COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2822 **Cir. Ct. No. 2010CV4043**

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.

APPEAL from an order of the circuit court for Dane County: AMY R. SMITH, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 BLANCHARD, P.J. This is the third appeal to this court arising from a dispute between homeowners Kathleen Cox and Kimberly Whalen (the "homeowners") and the Hawk's Landing Homeowners Association (the "Association"). The dispute involves the homeowners' efforts to illuminate their

backyard sports court with a pole-mounted floodlight, over the Association's objection. The homeowners appeal a circuit court order (1) declaring that the Association's denial of the homeowners' request to install a single-source floodlight in 2006 was valid, and (2) requiring the homeowners to cease using and to remove the single-source floodlight they installed in 2009.

¶2 The homeowners argue that the circuit court erred because the Association's Architectural Control Committee (the committee) approved the single-source floodlight by default and because claim preclusion bars the Association's defenses in this action.

¶3 The Association responds with several arguments in support of the circuit court's decision, including that: there was no approval by default; the homeowners waived and forfeited their asserted right to install the single-source floodlight based on their theory of approval by default; and claim preclusion does not bar the Association's defenses.

¶4 We conclude that, although the Association fails to show waiver, it has shown that the homeowners forfeited their asserted right to install the single-source floodlight. We also conclude that the homeowners' claim preclusion argument is not convincing. These conclusions make it unnecessary to address the merits of the homeowners' approval-by-default theory. We affirm the circuit court's order.

BACKGROUND

¶5 The dispute between the homeowners and Association has a lengthy litigation history. This requires an extended explanation of the facts to place the issues in proper context. Facts are undisputed unless otherwise indicated.[1]

¶6 The homeowners own a lot in the Hawk's Landing subdivision in Madison. There is no dispute that various uses of this lot are subject to a Declaration of Covenants and Restrictions (the Declaration). More specifically, the Declaration provides that the committee must approve certain improvements, including the improvements at issue here, and establishes procedures for review of such improvements.

¶7 In April 2006, the homeowners submitted a "landscaping plan" to the committee, as required by the Declaration, proposing to install a backyard sports court with a pole-mounted floodlight. On May 8, 2006, the homeowners provided additional information to the committee, specifying that the floodlight would have a single source, namely, one 400-watt bulb.

¶8 On May 16, 2006, the committee indicated in an email to the homeowners that the committee approved the plan with certain exceptions, one of which was that the committee did not approve the lighting. The homeowners constructed the sports court without a floodlight.

[1] We take our background facts primarily from the circuit court's decision and from this court's decisions in the prior appeals. *See* ***Cox v. Hawk's Landing Homeowners Ass'n, Inc.***, Nos. 2011AP913/1452, unpublished slip op. (WI App June 28, 2012); ***Hawk's Landing Homeowners Ass'n, Inc. v. Cox***, No. 2009AP701, unpublished slip op. (WI App June 24, 2010).

¶9 More than a year later, in September 2007, the homeowners installed a *triple*-source floodlight on the sports court, without committee approval. That led in 2008 to an action commenced by the Association against the homeowners, seeking removal of the triple-source floodlight. This was the first of two legal actions pertinent to this appeal.

¶10 In this first action, the homeowners contended, in part, that the committee had approved the floodlight by default in 2006 because the committee failed to follow the Declaration's procedures for addressing a requested improvement and because the committee's decision was untimely under the Declaration. The circuit court made a pretrial ruling that the homeowners' default-approval theory was irrelevant because it was undisputed that the *triple*-source floodlight installed in 2007 was not the *single*-source floodlight specified in the homeowners' 2006 plans. The circuit court held a bench trial on other issues that we need not detail here and enjoined the homeowners from using the floodlight and ordered the lighting source removed in a November 2008 judgment.

¶11 The homeowners appealed, and this court affirmed in what was the first of the two prior appeals. *See* ***Hawk's Landing Homeowners Ass'n v. Cox***, No. 2009AP701, unpublished slip op. (WI App June 24, 2010). We rejected the homeowners' argument that the circuit court erroneously prevented them from introducing evidence showing that the triple-source floodlight installed in 2007 was approved by default in 2006. In doing so, we rejected the proposition that the homeowners had requested approval from the committee in 2006 for both the single-source floodlight and the triple-source floodlight. Rather, we explained that the evidence made it clear that the homeowners had requested approval of the single-source floodlight only. *See* ***id.***, ¶¶42-44. We also agreed with the circuit court that, because the floodlight actually installed was different from the

floodlight submitted for approval, any evidence of the 2006 committee procedures purportedly showing approval by default was irrelevant. ***Id.***, ¶44

¶12 In June 2009, while that first appeal remained pending, the homeowners removed the triple-source floodlight. However, they replaced it with a single-source floodlight, which they began using. The Association moved for contempt.

¶13 The homeowners argued the following theory at the contempt hearing: the single-source floodlight submitted to the committee had been approved by default; the circuit court in the earlier proceedings had declined to consider the homeowners' approval-by-default theory, based on the court's ruling that the triple-source floodlight installed in 2007 was not the same type of floodlight as the single-source floodlight installed in 2009; therefore, the court's November 2008 judgment did not prohibit the use of the single-source floodlight.

¶14 The homeowners also filed an action for declaratory judgment, arguing that the single-source floodlight was approved by default. This is the second of the two actions pertinent to issues raised here and, as indicated below, the action that led to both the second appeal and the appeal now before us.[2]

¶15 In January 2011, the circuit court dismissed the homeowners' action on the ground that it was barred by the prior November 2008 judgment. In June 2011, the court issued an order enjoining the use of any lighting on the sports court.

[2] We omit subsequent procedural history relating to the contempt motion because it is not material to our decision.

¶16 The homeowners appealed, and we reversed, in the second of the two prior appeals. *See* ***Cox v. Hawk's Landing Homeowners Ass'n, Inc.***, Nos. 2011AP913/1452, unpublished slip op. (WI App June 28, 2012). We remanded for further proceedings on the homeowners' theory that the single-source floodlight was approved by default. *See* ***id.***, ¶¶5, 81.

¶17 We concluded in the second appeal that the June 2011 order enjoining "any lighting on the sports court," including the single-source floodlight, went beyond the scope of the November 2008 judgment and that the homeowners' action was not barred by that judgment, which had resulted from the Association's action against the homeowners. ***Id.***, ¶¶3-4, 9, 16, 68, 78. Our conclusions were based on our interpretation of the November 2008 judgment. We determined that the judgment was ambiguous but that, when considered in the context of all the circumstances at the time and the record as a whole, the judgment did not prohibit the homeowners from installing and using the single-source floodlight that they had proposed as part of their plan in 2006. *See* ***id.***, ¶¶16, 40-62.

¶18 Certain portions of our analysis in the second appeal are particularly germane to the issues we face now. We observed that the homeowners did not argue until after the November 2008 judgment that the committee's alleged non-compliance with Declaration procedures in 2006 was relevant because it supported a theory that the *single*-source floodlight was approved by default. ***Id.***, ¶55. We stated that "[u]se of the single-source light was simply not raised as an issue by either party [in the first action], and the [circuit court] did not address it." ***Id.***, ¶59. Also pertinent to the issues now presented, we stated that, had the Association known before entry of the November 2008 judgment that the homeowners might seek to install and use the single-source floodlight, it would likely have raised the issue, and the circuit court would likely have resolved that issue. ***Id.***, ¶67.

¶19 On remand from the second appeal, the circuit court addressed the merits of the homeowners' approval-by-default theory. The court rejected that theory, concluding on summary judgment that the committee complied with the Declaration's requirements. It also rejected the homeowners' argument that claim preclusion, law of the case, or judicial estoppel barred the Association's defenses.

¶20 The circuit court ruled that the committee's decision to deny the homeowner's request to install a single-source floodlight was valid, and ordered the homeowners to cease using and to remove the single-source floodlight. The court did not reach Association arguments that the homeowners waived and forfeited their claim that the single-source floodlight was approved by default. As indicated above, the homeowners appeal.

DISCUSSION

¶21 The homeowners argue that the circuit court erred because the committee approved the single-source floodlight by default and because claim preclusion bars the Association's defenses. The Association responds with several arguments in support of the circuit court's decision, including that: there was no approval by default; the homeowners waived and forfeited their asserted right to install the single-source floodlight based on an approval-by-default theory; and the Association's defenses are not barred by claim preclusion.

¶22 We begin with the waiver and forfeiture issues and conclude that the Association has not shown waiver but has shown forfeiture. We also conclude that the homeowners' claim preclusion argument fails. Based on these conclusions, we need not reach other issues, including the merits of the homeowners' approval-by-default theory.

¶23 We review a grant of summary judgment de novo, applying the same standards as the circuit court. ***Mettler v. Nellis***, 2005 WI App 73, ¶7, 280 Wis. 2d 753, 695 N.W.2d 861. We need not repeat all of those standards here. For current purposes, it is enough to say that summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* ***id.*** Here, our decision does not turn on any material factual dispute but on the application of the legal standards for waiver, forfeiture, and claim preclusion to undisputed facts. The parties do not argue that there is any material dispute of fact as to the waiver, forfeiture, and claim preclusion issues. We agree.

A. Waiver and Forfeiture

¶24 "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts." ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. "'[W]aiver is the intentional relinquishment or abandonment of a known right.'" ***Id.*** (citation omitted). In contrast, "'forfeiture is the failure to make the timely assertion of a right.'" ***Id.*** (citation omitted). Because waiver and forfeiture are closely related, and because our analysis of waiver here informs our analysis of forfeiture, we address both.

¶25 For purposes here, the right allegedly subject to waiver or forfeiture is the homeowners' asserted right to install and use the single-source floodlight based on their theory that the committee approved a single-source floodlight by default in 2006. For shorthand, we will sometimes simply refer to this asserted right as the homeowners' asserted "default approval of the single-source floodlight."

¶26 As indicated above, the homeowners did not specifically advance this asserted right until after the November 2008 judgment. Indeed, as far as we can discern, the first time they advanced it was in response to the Association's motion for contempt in June or July 2009. The homeowners do not seriously dispute these points.

1. Waiver

¶27 The definition of waiver as an "intentional" relinquishment of a "known" right is "'misleading from the start … [because it] suggests that a waiver requires more purposefulness than the courts have generally required.'" ***Nugent v. Slaght***, 2001 WI App 282, ¶12, 249 Wis. 2d 220, 638 N.W.2d 594 (citations omitted). This is reflected in both the knowledge and intent elements of waiver.

¶28 The knowledge element of waiver may be satisfied by actual or constructive knowledge. ***Id.***, ¶13. "'Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence.'" ***Id.*** (citation omitted). In other words, constructive knowledge refers to information that a person *should* have known. *See, e.g.*, ***State v. Mudgett***, 99 Wis. 2d 525, 530-31, 299 N.W.2d 621 (Ct. App. 1980) (using the concept of constructive knowledge interchangeably with the concept of whether a person "should have known" in the waiver context).

¶29 As to the intent element, it is enough that the waiving party "act intentionally and with knowledge of the material facts." ***Nugent***, 249 Wis. 2d 220, ¶13. The Association relies on case law stating that the intent element may be shown when a claimant takes actions "so inconsistent" with an intent to exercise the right "as to leave no room for a reasonable inference" but of a purpose to waive. *See* ***Fraser v. Aetna Life Ins. Co.***, 114 Wis. 510, 523-24, 90 N.W. 476

(1902); *see also* ***Scott v. Ross***, 181 Wis. 125, 135, 194 N.W. 151 (1923) (quoting ***Fraser*** on this point). For purposes here, we will assume without deciding that the Association is correct that ***Fraser*** states the proper standard.

a. Waiver–Homeowners' Knowledge

¶30 The parties disagree as to whether or when the homeowners knew (or should have known) the material facts for purposes of waiver. Beyond that, each party's argument on the knowledge element is a bit difficult for us to understand. Addressing the arguments as we understand them, we conclude that the Association's argument misses the mark.

¶31 The Association appears to argue that the homeowners were aware that they could challenge the committee's denial of their plan to install the single-source floodlight, based on an approval by default theory, as of May 16, 2006. This is the date the homeowners received the Association's email generally approving their plan but denying their request to install the single-source floodlight. The Association appears to base this argument on the proposition that the homeowners are charged with knowledge of the procedural requirements that the Declaration placed on the committee, and therefore should have known as of the date of the email that any failure by the committee to comply with Declaration procedures would result in an approval by default.

¶32 The homeowners do not dispute that they are charged with knowledge of the Declaration's procedural requirements. They argue, however, that they lacked knowledge of the material facts because they had no reason to suspect that the committee failed to comply with the Declaration procedures until the homeowners obtained discovery in the litigation in the first action.

¶33 As to the Association's argument, we reject its implicit premise that the homeowners knew, as of the May 16, 2006 email, all material facts related to the procedures the committee followed in determining whether to approve the homeowners' landscaping plan. We instead agree with the homeowners' implicit premise that material facts include the facts regarding what the committee members did or did not do leading up to the May 16, 2006 email. It is those facts that would have given the homeowners reason to know whether they had a colorable argument that the committee failed to comply with the Declaration's procedures.

¶34 The question becomes *when* the homeowners knew, or should have known, those material facts. Although the homeowners have now conceded, as part of their argument above, that they knew of the material facts at the time of discovery in the first action, it is unclear whether the homeowners knew or should have known of those facts before that time. The Association gives us no help on that topic. We therefore conclude that the Association has not shown that the homeowners knew or should have known of the material facts before discovery in the first action. We will thus assume for the remainder of this decision, consistent with the homeowners' concession, that they first knew of the material facts during discovery in the first action, in 2008. This conclusion is pivotal for purposes of our analysis of the intent element of waiver, to which we turn next.

b. Waiver—Homeowners' Intent

¶35 In arguing the intent element, the Association focuses on the homeowners' conduct *before* the Association commenced the first action in 2008 and before the homeowners obtained discovery in that action. Specifically, the Association points out that, after the homeowners received the May 16, 2006

email, the homeowners proceeded with construction of the sports court, but did not install any floodlight for more than a year. The Association also points out that, when the homeowners finally installed a floodlight in September 2007, it was the triple-source floodlight, not the single-source floodlight.

¶36 However, based on what is now our working assumption that the homeowners first learned the material facts during discovery in the first action, this conduct occurred before the homeowners had knowledge of the material facts. Accordingly, we see no basis to conclude that the Association can show intent based only on that conduct.

¶37 It is true that, even after the homeowners obtained discovery in the first action, they did not initially raise their asserted default approval of the single-source floodlight. Rather, they waited until after the November 2008 judgment in that action to raise it. However, the Association does not argue that this delay is sufficient to show intent for purposes of waiver. Accordingly, we decline to conclude that this delay was "so inconsistent with a purpose to stand upon" the right to default approval of the single-source floodlight "as to leave no room for a reasonable inference" but of a purpose to waive. *See* ***Scott***, 181 Wis. at 135 (quoting ***Fraser***, 114 Wis. at 523-24).

¶38 For all of the reasons stated, we conclude that the Association has not shown waiver under the circumstances. As we now explain, however, those same circumstances are sufficient to show forfeiture.

2. Forfeiture

¶39 Forfeiture has no intent element, and it does not need to be "knowing[]" in the same way a waiver must be. *See* ***Ndina***, 315 Wis. 2d 653, ¶31.

Rather, the only question is whether the homeowners failed "to make the timely assertion" of their asserted default approval of the single-source floodlight. *See* ***id.***, ¶29.

¶40 The Association argues that the homeowners failed to timely assert their right to the single-source floodlight based on both pre-litigation conduct and on conduct during the course of litigation. Specifically, the Association points out that the homeowners (1) allowed more than a year to pass following the date of the asserted approval by default before installing any floodlight; (2) then installed the triple-source floodlight instead of the single-source floodlight; (3) advanced their approval-by-default theory in an attempt to establish a right to the *triple*-source floodlight; and (4) did not specifically assert that theory as to the single-source floodlight until after the November 2008 judgment, and apparently not until June or July 2009 at the contempt hearing, three years after the date of the asserted approval by default.

¶41 In response, the homeowners' sole argument against forfeiture is that the forfeiture rule "only applies in ongoing legal proceedings." They do little to explain this argument further, other than pointing to case law suggesting that the rule and the policies behind it apply only to a failure to assert a right *during* legal proceedings, as opposed to any failure to assert a right before legal proceedings have commenced. *See* ***Id.***, ¶30 ("[S]ome rights are forfeited when they are not claimed at trial."); *see also* ***State v. Soto***, 2012 WI 93, ¶36, 343 Wis. 2d 43, 817 N.W.2d 848 ("Rights that are subject to forfeiture are typically those … whose protection is best left to the immediacy of trial, such as when a party fails to raise an evidentiary objection.").

¶42 As we understand it, the homeowners' argument is that, for purposes of the forfeiture rule, their pre-litigation conduct is irrelevant. That is, the homeowners appear to argue that it is irrelevant for purposes of forfeiture that they failed to install a light of any kind for over a year after the May 16, 2006 email, and then, in September 2007, initially installed the triple-source floodlight instead of the single-source floodlight that was the subject of their application to the Association. However, the homeowners cite no authority for the particular proposition that pre-litigation conduct cannot be relevant to application of the forfeiture rule.

¶43 Regardless, even if we assume that the homeowners' pre-litigation conduct cannot be considered for purposes of forfeiture, we conclude that there is a forfeiture here based on litigation conduct, namely the homeowners' failure to timely assert that they had a right to default approval of the single-source light. There is no dispute that, once litigation commenced in 2008, the homeowners initially argued their approval-by-default theory only as to the triple-source floodlight and failed to raise their asserted right to the *single-source* floodlight until *after the November 2008 judgment*, and apparently not until June or July 2009. We conclude that this conduct is sufficient to constitute forfeiture. Putting this conclusion in terms of the homeowners' argument, their conduct in 2008 and 2009 occurred "in ongoing legal proceedings," and shows forfeiture. In other words, their conduct during that time shows the failure to timely assert a right, in particular the failure to assert their alleged right to default approval of the single-

source floodlight, until well after the November 2008 judgment in the first legal action.[3]

¶44 We see nothing unfair in the application of the forfeiture rule here. The homeowners made a series of litigation decisions with the benefit of counsel over an extended period. We note that the approval-by-default theory for the single-source light is not complex or esoteric and could easily have been argued promptly to the circuit court. Indeed, as repeatedly explained above, that theory is one of the theories the homeowners advanced in support of their asserted right to the *triple*-source light. In addition, as stated above, we explained in one of the previous appeals that, had the Association known during the course of the litigation leading to the November 2008 judgment that the homeowners were seeking to use a single-source floodlight, and not the triple-source floodlight they first installed, it would likely have raised the issue at the time, and the court would likely have resolved that issue then. *See* ***Cox***, Nos. 2011AP913/1452, unpublished slip op., at ¶67.

[3] We note that, while one or more other equitable doctrines might also apply to bar the homeowners' asserted default approval of the single-source floodlight, it is enough for current purposes to conclude there is forfeiture. For example, the Association might have made a case for laches, based in part on the homeowners' pre-litigation conduct. The elements of laches are that "(1) the [claimant] unreasonably delayed in bringing the claim, (2) the defense lacked any knowledge that the [claimant] would assert the right on which the suit is based, and (3) the defense is prejudiced by the delay." ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). Courts have said in the context of laches that even a "slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of … position, has been held sufficient." *See* ***Flejter v. Estate of Flejter***, 2001 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552 (Ct. App. 2000) (quoting ***Likens v. Likens***, 136 Wis. 321, 327, 117 N.W. 799 (1908)). Separately, we note that the Association has abandoned an argument it made in the circuit court that the homeowners' asserted right to the single-source light should have been barred because the homeowners had "unclean hands." We therefore do not address the issue of unclean hands.

¶45 Although the homeowners do not raise the topic, we acknowledge that our conclusion today that the homeowners forfeited their asserted right to the single-source floodlight might, at first glance, seem at odds with our conclusion in the second of the two previous appeals that the homeowners' claim for the single-source floodlight was not barred by the November 2008 judgment. However, a careful review of our decision in that appeal makes clear that our conclusion was based on our interpretation of the November 2008 judgment as not addressing the merits of the homeowners' right to a single-source floodlight and on our application of the common law compulsory counterclaim rule. The issue of forfeiture was not then squarely presented by either party, nor did we take it up. It has been squarely presented now, and we conclude that in fairness this rule of judicial administration should be enforced against the homeowners. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177 ("Forfeiture is a rule of judicial administration" that encourages parties and counsel to give notice of issues to opposing parties, to diligently prepare in the course of litigation, and to avoid "sandbagging"). The homeowners do not argue that the Association forfeited its forfeiture argument.[4]

B. Homeowners' Claim Preclusion Argument

¶46 We now turn to the homeowners' argument that the Association's defenses are barred by claim preclusion. We question whether this argument is

[4] Moreover, we note that the Association raised the concepts of forfeiture and waiver in the second appeal. The Association argued in one portion of its brief in that appeal that "the Homeowners were required to make the Single-Source Light an issue in the Prior Lawsuit (by asserting their present claim at that time) or forfeit any rights they may have had by virtue of a 'deemed approval' under the doctrines of claim preclusion (res judicata), waiver or abandonment."

tenable, given our conclusion that the homeowners forfeited their asserted right to the single-source floodlight. However, as far as we can discern, the homeowners intend their claim preclusion argument to apply not only to the Association's substantive defenses but also to the Association's waiver and forfeiture arguments. Moreover, it is clear from the Association's briefing that this is how the Association interprets the homeowners' claim preclusion argument, which the Association responds to on its merits. Accordingly, we address the homeowners' claim preclusion argument.

¶47 "The doctrine of [claim preclusion] provides that a final judgment 'is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 472-73, 515 N.W.2d 904 (1994) (citation omitted). Here, of course, the question is not, strictly speaking, whether there is a "claim" the Association should have brought in the first action but whether the Association's defenses, including its forfeiture defense, are "matters" that the Association might have litigated in the first action. *See* ***id.***

¶48 Claim preclusion requires there to be "(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 of competent jurisdiction." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Whether claim preclusion applies to a particular factual scenario is a question of law subject to de novo review by this court. ***Id.***

¶49 The parties focus primarily on the second element. As to that element, Wisconsin courts follow a "transactional" approach to determine whether two actions involve an identity between claims. ***Northern States Power***, 189 Wis. 2d at 553. "The concept of a transaction, 'connotes a natural grouping or common nucleus of operative facts.'" ***A.B.C.G. Enters.***, 184 Wis. 2d at 481 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982)). The question is whether the claims should have been brought together because they arise "from the same factual underpinnings." *See* ***Northern States Power***, 189 Wis. 2d at 555.

¶50 The circuit court concluded that the two actions did not arise from the same factual underpinnings, because the first action pertained to the homeowners' installation of the triple-source floodlight and the second action pertained to the homeowners' installation of the single-source floodlight. The court also reasoned that the Association sought to avoid litigating the homeowners' approval-by-default theory in the first action for the logical reason that the triple-source floodlight then in place could not have been approved by default in light of the fact that the homeowners had sought approval of only a single-source floodlight. The court further reasoned that the Association could not have anticipated that the homeowners would later, after removing the triple-source floodlight in June 2009, replace that floodlight with a single-source floodlight.

¶51 The homeowners argue that the circuit court erred because both actions were based on the same submissions to the committee, the same sports court, and the same committee actions. The homeowners also argue that both parties' motivations were the same in both actions: the homeowners wanted to illuminate their sports court and the Association wanted to prevent the sports court from being illuminated. The homeowners further argue that whether the

Association knew or anticipated that the homeowners would later install the single-source floodlight is irrelevant to the identity of claims analysis.

¶52 We are not persuaded by the homeowners' arguments and instead agree with the Association that the circuit court's reasoning is sound under the unusual circumstances here, which involved a significant change of circumstances after the November 2008 judgment.

¶53 Although neither the homeowners nor the Association discuss any analogous case law, we find support for the circuit court's conclusion in the RESTATEMENT (SECOND) OF JUDGMENTS. Wisconsin courts often look to the Restatement in matters of claim preclusion. *See, e.g.*, ***Northern States Power***, 189 Wis. 2d 541 at 549, 553-55; ***A.B.C.G. Enters.***, 184 Wis. 2d at 480-81; ***Landess v. Schmidt***, 115 Wis. 2d 186, 192-93, 340 N.W.2d 213 (Ct. App. 1983).

¶54 The RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) directs that the question of what constitutes a transaction be determined "pragmatically." Similarly, a comment to that section explains that what constitutes a "transaction" "is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases." RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) cmt. b.

¶55 Especially pertinent here, another comment to this Restatement section explains that a "change of circumstances" may undermine an asserted identity of claims:

> *Change of circumstances*. Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.

Id., cmt. f.

¶56 Here, the circuit court took a pragmatic approach and recognized that there was a significant change of circumstances after the November 2008 judgment: the homeowners' replacement of the triple-source floodlight with the single-source floodlight. This is the crucial "operative fact." *See* ***A.B.C.G. Enters.***, 184 Wis. 2d at 481 While many of the other factual underpinnings of each action may be the same, we are persuaded that this represents a pivotal change of circumstances.

¶57 In addition, the RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) specifically states that courts should consider whether treating the facts underlying the two actions as a unit "conforms to the parties' expectations." This portion of the Restatement appears to directly undercut the homeowners' argument that it is irrelevant whether the Association would have expected or anticipated that the homeowners would install the single-source floodlight after the first action was litigated to final judgment.

¶58 For these reasons, we agree with the circuit court and the Association that the second element of claim preclusion is not satisfied, and we need proceed no further in our claim preclusion analysis to conclude that the Association's forfeiture argument is not barred.[5]

[5] The homeowners also advance arguments based on law of the case and judicial estoppel. The circuit court concluded that these arguments were undeveloped. We agree. The homeowners say that they advance these arguments as "further support" for "the application of claim[] preclusion." Given our conclusion that the second claim preclusion element is not met, we see no reason why we need to address separately the homeowners' reliance on law of the case and judicial estoppel as "support" for their claim preclusion argument. The homeowners do not explain why we need to do so. Moreover, the homeowners fail to provide any specific explanation as to why their law of the case and judicial estoppel arguments—which appear to be (continued)

CONCLUSION

¶59 In sum, for the reasons stated, we affirm the circuit court's order declaring that the Association properly denied the homeowners' request to install a single-source floodlight and requiring the homeowners to cease using and remove the single-source floodlight they installed in 2009.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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based on previous Association positions and court conclusions on the topic of claim preclusion—would now bar the Association's argument on the related but separate topic of forfeiture. For all of these reasons, we decline to reverse the circuit court based on the homeowners' law of the case and judicial estoppel arguments.