COURT OF APPEALS DECISION DATED AND FILED

October 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-2732

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CHARLES J. MUELLER, BARBARA J. MUELLER,
JEROME L. SALAJA, MARY L. SALAJA,
TIMOTHY J. REYNOLDS AND CAROLYN M. REYNOLDS,

PLAINTIFFS-RESPONDENTS,

V.

DIANA M. KEARNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Diana M. Kearns, *pro se*, appeals from a judgment entered after a bench trial. Kearns argues that the trial court erred when it: (1) denied her claim for an abatement of water run-off; (2) ordered her to asphalt a portion of a roadway easement; (3) denied her claim to present payment for

asphalt paving; (4) concluded that late payment fees levied on maintenance fees constituted an unenforceable penalty; (5) concluded that the maintenance fee can only be applied to upkeep of the ten-foot-wide roadway of the thirty-foot easement; (6) denied contribution to the cost of a catch basin and property taxes; and (7) granted an offset to plaintiffs against other amounts they owed her. Because we resolve each claim of error in favor of upholding the judgment, we affirm.

I. BACKGROUND

¶2 In 1991, Kearns assembled two parcels of adjoining land located on the east side of South 20th Street in the City of Milwaukee. In December 1993, she subdivided the land into four parcels, numbered one through four. In January 1994, she divided parcel one into two smaller parcels, therefore resulting in five parcels of land. She kept new parcel one for herself and sold the remaining lots to other individuals, including Charles J. and Barbara J. Mueller, Timothy J. and Carolyn M. Reynolds and Jerome L. and Mary L. Salaja. The Salajas bought parcel two, the Muellers bought parcel three and the Reynoldses bought parcel four.

¶3 The purchase of each property included a non-exclusive easement for ingress, egress, and utilities thirty feet in width and 600 feet long. The specified easement runs from 20th Street east, doglegs north at the western border of Kearns's parcel, and continues east past the north boundaries of Kearns's and the Salajas' parcels to the west property lines of the Muellers' and the Reynoldses'

parcels. None of the homes of the three families have frontage on 20th Street. The easement is used to access their homes.[1]

¶4 Originally, a gravel road ten-to-twenty feet in width ran through the center of the thirty-foot-wide easement. In 1995, Kearns created a berm, running for approximately 125 feet along the north side of her parcel, inside the easement. The berm is approximately twelve-feet wide and approximately one and one-half to two feet high. In addition, the gravel road varying from ten-to-twenty feet remained down the center of the easement. In 1996, the gravel road was narrowed and asphalted, creating a roadway ten feet in width. In August 1998, Kearns erected a six-foot-high fence running east and west along a portion of the berm and connecting to another fence of similar height running north and south along her eastern property line adjoining the Salajas' parcel. The east-west fence also lies within the easement.

¶5 In December 1998, the three families filed an action against Kearns claiming that the berm and fencing interfered with their use of the easement. They sought a declaration affirming their right to the easement contained in their Warranty Deeds and requested an injunction requiring Kearns to remove the fencing that interfered with the easement. They also requested that Kearns be permanently enjoined from placing any structures on the property, which would constitute an unreasonable interference with the easement. They further claimed that Kearns had unreasonably refused to complete the final coat of asphalt on the asphalted drive portion of the easement. Kearns answered and counterclaimed for

[1] For ease in description, we shall refer to the Muellers, Salajas and Reynoldses collectively as the "three families," unless context dictates otherwise.

abatement of an alleged water nuisance by the Salajas and a determination of claims for various fees, claims for expenses and damages owed by the three families to her. Plaintiffs moved for partial summary judgment. The court ordered Kearns to remove all obstructions and interferences to the easement. The remainder of the claims and counterclaims were tried to the court. In a lengthy and detailed judgment, the trial court granted in part, and denied in part, the claims of all parties. Kearns now appeals.[2]

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[2] The judgment provided in pertinent part:

> 1. That the 30 foot easement at issue in this matter is owned by Kearns and she is responsible for maintaining same. That within the 30 foot easement area for ingress and egress and underground utilities there is an approximate 10 foot roadway that Kearns must build to the specifications set forth in the National Survey Plan dated May 9, 1994 and entered as Exhibit 73 in the trial, including, but not limited to, the construction details that require the installation of a base coat followed by top coat of asphalt as set forth therein ... as set forth on Part Two of the Warranty Deed….
>
> 2. That Part Two of the Warranty Deed ("Part Two") from Kearns to each of the [P]laintiffs is clear and unambiguous. Accordingly, Plaintiff[]s must make their monthly maintenance fees as set forth in Part Two of the Warranty Deed. Kearns shall maintain and repair the roadway portion of the easement using the maintenance funds for this purpose. Kearns shall reimburse herself as set forth in Part Two of the Warranty Deed.
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> 3. That the entire 30 foot easement is accessible for ingress and egress. If the Plaintiff[s] or their guests damage any part of the road or non-roadway portion of the easement while utilizing such easement, that party shall be responsible to Kearns for the cost of repair. Kearns maintains the right to use the procedure set forth in Paragraph 6 of Part Two of the Warranty Deed to recover for negligent damage.
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> 4. ….
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> B) Kearns has the responsibility to leave the 30 foot easement area unobstructed.…

(continued)

II. ANALYSIS

A. Abatement of Water.

¶6 Kearns first contends that the trial court erroneously exercised its discretion in failing to order the Salajas to abate the flowing of drain water from their property onto the southeast portion of her land.

¶7 The term "discretion" contemplates an exercise of judicial judgment based on three factors: (1) the facts of record; (2) logic; and (3) the application of proper legal standards. ***Shuput v. Lauer***, 109 Wis. 2d 164, 177-78, 325 N.W.2d 321 (1982). Where the court has undertaken a reasonable inquiry and examination

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> 5. That Plaintiffs Salaja do not have to abate any water flow onto Kearns['s] land as Kearns has not proven that she has been harmed by water from the Salaja[s'] property and any counterclaim of Kearns regarding this issue is dismissed with prejudice….
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> ….
>
> 7. The Plaintiffs do not have to participate in any real estate taxes as part of maintenance fees as set forth in Part Two of the Warranty Deed, because the 30 foot easement belongs to Kearns, and any counterclaim of Kearns regarding this issue is dismissed with prejudice.
>
> 8. That the late fees set forth in Part Two of the Warranty Deed are punitive, not proper liquidated damages, and thus unenforceable, and accordingly the $2.00 per day late fee in Part Two of the Warranty Deed is struck in its entirety and any counterclaim of Kearns regarding this issue is dismissed with prejudice.
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> 9. Plaintiffs are not obligated to participate in the cost of the catch basin as it is an improvement for Kearns on her own land whether the water comes from the roadway or not and any counterclaim of Kearns regarding this issue is dismissed with prejudice.

of the facts as the basis of its decision and has made a reasoned application of the appropriate legal standard to the relevant facts in the case, it has properly exercised its discretion and we will affirm if there is a reasonable basis for its determination. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶8 Stated another way, we will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised, and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). We need not agree with the trial court's exercise in order to sustain it. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980).

¶9 An erroneous exercise of discretion occurs if the record demonstrates that the facts do not support the trial court's decision or that the trial court applied the wrong legal standard. ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 622-23, 478 N.W.2d 48 (Ct. App. 1991). Implicit in this exercise is a review of the facts found by the trial court.

¶10 A trial court's findings of fact are reviewed under the clearly erroneous standard. WIS. STAT. § 805.17(2) (1997-98).[3] Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding. ***Noll v. Dimiceli's Inc.***, 115 Wis. 2d 641, 643, 340

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

N.W.2d 575 (Ct. App. 1983). To justify reversal of a trial court finding, the evidence for a contrary finding must itself constitute the great weight and clear preponderance of the evidence. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶11 Kearns, in effect, argues that the record supports her contention that abatement should have been ordered. We are not convinced. Six witnesses testified relative to this issue: Kearns, Mary Salaja, Kearns's engineering expert Minal Steinman, Jeff Grundy from RMS Landscaping who completed the landscaping improvements for the Salajas, and two City of Milwaukee employees, Cary Meier and Clarence Goyette.

¶12 After the trial court heard the testimony of these witnesses, it ruled: "I find that the defendant has not proven that she has been harmed by water from the Salaja's [sic] improvement …." Whether a party with the burden of proof meets that burden is a question of law which we review independently. ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 776, 528 N.W.2d 446 (Ct. App. 1994).

¶13 Steinman, Kearns's expert, concluded that after the Salajas made the landscaping improvements to their land, the Salajas' water flowed southwest onto Kearns's property, but only a "pretty good trickle." Grundy admitted that after his landscape work was completed, the southeast area in Kearns's backyard was now lower than the Salajas' land and that he had observed water draining onto Kearns's land.

¶14 In contrast, Steinman stated that water flowed along the rear lot line to the east, away from her client's property. On another occasion, Grundy observed water draining from Kearns's land onto the Salajas' land. The two City of Milwaukee building inspectors visited the properties both during and after

rainstorms, and subsequent to the installation of the landscape plan on the Salajas' property. Meier did not notice any water flowing from the Salajas' property onto Kearns's property. Goyette notes that there was no indication that there was water coming from the Salajas' property onto Kearns's property.

¶15 Further, no witness could state that damage occurred to Kearns's property. Given this conflicting testimony as to whether or not water was flowing from the Salajas' land onto Kearns's land, plus the absence of any independent proof of material damage to Kearns's property, we conclude as a matter of law that the trial court did not err in concluding that Kearns did not meet the burden of proof to warrant an abatement order.

B. Completion of Asphalt Roadway.

¶16 Next, Kearns claims the trial court erred when it concluded:

> [W]ithin the 30 foot easement area there is a ten foot roadway that Ms. Kearns agreed to build, has the contractual obligation to build to the specifications set forth in the National Survey Plan which includes construction detail that require[s] the installation of a base coat followed by a top coat of asphalt.

¶17 This decision by the trial court was in response to the three families' allegation contained in paragraph twelve of their complaint claiming that "Kearns has unreasonably refused to complete the final coat of asphalt on the asphalted drive portion of the easement," and the proofs they submitted.

¶18 Kearns's argument consists of three parts: (1) the offer to purchase signed by the Reynoldses did not include "asphalting the driveway;" (2) no document exists in the Salajas' sale which requires Kearns to install asphalt as provided in the National Survey & Engineering specifications; and (3) the

Muellers' offer to purchase includes no obligation by Kearns to asphalt. We are not persuaded for two reasons.

¶19 The record contains the following evidentiary material for the trial court to have considered. When Kearns opposed the plaintiffs' motion for partial summary judgment, she submitted an affidavit averring that the plaintiffs were given "true and correct copies of the proposed and performed work done by National Survey & Engineering for the development of utilities and access drive [] that now services defendant's and plaintiffs' properties." Also, in the record is a March 23, 1994 letter, from National Survey for the proposed work including a paving plan for the private access driveway which Kearns accepted.

¶20 Appended to the affidavit as an exhibit is a paving and erosion control plan prepared by National Survey. The plan depicts a typical cross section of a driveway and the layers of material that would constitute the road. Additionally, Kearns states that she executed a contract with G.A.P., Inc. to "perform the work of the private driveway per National Survey & Engineering, Inc. specs dated August 8, 1994 …." but G.A.P. never completed the asphalting because of a dispute with Kearns.

¶21 Kearns claims that the development plan was not given to the plaintiffs to set forth the specifications of the driveway plans, but only for future purposes to inform them of the location of their utility lines. Furthermore, she

claims that despite the plaintiffs' attempt to support their theory of nonperformance, their expert witness failed to support their contention.[4]

¶22 The Reynoldses' offer to purchase specifically referred to the National Survey & Engineering plan and that the private driveway would be completed by September 10, 1994. Yet, in the same agreement, it states that asphalting the private drive is not included in the transaction. The Reynoldses did not close with Kearns until September 20, but the driveway was not completed by that date. The lack of driveway completion did not deter the closing because the Reynoldses relied on numerous good faith assurances made by Kearns—that the driveway would be completed according to the plans that they had been shown.

¶23 The Salajas' offer to purchase makes no mention of the National Survey & Engineering plan or any exclusion for asphalting of the driveway. Nevertheless, Mary Salaja testified that she received the National Survey plan, thoroughly discussed the road plan with Kearns, and was assured that there would be a roadway and that it would be paved.

¶24 The Muellers' offer to purchase does not mention the National Survey & Engineering plan and specifically excludes asphalt on the private drive. Charles Mueller, however, testified that he received a copy of the National Survey plan and discussed it on the day the offer to purchase was signed. He remembered subsequent discussions with Kearns in which she promised to install the second

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[4] A fact finder is not bound by the conclusions of any expert witness, even if the opinions are uncontradicted. ***Pautz v. State***, 64 Wis. 2d 469, 476, 219 N.W.2d 327 (1974). Expert testimony is received to help the fact finder evaluate the evidence much like a consultant might advise a business. 2 SALTZBURG & MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 14 (5th ed. 1990).

layer of asphalt as soon as the heavy trucks, engaged for construction purposes, were no longer using the subdivision private road.

¶25 Faced with this conflicting evidence, the trial court was forced to weigh credibility, assess probity, and make alternative determinations based on the record in order to arrive at a reasonable conclusion of law. The fact finder may construct conclusions of law from various blocks of evidence as long as there is sufficient foundational support for the edifices. Kearns suggests that the trial court's finding, or lack thereof, on this issue results in insufficient evidence to support its conclusions. We cannot agree.

¶26 "Failure by the trial court to make findings of fact is not necessarily reversible error." ***Chuck Wagon Catering, Inc. v. Raduege***, 88 Wis. 2d 740, 749, 277 N.W.2d 787 (1979). Where a trial court fails to make specific findings of fact, the reviewing court may assume that such findings of fact were made implicitly in favor of its ultimate decision. ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

¶27 Where a trial court fails to make necessary express findings of fact, the proper appellate course of action depends on the record. ***Ritt v. Dental Care Assocs.***, ***S.C.***, 199 Wis. 2d 48, 81, 543 N.W.2d 852 (Ct. App. 1995). In general, when faced with inadequate findings, an appellate court may: (1) look to an available memorandum decision for findings and conclusions; (2) review the record anew and affirm if a preponderance of the evidence clearly supports the judgment; (3) reverse if the judgment is not so supported; or (4) remand for further findings and conclusions. ***T.R.M. v. Brookens***, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981). An appellate court will search the record for evidence to

support the trial court's findings of fact. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

¶28 It is obvious from the trial court's remarks from the bench and its written findings of fact and conclusions of law that it gave more credence to evidence presented by the three families than that presented by Kearns. Although the Muellers' offer to purchase excludes an asphalt paving commitment, the Salajas' offer makes no mention of such an obligation. The Reynoldses' offer to purchase by both including a commitment for a certain type of asphalting, and excluding the same, renders the document ambiguous. As a result, the trial court could properly construe it against the drafter, Kearns, and in favor of the Reynoldses. ***Farley v. Salow***, 67 Wis. 2d 393, 400-01, 227 N.W.2d 76 (1975). The court heard a great deal of testimony about the content of the paving plan presented by National Survey, which was approved and implemented by Kearns. Although Kearns executed a contract for the implementation of the paving plan, it was never completed. Based upon the evidence the court had before it, it did not commit error in concluding that Kearns and the three families entered into an oral agreement over and above the purchase of real estate. The details of the planned paved private roadway were discussed, Kearns executed a contract to accomplish the project as evidenced by her pleadings, and only a disagreement with the contractor stood in the way of its realization as planned and promised. The nature of the agreement and the circumstances of its creation insolate it from any statute of frauds defense.

C. Payment for Asphalt Paving.

¶29 Kearns's third claim of trial court error relates to when she should be paid from the maintenance fee account for asphalt paving that she did install. In

her amended counterclaim, Kearns claims the language of Part Two of the Warranty Deed plainly and simply grants her the ability to collect full payment at anytime between the date plaintiffs signed Part Two and the year 2007. She argues that because Part Two does not set forth a specific due date for payments, the amount of reimbursement for the paving should be payable on demand pursuant to WIS. STAT. § 403.108(1)(b). We are not persuaded.

¶30 The interpretation of a contract is a question of law we review independently. ***Gunka v. Consolidated Papers, Inc.***, 179 Wis. 2d 525, 531, 508 N.W.2d 426 (Ct. App. 1993). When a contract's terms are unambiguous, we must give the contract its plain and ordinary meaning and construe it as it stands. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). Contractual language is ambiguous when it is "reasonably or fairly susceptible of more than one construction." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Whether a contract provision is ambiguous is a question of law.

¶31 When the trial court examined this fourth claim of Kearns's amended counterclaim, it ruled:

> I find that the language is unambiguous, and it is clear and understandable that the 30 foot easement area is land belonging to Diana Kearns, and it is land that Ms. Kearns is responsible for maintaining.
>
> I find that within the 30 foot easement area there is a ten foot roadway that Ms. Kearns agreed to build ….
>
> [T]he ten foot roadway is the portion of the easement area that the plaintiffs have agreed to maintain in this manner.
>
> They pay the monthly maintenance fees as set forth in their warranty deed part two. Ms. Kearns then maintains and repairs the roadway using those funds and reimbursing herself as set forth in those warranty deeds part two.

> I'm making these determinations based on the language which is clear, understandable and unambiguous.
>
> ....
>
> Now with respect to the cost of the paving, the cost of the paving according to the warranty deed part two must come out of the maintenance fee over time as set forth in the plan Ms. Kearns developed and designed when she wrote that part two.

The trial court came to these determinations and conclusions by reading the following relevant portion of paragraph three of Part Two of the Warranty Deed signed by the parties:

> Diana M. Kearns will be reimbursed for the paving of the private drive through the maintenance fee account at the time the person/s of the third part feels there is [sic] adequate funds in the account for the everyday up keep necessary to maintain the drive. Payment in full to Diana M. Kearns will not exceed the year 2007.

¶32 Contrary to Kearns's argument, the triggering event for withdrawal of funds for the maintenance of the roadway is when, in Kearns's judgment, there are sufficient funds paid into the account pursuant to the monthly payment obligation of the plaintiffs to make a withdrawal. If all terms of the contractual relationship are performed, there will be funds in the maintenance account. Whether the payment formula is adequate for the purposes of roadway cost and maintenance is not a matter relevant to the disposition of this claim of error. We conclude the court correctly interpreted the provisions of the Warranty Deed.

D. Late Payment Fees.

¶33 Fourth, Kearns contends the trial court erred in concluding that the late payment assessment of $2 per day for the monthly maintenance fee is an unenforceable penalty.

¶34 Whether a liquidated damage clause is a penalty and therefore unenforceable is a question of law which we review independently. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 523-24, 331 N.W.2d 357 (1983). In ***Wassenaar***, our supreme court established the appropriate methodology by which a court considers the validity of stipulated damage clauses. The overriding test is one of reasonableness under the totality of the circumstances. ***Id.*** at 529-30. Reasonableness is ascertained by the application of the following three nonexclusive factors:

> (1) Did the parties intend to provide for damages or for a penalty? (2) Is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract? and (3) Are the stipulated damages a reasonable forecast of the harm caused by the breach?

Id. (footnotes omitted). WISCONSIN STAT. § 402.718(1) played a significant role in the ***Wassenaar*** decision. The statute reads:

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

¶35 According to the payment formula for the maintenance fee set forth in paragraph three of Part Two of the Warranty Deed, if the individual plaintiffs fail to pay the fee of $15 per month (which increases by $12 each year) by the fifth day of each month, a $2 per day penalty will be assessed and added to the balance owed until the gross balance is paid in full for that month's fee. Considered in terms of one month, the fee is $75, which is exorbitant. In accord with the trial court's ruling, we also conclude that the liquidated damages constitute a penalty.

E. Monthly Maintenance Fee.

¶36 Kearns's last claim of error is a potpourri of errors alleging that the trial court should be reversed for denying various items of costs contained in her amended counterclaim.

¶37 The first of this group of alleged errors relates to the application of the monthly maintenance fee. Kearns contends that the monthly maintenance fee can be applied to the entire thirty-foot-wide easement. We reject this reading of paragraph three of Part Two of the Warranty Deed. Succinctly expressed, from a reasonable reading of paragraph three, one can conclude that the maintenance fee is to be used only for the private drive and not for any part of the easement beyond the length and breadth of the roadway.

¶38 Second, Kearns contends she is entitled to assess the plaintiffs for any damage arising from negligent acts affecting the whole easement from the maintenance account. We reject this claim also. No reasonable reading of Part Two of the Warranty Deed even suggests this interpretation. The account exists only for the maintenance of the private drive. Paragraph six describes how negligent damages to the easement, as a whole attributable to the plaintiffs, are to be handled. Once the damages are fixed, and if not paid by the responsible party, the amount is to be individually assessed and added to the monthly maintenance fee of the person(s) responsible for the damages.

¶39 Third, Kearns claims she is entitled to be reimbursed for the real estate taxes attributable to the easement. We find no support for this claim. Doubtless, Kearns owns the easement. Further, there is no language in the Warranty Deed requiring the plaintiffs to reimburse Kearns for their pro-rata share of the real estate taxes attributed to the area of the easement.

F. Catch Basin.

¶40 Kearns next claims she is entitled to damages for the installation of a catch basin. She was ordered by the City of Milwaukee to install the catch basin to prevent groundwater from flowing from her property to property located to the south. Litigation ensued and eventually a settlement was reached. A condition of the settlement required Kearns to install the catch basin. She now argues that she can transfer the cost of the catch basin to the maintenance costs of the easement. It is unmistakably clear, as decided earlier in this opinion, that the assessed maintenance fee can only be applied for the maintenance of the private roadway. There is no evidentiary support for a conclusion that the plaintiffs were parties to the installation of the catch basin.

G. Offset.

¶41 Lastly, Kearns claims trial court error in allowing the plaintiffs an offset of damages. These damages relate to Kearns's activities during the period that the Salajas were engaged in their landscaping project. The trial court ruled that Kearns's actions caused the Salajas to pay an additional $500 to their landscaping contractor. We have reviewed the record in this regard and conclude that its contents support the trial court's determinations and conclusions. The trial court did not erroneously exercise its discretion and the evidence reasonably supports its conclusions.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.