# EXHIBIT 29

Not Reported in F.Supp.2d, 2006 WL 5219390 (D.N.D.)
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Only the Westlaw citation is currently available.

United States District Court,
D. North Dakota,
Southeastern Division.
INDUSTRIAL AUTOMATION SUPPLY, LLC, A North Dakota limited liability company, Plaintiff,
v.
UNITED RENTALS HIGHWAY TECHNOLOGIES, Inc., a Massachusetts corporation; United Rentals (North America), Inc., a Delaware corporation; and United Rentals Highway Technologies, L.P., a Texas limited partnership, Defendants.
**Civil File No. 3:04-cv-99.**

Feb. 8, 2006.

Named Expert: Dr. Leonard Sliwosky
Wayne W. Carlson, Vogel Law Firm, Fargo, ND, for Plaintiff.

Jane L. Dynes, Ronald H. McLean, Jane L. Dynes, Serkland, Lundberg, Erickson, Marcil & McLean, Ltd. Fargo, ND, for Defendants.

**ORDER DENYING DEFENDANT'S MOTION IN LIMINE**

RALPH R. ERICKSON, District Judge.

***1** Before this Court is Plaintiff's Motion in limine to exclude the testimony of Dr. Leonard J. Sliwoski. (doc. # 58). Defendant offers Dr. Sliwoski as an expert in the field of business evaluation. Dr. Sliwoski is a professor of accountancy at Minnesota State University Moorhead and is also the director of the University's Small Business Development Center. He possesses a Ph.D. in business education, with an emphasis in marketing and management.

Plaintiff objects to Dr. Sliwoski's testimony on two grounds. First, Plaintiff argues that while Dr. Sliwoski's is an expert in the field of business evaluation, he possess no expertise in the field of road construction and that he is unfamiliar with the machinery currently at issue ot their respective pricing. Second, Plaintiff argues that the testimony of Dr. Sliwoski does not help to answer any factual issue before the jury and is therefore irrelevant.

The Court serves a "gatekeeping" function, deciding which evidence a jury will hear and ultimately consider. In regards to expert testimony, the party seeking admission of such testimony must prove its admissibility by a preponderance of the evidence. *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 592 (1993). Expert testimony must meet three requirements in order to be admitted under Federal Rule of Evidence 702. First, the witness must be qualified to assist the finder of fact. *Lauzon v. Senco Prod., Inc.,* 270 F.3d 681, 686 (8th Cir.2001) . Second, the proposed evidence must be reliable or trustworthy in an evidentiary sense. *Id.* Third, the evidence must be useful to the finder of fact in deciding the ultimate issue of fact. *Id.*

Turning to the first point, Plaintiff argues that Dr. Sliwoski does not utilize any expert knowledge and instead simply "regurgitates" content from the Standard Industrial Code (SIC) and Risk Management Associates Annual Statement Studies (2004-05). As such, Plaintiff argues that Dr. Sliwoski's testimony does not meet the first the above first prong. However, this argument does not recognize that courts routinely allow experts to testify as to subject areas related to, although not conterminous with, their expertise. Defendant points out that courts have allowed economists with no real estate development experience to testify about expected returns from real estate investments, *Maiz v. Birani,* 253 Fed.3d 651 (11th Cir.2001), have allowed a veterinarian without toxicology specialization to testify about the toxic effects of a substance on cows, *Quinton v. Farm Land Industries,* 928 Fed.2d. 335, 336 (10th Cir.1991), as well as allowing the testimony of a chemistry expert that had no

expertise in polyurethane chemistry, *Ashland Oil, Inc. v. Delta Oil Products Corp.*, 685 Fed.2d. 175, 178 (7th Cir.1982). It would seem that the general practice of business evaluation would have significant spill-over into many other, if not all, commercial enterprises. Further, this Court does not see Dr. Sliwoski's testimony as mere regurgitation of the SIC and Risk Management Studies, but rather his study helps to determine whether the price and price mark-up exceeded that of other products in the market. Moreover, Dr. Sliwoski's testimony is useful in determining where on the pricing chain the price ceased to comport with industry standards. In short, his testimony will assist the fact finder in determining whether the product was above-average in price and also who is chiefly responsible for the determination of that price.

***2** Secondly, Plaintiff contends Dr. Sliwoski's testimony is irrelevant. Specifically, Plaintiff argues that Dr. Sliwoski's determination as to whether it was economically feasible to sell the RAM equipment at the 2002-03 price is not a question for the jury. A piece of evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Ev. 401. This is a liberal standard. *Daubert*, 509 U.S. at 588. The question of whether the RAM pricing was feasible is not a factual question currently before the jury, however the Court recognizes two other ways in which Dr. Sliwoski's testimony is relevant. First, Dr. Sliwoski's testimony would assist the fact finder in determining whether the open price term was set in good faith. If the price or percentage of mark-up far exceeds others products in a similar field, this would assist in determining whether Plaintiff set the price of RAM machinery in good faith. Secondly, Dr. Sliwoski's testimony helps to determine whether Defendant used "best efforts" to sell the RAM products. If the market cannot support the prices as tendered, this is instructive as to whether United Rentals' "best efforts" could have produced any better result than the one achieved here.

Upon review of the pleadings of both parties, and the supporting affidavit and materials of Dr. Sliwoski, this Court finds that Dr. Sliwoski is qualified to give testimony and that this testimony is relevant to the current litigation. The Court **DENIES** Plaintiff's Motion in limine.

**IT IS SO ORDERED.**

D.N.D.,2006.
Industrial Automation Supply, LLC v. United Rentals Highway Technologies, Inc.
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