

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

DARNELL DUNLAP,

Plaintiff-Appellee,
and

DEPARTMENT OF SOCIAL SERVICES,

Intervening Plaintiff,

v

CITY OF DETROIT,

Defendant/Third-Party-Plaintiff,
and

DETROIT EDISON COMPANY,

Defendant/Third-Party
Defendant/Appellant,

and

VALTZ EXCAVATION COMPANY,

Defendant.

UNPUBLISHED
April 17, 2001

No. 210413
Wayne Circuit Court
LC No. 95-502402-NO

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

MARKEY, J. (dissenting).

I respectfully dissent from the majority's decision to affirm the trial's disallowing the expert testimony offered by Dr. Uzgiris. I would find that the trial court abused its discretion in disallowing Dr. Uzgiris' testimony; consequently, I would reverse and remand for a new trial on that basis.

As the majority has set forth, a person may be qualified to testify by virtue of his knowledge, skill, experience, training, or education in the subject matter of the testimony. Here,

Dr. Uzgiris testified that he has a bachelor of science and a master of science degrees in mechanical engineering, and doctorate degrees in both mechanical and aerospace engineering. He was not familiar with the design or maintenance of a “Boosey valve or any similar valve,” nor had he been involved in the design, operation, or maintenance of an underground steam system like the one at issue. On that basis, the trial court found that Dr. Uzgiris was unqualified to testify as an expert on the subject of the Boosey valve.

After reading relevant testimony in this trial and correlating it to the issues, I believe the trial court’s decision was an abuse of discretion. Certainly, Dr. Uzgiris has tremendous educational credentials, and, in my opinion, the issue involved was well within his realm of understanding and training. Dr. Uzgiris testified that his lack of personal involvement or familiarity with or in the design or maintenance of either a Boosey valve or any similar valve or an underground steam system was unimportant because the valve and the components of the steam system were “elementary” for a mechanical engineer. The critical question in MRE 702 is whether expert testimony will aid the trier of fact in reaching the ultimate decision. The witness must be qualified as an expert, must give the trier of fact a better understanding of the evidence or assist in determining a fact at issue, and must be from a recognized discipline. MRE 702. I believe that the proffered testimony, particularly when viewed in context and as it related and compared to the expert testimony provided by defendant’s expert, more than adequately demonstrates that Dr. Uzgiris was not only an expert in this area but also could very much have assisted the triers of fact in reaching their ultimate decision as to what caused the water accident.

I agree with defendant’s contention that the trial court was also inconsistent in his rulings because plaintiff’s expert, who had similar qualifications, was allowed to testify regarding the Boosey valve and the source of water in the manhole. Again, Dr. Uzgiris’ testimony that the check valve at issue was “elementary,” explained that a check valve is nothing more than a simple gravity flapper that allows the flow of water to go in one direction. Dr. Uzgiris also stated that he was competent to render an engineering opinion regarding the mechanics of the Boosey valve.

This case is somewhat similar to that of *Berryman v K Mart Corp*, 193 Mich App 88; 483 NW2d 642 (1992). *Berryman* was a slip and fall case where the plaintiff’s proffered expert also was not allowed to testify. The expert held a Ph.D. in experimental psychology and had extensively researched and published in the fields of psychology, human-factors engineering, and human perception. *Id.* at 98. The proffered expert had served as an expert in a number of cases involving people who had fallen but not one specifically involving a K Mart store. *Id.* at 99. He was, however, familiar with other kinds of retail stores. *Id.* The trial court refused to allow the expert to testify because he had never “examined a situation” similar to the one at hand, he had never been admitted by an expert to another court and he had not examined the scene of the plaintiff’s accident. *Id.* at 97-98. On appeal, the *Berryman* Court found that the trial court abused its discretion in refusing to allow this expert to testify noting that pursuant to MRE 703, an expert’s testimony may be based on facts “perceived by or made known to him at or before the hearing.” *Id.* at 99. The expert in *Berryman* had read depositions of the plaintiff and two of the defendant’s employees. *Id.* He had, however, not actually examined the scene of the accident at K Mart. *Id.*

Certainly, the argument in support of allowing Dr. Uzgiris to testify is far stronger here. His credentials were certainly more than appropriate to establish his expertise. He had a plausible opinion to offer as to why there was so much water in the underground system, and he indicated that he had “plenty of experience” with check valves because they are extremely common and that he completely understood defendant’s steam heating system. Moreover, he would most certainly have aided the triers of fact in deciding the issue before them: why there was so much water underground. Refusing to allow Dr. Uzgiris to testify was in my opinion an abuse of discretion and contrary to established law. Consequently, I would reverse and remand for a new trial.

/s/ Jane E. Markey