COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2206-FT

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

RANDY C. MINDER AND VICTORIA MINDER,

PLAINTIFFS-APPELLANTS,

V.

NATHAN A. DEGROSS AND ALLSTATE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

GORDON L. TATE AND MSI INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy and Victoria Minder (collectively, Minder) appeal a judgment dismissing their personal injury action against Nathan DeGross

and his insurer.[1] Randy was a passenger in a car driven by DeGross when it struck an unlit tractor blocking his lane of travel one hour after sunset.[2] The jury found that DeGross did not negligently operate his vehicle at the time of the accident. Minder argues that the court improperly exercised its discretion when it refused to allow an accident reconstruction expert to testify whether DeGross's consumption of alcohol contributed to the accident and when it refused to allow rebuttal evidence on DeGross's intoxication. We reject these arguments and affirm the judgment.

¶2 Minder alleges that DeGross was negligent as to lookout when he failed to see the tractor. The tractor had just been used to assist Scott McCracken, whose van had been stuck in a snowbank. At the time of the accident, the van was parked at the side of the road facing toward DeGross's oncoming car. There is conflicting evidence whether the van's headlights and four-way flashers were on at the time. McCracken was hitching a snowmobile trailer to the van when he heard DeGross's car approach. He yelled to the tractor driver who could not hear him. He then stepped out from behind his van and stood in the roadway waiving his arms to get the driver's attention. DeGross never saw him. He did apply the brakes before the accident, leaving skid marks from the approximate area McCracken would have been standing to the point of collision. Minder contends that DeGross's failure to see the tractor or McCracken establishes his failure to maintain a proper lookout and that DeGross's intoxication contributed to his inability to avoid the accident.

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[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to be 1997-98 edition.

[2] The tractor was operated by Gordon Tate. Minder's action against Tate was dismissed because Tate was not served with the summons and complaint.

¶3 Minder's accident reconstruction expert, Sergeant Douglas Ducklow, testified regarding the location of the vehicles and skid marks. He arrived on the scene twenty minutes after the accident and never personally observed DeGross's condition. The trial court would not permit Ducklow to state his opinion whether DeGross's use of alcohol was a cause of the accident. The court sustained an objection to lack of foundation after determining that Ducklow did not base his opinion on personal observations. The court later noted that no evidence had been presented that DeGross was traveling at an excessive speed, deviated from his lane of travel or drove in any manner that would indicate that alcohol affected his driving. Therefore, the record disclosed no underlying basis for Ducklow to form an opinion regarding the role alcohol may have played in the collision.

¶4 Whether to admit expert testimony is a matter within the trial court's discretion. *See* ***Herman v. Milwaukee Children's Hosp.***, 121 Wis. 2d 531, 551, 361 N.W.2d 297 (Ct. App. 1984). An expert may testify only within the areas in which the expert is qualified. *See* ***id.*** To establish negligence based on intoxication, Minder would have to show that the intoxicants DeGross consumed affected his ability to exercise ordinary care in the operation of his car. *See* WIS JI—CIVIL 1035. Therefore, to establish error, Minder would have to show by offer of proof that Ducklow was qualified to determine the effect of alcohol on a driver's ability to see objects in the dark, possibly hidden behind the glare of oncoming headlights, or a driver's ability to respond to the hazard. The offer of proof would also have to state Ducklow's opinion and establish the underlying facts upon which his opinion was based.

¶5 Minder made no offer of proof as to Ducklow's qualifications, the foundation for his opinion, or even what his opinion was. Error may not be

predicated on a ruling that excludes evidence in the absence of an offer of proof unless the substance of the evidence was apparent from the context of the question. *See* WIS. STAT. § 901.03(1)(b). While the fact of DeGross's intoxication was made known to the trial court, Ducklow's qualifications, his opinion that DeGross's intoxication contributed to the accident and the foundation for that belief were not made known to the trial court and are not obvious from the question. Therefore, the issue is not properly preserved for appeal.

¶6 DeGross was called to testify adversely in Minder's case-in-chief. When asked by plaintiffs' counsel whether he was "under the influence" he responded that he "had a few beers, but … was not intoxicated." Minder attempted to have the deputy who arrested DeGross for drunk driving testify in rebuttal regarding DeGross's intoxication.

¶7 The trial court correctly ruled that this testimony was beyond the scope of rebuttal. Rebuttal is limited to new issues brought out in the defendant's case. Because the evidence in question came out in the plaintiff's case-in-chief, any facts contradicting that testimony should also have been presented in the case-in-chief. It is not appropriate to present evidence "in rebuttal" that does not rebut evidence presented in the defendant's case. *See* ***Rausch v. Buisse***, 33 Wis. 2d 154, 167, 146 N.W.2d 801 (1966). While this rule is not inflexible, Minder has not established an adequate basis for allowing the evidence in this case. Because Minder presented no evidence of DeGross's improper driving and no expert evidence linking intoxication to a driver's ability to see objects in the dark, DeGross's denial that he was intoxicated is not so important as to require an exception to the general rule in order to achieve justice.

¶8 Finally, Minder requests a new trial in the interest of justice, alleging that the real controversy has not been fully tried and that justice has miscarried based on the same issues previously addressed in this opinion. We conclude that any failure to fairly try the controversy was due to Minder's failure to call appropriate witnesses or lay necessary foundation and that he should not be allowed a second trial to remedy his own tactical errors. We also conclude that justice did not miscarry and there is no reason to believe a retrial would result in a different verdict. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.