

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2026

Samuel A. Christensen
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 No. 2024AP404
STATE OF WISCONSIN**

Cir. Ct. No. 2023TR797

**IN COURT OF APPEALS
DISTRICT III**

LINCOLN COUNTY,

PLAINTIFF-RESPONDENT,

V.

KAYLA J. RISTAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
ROBERT R. RUSSELL, Judge. *Reversed and cause remanded for further proceedings.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 HRUZ, J.¹ Kayla J. Ristau appeals a default judgment entered against her after she failed to personally appear at a pretrial hearing in a civil case. Ristau argues that article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1) permit a civil defendant to appear at all hearings, including a trial, through his or her attorney. Therefore, because her attorney was present at the subject hearing, she did not fail to appear, nor did she otherwise violate any circuit court order, and she therefore could not be sanctioned by the court with a default judgment for failing to appear. Lincoln County argues that a person's right to appear in a civil matter through his or her attorney is not unlimited. Instead, according to the County, that general right is subject to the subpoena authority and discretion of the court, and the court here properly ordered Ristau to personally appear.

¶2 We conclude that even if the circuit court had the authority to order Ristau's personal appearance through its subpoena powers or by issuing a scheduling or pretrial order, the court did not, in fact, do so here. Further, Ristau was never provided sufficient notice that a default judgment could be entered against her if she did not personally appear at any particular hearing. Accordingly, we reverse the default judgment and remand for further proceedings.

BACKGROUND

¶3 On July 17, 2023, Lincoln County Sheriff's Department Deputy Conner Monk issued Ristau a citation for operating a motor vehicle while under

¹ This appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. § 752.31(3) (2023-24) and WIS. STAT. RULE 809.41(1) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

the influence of an intoxicant (OWI), contrary to WIS. STAT. § 346.63(1)(a), as a first offense.² On September 14, 2023, Ristau and her counsel were sent a notice of the date, time and location of a final pretrial hearing set for March 1, 2024, which provided that the “[d]efendant [m]ust [a]ppear in [p]erson.” That formal notice further stated that the matter was set for a jury trial on March 5, 2024, at 8:30 a.m., and again declared that the defendant must appear in person at that time. The notice did not contain any statement regarding possible sanctions for failing to appear on either date.

¶4 Ristau did not personally appear at the final pretrial hearing; instead, she appeared through her attorney. The circuit court told Ristau’s counsel, “Your client needs to be here,” to which counsel responded that Ristau had a constitutional right to appear by her attorney in a civil case and that Ristau was exercising that right. The court found Ristau in default for not appearing, scheduled a hearing for March 4, 2024—giving Ristau and the County the opportunity to present materials regarding Ristau’s right to appear through counsel—and withheld entering judgment pending that hearing. Counsel filed a letter stating that Ristau’s right to appear through counsel was provided by article I, section 21 of the Wisconsin Constitution and WIS. STAT. § 799.06(2), and that Wisconsin’s Supreme Court Rules and case law support that right. See SCR 11.02(1).

¶5 In support of his interpretation of the above provisions, Ristau’s counsel cited *Sherman v. Heiser*, 85 Wis. 2d 246, 248-50, 270 N.W.2d 397

² Under Wisconsin law, a first-offense OWI is a civil matter, not a criminal matter. See WIS. STAT. § 346.65(2)(am)1.; *City of Cedarburg v. Hansen*, 2020 WI 11, ¶14 & n.9, 390 Wis. 2d 109, 938 N.W.2d 463.

(1978), where our supreme court addressed whether granting a default judgment without notice to the party against whom it was entered violated Wisconsin statutes and constitutional due process when the case was set for a jury trial, the party did not appear for trial, the party's attorney did appear, and the attorney withdrew the day of trial without notice to the party. The **Heiser** court reasoned that the version of WIS. STAT. § 806.02(5) in effect at that time, allowing for default judgment against a defendant that failed to appear at trial, did not apply because the party did "'appear' at trial by the fact that his counsel appeared." **Heiser**, 85 Wis. 2d at 254 (quoting § 806.02(5)).

¶6 At the March 4 hearing, Ristau's counsel again appeared, but Ristau was absent. The circuit court then began discussing whether the entry of a default judgment was appropriate. The court noted that the hearing notice stated that Ristau was required to appear in person, but the court stated that it *did not construe the notice as a court order*. The court further stated that Ristau did not violate any court order and that it would "vacate" the default finding against Ristau. However, the court stated, on the record, that it was going to order Ristau appear at the jury trial the following day and that it would sanction Ristau if she did not appear. The court reasoned that, among other issues, it would be difficult for counsel to discuss and handle any last-minute issues or any motions in limine without Ristau present and that the court "philosophically" "ha[d] a problem with a defendant requesting a jury trial and then not really caring if he or she appears at the jury trial."

¶7 Ristau's counsel steadfastly maintained that the circuit court did not have the authority to order Ristau to personally appear, that Ristau had never personally appeared in this case and would not do so going forward, and that counsel would prefer that the court just enter a default judgment against Ristau at

that time, given the court’s statements. In response, the court stated it was “apparent [Ristau] had no intentions of appearing at the jury trial,” and, based on her continuing failure to appear, the court entered a default judgment against her.

¶8 The circuit court ultimately adopted the County’s penalty recommendations and ordered Ristau to pay a fine of \$1,019. The court also imposed an eight-month license revocation, ordered Ristau to install an ignition interlock device for twelve months on any vehicles she owned, and ordered Ristau to complete an alcohol and other drug abuse assessment. Ristau now appeals.

DISCUSSION

¶9 We begin our analysis by outlining the parties’ respective arguments on appeal. Ristau argues that a defendant has the unconditional right to appear by counsel in civil matters at all times. In support, Ristau cites: (1) article I, section 21 of the Wisconsin Constitution, which provides, “In any court of this state, *any suitor may* prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice”; (2) WIS. STAT. § 799.06(2), which provides, in part, “A *person may* commence and prosecute or defend an action or proceeding under this chapter and may appear in his, her, or its own proper person or by an attorney regularly authorized to practice in the courts of this state”;³ and (3) SCR 11.02(1), which provides, “*Every person* of full age and sound mind *may* appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in

³ WISCONSIN STAT. ch. 799 is principally known for governing “small claims” actions in Wisconsin. However, it includes other enumerated proceedings, including, among others, replevin claims, evictions, and, as relevant here, actions to recover forfeitures (with certain exceptions not relevant to this opinion). WIS. STAT. § 799.01(1)(a)-(c).

person.” (Emphases added.) Ristau emphasizes the permissive language of these provisions and argues that it gives *a person*, rather than *the court*, the sole discretion to decide whether counsel can appear on that person’s behalf.

¶10 Ristau argues that her position is further supported by *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 595 N.W.2d 635 (1999), and *Heiser*, the latter of which was discussed above. See *supra* ¶5. In *Davis*, our supreme court addressed whether a municipal court had the inherent authority to order an out-of-state defendant to personally appear at a civil trial for a first-offense OWI. *Davis*, 226 Wis. 2d at 742. Our supreme court noted that ordering a person to personally appear was, in essence, a subpoena and that there was no statutory authority for a municipal court to issue a subpoena, and the court then analyzed whether a municipal court could subpoena a party as a part of the court’s inherent authority.⁴ *Id.* at 747.

¶11 The *Davis* court stated that there are generally three areas in which courts have exercised inherent authority: (1) internal operations of the courts, wherein courts “exercise inherent authority to guard against ‘any action that would unreasonably curtail the powers or materially impair the efficacy of the courts or judicial system’”; (2) regulating members of the bench and bar; and (3) “ensuring that the court functions efficiently and effectively to provide the fair administration of justice.” *Id.* at 749-50 (quoting *Flynn v. DOA*, 216 Wis. 2d 521,

⁴ The *Davis* court, citing WIS. STAT. § 885.04 (1978), noted that it was unquestioned that a municipal court had the power to authorize the subpoena of a defendant who lives in Wisconsin. *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747, 595 N.W.2d 635 (1999). After the release of *Davis*, § 885.04 (2020) was amended to include the following language: “A subpoena to require the attendance of the defendant, whether the defendant is within or without the state, may be served by mailing it to the defendant at the address on file with the court.” 2019 Wis. Act 70, § 44.

550, 576 N.W.2d 245 (1998)). After analyzing each of these areas, the court concluded that if a municipal court had inherent authority to order an out-of-state defendant to personally appear, that authority must fall within the third area of inherent authority. *Id.* at 751.

¶12 In determining whether the municipal court’s order was related to the existence of the court and ensuring the orderly and efficient exercise of its jurisdiction, our supreme court looked to the municipal court’s reasons for ordering the defendant’s presence. *Id.* at 751-52. These reasons included that the “defendant’s physical presence would promote prompt justice because he knew the facts and could enter into trial stipulations or meaningful settlement discussions”; “the defendant’s physical presence enhanced the search for the truth because the court could ask questions directly of the defendant” and “the court could observe the defendant’s demeanor”; and because ordering the defendant’s physical presence “discouraged abuse of the municipal court.” *Id.* (citation modified). Our supreme court concluded that, while all of the municipal court’s reasons were legitimate concerns, none were “related to the existence of the court and to the orderly and efficient exercise of its jurisdiction.” See *id.* at 752 (quoting *Jacobson v. Avestruz*, 81 Wis. 2d 240, 247, 260 N.W.2d 267 (1977)). Thus, the court reasoned that the municipal court did not have the inherent authority to order the out-of-state defendant to personally appear. *Id.* at 760.

¶13 Ristau likens her circumstances to those of the defendant in *Davis*, arguing that the circuit court could not order her appearance by using the court’s inherent authority. In particular, Ristau asserts that none of the bases outlined in *Davis* for a court to order her personal appearance existed in this case. She further

asserts that a circuit court must provide an order requiring an in-state defendant's appearance at a specific hearing and that she never received any such order.⁵ Ristau states that her attorney was authorized to appear on her behalf and was prepared to proceed with the case, and article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1) permit an attorney to appear on behalf of a defendant in a civil forfeiture action.

¶14 Importantly, the County agrees with Ristau that the circuit court did not, in fact, order her appearance using the court's inherent authority. The County instead argues that the court has the statutory authority to order a party's appearance and that the ability to appear by one's attorney "is not an unlimited right," but rather is "subject to the discretion of the [circuit] court." The County asserts that "there is no reason to construe" the permissive "may" in article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1) "as being the equivalent of 'shall be permitted' to appear by an attorney for all their hearings." In other words, according to the County, while, absent a court order to the contrary, a civil party may appear via counsel in court proceedings, the provisions on which Ristau relies do not abrogate a circuit court's statutory ability to order the party's personal appearance.

¶15 Specifically, the County contends that the circuit court can require a defendant in a civil matter to personally appear through the court's subpoena

⁵ Ristau does not specify whether she is asserting that the circuit court must provide an order to the party personally or to the party's counsel. The County does not address this ambiguity. Because the parties do not develop any argument regarding on whom the order must be served, we do not address this issue further.

powers.⁶ The County asserts that because the court’s notice of the final pretrial hearing and of the trial provided that “the [d]efendant [m]ust [a]pppear in [p]erson,” that notice commanded Ristau’s appearance and effectively served as a subpoena.

¶16 In reply, Ristau argues that the County’s assertion that a circuit court has the discretion to prohibit a civil defendant from appearing only by counsel is “an erroneous interpretation of the explicit language” in article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1). Ristau also argues that the County’s argument that the notice of hearing acted as a subpoena is erroneous because the purpose of a subpoena is to require a witness to testify and because the notice of hearing did not provide any guidance as to a possible punishment for failure to appear.

⁶ The County refers to the circuit court’s subpoena powers under WIS. STAT. § 885.01. We note, however, that WIS. STAT. ch. “885 is to apply in all criminal proceedings” and that the legislature enacted WIS. STAT. § 805.07 for subpoenas in civil matters. See *State v. Wilson*, 2017 WI 63, ¶¶34, 39, 376 Wis. 2d 92, 896 N.W.2d 682; WIS. STAT. § 801.01(2) (“[WIS. STAT. chs.] 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings”). An OWI first offense is a civil matter under Wisconsin law. See WIS. STAT. § 346.65(2)(am) (providing the possible OWI penalties); see also *supra* note 2. Thus, the civil statute, § 805.07, applies here.

WISCONSIN STAT. § 805.07(1) provides: “Subpoenas shall be issued and served in accordance with ch. 885.” Accordingly, we acknowledge that, pursuant to WIS. STAT. § 885.01(1), a judge with jurisdiction may “require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court.” However, § 805.07 materially differs from the subpoena requirements in WIS. STAT. §§ 885.01-885.03 in that the form of a subpoena under § 805.07(4) is *mandatory*, whereas the form of a subpoena under § 885.02 is permissive. See § 805.07(4) (“The subpoena *shall* be in the following form”); § 885.02(1) (“The subpoena *may* be in the following form”) (emphases added).

We also pause to emphasize the applicability of this opinion. This opinion applies to general civil proceedings but does not apply where a civil statutory chapter provides its own rules regarding a party’s appearance and default judgment. See WIS. STAT. § 801.01(2) (stating that WIS. STAT. chs. 801 to 847 “govern procedure and practice ... in all civil actions and special proceedings ... except where different procedure is prescribed by statute or rule”).

¶17 Having outlined the parties’ respective appellate arguments, we now analyze and decide how, under relevant law, we should dispose of this appeal. We generally review a “circuit court’s decision to grant a default judgment under the erroneous exercise of discretion standard.” *Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544. “The circuit court erroneously exercises its discretion when it applies the wrong legal standard or if the facts of record fail to support the ... court’s decision.” *Werner v. Hendree*, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423. Determining whether the court applied the wrong legal standard includes the legal question of whether a circuit court has any authority, in the first instance, to issue a default judgment under particular circumstances.⁷

¶18 The resolution of the parties’ arguments requires us to interpret the Wisconsin Constitution, statutes, and supreme court rules, all of which we review de novo. See *State v. Halverson*, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847; *State v. Stewart*, 2018 WI App 41, ¶18, 383 Wis. 2d 546, 916 N.W.2d 188; *Filppula-McArthur ex rel. Angus v. Halloin*, 2001 WI 8, ¶32, 241 Wis. 2d 110, 622 N.W.2d 436. “In interpreting the Wisconsin Constitution, we focus on the language of the adopted text and historical evidence.” *Halverson*, 395 Wis. 2d 385, ¶22. When interpreting statutes, “[w]e assume that the legislature’s intent is

⁷ Citing *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9, 242 Wis. 2d 153, 624 N.W.2d 375, the County asserts that “[t]he entry of a default judgment by a circuit court is an exercise of discretion [that] must be upheld unless there was an erroneous exercise of discretion.” While this statement is correct, insofar as it goes, in this case there is also the important question of law regarding whether a circuit court has the authority to enter a default judgment under a particular set of facts, including what is required for a court to properly exercise its discretion in doing so. See *Hughes v. Hughes*, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998) (“[W]hen the contention is that the [circuit] court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue of law de novo.”).

expressed in the statutory language.” *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110. “[S]tatutory interpretation ‘begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.’” *Id.*, ¶45 (citation omitted). “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* “We decline to read into the statute words the legislature did not see fit to write.” *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis.2d 318, 801 N.W.2d 316. Similarly, “[t]he goal of rule interpretation ... is to give effect to the intent of the enacting body.” *City of West Allis v. Sheedy*, 211 Wis. 2d 92, 96, 564 N.W.2d 708 (1997).

¶19 We conclude that both parties correctly state portions of the governing law but also overstate the applicable law in support of their positions. In other words, the answer, as is often the case, is somewhere in the middle. We agree with Ristau that the plain language of article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1) generally gives Ristau, as well as similarly situated suitors and defendants, the discretion to appear in a civil matter by an attorney. See WIS. CONST. art. I, § 21(2) (“[A]ny suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice.”); § 799.06(2) (“A person may commence and prosecute or defend an action or proceeding under this chapter and may appear in his, her, or its own proper person or by an attorney regularly authorized to practice in the courts of this state.”); and SCR 11.02(1) (“Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.”). This conclusion is further supported by *Heiser*, where our supreme

court concluded that the appellant did appear at trial “by the fact that his counsel appeared.” *Heiser*, 85 Wis. 2d at 254. Contrary to the County’s assertion, nothing in article I, section 21 of the Wisconsin Constitution, § 799.06(2), or SCR 11.02(1) grants *the court* the discretion to choose whether a defendant in a civil matter may appear by an attorney, and the County does not cite any case law in support of its assertion.

¶20 While the County argues that a circuit court may order a party’s appearance through a subpoena, *see* WIS. STAT. § 805.07(1), we conclude that the notice of the final pretrial hearing, here, was not a subpoena. “Subpoena” is defined as “[a] writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.” *Subpoena*, BLACK’S LAW DICTIONARY (12th ed. 2024). However, this definition does *not* mean that all orders to appear before a court are subpoenas. Importantly, in Wisconsin, a subpoena must be served upon the person whose attendance is sought. *See* § 805.07(1). Further, in a civil matter, a subpoena *must* be in the form provided by § 805.07(4).

¶21 Here, the County does not argue that the circuit court’s notice of the final pretrial hearing satisfied WIS. STAT. § 805.07(1)’s service requirements or § 805.07(4)’s form requirements. And the notice clearly did not do so. Further, the County did not subpoena Ristau to testify at trial, nor would she have testified at the final pretrial hearing. Accordingly, we conclude that the court’s notice of the final pretrial hearing was not a subpoena.

¶22 Yet, the foregoing analysis does not end our inquiry. The County additionally argues that a circuit court has the power to enter a default judgment for violating a scheduling or pretrial order under WIS. STAT. §§ 802.10(7), 805.03,

and 804.12(2)(a)3., and *Gaertner v. 880 Corp.*, 131 Wis. 2d 492, 497-98 & n.6, 389 N.W.2d 59 (Ct. App. 1986).⁸ Cf. § 802.10(6), (7) (providing that the court may require a party to be present at any pretrial conference to consider a possible settlement and to enter a default judgment for violation of a pretrial order). We ultimately need not reach this issue, as we conclude that even if the court had the statutory authority to order Ristau’s personal appearance at the pretrial hearing despite her decision to appear solely through counsel, the court did not enter any such order in this case that Ristau could have violated. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on “the narrowest possible ground”); *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶91, 294 Wis. 2d 441, 717 N.W.2d 803 (stating that we do “not normally decide constitutional questions if the case can be resolved on other grounds” (citation omitted)).

¶23 WISCONSIN STAT. § 802.10(7) provides that “[v]iolations of a scheduling or pretrial order are subject to [WIS. STAT. §§] 802.05, 804.12, 805.03, and 895.044.” Section 805.03 provides, in relevant part, “[F]or failure of any party ... to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to

⁸ The County argues that the circuit court’s notice of hearing was a pretrial scheduling order. The County does not address whether the “scheduling order” in WIS. STAT. § 802.10(7) is in reference to the scheduling order contemplated in § 802.10(3)—which is commonly entered following a scheduling conference, see *Hefty v. Strickhouser*, 2008 WI 96, ¶¶31-32, 312 Wis. 2d 530, 752 N.W.2d 820—or if the “scheduling order” means any order of the court scheduling anything. While we note the proximity between § 802.10(3) and (7), we need not resolve this ambiguity, as § 802.10(7) provides that WIS. STAT. § 805.03 is applicable for the violation of a scheduling or pretrial order, and § 805.03 broadly applies to “any order of [the] court ... in which the action is pending.” Thus, the court’s notice of hearing *could* have been construed as a pretrial order had the court not specifically disavowed that this notice was a court order requiring Ristau’s personal attendance. See *supra* ¶6, *infra* ¶26 note 12.

orders authorized under [§] 804.12(2)(a).” Section 804.12 provides that when “a party fails to obey an order to provide or permit discovery,” the court “may make such orders in regard to the failure as are just,” including “[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.” Sec. 804.12(2)(a), (2)(a)3.

¶24 The former WIS. STAT. §§ 805.03 and 804.12(2)(a) were discussed by this court in *Gaertner*, where we concluded that the circuit court did not erroneously exercise its discretion when it entered a default judgment against a party that failed to appear at a scheduling conference. *Gaertner*, 131 Wis. 2d at 497-98 & n.6. The default judgment in *Gaertner* stemmed from the court entering a “‘Scheduling Conference Memorandum and Order’ specifically requiring the parties’ attendance” at a scheduling conference. *Id.* at 499. The order was sent to the appellant—a corporation—and to the appellant’s counsel, who subsequently withdrew as counsel. *Id.* The appellant did not appear at the conference. *Id.* at 496.

¶25 We rejected the appellant’s argument that the circuit court erred by granting default judgment because the appellant did not receive notice of a motion for judgment as required by WIS. STAT. § 806.02(1).⁹ *Gaertner*, 131 Wis. 2d at 502-03. Relying on our supreme court’s precedent, we concluded that “[WIS. STAT. §] 805.03 is sufficient notice to attorneys practicing in this state of the

⁹ In *Gaertner*, the corporate appellant did not raise any constitutional argument, including under article I, section 21 of the Wisconsin Constitution, or dispute “the [circuit] court[’s] ... statutory authority ... to render a default judgment against [it] for failure to appear at the scheduling conference.” *Gaertner v. 880 Corp.*, 131 Wis. 2d 492, 497, 389 N.W.2d 59 (Ct. App. 1986).

action which a court may take upon a party's failure to comply with statutes governing procedure in civil actions or to obey any order of a court.” *Id.*; cf. *Neylan v. Vorwald*, 124 Wis. 2d 85, 93, 368 N.W.2d 648 (1985) (“Where no constructive notice is given, fundamental fairness and due process require that a litigant be given actual notice before a court enters a dismissal” under § 805.03 “without the notice and motion of any party.”). The County cites *Gaertner* and states, “[I]t is clear [the circuit court] had the authority to enter a default judgment against Ms. Ristau for her disobedience to the court’s order.”¹⁰

¶26 We conclude that *Gaertner* is materially distinguishable from the facts of Ristau’s case for purposes of determining whether the circuit court properly ordered a default judgment against Ristau. First, unlike in *Gaertner*, where no one appeared on behalf of the corporation, *Gaertner*, 131 Wis. 2d at 496-97, Ristau did “appear” at the hearing through her attorney, as is permitted by article I, section 21 of the Wisconsin Constitution, WIS. STAT. § 799.06(2), and SCR 11.02(1).¹¹ See *Heiser*, 85 Wis. 2d at 254. Second, unlike the appellant in *Gaertner*, which violated the court’s order specifically requiring the corporation’s attendance, *Gaertner*, 131 Wis. 2d at 499, in this case, there ultimately was no

¹⁰ Ristau appears to argue in her reply brief that WIS. STAT. §§ 802.10(7), 805.03, and 804.12(2)(a)3. do not actually cover the general fact pattern found in this case. Her arguments in this regard fail to address the rationale articulated in *Gaertner*, 131 Wis. 2d at 497 n.6. Ultimately, for the reasons explained in this opinion, Ristau’s failures in these regards are not fatal to her appeal, given our conclusion that under the particular facts of this case, the statutes upon which *Gaertner* relied do not apply due to the circuit court technically never issuing an order as contemplated by § 802.10(7), which was previously § 802.10(3)(d).

¹¹ We note that “under Wisconsin rules and statutes, only lawyers can appear on behalf of or perform legal services for corporations in legal actions in Wisconsin courts,” with the “only exception” to this rule being actions in small claims court. *Carmain v. Affiliated Cap. Corp.*, 2002 WI App 271, ¶19, 258 Wis. 2d 378, 654 N.W.2d 265. Thus, a corporation generally cannot appear without counsel in a case.

such order entered in the record specifically requiring Ristau to personally appear, as opposed to just her counsel appearing.¹² Third, and related to the last point, unlike the appellant in *Gaertner*, to which knowledge of a possible default judgment due to failing to comply with a court order pursuant to WIS. STAT. § 805.03 could be imputed, *Gaertner*, 131 Wis. 2d at 502-03, Ristau was never given notice, constructively or otherwise, of the possibility of default judgment.

¶27 The plain language of WIS. STAT. § 806.02(1), Wisconsin’s default judgment statute, mandates that “[a]ny defendant appearing in an action *shall be entitled to notice of motion for judgment.*” (Emphasis added.)¹³ Given that the circuit court here concluded that it had the authority to order Ristau’s personal appearance and entered a default judgment at that same hearing, Ristau was given no such notice.¹⁴ Accordingly, Ristau could not be deemed to be on notice of the

¹² While the County contends that Ristau violated the circuit court’s notice of hearing requiring her personal appearance, the court itself stated that it did not construe the notice as a court order. Importantly, the County’s appellate arguments never account for this critical fact. Thus, the circuit court could not enter a default judgment under WIS. STAT. §§ 802.10(7), 805.03, and 804.12(2)(a)3 based on the notice of hearing.

¹³ While WIS. STAT. § 806.02(1) contemplates there being a motion for default judgment, we note that WIS. STAT. § 804.12(2)(a)3. does not require the nonoffending party to move for default judgment. Indeed, the trio of statutes discussed in *Gaertner*, 131 Wis. 2d at 497 n.6, appears to operate in a way that gives courts authority to order a default judgement sua sponte.

¹⁴ After the circuit court disavowed that the notice of hearing was an order requiring Ristau to appear in person and expressly ordered Ristau to personally appear at trial the next day, Ristau’s counsel stated that he would prefer the court to simply enter a default judgment at that pretrial hearing, as counsel continued to assert that the court did not have the authority to order Ristau to personally appear, thereby indicating that Ristau would not be personally attending the trial. While counsel was clear that Ristau did not wish to personally attend the trial, there is nothing in the record to indicate that Ristau was aware that, if she failed to personally appear at trial (which was scheduled to begin the next day), the court would enter a default judgment against her.

(continued)

possibility of a default judgment being entered against her either by virtue of a violated court order, as in **Gaertner**, or by any other sufficient notice from the court akin to that required in a motion for default judgment.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

To be clear, it was not unreasonable for the circuit court to rely on counsel’s statement that Ristau would not personally attend the trial the following day. However, WIS. STAT. § 806.02(1) still requires that a defendant be given notice of a possible default judgment, and by entering default judgment at the pretrial hearing, Ristau’s counsel could not have warned Ristau of that possible consequence. We suggest a better practice would have been to wait until the following day to see if Ristau complied with the court’s order before entering default judgment, thereby indisputably providing Ristau notice of possible default judgment a la STAT. § 805.03 and **Gaertner**, 131 Wis. 2d at 502-03, inasmuch as her counsel would have been ethically obligated to inform and warn Ristau of the upcoming entry of default judgment if she did not appear that day. We also note that the County does not argue invited error as a basis to affirm the circuit court’s entry of default judgment in the manner that it did at the pretrial hearing. *See generally State v. Slater*, 2021 WI App 88, ¶40, 400 Wis. 2d 93, 968 N.W.2d 740 (explaining the doctrine of invited error).

