Criminal Law

Domestic Abuse Repeater Statute – Calculation of Eligibility

***State v. Ricketts*, 2026 WI App 4 (filed Dec. 9, 2025) (ordered published Jan. 28, 2026)**

HOLDING: The defendant's prior record qualified him as a "domestic abuse repeater."

SUMMARY: Under Wis. Stat. section 939.621, a defendant qualifies as a "domestic abuse repeater" if, during the 10-year period preceding the commission of an offense, the defendant "was convicted on 2 or more separate occasions" of certain crimes involving domestic abuse. *See* § 939.621(1)(b) (¶ 1). If a person who is a domestic abuse repeater "commits an act of domestic abuse, as defined in § 968.075(1)(a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years." In addition, this penalty increase "changes the status of a misdemeanor to a felony" (¶ 6) (citation omitted).

The issue in this appeal concerned the interpretation of the statutory phrase "was convicted on 2 or more separate occasions." The circuit court interpreted this phrase to mean that the defendant's prior convictions for domestic abuse offenses must arise out of "two separate incidents"; in other words, there must be two "separate dates of offense." Because the defendant in this case was convicted of two prior domestic abuse offenses that arose out of the same incident and had a single offense date, the court concluded that he did not qualify as a domestic abuse repeater. The circuit court therefore granted a defense motion to strike the domestic abuse repeater enhancer (*see* ¶ 1).

In an opinion authored by Judge Hruz in this interlocutory appeal, the court of appeals reversed. The court concluded that "a person is a domestic abuse repeater if he or she was convicted of two or more qualifying domestic abuse offenses during the requisite statutory time period, regardless of whether those convictions arose out of the same incident, had the same offense date, or occurred during the same court appearance. Consistent with [*State v.*] *Wittrock* [119 Wis. 2d 664, 350 N.W.2d 647 (1984)] and [*State v.*] *Hopkins* [168 Wis. 2d 802, 484 N.W.2d 549 (1992)], what matters is the quantity of the defendant's prior domestic abuse crimes, not the time of commission or the time of conviction" (¶ 37). In *Wittrock* and *Hopkins,* "the supreme court interpreted nearly identical language in the closely related general repeater statute" (Wis. Stat. § 939.62) (¶ 30).

The defendant's record as described above qualified him as a domestic abuse repeater. Accordingly, the court of appeals reversed the circuit court's order striking the domestic abuse repeater enhancer from the charges in this case, and it remanded the matter to the circuit court for further proceedings consistent with this opinion (*see* ¶ 53).

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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Evidence

Experts – Compensation – Disqualification

***Kyllonen v. Artisan & Truckers Cas. Co.*, 2026 WI App 2 (filed Dec. 10, 2025) (ordered published Jan. 28, 2026).**

HOLDING: It was reversible error to exclude expert testimony by the plaintiff's treating physicians.

SUMMARY: The plaintiff brought a personal-injury lawsuit for injuries suffered in a car accident. The trial judge ruled that the plaintiff's treating physicians were precluded from testifying by Wis. Stat. section 907.02(2). Following a trial, the plaintiff appealed the judge's pretrial ruling.

The court of appeals reversed, and granted a new trial on the issue of damages, in an opinion authored by Judge Grogan. The court held that the trial judge misinterpreted Wis. Stat. section 907.02(2), which provides that "the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered" (¶ 12). The three physicians had treated the plaintiff for his injuries. The plaintiff's counsel had promised to "protect" the physicians' claims to payments for providing medical services.

The court carefully construed the terms "compensation" and "contingent" while also considering the context in which they are used in Wis. Stat. section 907.02(2). "Stated otherwise, to preclude an expert witness from testifying under § 907.02(2), there must be an agreement that the expert witness is exchanging the testimony for payment for the testimony itself that will only occur if the lawsuit resolves in the proponent's favor" (¶ 21).

The "broad reading" urged by the defense would lead to an "absurd and unreasonable result because doing so would necessarily exclude the testimony of any treating doctor who provided medical treatment to a plaintiff based solely on the fact that outstanding bills remained for that medical service. Under such a broad interpretation, *any* service provider's outstanding bills could constitute 'compensation' that is 'contingent' on the outcome of a case if a successful outcome would ultimately increase the party's ability to satisfy [the party's] financial obligations for the non-testimonial services rendered. Thus, whether an expert witness could testify would turn on whether a party proponent had the ability to pay for non-testimonial related services incurred prior to trial" (¶ 22).

The letter by the plaintiff's lawyer functioned as a "medical lien." It did not waive the plaintiff's responsibility for the medical bills. Nor was there an agreement that these physicians would be paid a contingent fee only if they testified at trial (*see* ¶ 24). "Put simply, the fact that Kyllonen's success at trial may ultimately have impacted his ability to pay his outstanding medical bills did not transform his financial obligations into contingency payments or contingent compensation within the meaning of Wis. Stat. § 907.02(2)" (¶ 26).

Torts

Products Liability – Warnings – Misuse – "Sham" Affidavit

***Aker v. Good Sportsman Mktg. LLC*, 2026 WI App 3 (filed Dec. 4, 2025) (ordered published Jan. 28, 2026)**

HOLDING: Disputed issues of material fact foreclosed summary judgment in this products-liability case.

SUMMARY: Aker was seriously injured while hunting in a tree stand when the safety-harness system failed. He sued the manufacturer. The circuit court granted summary judgment in favor of the defendants.

The court of appeals reversed in an opinion authored by Judge Graham. "Aker was injured when the buckle release loop on the subject harness system broke ... because Aker misused the harness system by [incorporating a carabiner].... The instructions for the subject harness system ... explained how to properly connect the harness to the subject tree strap, but Aker did not review those instructions.... There were no warnings on the subject tree strap itself that would have alerted Aker that the buckle release loop was not intended for carabiner attachment and was not strong enough to bear his weight" (¶ 29).

The defense contended that the plaintiff's misuse of the harness was not reasonably foreseeable. The court disagreed. "[F]or purposes of reasonable foreseeability, the issue here is whether the defendants could have foreseen that a consumer might misuse the subject harness system by attaching a carabiner to the buckle release loop. A ... jury could determine that it was foreseeable that some potential users might misuse the subject harness system in this manner" (¶ 40).

Nor did it matter whether the plaintiff's decision to use a carabiner stemmed from his experience with a tree strap made by other manufacturers: "a jury could conclude that the defendants should have foreseen that the buckle release loop ... presented a hidden hazard to consumers" (¶ 42).

The court then rejected the contention that the plaintiff's later affidavit on this point, which differed from his deposition, violated the "sham affidavit rule." The differences reflected only an "evolution in Aker's understanding [that] readily explain the slight differences between the affidavit and the deposition testimony" (¶ 47).

Two other points merit mention here. First, this was not an "extreme case" in which the record showed that the plaintiff's conduct was so unreasonable and dangerous that his contributory negligence precluded judgment against the defendants (¶ 56).

Second, the plaintiff's claims were not precluded by Wis. Stat. section 895.047(1)(d) or the case law on strict products liability because of the "change" made by the plaintiff (¶ 57). "Here, ... the carabiner did not fail and it was not the aspect of the subject harness system that allegedly made it 'dangerously defective.' Instead, ... the buckle release loop on the tree strap ... was dangerous because it did not contain a warning to alert the user that it was not intended to be used with a carabiner or to bear weight. This aspect of the subject harness system indisputably existed at the time the product 'left the manufacturer's control'" (¶ 62). **WL**