

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

TOWN OF EAGLE,

Case No. 2016CV001086

Plaintiff,

v.

ANNALYSE V. VICTOR,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT**

INTRODUCTION

Defendant Annalyse V. Victor respectfully moves this Court, in accordance with Wisconsin Statutes § 806.07(1)(h), to vacate the \$87,944.50 default judgment entered against her in the above-captioned lawsuit. This default judgment was entered (1) despite Annalyse timely responding to Plaintiff Town of Eagle's Complaint; (2) without Annalyse's knowledge that the Town had filed a motion for default judgment; (3) without consideration of the merits; (4) without support for the Town's allegations in the Complaint and in violation of the United States and Wisconsin constitutions; and (5) against principles of equity.

Since its entry, the Town has spent years dissuading Annalyse from seeking a vacatur of this default judgment by leading her to believe the Town would settle the dispute for an amount significantly lower than the default judgment amount. The Town now refuses to respond to any correspondence from Annalyse or engage in settlement discussions, making clear that the Town's representations of possible settlement were nothing more than delay tactics to prevent Annalyse from seeking relief from this Court. No longer deterred, Annalyse respectfully requests that this Court vacate the default judgment.

FACTS

I. The Victors move to the Town of Eagle.

Annalyse purchased 8.5 acres of land in the Town of Eagle in 2015, believing she and her husband, Joe, had found their perfect home. Ex. A (Aff. A. Victor). The previous owner of the property parked tractor trailers on the land, which was particularly appealing to the Victors given Joe's career as a truck driver. *Id.* Before parking their own tractor trailers on the property, however, the Victors checked with the listing agent, their realtor, and their nearby neighbors to ensure there would not be any problems with parking tractor trailers on the property. *Id.* No one objected. No one raised concerns. *Id.*

Yet, on March 18, 2016, shortly after the Victors moved into their home, they found a letter posted to their door informing them that they were not in compliance with Town of Eagle Zoning Code Sections 3.05(2)(D)(2) and 5.06, which prohibit business operations

and the “outside parking of commercial vehicles” in their zoning district. (*See* Compl., Ex. A.) In this letter, the Town’s Building Inspector informed the Victors that they had 30 days to come into compliance, specifically stating that the Victors must move their business to an “appropriately zoned site” and that their “commercial vehicle must be stored indoors or removed from the property.” *Id.* Though the four tractor trailers housed on their property were registered to Joe personally, and not commercial vehicles, the Victors promptly moved the tractor trailers that could not be housed elsewhere indoors—into their 6,000-square-foot garage. Ex. A; *see also* Ex. B (aerial photographs of property).

II. The Town of Eagle files suit and pursues a default judgment.

Despite the Victors’ compliance with the Town’s instruction to move their tractor trailers indoors, the Town wasn’t satisfied. Three months after posting the letter, the Town reposted the same notice, bearing the same March 18, 2016 date, on the Victors’ door. Ex. A. When the Victors called the Town to ask what more needed to be done, the Town informed them that, despite the instructions in the original notice, the tractor trailers had to be removed from the property entirely. *Id.* The Victors searched tirelessly for a shop that could house their tractor trailers, but storage space was not available until August 1, 2016. *Id.*

The Victors informed the Town of their efforts and explained they would move the trucks as soon as possible, but the Town chose to file suit against Annalyse in this Court, alleging, without specificity, that Annalyse had violated four ordinances every single day

since March 18 by: (1) using her property for commercial purposes; (2) parking vehicles not used by the property's residents on the property; (3) parking commercial vehicles on the property; and (4) causing noises that disturb the public peace. (Compl. ¶¶ 8–24.) Annalyse searched for an attorney to assist her, but she could not find representation before the deadline to respond. *See* Ex. A. So, proceeding pro se, Annalyse timely responded to the Town's Complaint in a letter dated July 4, 2016. *See* Ex. C (Letter from A. Victor to Town of Eagle dated July 4, 2016). Annalyse also timely delivered this letter to the Court by placing it in the Court's overnight drop box. *See* Ex. A. There can be no question that both Annalyse and the Town's attorney, Paul Alexy, understood the July 4 letter to be Annalyse's Answer to the Complaint. Yet, the Town still sought a default judgment.

In his affidavit in support of default, Attorney Alexy acknowledged Annalyse's lack of understanding regarding how to respond to a summons and complaint. (*See* P. Alexy Aff. of Default ¶ 5, Aug. 8, 2016) ("Defendant Annalyse V. Victor contacted Affiant via telephone to inquire as to what Defendant should do in response to said Summons and Complaint."). And he recognized that Annalyse prepared the July 4 letter in response to the Town's Summons and Complaint against her. (*See id.* at ¶ 7) ("On July 5, 2016, Defendant delivered or caused to be delivered the [July 4] letter attached hereto . . . acknowledging receipt of the Summons and Complaint."). Despite Annalyse's pro se status and Attorney Alexy's obvious understanding that the July 4 letter was Annalyse's

Answer, Attorney Alexy sought to invalidate the letter as not comporting with the statutory requirements for an answer and failing to amount to an appearance before the Court. (*See id.*) Based on those alleged shortcomings, which were easily remediable, the Town sought a default judgment. *See* Ex. D (Pl.’s Mot. for Default J., Aug. 5, 2016).¹

However, the Town never served Annalyse with notice of its Motion for Default Judgment. *See* Ex. A. In fact, the record in this case is devoid of any proof of service or a copy of the motion itself. And though the Town mailed a copy of the motion to Attorney Richard Torhorst—who Annalyse hired after she filed her Answer to the Town’s Complaint—Attorney Torhorst never informed Annalyse that the motion had been filed. *Id.*

Attorney Torhorst did not file an appearance with the Court in this matter, but he had been in communications with the Town regarding the litigation and had a duty to inform Annalyse of and respond to the motion for default judgment. Yet, according to Attorney Torhorst’s sole invoice and the client files that the undersigned counsel obtained from Attorney Torhorst, he did not do any work for or correspond at all with Annalyse after he received the Motion for Default Judgment. *See* Ex. A, Appendix (billing statement); *see also* Ex. E (Aff. A. Gervasi). Instead, after a month of silence and after this

¹ The document entitled “Plaintiff Town of Eagle’s Motion for Default Judgment Against Defendant Annalyse V. Victor” was not included in the record that the undersigned counsel received from this Court, though the accompanying Affidavit of Default and exhibits were provided. The undersigned counsel received a copy of the Motion for Default Judgment from Attorney Torhorst’s files and have attached this copy as Exhibit D for completeness of the record.

Court entered default judgment against Annalyse, Attorney Torhorst sent the Victors an invoice for more than \$400.00 and effectively ended his representation. Despite the unequivocal ethical duties that guide those in the legal profession, Attorney Torhorst allowed a motion for default judgment, carrying an \$80,000 financial penalty and the threat of jail time, to go unanswered.

Due to the Town's failure to properly serve Annalyse and Attorney Torhorst's failure to competently represent her, Annalyse was not aware of the Town's Motion for Default Judgment, *see* Ex. A, and she was deprived of the opportunity to defend against it. Because of these failures, this Court—after removing the Town's proposal that Annalyse serve jail time if she could not immediately pay the judgment—signed the Town's proposed order for default judgment on September 2, 2016. *See* Default J. Order, Sept. 2, 2016. The Town did not offer any evidence to support its allegations that Annalyse violated the four above-mentioned ordinances, much less that she violated each of the four ordinances every day for nearly six months.

III. The Town of Eagle moves for sanctions and criminal penalties.

Less than three weeks after the default judgment was entered, the Town accused Annalyse of continuing to violate Town ordinances, in violation of the injunctive relief granted by this Court's default judgment, and filed a Motion for Sanctions and Amendment of Order of Judgment. (Mot. for Sanctions and Amend. of Order of J.) Again, the Town requested that, among other penalties, Annalyse be sentenced to jail. *Id.* This

time, the Town did provide Annalyse with notice of the motion, and this Court entered an order to appear, which Annalyse observed. (*See* Aff. of Service, Sept. 23, 2016; Order to Appear, Sept. 29, 2016).

At the hearing that followed on November 11, 2016, Annalyse, appearing pro se, asked, “[W]hat financially is it going to cost to close the file on the Town of Eagle?” Ex. F at 18:17–18 (Tr. of Nov. 11, 2016 Hr’g). At this, the Court instructed the parties to “take a moment or two and go off the record” to try to reach a settlement. *Id.* at 18:21–23.

When the parties returned, Attorney Alexy indicated to the Court that the parties had reached settlement. *Id.* at 20:9–21:9. The Town agreed not to pursue criminal charges and jail time against Annalyse, and Annalyse agreed to pay the Town \$7,000, which would also cover Attorney Alexy’s fees and court costs. Attorney Alexy phrased the agreement to the Court as an agreement to “modify the order of judgment to add an additional \$7,000 in total to the amount of the judgment that would include the costs for the Town to bring the motion. That is inclusive of the Town [sic] to bring the motion and the additional days of violation.” *Id.* at 20:23–21:4. Though the Court asked Annalyse whether Attorney Alexy’s representations were “[her] understanding as well,” *id.* at 21:10–11, the parties did not in fact have a meeting of the minds.

Both Annalyse and her father, who accompanied her during the hearing and off-record negotiation, understood that the *entire dispute*, including the original default judgment, were being resolved for \$7,000 total. *See* Ex. A; Ex. G (Aff. J. Kreger). As a

reminder, Annalyse’s original question was “[W]hat financially is it going to cost to close the file on the Town of Eagle?” Ex. F at 18:17–18. In other words, she was asking to know the total cost to resolve the whole dispute. Therefore, Annalyse, proceeding pro se, had every reason to believe the answer to her question—what would it cost to “close the file” — was \$7,000 *total*. Not \$80,944.50—an amount that Annalyse did not know she already owed²—*plus* \$7,000. After all, Annalyse did not gain a financial benefit by “settling” for an additional \$7,000 debt; this is the financial penalty she was facing absent any settlement negotiations.

As a result of the parties’ misunderstanding, the Court entered a revised judgment of nearly \$88,000. (Am. Forfeiture J., Dec. 7, 2016.) For Annalyse, it was not until she attempted to refinance her home that she learned the amount of this judgment. Based on her conversations with Attorney Alexy during their negotiations, during which Attorney Alexy informed her that any settlement would need to be presented to and approved by the Town Board at an official Town meeting, Annalyse believed Town Board approval was the last step to settling the dispute with the Town for the significantly lower sum they had agreed to, *see* Ex. A, which the Victors promptly sought at the next Town Board meeting. *See* Ex. H (Minutes of Town Board Meeting dated Jan. 18, 2017). The Town Board

² The exact amount of the original default judgment was not calculated until November 2, 2016 when this Court entered its Forfeiture Judgment, and the record does not reflect any proof of service showing that Annalyse received notice of the Forfeiture Judgment prior to the November 11 hearing. (*See* Forfeiture J., Nov. 2, 2016.) As such, she had no reason to know that \$7,000 would be tacked onto a previously entered \$80,944.50 fine.

informed the Victors that it would consider the settlement proposal during its closed session, *id.*, and that it would have an answer within the week. Ex. I (Aff. J. Victor).

Four years later, the Town Board has not formally responded to the Victors' request. *Id.*; *cf.*, *e.g.*, Ex. J (Minutes of Town Board Meeting dated June 20, 2018) (noting subsequent closed-session discussion regarding this lawsuit more than 18 months after the Victors made their original settlement request). The Victors, personally and with the help of an attorney,³ repeatedly followed up with the Town Board and Town attorney for an answer and to reach resolution, but to no avail. *See* Ex. A; Ex. I. In one of his few communications with the Victors, Attorney Alexy informed them via phone call that he would not agree to settle for less than \$45,000, because anything less would not cover his attorney fees. *See* Ex. I. Alexy also informed the Victors that the Town would not settle for less than \$45,000 because the Town wanted to divide the proceeds from the Victors' payment and distribute them to the Town's residents to offset residents' taxes. *Id.* Neither is a legitimate reason to impose a \$45,000 fine, much less an \$88,000 judgment, against a young family accused of parking their own tractor trailers on their own property.

Despite earlier representations of possible settlement and the parties' negotiations, the Town and its attorney have stopped responding to the Victors' and Attorney Frederick's communications. *Id.*

³ In September 2017, the Victors hired Attorney Richard Frederick to represent them in their negotiations with the Town. However, Attorney Frederick did not represent Annalyse in this litigation or enter an appearance in this matter.

It is now clear that the Town has no intention of resolving this dispute via settlement, despite its years-long representations otherwise, and that Court intervention is necessary. Annalyse respectfully moves the Court to, in the interest of justice, vacate the default judgment entered against her.

STANDARD OF REVIEW

The Supreme Court of Wisconsin has emphasized that default judgment is “a result disfavored by law, which prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues.” *Casper v. American Int’l S. Ins. Co.*, 2011 WI 81, ¶ 38, 336 Wis. 2d 267, 800 N.W.2d 880. As part of this preference against default judgment, “Wisconsin Stat. § 806.07(1)(h) grants the circuit court broad discretionary authority to relieve a party from a judgment, order, or stipulation for ‘[a]ny [] reason[] justifying relief from the operation of the judgment.’” *Werner v. Hendree*, 2011 WI 10, ¶ 71, 331 Wis. 2d 511, 795 N.W.2d 423 (alterations in original). In light of this “broad authority . . . § 806.07(1)(h) must be liberally construed to provide relief from a judgment whenever appropriate to accomplish justice,” while also appreciating the “policy favoring the finality of judgments.” *Id.* (internal quotation marks omitted). To balance these two interests, circuit courts should vacate judgments where “the sanctity of the final judgment is outweighed by the incessant command of the court’s conscience that justice be done in light of *all* the facts.” *Id.* (emphasis in original) (internal quotation omitted). In other words, a motion to

vacate judgment should be granted where “there are extraordinary circumstances justifying relief in the interest of justice.” *Id.* at ¶ 72 (internal quotation omitted).

In considering whether such extraordinary circumstances⁴ exist, the Supreme Court of Wisconsin has instructed courts to consider, among other factors:

[(1)] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [(2)] whether the claimant received the effective assistance of counsel; [(3)] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; [(4)] whether there is a meritorious defense to the claim; and [(5)] whether there are intervening circumstances making it inequitable to grant relief.

Miller v. Hanover Ins. Co., 2010 WI 75, ¶ 36, 326 Wis. 2d 640, 785 N.W.2d 493.

ARGUMENT

Extraordinary circumstances justify vacating the default judgment in this case. First, the default judgment was not the result of a conscientious, deliberate, and well-informed choice by Annalyse. Annalyse did timely file a response to the Town’s Complaint and Summons, which the Town itself recognized as Annalyse’s Answer. Second, Annalyse did not receive effective assistance of counsel. Her own attorney failed

⁴ Despite the courts’ use of the term “extraordinary circumstances,” it is not unusual for Wisconsin courts to find that the circumstances warrant vacating a judgment or order. *See, e.g., Miller*, 2010 WI 75 at ¶ 36; *Werner*, 2011 WI 10 at ¶ 73; *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 626, 511 N.W.2d 868 (Wis. 1994); *see also State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552 (Wis. 1985) (noting that courts “should not . . . interpret extraordinary circumstances so narrowly that subsection (h) does not provide a means for relief for truly deserving claimants”). This is especially true in cases concerning default judgments because of the law’s strong preference for affording litigants their day in court. *See Miller*, 2010 WI 75 at ¶ 46 (“[M]any of the factors will weigh in favor of a party seeking relief from a default judgment entered for failure to timely answer . . . [T]his is consistent with our stated policy that default judgments are the ultimate sanction and that we regard them with particular disfavor.” (internal quotations omitted)).

to respond to the Town's motion for default judgment or even inform Annalyse that it had been filed, depriving her of the opportunity to defend against it. Third, the default judgment was entered without consideration of the merits of the Town's case. Fourth, the Town does not have competent evidence to support its claims, and the Town's claim for damages violates both the United States and Wisconsin constitutions. Fifth, no intervening circumstances counsel against granting relief from judgment. To the contrary, the principles of equity command against imposing an \$88,000 judgment under these circumstances. In addition to these extraordinary circumstances, vacatur will not undermine this Court's general interest in the finality of judgments. Instead, it is the Town who has already undermined this Court's judgment by falsely leading Annalyse to believe it would settle the dispute for a significantly lower amount.

Finally, separate from the extraordinary circumstances that justify vacating the default judgment entered against Annalyse, this Court should declare the default judgment void due to the Town's failure to properly serve Annalyse with the Motion for Default Judgment.

I. The default judgment did not result from a conscientious, deliberate, and well-informed decision by Annalyse.

As the Town itself acknowledged in its motion for default judgment, Annalyse timely responded to the Town's Complaint and Summons. Annalyse delivered her Answer, which was presented in the form of a letter, to the Town's attorney, and she left a copy of the Answer in the Court's drop box because the courthouse was closed at the

time of her delivery.⁵ See Ex. A. Annalyse, proceeding pro se at the time, does not represent that her Answer was perfect. But any shortcomings in Annalyse's Answer were not the result of a "conscientious, deliberate and well-informed choice" to ignore pleading and appearance requirements.

As noted, default judgment is "a result disfavored by law, which prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." *Casper*, 2011 WI 81, ¶ 38. Instead of imposing default judgments for remediable, innocuous errors, such as the errors in Annalyse's Answer, Wisconsin courts have long held that "[t]o enter a default judgment, the trial court must determine that the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse." *Smith v. Golde*, 224 Wis. 2d 518, 526, 592 N.W.2d 287, 291 (Wis. Ct. App. 1999) (internal quotation omitted).

Here, there is no evidence of bad faith or egregious, irremediable misconduct. Annalyse searched for an attorney to represent her in this litigation (to no avail), proceeded pro se, and reached out to the Town's attorney to ask what she should do to respond to the Complaint and Summons, and the Town rebuffed her. So, she did her best to respond, preparing a letter and submitting it to the Court and the Town's attorney. The Town understood this to be Annalyse's Answer, as imperfect as it was, and any shortcomings in this Answer could have been quickly resolved with an amended answer.

⁵ Though Annalyse timely delivered a copy of her Answer to the court by placing it in the court's drop box, the Answer does not appear in the record. It is possible that, not recognizing the document as Annalyse's Answer, the response was not correctly filed as a pleading in this case.

Yet the Town chose to pursue the harsh, disfavored punishment of a default judgment for an incredibly large sum of money—nearly \$20,000 more than the median household income in the United States. In light of Annalyse’s good-faith efforts to respond to the Town’s Complaint and Summons, it is clear that the default judgment was not the natural consequence of a “conscientious, deliberate and well-informed choice” by Annalyse.

II. Annalyse did not receive the assistance of effective counsel, and, in turn, she did not receive notice of the Town’s Motion for Default Judgment.

Annalyse did not receive the assistance of effective counsel. As previously noted, Annalyse was not represented by counsel at the time she responded to the Complaint and Summons. And though she did enlist counsel shortly thereafter, he failed to provide the effective counsel that the State Bar of Wisconsin requires. Specifically, Attorney Torhorst appears to have received a copy of the Town’s Motion for Default Judgment but never informed Annalyse that the motion had been filed, never sent her a copy of the motion, and never took steps to respond to the motion. *But see generally* Wis. R. Prof’l Conduct 20:1.3–1.4 (providing rules for diligent representation and prompt communication with client). In fact, as his billing records indicate, Attorney Torhorst did not perform any work for Annalyse after he received a copy of the Motion for Default Judgment, although he did—a month after receiving the motion and a week after the Court entered the default judgment—send her a bill for more than \$400, again without notifying Annalyse that he was in possession of a Motion for Default Judgment for more than \$80,000 or of the consequences of the entry of a default judgment. Instead, without informing her, Attorney

Torhorst ceased representing Annalyse altogether and left Annalyse with no way to defend against or mitigate a nearly six-figure financial penalty.⁶ *But see* Wis. R. Prof'l Conduct 20:1.16 (setting forth rules for terminating representation). But for his ineffective assistance, there is no doubt that Annalyse would have properly appeared before this Court to defend against the imposition of an \$80,000 default judgment and rectified any pleading errors through an amended answer. *Cf.* Wis. Stat. § 802.09(1) (noting that a party may amend a pleading within six months of the filing of the complaint and summons).

The Supreme Court of Wisconsin has emphatically and repeatedly noted that “default judgment is the ultimate sanction.” *Miller*, 2010 WI 75, ¶ 31. Where, as here, it is the attorney who was derelict in his duties, “he may be personally punished, but his client should not normally be made to bear the consequences of his transgression.” *Hauer v. Christon*, 43 Wis. 2d 147, 155, 168 N.W.2d 81, 85 (Wis. 1969). Despite this axiom, Annalyse has been punished for her previous counsel’s ineffective assistance. Justice demands otherwise.

⁶ The undersigned counsel has contacted Attorney Torhorst on multiple occasions to gain additional insight on the events surrounding his representation of Annalyse and to better understand why the Motion for Default Judgment went unanswered. *See* Ex. E. However, Attorney Torhorst stated that he had no relevant recollection of his representation of Annalyse and directed undersigned counsel to refer to the documents in his client file. *Id.* As noted, these documents reflect that his representation came to an abrupt end after he received a copy of the Motion for Default Judgment.

III. The default judgment was entered without consideration of the merits of the Town's case.

This Court did not consider the merits of the Town's case before entering the default judgment against Annalyse. Of course, that is the nature of a default judgment. But, as the Supreme Court of Wisconsin has observed, the fact that many of the five factors will naturally "weigh in favor of a party seeking relief from a default judgment entered for failure to timely answer . . . is consistent with [the Court's] stated policy that default judgments are the ultimate sanction and [the Court] regard[s] them with particular disfavor." *Miller*, 2010 WI 75, ¶ 46 (internal quotation omitted). As discussed further in the next section, the importance of considering the merits of this case far outweighs this Court's interest in the finality of its judgments, which has already been undermined by the Town's own indications that it would settle the matter for significantly less than the Court's Forfeiture Judgment. The Town has not offered—and cannot offer—any evidence to support its allegations, and the resulting default judgment violates both the United States and Wisconsin constitutions. This unlawful and unconstitutional result can be avoided by reversing the default judgment and affording Annalyse her day in court.

IV. The Town's claims lack a foundation in the facts and lead to unconstitutional results.

If given her day in court, Annalyse would present a meritorious defense to the Town's claims. The Town's Complaint consists of summary allegations, not specific facts. If tested, these claims would fail as the Town cannot present competent evidence to show

that each of the four alleged violations occurred at all, let alone that they occurred every single day for approximately six months, as the Town alleges. For instance, the Town has alleged that Annalyse caused a noise disturbance every day for six months. But it is beyond the realm of reason to suggest that the tractor trailers, which were not driven every day, *see* Ex. A, caused a daily noise disturbance. The burden of proof is on the Town, *see City of Cudahy v. DeLuca*, 49 Wis. 2d 90, 92–93, 181 N.W.2d 374, 375 (1970) (holding that local governments generally must prove municipal ordinance violations by a preponderance of the evidence), and it cannot rise to the occasion.

But even if the Town could provide evidence to support its claims, the Town’s claim for damages would still fail under the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution and article I, section 6 of the Wisconsin Constitution. Imposing excessive fines on property owners—like the \$88,000 fine imposed here—violates the principle of proportionality elucidated by the Supreme Court in *United States v. Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, the Court emphasized that the amount of the penalty must “bear some relationship to the gravity of the offense that it is designed to punish.” *Id.* at 334. Looking back to the history of the excessive-fines clause and its roots in the English Bill of Rights, the Court stated that it was important that fines be proportioned to the offense and not deprive a wrongdoer of his livelihood. *Id.* at 335–36.

Applying the *Bajakajian* test, the Wisconsin Court of Appeals ruled that it would violate the Eighth Amendment and the Wisconsin Constitution to apply even a \$5 to \$10

dollar daily fine, amounting to \$50,396.70, for 773 days of a minor code violation. *Town of Ixonia v. Knopps*, 2017 WI App 41, ¶ 24, ¶ 35, 900 N.W.2d 344, 376 Wis. 2d 525 (unpublished). As the *Ixonia* Court observed, it would be “shocking to the conscience” to penalize a person with “such a large forfeiture that he could well lose his home.” *Id.* at ¶ 35. Likewise, the six months’ worth of \$100 to \$200 daily fines, *per alleged violation*, imposed against Annalyse amount to an excessive penalty that risks bankrupting the Victors. Such a result is disproportionate and unconstitutional.

V. The default judgment is inequitable.

No intervening factors counsel against vacating the default judgment. To the contrary, the principles of equity underscore the importance of reversing the unconstitutionally excessive penalty imposed against Annalyse. As discussed, the basis of the Town’s Complaint is that tractor trailers, registered to Annalyse’s husband personally, were parked on the couple’s 8.5-acre property. And when Annalyse received notice that the tractor trailers must be placed indoors, she moved them into a covered garage and took prompt steps to find them another home. Annalyse kept the Town informed of her progress, and she took every reasonable step to come into compliance. Yet a default judgment of more than \$80,000 was entered against her because she did not have the assistance of effective counsel. When Annalyse appeared before the Court and attempted to reach a settlement with the Town, she understood that the entire dispute had been

resolved for the not-insignificant cost of \$7,000. Yet she now faces nearly \$90,000 in fines and fees—an inequitable result by any standard.

The Town will likely argue that this Court should deny Annalyse relief because the challenged judgment was entered in November 2016 and, therefore, too much time has passed. But this temporal argument is a red herring. Wisconsin Statute § 806.07(1)(h) is not confined by a specific limitations period. Instead, it requires that a motion for relief from judgment “be made within a reasonable time,” without defining “reasonable.” Wis. Stat. § 806.07(2). And the Supreme Court of Wisconsin has already made clear that the “reasonable” time limitation for seeking relief under subsection (h) is permissive, not restrictive. *See, e.g., M.L.B.*, 122 Wis. 2d at 554.

In *M.L.B.*, for instance, the Supreme Court of Wisconsin reversed a denial of relief that was sought more than four years after the subject agreement was approved and filed by the circuit court. *Id.* at 538–39. Despite the time that had passed between the filing of the agreement and the movant’s motion to set it aside, the Supreme Court of Wisconsin explained that the only relevant question was whether there were extraordinary circumstances justifying relief from the agreement. *Id.* at 554. The passage of time between the agreement’s filing and the motion to set it aside did not prevent the availability of relief. The Court accordingly remanded the case to the circuit court for a hearing and a more extensive analysis on the equities of the case. *Id.*

A more-than-four-year gap did not fall outside the bounds of reasonableness for the Supreme Court in *M.L.B.* Nor does it here. *See also Cynthia M.S.*, 181 Wis.2d at 631–32 (finding an 11-year gap between the entry of the challenged order and the movant’s motion to vacate was not unreasonable).

Further, any delay in Annalyse’s filing of this Motion is the result of the Town’s own actions and factors outside of Annalyse’s control. As discussed, the Town, through both the members of the Town Board and its private counsel, engaged in settlement discussions with Annalyse and Joe for sums significantly less than the amount of the default judgment, disincentivizing Annalyse from incurring the time and financial expenses of seeking relief from this Court. And while the settlement discussions dragged on, Annalyse struggled to find an attorney who could represent her in this litigation, not just in negotiations, only for her efforts to be further stymied by the coronavirus pandemic and the increased demands of her job as a nurse practitioner. The Town should not now be allowed to benefit from its misrepresentations about its willingness to settle the matter for a significantly lower amount, particularly as the Town will not suffer any prejudice by simply being required to litigate the case that it filed.⁷ Instead, justice requires affording

⁷ The lack of potential prejudice to the Town is further highlighted by the fact that the Town has not taken any steps to enforce the default judgment against Annalyse, demonstrating that the Town does not have a reliance interest in the default judgment that has been entered. Annalyse, on the other hand, has an \$88,000 judgment against her that is making daily impacts on her credit score and her ability to take out a loan, if needed, or obtain a mortgage to move away from the Town of Eagle.

Annalyse the opportunity to appear before this Court and defend against the imposition of an \$88,000 penalty for minor ordinance violations.

VI. In the alternative, this Court should vacate the default judgment as void.

As discussed above, the Town never served Annalyse with its Motion for Default Judgment. This fact alone is sufficient reason to vacate the default judgment. Attorney Torhorst did not enter an appearance on behalf of Annalyse in this matter; therefore, she did not have counsel of record and the Town should have effectuated service on her personally. *See* Wis. Stat. § 801.14. This failure to properly serve Annalyse with the Motion for Default Judgment renders the subsequent judgment void. *See Stein v. Ill. State Assistance Comm'n*, 194, Wis.2d 775, 783 (Wis. Ct. App. 1995) (“In the absence of compliance with [Wis. Stat. § 801.14,] the judgment is void and, therefore, must be set aside.”); Wis. Stat. 806.07(1)(d). As such, the default judgment should be set aside, and Annalyse should be granted the opportunity to defend against the Town’s allegations.

CONCLUSION

Though “the sanctity of the final judgment” demands respect, in this case, any interest in preserving the default judgment “is outweighed by the incessant command . . . that justice be done in light of *all* the facts.” *Werner*, 2011 WI 10 at ¶ 71 (emphasis in original) (internal quotation omitted). Therefore, this Court should vacate the default judgment entered against Annalyse.

Dated: January 25, 2021

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*Motion for admission pro hac vice
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