory injunction" ordering Keever "to unblock and remove any obstruction from the inlet and terminus of the pipe[]" and "permanently restrained and enjoined [Keever] from blocking, obstructing, removing or burying the inlet or terminus of the pipe[.]" The trial court's judgment provided that "[t]his permanent injunction applies to and enjoins, not only the named Keever in this case, but any agents, servants, employees of Keever as well as the unknown heirs, devisees, grantees, assignees, legatees, administrators, executors, guardians, mortgagees, trustees, and legal representatives or other persons or corporations claiming an interest in the Subject Property through Keever." Keever asserts that, pursuant to Rule 92.02(e), such an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or

participation with them who receive actual notice of the order by personal service or otherwise."

"Rule 92.02 applies to temporary restraining orders and preliminary injunctions[.]" ***Dohogne v. Counts***, 307 S.W.3d 660, 668 (Mo.App. 2010). In this case, a permanent injunction was issued, thus Rule 92.02 does not apply. *See* ***id.***

In addition, Keever's point assigns error to the form or language of the judgment issued. "[A]llegations of error relating to the form or language of the judgment" must be raised in a motion to amend the judgment to preserve the issue for appellate review, pursuant to Rule 78.07(c). *See also* ***Dohogne***, 307 S.W.3d at 669. No motion to amend the judgment was filed in this case. Keever's sixth point is denied.

III. Denial of Counterclaim

A. Motion to Dismiss

In her fourth point, Keever contends that the trial court erred in granting City's motion to dismiss Keever's initial counterclaim filed on March 8, 2010, because she claims that City's motion to dismiss was essentially a motion for summary judgment, and "there were still material facts requiring a trial for resolution."[6]

Keever filed her initial six-count counterclaim on March 8, 2010. City thereafter filed a motion to dismiss Keever's counterclaim for failure to state a claim upon which relief can be granted. The trial court granted City's motion and dismissed the counterclaim.

[6] While Keever refers to a motion to dismiss her affirmative defenses in her point relied on, the only motion to dismiss identified in her argument under this point is City's Motion to Dismiss her counterclaim, filed on March 8, 2010, for failure to state a claim upon which relief can be granted. "Any claim of error raised in a point relied on which is not addressed in the appellant's argument is deemed waived." G.J.R.B. ex rel. R.J.K. v. J.K.B., 269 S.W.3d 546, 559 (Mo.App. 2008) (quoting Cohen v. Cohen, 73 S.W.3d 39, 52 (Mo.App. 2002)).

On January 10, 2011, Keever moved for leave to file a counterclaim. Two days later, City filed its objection to allowing Keever to file the counterclaim because a trial setting was only a week away.

The case was tried on January 19, 2011. City orally moved to dismiss Keever's counterclaim if the trial court granted her leave to file it. After both parties rested, the trial court stated that it was taking City's motion to dismiss under advisement and further noted that it "permitted [Keever] to file a counterclaim."

The trial court filed its judgment on February 25, 2011. Therein, the trial court found that Keever failed to prove the necessary elements to support her claims and denied Keever's counterclaim "in its entirety."

In her challenge to the trial court's grant of City's motion to dismiss her initial counterclaim, Keever incorrectly characterizes City's motion to dismiss her initial counterclaim as a motion for summary judgment. Keever is correct that a motion to dismiss for failure to state a claim upon which relief can be granted may be treated as a motion for summary judgment *when* the trial court accepts and considers matters outside the pleadings. ***Weems v. Montgomery***, 126 S.W.3d 479, 482 (Mo.App. 2004). Where her point fails, however, is that she does not direct us to anything in the record before us that supports that the trial court accepted and considered any matter outside of her initial counterclaim in granting City's motion to dismiss.

Moreover, Keever fails to make any argument that, based solely upon the allegations contained in her initial counterclaim, the trial court erroneously granted City's motion to dismiss. Keever's fourth point is denied.

B. Failure to Carry Burden of Proof on Counterclaim

In her eighth point, Keever claims that the trial court "erred in denying any and all relief because the ruling is against the weight of evidence and erroneously applies the law[.]" Proceeding further, Keever sets forth eight reasons why the trial court should have found favorably for her:

> [City] as respondeat superior does not have sovereign immunity for negligence and wrongdoing of employees and public officials in the performance of the ministerial duty of plat approval and issuance of building permits; the actions of [City's] Planning and Zoning Commission and city Engineer . . . were unlawful; [City] was negligent in that it took no action to stop or correct this unlawful act; city employees and officials have concealed the unlawful action of the Planning and Zoning Commission and . . . City Engineer; [Keever] is not barred by the statute of limitations; the Planning and Zoning Commission and . . . City Engineer and Planning and Zoning Commissioner were negligent and unlawfully approved a minor subdivision as a lot split thereby avoiding all the requirements of a plat; . . . City Engineer was negligent in his drainage design. The actions of [City's] Planning and Zoning Commission and . . . City Engineer were the proximate cause of injury to [Keever].

In its judgment, the trial court found that Keever "failed to prove the necessary elements to support the claims levied against [City] in her Counterclaim[.]" Further, the trial court denied Keever's counterclaim "in its entirety." These were the only "rulings" related to Keever's counterclaim that were included in the judgment.

As in any court-tried case, we will affirm the judgment of the trial court unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. ***River Oaks Homes Ass'n v. Lounce***, 356 S.W.3d 855, 859 (Mo.App. 2012) (citing ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo. banc 1976)).

While Keever proposes eight reasons why the trial court should have, in her opinion, found in her favor, these reasons are merely conclusory statements that are not

supported by the evidence admitted at trial. In each instance, Keever points to purported evidence that was not before the trial court, referencing letters, minutes, plans, exhibits, and ordinances that were never admitted into evidence. While Keever, in her argument, also relies on testimony from her witnesses, we are constrained by the trial court's credibility determinations and must defer to the trial court, "'which is free to believe none, part, or all of the testimony of any witness.'" ***Noland-Vance v. Vance***, 321 S.W.3d 398, 402 (Mo.App. 2010) (quoting ***In re Marriage of Colley***, 984 S.W.2d 163, 166 (Mo.App. 1998)).

The trial court's judgment is presumed valid, and Keever has the burden to demonstrate its incorrectness. ***Houston v. Crider***, 317 S.W.3d 178, 186 (Mo.App. 2010). Our standard of review requires that we view the evidence and reasonable inferences drawn therefrom in a light favorable to the judgment while we disregard evidence that is contrary to the judgment. ***Id.***

A claim that the trial court's judgment was against the weight of the evidence requires that Keever:

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
>
> (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
>
> (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition.

Id. at 187. Keever failed to identify and develop the evidence favorable to the trial court's ruling and consequently has not met the requirement that she demonstrate how that favorable evidence "is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." ***Id.*** For this court to devise and articulate such an analysis exceeds the scope of our review and moves us into the realm of becoming an advocate for Keever, which we cannot and will not do. ***Id.***

Similarly, Keever's failure to provide any legal argument or analysis in the context of the facts viewed in a light favorable to the trial court's judgment also precludes this court from considering and resolving any claims that the trial court misapplied the law to the facts. Any analysis of law based upon evidence outside the record or upon facts not viewed in the light most favorable to the judgment is irrelevant to any issue this court may review on appeal. Keever's eighth point is denied.

C. No Misapplication of the Law Demonstrated

In her ninth point, Keever contends:

> The trial court erred and misapplied the law in denying [Keever] any and all relief from Recurring Trespass and Temporary Recurring Nuisance caused by [City's] storm water drainage system because it is an abatable nuisance in that [City] has had knowledge of the defective drainage plan and has taken no action to correct a dangerous condition; [City] has directed its storm water drainage system to private property during the commission of an unlawful act; [City] knowingly allowed additional development to direct its storm water runoff to [City's] storm water drainage system which terminates on private property and is in excess of its capacity; the use of a closed sinkhole under [Keever's] home for storm water drainage is an abnormally dangerous usage and risk to human life in that it erodes the ground under [Keever's] home.

Included in Keever's counterclaim were counts for "continuing recurring trespass" and "recurring temporary nuisance." Keever claims that the stormwater collecting on her

property "is an abatable nuisance in that [City] has had knowledge of the defective drainage plan and has taken no action to correct a dangerous condition." The trial court denied these claims, finding that Keever "failed to prove the necessary elements to support the claims[.]"

Like in her eighth point, discussed *supra*, Keever attempts to support her legal argument with "facts" derived from documents never admitted into evidence and testimony from witnesses favorable to her claims. As previously discussed in that point, the trial court could not rely upon the former and was free to disbelieve the latter. Because of Keever's failure to view the evidence in a light favorable to the judgment, as we are required to do by our standard of review, as discussed *supra*, her prospects for making a cogent argument that the trial court misapplied the law is necessarily doomed due to the lack of the requisite factual foundation. In the absence of such an argument, we have no alternative other than to deny her ninth point.

IV. Trial Court Conduct

Keever's tenth and final point alleges:

> The Court erred because the Court gave impression of bias and preferential treatment in that the Court referred to attorney for Respondent . . . as the prosecutor; and when the Court requested attorney for Respondent, Patrick Sweeney see him in his chambers during the hearing and outside the presence of [Keever].

"Appellate courts are merely courts of review for trial court errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court." ***Robbins v. Robbins***, 328 S.W.2d 552, 555 (Mo. 1959). "An issue that was never presented to or decided by the trial court is not preserved for appellate review." ***VanBooven v. Smull***, 938 S.W.2d 324, 330 (Mo.App.1997). Here, Keever never made any objection in the trial court to either alleged error. Her tenth point is denied.

Decision

The trial court's judgment is affirmed.