

STATE OF MICHIGAN  
COURT OF APPEALS

---

ETV, INC.,

Plaintiff-Appellant,

v

JEFFREY ANDERSON, JIM H. HULST, and  
KOLEASCO, INC.,

Defendant-Appellees.

---

UNPUBLISHED  
August 13, 1999

No. 209093  
Kent Circuit Court  
LC No. 97-002742 NI

Before: Gage, P.J., and White and Markey, JJ.

WHITE, J. (concurring in part and dissenting in part).

To the extent that the majority affirms the dismissal of plaintiff's claims for damages relating to the historical costs of developing rates, a process embodied in documents wrongfully appropriated by defendants, I respectfully dissent. As to this claim, the majority concludes that plaintiff presented only its own allegations to substantiate its entitlement to damages. Given the procedural posture of the case, I conclude that regarding historical-costs damages, plaintiff made a sufficient showing that a record might have been developed that would leave open an issue on which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

Defendants' motion for summary disposition addressed the character of the documents involved, defendants' alleged solicitation of drivers and customers and, regarding damages, was confined to arguing that plaintiff had not established lost business or revenue due to defendant's conduct. Plaintiff's brief in response to defendants' motion asserted that plaintiff had suffered damages in several areas not addressed by defendants, including "[h]istorical cost invested in building, negotiating and formulating the rates, tariffs and records thereof [ , w]hich were then copied and made use of outside the company;" and "[h]istorical cost invested internally to cost analyze each run in order to bid. This was then used by outside sources without reimbursement." Plaintiff argued these costs at the hearing on defendants' motion and stated that the experts it had listed on its expert-witness list would address those damages.<sup>1</sup> When the circuit court granted defendants' motion, plaintiff argued that the historical costs sought to be recovered were separate from the elements of damage ruled on and should thus survive the motion. I conclude that given this posture, if the issue was simply the adequacy of the

evidentiary support for plaintiff's historical-costs claim, the court should have allowed plaintiff a short time to produce affidavits or deposition testimony of the experts.

I would remand to the circuit court on the issue of historical costs.

/s/ Helene N. White

<sup>1</sup> Plaintiff's counsel noted that experts had not been deposed because he and defense counsel had an informal agreement to extend discovery beyond the deadline of October 1, 1997.