

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 00-0285-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT PEASLEE AND BEVERLY PEASLEE,

**PLAINTIFFS-APPELLANTS-CROSS-
RESPONDENTS,**

v.

DAVID PEASLEE AND KAREN PEASLEE,

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Robert Peaslee and Beverly Peaslee (Robert) appeal from a judgment giving them a necessary easement over property owned by

David Peaslee and Karen Peaslee (David). They argue that the trial court placed improper restrictions on the scope of the easement. We agree, and reverse the judgment. David cross-appeals, arguing that a necessary easement should not have been granted because it was barred by the statute of limitations. The trial court did not address this issue at trial, and we direct it to do so on remand.

¶2 The facts need not be spelled out in detail for purposes of this appeal. Robert and David own adjoining forty-acre rural properties. A road passing along the edge of the two properties is the only access to Robert's land. This action was commenced by Robert to obtain an easement over the road. The trial court granted a necessary easement, but placed certain restrictions on its use during the gun deer-hunting season. One of those restrictions is that during the gun deer-hunting season, "neither plaintiffs, defendants, or their invitees, heirs, successors, lessees or assigns shall use the easement for motor vehicle travel" between daybreak and 11:00 a.m., and between 1:00 p.m. and dusk. Robert appeals only to remove this restriction.¹

¶3 On appeal, the parties agree that once it has been determined that a necessary easement exists, the scope and location are left to the discretion of the

¹ The judgment also contains another restriction. The judgment begins by granting to Robert a necessary easement "on the eastern edge of the following described property." The judgment then provides the legal description for David's property. The judgment further states: "During the annual rifle deer hunting season, no unnecessary activity shall occur on the described property. The intent is to limit noise and activity which would disturb deer. Examples include recreational vehicle use and camp fires."

In Robert's briefs on appeal, he appears to believe that this restriction applies to his property. However, as we read the judgment, it is actually David's property which is the "described property" to which the limit on unnecessary activity applies. This may not have been the trial court's intent in drafting the judgment, but we do not know that from this record. It does not appear that Robert is aggrieved by this provision of the judgment, as it is presently written. Accordingly, we confine our analysis to the restriction on vehicle traffic across the easement itself.

trial court. The parties also agree that the scope of a necessary easement is stated in our recent decision in *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 842, 593 N.W.2d 103 (Ct. App. 1999): “[A] way of necessity is coextensive with reasonable needs, present and future, of the dominant estate and varies with the necessity, insofar as may be consistent with the full reasonable enjoyment of the servient estate.”

¶4 Robert argues that the trial court’s time-of-day restriction on use of the easement is not consistent with his dominant estate’s reasonable present and future needs, including its potential as a residential property. He argues that the restriction essentially limits his estate to use as hunting land during the hunting season. In response, David argues that the restriction is reasonable to allow for the full enjoyment of his servient estate’s use as hunting land, because the passage of vehicles would disturb deer.

¶5 We conclude that the trial court erroneously exercised its discretion by imposing the restriction. The trial court’s limit on vehicular traffic unreasonably limits Robert’s use of the land, particularly as a residential property. While passage of vehicles along the edge of David’s property may well cause an occasional disturbance to deer, this restriction on Robert’s passage is not necessary for David to have “full reasonable enjoyment” of a forty-acre property as hunting land.

¶6 In his cross-appeal, David argues that any necessary easement is barred by the statute of limitations, WIS. STAT. § 893.33 (1997-98).² Robert

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

agrees that the trial court did not address this issue when David raised it at trial. However, Robert argues that the trial court properly did not address the issue, because the statute of limitations defense was not raised until trial, and was therefore waived. David, in reply, asserts that up until trial Robert sought only a prescriptive easement, rather than a necessary easement, and therefore David had no reason to raise the statute of limitations defense. We conclude that the trial court should rule on these arguments. If the trial court concludes that the statute of limitations defense is properly before it, the court should also rule on the merits of that defense.

By the Court.—Judgment reversed and cause remanded with directions.

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

