COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal Nos. 2011AP913 & 2011AP1452

Cir. Ct. No. 2010CV4043
2008CV221

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

KATHLEEN S. COX AND KIMBERLY C. WHALEN,

PLAINTIFFS-APPELLANTS,

V.

HAWK'S LANDING HOMEOWNERS ASSOCIATION, INC.,

DEFENDANT-RESPONDENT.

HAWK'S LANDING HOMEOWNERS ASSOCIATION, INC., AND RICHARD S. WILLIAMS,

PLAINTIFFS-RESPONDENTS,

V.

KATHLEEN S. COX AND KIMBERLY C. WHALEN,

DEFENDANTS-APPELLANTS.

APPEALS from orders of the circuit court for Dane County: DANIEL R. MOESER and JULIE GENOVESE, Judges. *Reversed and causes remanded.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 VERGERONT, J. The two actions consolidated for this appeal relate to the efforts of homeowners in a subdivision to have lighting on their backyard sports court over the objections of the homeowners' association. The first action is one for injunctive relief filed by the Hawk's Landing Homeowners' Association. In a prior appeal we affirmed the judgment of the circuit court entered in favor of the Association. After judgment was entered in that action, a dispute arose concerning whether, in addition to prohibiting illumination of the sports court with the three-source light that was in place in 2007 when the Association filed the injunction action, the judgment also prohibited illumination with a single-source light. In response to post-judgment motions filed by the Association, the circuit court entered a series of orders prohibiting illumination of the sports court with any light. The homeowners seek to appeal not only the most recent of those orders, but five prior orders.

¶2 The second action, filed by the homeowners after we issued our decision on appeal in the first case, is for a declaratory judgment. The homeowners seek a declaration that their use of the single-source light was approved by default as a result of the failure of the architectural control committee to follow required procedures when the homeowners submitted their landscaping plan in 2006. The circuit court in this action concluded that the homeowners were barred from bringing this claim because they did not bring it as a counterclaim in the first action, the elements of claim preclusion are met, and the claim was a

common law compulsory counterclaim in the first action. The homeowners appeal the resulting order of dismissal.

¶3 We address the injunction action first and conclude that only the last order, entered in June 2011, is properly before us. As to that order, we conclude it was entered in error because the judgment, properly construed, does not enjoin use of the single-source light.

¶4 With respect to the declaratory judgment action, we conclude the homeowners are not barred from bringing this action. Even if all three elements of claim preclusion are met, an issue we do not decide, the homeowners, as defendants in the prior action, are not barred from bringing the claim they assert in this action unless it was a common law compulsory counterclaim in the first action. We conclude it was not.

¶5 Accordingly, we reverse the June 2011 order entered in the injunction action, 2011AP1452, and remand with instructions to vacate the order. We reverse the order of dismissal entered in the declaratory judgment action, 2011AP913, and remand for further proceedings. We deny the Association's request for attorney fees under WIS. STAT. § 809.25(3) (2009-10)[1] because the homeowners' appeal in neither action is frivolous.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND[2]

¶6 Kathleen Cox and Kimberly Whalen (the homeowners) purchased a lot in the Hawk's Landing Golf Club subdivision. The lots in the subdivision are subject to a Declaration of Covenants, Restrictions and Conditions (the Declaration), which establishes an architectural control committee charged with reviewing all building plans, specifications, site plans, and landscape plans. In April 2006 the homeowners submitted to the committee a landscaping plan that included a backyard sports court illuminated by a light. In May 2006 the committee approved the plan with some exceptions, one of which was that "[t]he lighting for the sports court will not be approved." The homeowners proceeded with the construction of the sports court without the light. However, in September 2007, the homeowners installed a three-source light mounted on top of a freestanding seventeen-foot pole.

¶7 When the homeowners refused to cease using the three-source light at night and to remove it, the Association and Richard Williams, president of the Association and owner of a lot, filed an action seeking injunctive relief. (We will refer to the Association and Williams collectively as "the Association" unless it is necessary to distinguish them.) On the parties' motions for summary judgment, the circuit court, the Honorable Michael Nowakowski presiding, agreed with the Association that the Declaration required approval by the committee before installing the light in 2007. However, the court concluded a trial was necessary on

[2] The facts in paragraphs 6 to 9 are taken largely from the background section in ***Hawk's Landing Homeowners Ass'n v. Cox***, No. 2009AP701, unpublished slip op. ¶¶3-9 (WI App June 24, 2010).

whether the committee acted reasonably in denying approval, post-installation, of the light installed in 2007.

¶8 Before trial, the circuit court ruled on the Association's motion in limine that any evidence about the procedural deficiencies and possible resulting approval by default in 2006 was irrelevant to the denial of approval of the light actually installed in 2007. This evidence was irrelevant, the court reasoned, because the light installed in 2007 was not the same type of light as the one proposed with the landscaping plan in 2006. We discuss the procedural facts regarding the homeowners' "approval by default" theory in more detail later in this opinion.

¶9 After a trial to the court, the circuit court determined that the committee's decision with respect to the light installed in 2007 was based on the evidence, was consistent with the Declaration, and was reasonable. The November 2008 judgment entered by the court provided, as relevant to this appeal:

> [The homeowners] and all persons claiming under any [homeowner] or acting by or under her authority or direction are hereby enjoined and restrained from using the sports court light on the [homeowners'] property which is the subject of this action.
>
> Within sixty days of entry of this Judgment, the [homeowners] shall remove or cause to be removed the sports court light including all fixtures and any accessory parts or equipment installed in violation of the restrictive covenant which is the subject of this action.

¶10 In June 2009, while the homeowners' appeal was pending in this court, the homeowners removed the three-source light and fixture and replaced it with a single-source light and fixture, which they began using to illuminate the

sports court.[3] This prompted a motion for contempt by the Association. The homeowners' position, as explained at the hearing on the motion for contempt, was that the diagram and information on the single-source light was originally submitted to the architectural control committee in April 2006 with the landscaping plan and was approved by default because the committee failed to follow the procedures required in the Declaration. According to the homeowners, the judgment did not prohibit use of this single-source light because the court had expressly declined to consider the propriety of the 2006 procedures, based on its ruling that the three-source light installed in 2007 was not the same type of light as the single-source light submitted for approval in 2006.

¶11 The circuit court, the Honorable Julie Genovese now presiding, found the homeowners were not in contempt because they did not "deliberate[ly] attempt to avoid" the judgment. However, Judge Genovese concluded that Judge Nowakowski had intended that there be no illumination of the sports court pending appeal; and she therefore entered an order that prohibited the homeowners from using any light on the sports court until this court decided the appeal.

¶12 We issued our decision on June 24, 2010, and affirmed the judgment. As pertinent to this appeal, we concluded: (1) the Declaration "plainly requires approval by … the committee for a light on the sports court on a freestanding seventeen-foot pole"; (2) the circuit court did not make legal or factual errors in concluding that the committee acted reasonably and consistent with the Declarations in disapproving the light installed in 2007; (3) the circuit

[3] The three-source light had a different fixture than did the single-source light. However, for simplicity's sake, from here on we omit reference to the fixtures and simply refer to "the single-source light" and "the three-source light."

court did not apply an incorrect legal standard or erroneously exercise its discretion in excluding evidence at trial on the homeowners' defense of approval by default in 2006; and (4) the exclusion of this evidence did not prevent the real controversy from being tried. ***Hawk's Landing Homeowners Ass'n v. Cox***, No. 2009AP701, unpublished slip op. ¶¶13, 19-26, 27-35, 40-45 (WI App June 24, 2010).[4]

¶13 In July 2010 the homeowners resumed using the single-source light. They also filed a declaratory judgment action against the Association seeking a declaration that the single-source light was approved by default in 2006 and the homeowners were therefore entitled to use it. The circuit court, the Honorable Daniel Moeser presiding, granted the Association's motion to dismiss on the ground that the judgment in the injunction action barred this action. Specifically, the court concluded that this claim relating to the single-source light was not brought as a counterclaim in the injunction action, all the elements of claim preclusion were met, and this claim was a common law compulsory counterclaim in the injunction action. The homeowners appeal this order of dismissal.

¶14 While the declaratory judgment action was pending before Judge Moeser, Judge Genovese issued an order in the injunction action prohibiting any lighting on the sports court unless Judge Moeser permitted it. After the homeowners appealed the dismissal order in the declaratory judgment action, Judge Genovese entered another order prohibiting any illumination on the sports court unless and until specified events occurred. We discuss the terms of these

[4] The supreme court denied the homeowners' petition for review of our decision, and remittitur occurred in October 2010.

orders in more detail later in the opinion. The homeowners filed a notice of appeal of the later of these two orders, the one entered in June 2011. In the alternative, they sought permission for leave to appeal that order as a nonfinal order. *See* WIS. STAT. § 808.03(2).

¶15 In addressing the homeowners' petition for leave to appeal Judge Genovese's June 2011 order, we did not resolve the issue whether that order was a final order and therefore appealable as of right under WIS. STAT. § 808.03(1). Instead, we concluded that "even if the order is not final, judicial economy is best served by reviewing it along with the … appeal [in the declaratory judgment action]." We ordered the appeal in the injunction action consolidated with the appeal in the declaratory judgment action.

DISCUSSION

¶16 In the following paragraphs we first discuss the homeowners' appeal of the June 2011 order in the injunction action. After determining that this is a final order and that none of the other prior post-judgment orders the homeowners challenge are properly before us, we conclude that the circuit court erred in entering the June 2011 order prohibiting any lighting on the sports court. We arrive at this conclusion because the judgment in the injunction action, properly construed, does not prohibit the homeowners from using the single-source light proposed in 2006. We then discuss the homeowners' appeal of the dismissal order in the declaratory judgment action. We conclude that dismissal was in error because the claim the homeowners assert in this action does not come within the common law compulsory counterclaim rule.

I. Post-Judgment Orders in the Injunction Action

A. The June 2011 Order is Final

¶17 The homeowners seek review of the June 2011 order entered in the injunction action. This order was entered post-judgment and after this court had issued its decision on the appeal of the judgment. The order provided:

> The July 8, 2009 Order continues to prohibit [the homeowners] from using any lighting on the sports court on [the homeowners'] property in Hawk's Landing unless and until [the homeowners] receive approval for such lighting on a future application under the procedures specified in the Declaration of Conditions, Covenants and Restrictions for Hawk's Landing Golf Club dated April 20, 2000. If circumstances change warranting further amendment or dissolution of the 7/8/2009 Order, [the homeowners] may seek further relief regarding the 7/8/2009 Order from this court.

The homeowners also seek review of five orders entered after the judgment and before the June 2011 order, all of which prohibited any lighting on the sports court for varying time periods.

¶18 As already noted, when the homeowners filed a notice of appeal of the June 2011 order and, in the alternative, a petition for leave to appeal, we did not resolve at that time the issue whether that order was final or nonfinal. However, we stated in our order of August 23, 2011, that we were "inclined to view the [June 2011] order as appealable as [a matter] of right." We now resolve this issue because it is fundamental to determining which circuit court orders entered prior to the June 2011 order are properly before us. For the reasons we explain below, we conclude the June 2011 order is final.

¶19 An order is final for purposes of appeal only "if it disposes of the entire matter in litigation as to one or more of the parties." WIS. STAT. § 808.03(1). The determinations whether an order is final and whether there is a

timely appeal from a final order present questions of law, which we review de novo. ***Sanders v. Estate of Sanders***, 2008 WI 63, ¶21, 310 Wis. 2d 175, 750 N.W.2d 806 (citations omitted).

¶20 At the time the June 2011 order was entered, the only matter pending before the circuit court was the homeowners' motion for the court to dissolve the then-existing order prohibiting the homeowners from illuminating the sports court "in any way unless and until illumination is permitted by a ruling [in the declaratory judgment action]" or, in the alternative, for the court to modify the then-existing order. Specifically, the homeowners sought the following modification as an alternative to dissolution of the order: the addition of language "to permit the lighting of the court in the event of changed circumstances in the future such as approval by the Architectural Control Committee or amendment of the covenants and restrictions to permit such lighting." The June 2011 order disposes of both alternatives in the motion: it expressly denies the motion for dissolution of the existing order and expressly grants the motion to amend the existing order. The remainder of the order provides as quoted above in paragraph 17. After this order was entered, there was no "matter in litigation" between the parties in this action. *See* WIS. STAT. § 808.03(1).

¶21 The last sentence of the June 2011 order—permitting the homeowners to "seek further relief" "if circumstances change"—does not indicate that the order lacks finality. If no future motion is filed by the homeowners, no action will be taken by the circuit court; and whether the homeowners file a future motion is up to them. The court's order is not conditional on any future action by the court or by either party.

¶22 We recognize that this order does not contain language explicitly stating that the order is final, as directed by the supreme court in ***Wambolt v. West Bend Mutual Insurance Co.***, 2007 WI 35, ¶44, 299 Wis. 2d 723, 728 N.W.2d 670 (citations omitted). However, the supreme court has since clarified that the absence of a finality statement does not render nonfinal an order or judgment that otherwise disposes of the entire matter in ligation between one or more parties. ***Admiral Ins. Co. v. Paper Converting Machine Co.***, 2012 WI 30, ¶29, 339 Wis. 2d 291, 811 N.W.2d 351.

¶23 Because the June 2011 order is final, the timely notice of appeal from that order brings before this court all nonfinal orders "adverse to the appellant and favorable to the respondent made in the action … not previously appealed and ruled upon." WIS. STAT. § 809.10(4). The notice of appeal of the June 2011 order does not, however, give this court jurisdiction over *final* orders entered in this action prior to June 2011. *See* ***Laube v. City of Owen***, 209 Wis. 2d 12, 15, 561 N.W.2d 785 (Ct. App. 1997). Instead, this court has jurisdiction over a prior final order only if a timely notice of appeal has been filed from that prior final order. ***Townsend v. Massey***, 2011 WI App 160, ¶11, 338 Wis. 2d 114, 808 NW.2d 155; *see also* § 809.10(1)(e). We therefore turn our attention to the five orders entered before June 2011 of which the homeowners seek review, and we examine which of those orders, if any, are properly before us.

B. The June 2011 Final Order Does Not Bring the Five Prior Orders Before Us

¶24 We address the five prior orders in chronological order. For the following reasons, we conclude that none are properly before this court.

¶25 The first two orders the homeowners seek to have reviewed are rulings Judge Nowakowski made in relation to the Association's post-judgment motion for contempt. As already noted, this contempt motion was prompted by the homeowners' illumination of their sports court with the single-source light. The Association asserted in its motion that the judgment prohibited all lights on the sports court without prior approval of the committee. The court, Judge Nowakowski presiding, issued an ex parte temporary restraining order (TRO) in July 2009 restraining the homeowners from using "any lighting on the sports court" pending a hearing on the motion. Judge Nowakowski extended this order twice because the hearing on the motion was rescheduled twice.

¶26 A motion for contempt initiates a special proceeding. *See* ***State v. Heyer***, 174 Wis. 2d 164, 168 n.2, 496 N.W.2d 779 (Ct. App. 1993) (a contempt order has traditionally been held to be a final order in a special proceeding). Thus, the ex parte TRO, twice extended, was a nonfinal order in a special proceeding. It was nonfinal because the issue of contempt remained to be decided when the court first entered the order and each time the court extended it. This special proceeding was concluded with an order entered on November 9, 2009, Judge Genovese presiding. This order determined that the homeowners were not in contempt and denied the motion for contempt.[5] This order was a final order in a special proceeding and therefore appealable as of right under WIS. STAT. § 808.03(1).

[5] At the same time, Judge Genovese denied, without comment, the homeowners' motion to dissolve the ex parte TRO and dismiss the contempt proceeding. This motion had been filed after the first extension of the ex parte TRO and was deferred until the contempt motion was heard.

¶27 The homeowners could have sought leave to appeal, under WIS. STAT. § 808.03(2), the nonfinal rulings extending the ex parte TRO during the pendency of the contempt proceeding. But they did not do that. Or the homeowners could have appealed as of right from the final order denying the motion for contempt, which would have brought those nonfinal rulings before this court. Even though the final order was favorable to the homeowners, they could have properly appealed it because the nonfinal orders were adverse to the homeowners. *See* ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 757 n.3, 548 N.W.2d 535 (Ct. App. 1996) (appeal from a final order favorable to the appellant is proper where prior nonfinal order was adverse), *abrogated on other grounds by* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶60-62, 279 Wis. 2d 520, 694 N.W.2d 879. Of course, there likely would have been an issue of mootness had the homeowners waited to appeal the rulings extending the ex parte TRO until appealing the final order denying the motion for contempt; but that does not affect this court's jurisdiction over a final order timely appealed.[6] In any case, the significant point here is that the homeowners did not timely appeal the final order in the contempt proceeding. *See* WIS. STAT. § 808.04 (governing time limits for appeals).

¶28 The third order the homeowners attempt to appeal is an order that Judge Genovese also entered on November 9, 2009, and it was contained in the same document as the order denying the contempt motion. In this document, after finding that the homeowners were not in contempt, Judge Genovese concludes that

[6] If this court has jurisdiction over an appeal, it has the authority to decide an issue even though it is moot, that is, even though a decision on the issue does not have an effect on an existing controversy. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989).

"it is appropriate to have a restraining order in place pending the Court of Appeals decision." The order states that:

> [T]he Ex Parte Temporary Injunction or Restraining Order dated July 8, 2009 [the first ex parte TRO entered by Judge Nowakowski after the motion for contempt was filed] [shall] be continued, and … it [shall] preclude [the homeowners] from using any lighting on the sports court on [the homeowners'] property in Hawk's Landing until the Court of Appeals issues its decision on the pending appeal in this case. After the Court of Appeals' decision, either party may request modification of this order to conform with the Court of Appeals' decision.

¶29 This order prohibiting the homeowners from using any lighting on the sports court pending our decision on appeal is somewhat confusing in that it purportedly continues the initial ex parte TRO entered in the contempt proceeding. However, the contempt proceeding ended with a finding of no contempt. We conclude this order is more aptly characterized as relief pending appeal because the circuit court's oral explanation for entering this order was to preserve the status quo pending appeal. *See* WIS. STAT. § 808.07(2)(a)3. (pending appeal the circuit court may "make any order appropriate to preserve the existing state of affairs").[7]

¶30 Turning to the issue whether this order prohibiting any lighting pending appeal is a final order, we conclude it is final. After Judge Genovese entered this order, there was no other matter pending before the court. True, this order stated that either party could request a modification of this order to conform

[7] Although we characterize this order as relief pending appeal, we do not intend to suggest thereby that the circuit court properly exercised its discretion in entering this order. We do not address that issue because, as we explain, this is a final order and is therefore not properly before us on appeal from the June 2011 order. *See* ¶¶24, 30-33.

to our decision. However, neither party was required to make a request, and, if they did not do so, no further action of the court was required. The fact that the Association did bring a motion to modify this order after we issued our decision does not make this order nonfinal. We do not determine finality by subsequent events but by what the document shows the circuit court contemplated at the time the order was entered. ***Townsend***, 338 Wis. 2d 114, ¶11 (citation omitted).

¶31 The homeowners appear to equate the temporary nature of an order with lack of finality, but this is a mistaken assumption. Orders that are called "temporary" because they are in effect only until the merits of a matter are decided—such as the TROs issued pending resolution of the contempt motion in this case—are nonfinal because there remains a matter for the court to resolve. However, an order that, by its terms, continues until the occurrence of an event may be a final order even though the event is certain to occur: what matters is whether the order "disposes of the entire matter in litigation as to one or more of the parties." WIS. STAT. § 808.03(1).

¶32 We recognize that there may be an ambiguity in the circuit court's order, but it is an ambiguity that does not affect the finality of the order. The last line of the order may mean the order expires when our decision is issued if there is no request by either party; or it may mean that the order continues in effect after our decision is issued if there is no request by either party. In either case, however, there is plainly nothing remaining before the circuit court for it to decide after the issuance of this order.

¶33 We also recognize that it is unusual to analyze an order pending appeal in terms of finality. This is because there is a simple and speedy avenue of relief for "[a] person aggrieved by an order of the trial court granting the relief

[pending appeal]…." WIS. STAT. § 809.12. Pursuant to § 809.12, that person "may file a motion for relief from the order with [this] court." If a person in the situation of the homeowners files such a motion, the issue whether the court's order pending appeal is final or nonfinal simply does not arise. It arises in this case because of the unusual circumstance that the homeowners did not seek relief from the circuit court's order pending appeal and now seek to have it brought before this court by appealing a later final order.

¶34 The fourth and fifth orders the homeowners seek to appeal were entered in response to the motion filed by the Association in August 2010 after the homeowners resumed using the single-source light. As already noted, our decision, issued in June 2010, affirmed the judgment but did not address the proper construction of the judgment or the merits of the homeowners' argument that the single-source light had been approved in 2006 by default. At the time the Association filed its August 2010 motion, the homeowners had already filed the declaratory judgment action seeking a ruling on their theory of "approval by default" of the single-source light. The Association's August 2010 motion in this case sought an order that the homeowners "comply with the initial Judgment by 1) ceasing to use <u>any</u> sports court light and 2) immediately removing the existing light." (Emphasis in original.) The Association's motion also sought attorney fees for Williams under the Declaration for the successful defense on the appeal and for the motion.

¶35 The fourth order was entered by Judge Genovese upon the filing of the Association's August motion and provided: "It is hereby ordered that [the homeowners] shall refrain from illuminating their sports court with either the existing single light or with any other light pending a hearing on [the Association's] Motion to Modify the Court's November 9, 2009 Order." This is

plainly a nonfinal order because the merits of the motion had yet to be decided and a pending hearing is referenced.

¶36 The fifth order was entered after the hearing and provided: "That a) [the Association's] Motion to Modify the Court's November 9, 2009 Order be granted and b) the [homeowners'] sports court shall not be illuminated in any way unless and until illumination is permitted by a ruling of the Honorable Daniel R. Moeser, in the [declaratory judgment action]." This order also awarded Williams attorney fees for defense of the appeal and for the motion.

¶37 We conclude this fifth order is final. After the entry of this order, nothing remained before the court for the court to decide. A timely appeal of this fifth order would have brought before the court of appeals the fourth order, the nonfinal order entered pending the hearing on the motion. Thus, neither the fourth nor the fifth order the homeowners seek to challenge is brought before this court by the timely appeal of the June 2011 order.[8]

C. The June 2011 Order was Entered in Error

¶38 Having concluded that only the June 2011 order is properly before us, we turn to the homeowners' challenge to this order.

¶39 The homeowners contend that the circuit court lacked the authority to enter the June 2011 order on a number of grounds, but we address only one. The homeowners assert that the order was broader than the judgment on which it

[8] Because we conclude the order awarding attorney fees for the appeal and for the Association's August 2010 motion are not properly before us, we do not address the homeowners' argument challenging the award of attorney fees for this motion.

was purportedly based and, thus, in effect, a permanent amendment to the judgment that the circuit court lacked the authority to enter. The Association responds that the judgment, properly construed, prohibits use of the single-source light and the circuit court had the inherent authority to enter the June 2011 order for the purpose of effectuating the judgment. The Association does not argue that the circuit court had the authority to enter the order if the judgment, properly construed, does not prohibit use of the single-source light. Because we conclude the judgment, properly construed, does not prohibit use of the single-source light, we reverse the order without examining the issue of a circuit court's authority to enter post-judgment, post-appeal injunctions where there has been a finding of no contempt of the judgment.

¶40 A judgment that is clear on its face is not open to construction, but a circuit court may construe an ambiguous judgment. ***Washington v. Washington***, 2000 WI 47, ¶17, 234 Wis. 2d 689, 611 N.W.2d 261. A judgment is ambiguous when the language "is subject to two or more reasonable interpretations, either on its face or as applied to the extrinsic facts to which it refers." ***Cashin v. Cashin***, 2004 WI App. 92, ¶11, 273 Wis. 2d 754, 681 N.W.2d 255 (citation omitted). In deciding whether a judgment is ambiguous, we consider the judgment as a whole, not the meaning of particular provisions in isolation. ***Id.*** Whether a judgment is ambiguous presents a question of law. ***Washington***, 234 Wis. 2d 689, ¶18.

¶41 We are uncertain whether Judge Genovese viewed the judgment as plainly enjoining use of the single-source light, a diagram of which the homeowners submitted in April 2006 with their landscaping plan, or whether she viewed the judgment as ambiguous on this point but resolved the ambiguity in favor of enjoining use of this light. However, because our review on the ambiguity issue is de novo, we undertake an independent analysis.

¶42 The judgment enjoins "using the sports court light on the [homeowners'] property which is the subject of this action." The homeowners rely on this provision in arguing that the light that was "the subject of the action" was the three-source light installed in 2007. The Association relies on the next provision in the judgment, which orders that, within sixty days of the entry of the judgment, the homeowners "shall remove or cause to be removed the sports court light including all fixtures, and any accessory parts or equipment installed in violation of the restrictive covenant which is the subject of this action." The Association contends that the "subject of this action" in this provision modifies "restrictive covenant" and therefore "equipment installed in violation of the restrictive covenant that is the subject of this action" includes the single-source light. The homeowners respond that the single-source light was approved by default in 2006, although the circuit court did not decide this issue, and therefore use of that light is not enjoined.

¶43 We conclude that both interpretations are reasonable. The judgment does not plainly state whether "the sports court light" includes the single-source light that was proposed in 2006 but was not installed until after the judgment was entered.

¶44 Our standard of review on resolving this ambiguity requires some discussion. We have held that, when a circuit court judge resolves an ambiguity in his or her own judgment, we defer to that interpretation and affirm it if it is based on the judge's experience of the trial and a reasoned rationale. ***Cashin***, 273 Wis. 2d 754, ¶12 (citing ***Schultz v. Schultz***, 194 Wis. 2d 799, 808-09, 535 N.W.2d 116 (Ct. App. 1995)). We do so because the judge who presided and entered the ambiguous judgment is in a better position than this court to make the

determinations involved in clarifying the ambiguity. ***Schultz***, 194 Wis. 2d at 808-09.

¶45 In this case, the ambiguous judgment was entered by Judge Nowakowski, and Judge Genovese's order was based on her construction of that judgment. We conclude that we are in as good a position as Judge Genovese to resolve the ambiguity. We therefore review her order de novo. However, as we discuss below, Judge Nowakowski, in the context of extending the ex parte TRO pending the contempt hearing, made comments on which Judge Genovese evidently relied, at least to some extent, in construing the judgment. As to Judge Nowakowski's comments, we examine them with the deference due the judge who presided and entered the ambiguous judgment. For the reasons we explain, we conclude these comments do not provide a basis for resolving the ambiguity in the judgment.

¶46 When we interpret an ambiguous judgment, we consider the circumstances at the time of the entry of the judgment and we also consider the entire record. *See* ***Washington***, 234 Wis. 2d 689, ¶17.

¶47 Beginning with the complaint, we see that it does not differentiate between the single-source light in the drawing submitted with the landscaping plan in 2006 and the three-source light installed in 2007; the complaint refers to both of these as "the Light" and requests an injunction enjoining use of "the Light" and ordering immediate removal of "the Light."

¶48 The next relevant portion of the record concerns the homeowners' motion for partial summary judgment. One of the grounds for this motion was the homeowners' "approval by default" defense. Specifically, the homeowners contended that the Association did not act on their landscaping plan in 2006 within

fifteen days of its submission and did not have a meeting to consider the submission. According to the homeowners, both these procedures were required by the Declaration. Therefore, the homeowners contended, "the light in controversy" was "deemed approved."

¶49 The Association asserted that the time and meeting requirements had not been met. In the alternative, the Association argued that, even if the light proposed in 2006 was deemed approved by the failure to meet those requirements, that theory did not help the homeowners for two reasons: they did not install the same type of light in 2007 and they did not install any light within the requisite time period after the "deemed" approval.

¶50 In ruling on the "approval by default" defense, Judge Nowakowski concluded that, based on the undisputed facts, the initial decision to disallow the light submitted was timely. The premise of the court's conclusion was that there was a presumption that the submission was mailed and a presumption that mail delivery took three days, and there was no evidence to overcome these presumptions. The court therefore found it unnecessary to address other issues related to the date of receipt of the submissions. With the timeframe based on the two presumptions, the court concluded that the undisputed facts showed there was a meeting within fifteen days of receipt of the submissions. However, the court stated, even if the decision on the 2006 submission was untimely or not made at a meeting, it was undisputed that the three-source light installed in 2007 was not the same type of light proposed with the 2006 submission. Therefore, the court concluded, the "deemed approval" theory did not give the homeowners the right to install the light they installed in 2007; and the court did not reach the Association's alternative argument that the installation of that light took place well

after the permissible date for implementation of anything that was "deemed approved."

¶51 Were this ruling viewed in isolation, it might support an argument that the circuit court conclusively resolved against the homeowners the factual issues of the timeliness of the 2006 disapproval and the meeting requirement. This would mean that neither the light proposed in 2006 nor the light actually installed in 2007 could have been "deemed approved" because of procedural deficiencies in 2006. This, in turn, might support an argument that the judgment was intended to enjoin not only use of the light installed in 2007, but also use of the light proposed in 2006. However, the court revisited the question of the procedural deficiencies in the 2006 disapproval at the hearing on the Association's motion in limine. We next examine the record of this hearing.

¶52 The hearing on the Association's motion in limine took place the day before the trial. The only issue set to be tried was whether the committee acted reasonably in retroactively denying approval of the light installed in 2007. As already noted, the Association sought to exclude evidence about the procedural deficiencies in 2006, arguing that they were not relevant given the court's ruling that it was undisputed that the light proposed in 2006 was not the same type of light installed in 2007. The homeowners explained to the court that, after the court ruled on its partial summary judgment motion, discovery disclosed that the 2006 submission had been hand-delivered and received earlier than the date presumed by the court; discovery also disclosed that the meeting the court had considered to fulfill the Declaration requirement did not address the homeowners' submissions. Therefore, the homeowners contended, this additional evidence warranted a trial on its "approval by default" theory.

¶53 In response, the court wanted to know if there was new evidence on whether the light proposed in 2006 was the same type of light as that installed in 2007. The court agreed that, if there was, the homeowners should be able to present that evidence, regardless of the ruling on the homeowners' motion for partial summary judgment. Because the homeowners were unable to describe new evidence on that point, the court concluded that all evidence of deficiencies in the 2006 procedures was irrelevant.

¶54 We are satisfied from the court's comments at the hearing on the motion in limine that the court did not view its prior rulings on the timeliness and the meeting requirements to be conclusive, given the homeowners' proffered newly acquired evidence on those points. Rather, the record shows the court believed the homeowners had the right to present that new evidence if it was relevant, that is, if they had evidence that the 2007 light was the same type of light as that proposed in 2006. The court's later comments in denying the homeowners' motion for reconsideration make explicit that the court did not intend to limit the presentation of evidence at trial based on its rulings on the summary judgment motions. What limited the presentation of evidence, the court stated, was its ruling on the motion in limine that the light proposed with the 2006 landscaping plan was a different type of light than that installed in 2007.

¶55 It is significant for our analysis that the homeowners did *not* argue to the court at the hearing on the motion in limine—or any other time before judgment—that the asserted deficiencies in the 2006 procedure were relevant because those deficiencies allowed the homeowners to use the single-source light based on their theory of "approval by default."

¶56 The reasonableness of the retroactive denial of approval of the light installed in 2007 was the only issue tried, and the court determined that the committee acted reasonably. Accordingly, the court stated, "judgment will be granted to the [Association] in the form of an injunction that will require the [homeowners] to remove the lights."

¶57 We next focus on the discussions in the record concerning the drafting of the judgment. When the court stated that the judgment would require "the [homeowners] to remove the lights," the homeowners' attorney indicated that his clients would like some time to consider an appeal and would like to leave the light up until they decided whether to appeal:

> [I]n order to avoid unnecessary expense or whatever to anybody, it seems to me it would serve the court just as well and the parties just as well to enter an injunction that the light not be used pending appeal, and if there's no appeal, obviously then they have to remove it. If there is an appeal, not using it doesn't impact adversely [on] anybody, and it doesn't run up any expenses for anybody, as far as tearing it down and then perhaps having the expense of putting it back up.

¶58 The court in response directed the Association's attorney, who was drafting the judgment, that the judgment "require that the light be removed within 60 days of the date of the judgment." The court selected sixty days after being advised by the homeowners' attorney that, if he were timely served with a notice of entry of judgment, the appeal time would be forty-five days. *See* WIS. STAT. § 808.04(1). The court ascertained that it was satisfactory to the Association's attorney that "the lights not be used during any pending appeal, but if no appeal is taken, then the injunction would require that they be removed within that 60-day period."

¶59 Based on this record, we are convinced that the record does not show an intent by Judge Nowakowski that the judgment enjoin the homeowners' use of the single-source light. Use of the single-source light was simply not raised as an issue by either party, and Judge Nowakowski did not address it. Thus, whether that light was "approved by default" and whether, even if it was, the homeowners lost the right under the Declaration to install it are issues that were not decided in this action. We do not understand the Association to argue that these issues were decided.

¶60 Instead, as we understand the Association's argument, because the homeowners could have raised their "approval by default" theory as to the single-source light but did not, the judgment is properly interpreted to prohibit use of that light. There are two flaws in this argument. First, it confuses the doctrine of claim preclusion with the issue of the proper construction of the judgment. As we explain in the next section, the doctrine of claim preclusion, when it applies, bars a party in a second action from bringing a claim that it did bring or could have brought in the first action with the same party. ***Kruckenberg***, 279 Wis. 2d 520, ¶25. However, it does not follow that a permanent injunction entered in the first action is properly construed to enjoin all conduct by a party that could have been enjoined had the party brought the claim, or counterclaim, in the first action and lost. The proper construction of the judgment in the first action is, as we have already explained, based on the language of the judgment and the record in the first action. *See* ***Washington***, 234 Wis. 2d 689, ¶¶17, 18.

¶61 The second flaw in the Association's argument is that, as we explain in the next section, the homeowners were not required to raise their "approval by default" theory regarding the single-source light as a counterclaim in the first action, the injunction action. Thus, the Association cannot succeed on an

argument on the proper construction of the judgment in this action that is based on a contrary premise.

¶62 The Association also finds support for its position in the conclusion in our June 2010 opinion that the real controversy was fully tried. However, when that conclusion is placed in context, it is clear that it does not mean that the "approval by default" theory with respect to the single-source light had been fully tried. The homeowners argued before this court that the real controversy had not been fully tried because "they were precluded by the motion in limine from introducing evidence on their position that the light *installed in 2007* was approved by default in 2006." ***Hawk's Landing***, No. 2009AP701, unpublished slip op. ¶40 (emphasis added). In this argument, the homeowners raised the issue whether the "court was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." *See* ***id.***, ¶41 (citation omitted). We concluded this had not occurred because, as we had already held, the circuit court had not erred or erroneously exercised its discretion in its ruling on the motion in limine. ***Id.***, ¶43. In addition, we stated, we agreed with the circuit court that the evidence submitted by the homeowners with their motion for a new trial did "not show that the light proposed in 2006 was the same as that installed [in 2007]." ***Id.***, ¶44. Thus, the "real controversy" that had been fully tried was the controversy over the light that was installed in 2007.[9]

¶63 We next address Judge Nowakowski's comments made in the context of extending the ex parte TRO he had issued pending the contempt

[9] Nothing else in our June 2010 opinion sheds any light on the intent of the judgment with respect to use of the single-source light.

hearing. As we understand the record, these comments were at least a partial basis for Judge Genovese's construction of the judgment to prohibit use of the single-source light.

¶64 Judge Nowakowski's comments focused on the discussion that had taken place when the parties were before the court on the homeowners' motion for reconsideration, two months after the judgment was entered. (The circuit court denied that motion.) At that time, the sixty-day deadline for removal of "the sports court light including all fixtures" had passed and, the Association's counsel pointed out, the removal had not taken place. Judge Nowakowski stated that "the expectation was that within the 60-day period [the homeowners] would determine whether they were going to seek appellate review, and, if they were, they were going to then ask for a stay and that the stay would simply continue the status quo of the first 60 days, which was essentially don't use it." There followed discussion about the fact that sixty days, in particular, had been decided upon in view of the appeal deadlines, but that the deadlines had been extended by virtue of the motion for reconsideration. Judge Nowakowski commented that a motion for a stay pending appeal would ordinarily be first addressed to the circuit court and he would likely grant such a motion. This hearing concluded with the homeowners' counsel's statement: "It's my understanding we're abiding by the order not to use it. It just hasn't been taken down because of the pending proceedings," and with Judge Nowakowski's response: "And I think that was the intention."

¶65 When Judge Nowakowski learned, approximately six months after this discussion took place, that the homeowners had removed the three-source light and were using the single-source light—without any communication with the court—he viewed this as inconsistent with his previously stated intent that "the status quo" be preserved: the status at the time the prior discussion took place was

that there was no illumination on the sports court. Judge Nowakowski's view is supported by the record of the prior discussion and is reasonable. In light of that discussion, it is understandable that the court was not pleased that the homeowners began using the single-source light without an agreement with the Association or without some communication with the court beforehand.

¶66 However, the precise issue before us is the resolution of the ambiguity in the judgment concerning whether use of the single-source light is enjoined. Judge Nowakowski's comments were not focused on this issue and therefore do not provide a rationale based on the entire record for interpreting the judgment to enjoin use of that light. *Cf.* ***Cashin***, 273 Wis. 2d 754, ¶21 (accepting the trial judge's determination of his intent because it has a firm basis in the record and is supported by a reasonable rationale).

¶67 We recognize that, had Judge Nowakowski known before entry of the judgment that the homeowners might want to use the single-source light proposed in 2006 as an alternative to the three-source light installed in 2007, he would likely have wanted to resolve in this action whether they were entitled to do so based on their "approval by default" theory. We say this because the record shows that Judge Nowakowski made a commendable effort to resolve all aspects of the dispute between the parties that were brought to his attention, regardless of when during the proceeding they were presented. We also recognize that, had the Association known that the homeowners might want to use the single-source light, it would likely have placed this issue before the circuit court in this action. However, this issue was not presented to the court; the court did not address it; and we therefore conclude the judgment, properly construed, did not enjoin use of the single-source light.

¶68 Accordingly, Judge Genovese's June 2011 order enjoining "any lighting on the sports court … unless and until [the homeowners] receive approval for such lighting on a future application" is beyond the scope of the judgment. We therefore reverse the order and remand to the circuit court with directions to vacate the order.[10]

II. Declaratory Judgment Action—Claim Preclusion and Common Law Compulsory Counterclaim Rule

¶69 After our decision on appeal of the judgment in the injunction action was issued and upon the objection of the Association to the homeowners' use of the single-source light, the homeowners brought the declaratory judgment action seeking a ruling that use of the single-source light had been approved by default. The homeowners challenge the circuit court's order dismissing this action on the ground that it is barred by claim preclusion and the common law compulsory counterclaim rule.

¶70 "When the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters which were litigated or which might have been litigated in the former proceedings." ***Kruckenberg***, 279 Wis. 2d 520, ¶19 (internal quotation marks omitted). When the party against whom claim preclusion is asserted was a plaintiff in the first action, the doctrine of claim preclusion applies if the following elements are met: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court

[10] Because we conclude that only the June 2011 order is properly before us and because we conclude it was erroneously entered, we do not address the homeowners' argument that their right to due process was violated by the entry of that order and prior orders.

of competent jurisdiction." ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶¶22, 23, 302 Wis. 2d 41, 734 N.W.2d 855 (citation omitted).

¶71 However, when, as in this case, claim preclusion is asserted against a party who was a defendant in the first action, a different analysis applies. *See* ***id.***, ¶23. The reason is that counterclaims are generally permissive in Wisconsin and, if we were to apply claim preclusion whenever a defendant in a prior action chose not to counterclaim and the three elements of claim preclusion were met, we would be improperly creating a compulsory counterclaim rule. *See* ***A.B.C.G. Enters., Inc. v. First Bank Se., N.A.***, 184 Wis. 2d 465, 476, 515 N.W.2d 904 (1994) (citation omitted). Thus, "the general rule in Wisconsin is that where a defendant may interpose a counterclaim but fails to do so, he is not precluded from maintaining a subsequent action on that claim." ***Id.*** There is a narrow exception to this general rule, called the "common law compulsory counterclaim" rule. ***Id.*** at 476-77 (citation omitted). Under this exception, a party who was a defendant in a prior action is barred from raising a claim in a subsequent action if "a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action." ***Id.*** (citation omitted).

¶72 Thus, in order for the homeowners to be barred from bringing this declaratory judgment action, the three elements of claim preclusion must be met and, in addition, the claim must come within the common law compulsory counterclaim rule. *See* ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶28, 282 Wis. 2d 582, 698 N.W.2d 738. Whether a given set of facts fulfills these standards presents a question of law, which we review de novo. ***Id.***, ¶23 (citations omitted).

¶73 The Association and the homeowners agree that the first and third elements of claim preclusion are met: there is an identity of parties in the injunction action and this declaratory judgment action, and the injunction action was resolved by a final judgment on the merits. However, they disagree on the second element—whether there is an identity of causes of action. They also disagree on whether the common law compulsory counterclaim exception applies, that is, whether a judgment favorable to the homeowners in this action would nullify the judgment in the injunction action or impair rights established in that action.

¶74 As already explained, the common law compulsory counterclaim rule applies when the elements of claim preclusion are met and "a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action." ***Id.***, ¶28 (citation omitted).

> For such an occasion to arise, it is not sufficient that the counterclaim grow out of the same transaction or occurrence as the plaintiff's claim …. The counterclaim must be such that its successful prosecution in a subsequent action would nullify the judgment, for example, by allowing the defendant to enjoin enforcement of the judgment, or to recover on a restitution theory the amount paid pursuant to the judgment … or by depriving the plaintiff in the first action of property rights vested in him under the first judgment ….

A.B.C.G. Enters., 184 Wis. 2d at 477-78 (citation omitted).

¶75 The parties' dispute on this issue reflects their dispute over the proper construction of the judgment in the injunction action. The homeowners contend that a judgment in their favor in this action would not nullify the judgment in the injunction action because that judgment required them to remove the three-source light, which they have done, and did not enjoin them from using the single-

source light. The Association, in keeping with their broader view of the prior judgment, contends that the judgment prohibits the homeowners from illuminating their sports court with the single-source light. Therefore, in the Association's view, a judgment favorable to the homeowners in the present action would undermine the prior judgment.

¶76 In light of our determination on the proper construction of the judgment, we conclude this is not a situation where a judgment favorable to the homeowners in this second action would nullify the judgment in the first action. If the homeowners prevail in this action, the resulting judgment will not undermine or be inconsistent with the factual findings or legal conclusions determined in the injunction action. The legal conclusions forming the basis for the judgment in the injunction action were (1) that the Declaration required approval by the committee before installation of the light in 2007, and (2) that the committee's disapproval of the light installed in 2007 was reasonable. The factual findings related to the latter legal conclusion. These legal conclusions and factual findings would remain unaffected by a judgment in this declaratory judgment action that the different type of light proposed in 2006 was approved as a result of the committee's failure to follow the procedural requirements of the Declaration. In addition, there would be no impairment of the Association's right under the judgment in the injunction action to cessation of the use of the light installed in 2007 and to its removal.

¶77 The Association places emphasis on the principle underlying claim preclusion of promoting judicial economy by avoiding "repeated and needless litigation," citing ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 525 N.W.2d 723 (1995). However, that is not a complete statement of the applicable principles when, as here, the person against whom claim preclusion is asserted was a defendant in a prior action. In this situation, the underlying principle is that "a

defendant be given his day in court when and where he sees fit," unless a second judgment in that party's favor would nullify the initial judgment or impair rights established in the initial judgment. ***A.B.C.G. Enters.***, 184 Wis. 2d at 476-77. Inherent in this principle is an acceptance that there will be subsequent litigation on a claim that could have been brought in the first action but was not. Thus, while we recognize that time and resources would have been saved had the homeowners asked to amend their pleading in the injunction action to assert as a counterclaim the claim they assert in this action, we are convinced that the case law does not require that.

¶78 Because the homeowners were not required to bring the claim asserted in this action in the injunction action, this claim falls outside of the common law compulsory counterclaim rule. It follows that the homeowners are not barred from bringing this action.[11]

¶79 The homeowners ask that, if we reverse the circuit court's order dismissing this action, we decide the parties' cross-motions for summary judgment. The court did not decide these motions because it was unnecessary to do so after the court decided this action was barred. We generally do not decide issues not addressed by the circuit court, although we have the authority to do so when only issues of law are involved. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by statute*. We see no reason to depart from the general rule in this case.

[11] Because we conclude this action is not barred on this ground, we do not address the alternative grounds on which the homeowners assert the court erred in dismissing this action.

III. Attorney Fees

¶80 The Association requests attorney fees under WIS. STAT. § 809.25(3) on the ground of frivolousness. It appears the Association makes this request only with respect to the appeal in the injunction action. We deny the request because we have reversed the June 2011 order. If the Association intends to request attorney fees in the declaratory judgment action as well, we deny that request because we have reversed the order of dismissal in that action.

CONCLUSION

¶81 We reverse the June 2011 order entered in the injunction action, 2011AP1452, and remand with instructions to vacate the order. We reverse the order of dismissal entered in the declaratory judgment action, 2011AP913, and remand for further proceedings. We deny the Association's request for attorney fees under WIS. STAT. § 809.25(3).

By the Court.—Orders reversed and causes remanded.

Not recommended for publication in the official reports.