IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-948

MCI WORLDCOM NETWORK SERVICES, INC.,

Plaintiff-Appellants,

v.

MASTEC, INC.,

Defendant-Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF LEWIS E. KRANTZ d/b/a TREASURE COAST DIRECTIONAL DRILLING AND MICHAEL A. LIND d/b/a PIPELINE DIRECTIONAL SERVICES, INC. SUBMITTED IN SUPPORT OF THE APPELLEE BY CONSENT OF ALL PARTIES

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INTRODUCTION

By presenting certified questions to this Court, the Eleventh Circuit Court of Appeals has given this Court the opportunity to stop MCI's creative, yet iniquitous, nationwide scheme to use the legal system to earn extensive profits. MCI has concealed these profits under the guise of claimed tort "damages," to which it is not entitled. Perhaps the most significant issue that MCI chooses to ignore in its brief is the basic underlying tort principle relating to an award of compensatory damage, including damages for loss of use: if a person suffers no actual loss, he or she is not entitled to monetary compensation.

This basic premise demonstrates that a telecommunications carrier is not entitled to loss of use damages measured by the hypothetical cost to rent a replacement system where it suffered no actual loss of use damages and did not need to rent a replacement system because it was able to reroute calls within the existing redundant cable system the carrier necessarily installed in order to operate its business.

STATEMENT OF INTEREST

This amicus brief is submitted by Lewis E. Krantz, d/b/a Treasure Coast Directional Drilling ("Krantz"), and Michael A. Lind, d/b/a Pipeline Directional Services, Inc., ("Lind"). Krantz and Lind are both underground utility contractors who install utilities, and who, in 2000, each accidentally severed one of MCI's underground

communication cables. As a result of the severed cables, MCI sued Krantz and Lind with complaints similar to that filed against Mastec in this case.[1] As in this case, in Krantz and Lind, MCI was able to reroute any calls within its own system immediately and no calls were dropped. Thus, MCI suffered no actual loss of use damages as a result of the inability to use the severed cable. Further, in each case, MCI admitted that it did not suffer the full amount of damages sought. Despite these facts, in each case, MCI sought alleged loss of use damages which far exceeded the cost to repair the damaged cables.[2]

Given this background, Krantz and Lind are but two of many companies in the construction industry which will be impacted by this Court's decision. As conceded in the amicus brief filed on behalf of Mastec, the growing Florida telecommunications industry recognizes the "risk of cable by construction activities." [Amicus at 15]. As further discussed in the amicus brief, the Florida system designed to avoid such cable cuts, One-Call, received over one million incoming tickets to notify underground

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[1]MCI brought suit against Krantz in MCI Worldcom Network Servs., Inc. v. Lewis E. Krantz, d/b/a Treasure Coast Directional Drilling, Case No. 00-04249-CIV-Jordan and against Lind in MCI Worldcom Network Servs., Inc. v. Michael A. Lind, d/b/a Pipeline Directional Services, Inc., Case No. 00-04407-CIV-Jordan.

[2]In Krantz, MCI sought $24,356.48 for the cost to repair the cable and $983,573.47 for the alleged loss of use of the cable. In Lind, MCI sought $14,178.18 for the cost to repair the cable and $217,661.47 for the alleged loss of use of the cable during the time for repair.

service providers of upcoming construction. [Amicus at 16]. In light of their knowledge of the risk of cable cuts, communication providers such as MCI each necessarily maintain redundant cables within their systems and such cables are the norm in the underground telecommunication industry "in order to provide reliable service to consumers and businesses." [Amicus at 2-3].

Given the frequency of cable cuts in the construction industry and the knowledge of this risk by the communications providers, Krantz and Lind, as well as the construction industry, are particularly interested in this case. Thus, this brief is being filed to assist the Court by demonstrating the broad negative impact a decision entitling a telecommunications carrier to loss of use damages where it suffers no actual loss of use would have on the construction industry and the windfall which would be bequeathed on the telecommunications carriers.

Notably, the findings of the district court in the Krantz and Lind lawsuits demonstrate the extent of the potential windfall which would result from such a decision by this Court. [R4-139-9; 143-10]. In Krantz and Lind, the district court held

> [a]warding loss of use damages based on the presumed (but never used) rental value of transmitting its calls on a replacement system would not only make MCI whole it would provide an utter and unjustified windfall. MCI, in actuality, suffered *no* loss of use damages. It was able, nearly instantaneously, to reroute traffic to spare and protect lines preventing any interruption. In such a case, "[a]warding MCI the rental value of replacement cables would be grossly unfair." *Morris Plumbing*, No. 00-

> 4250-Civ-Garber, at *11. *See also MCI Worldcom Network Servs., Inc. v. GlendaleExcavation Corp.*, 244 F. Supp. 2d 875, 881 (D.N.J. 2002) ("It would be grossly unfair to require Glendale to pay to MCI almost $2,000,000 in damages should it be determined that MCI's actual losses were not very high due to MCI's ability to reroute its lost calls to other parts of its network.").[3]

Krantz, at 6-7; Lind, at 6-7.

Further, the district court noted that

> [s]ome of the record evidence suggest that MCI was indeed looking for a financial bonanza. *See* Defendant's Response, Exh. 2 (Email from Brian Tooley) ("We are developing Loss of Use calcs for the Local networks now. Using this calc, damages quickly escalate into the millions.")

Krantz, at 7, n.3; Lind at 7, n.3.

Thus, in both cases, the district court found that since MCI suffered no actual damages as a result of being unable to use the cable, it was not entitled to damages based upon the cost of renting a replacement since such a measure of damages would result in a windfall. Krantz, at 6-7; Lind, at 6-7. Consequently, the district court held that if MCI prevailed on liability, it would only be entitled to the value of the damaged cable plus any incidental damages, such as the cost of installation. Krantz, at 7; Lind at 7. [4]

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[3]The district court was citing to MCI Worldcom Network Services, Inc. v. Morris Plumbing & Elec. Co., et al., No. 00-4250-Civ-Garber.

[4]In each case, prior to trial, the parties jointly moved for the entry of judgment for the amount of repair costs, but reserving MCI's right to appeal the district court's

SUMMARY OF ARGUMENT

Florida law is clear that a party is not entitled to damages it did not suffer nor to use the legal system as an opportunity for a financial windfall. Rather, a party is only entitled to compensation for damages actually suffered. Section 556.106, Florida Statutes, which provides for loss of use damages capped at $500,000 where an underground cable is cut, does not alter the basic principle of compensatory damage, that where no actual damages result, a party is not entitled to recover damages. Rather, § 556.106, articulates that loss of use damages may be recovered where an underground cable is cut and the carrier suffers such damages. It does not create an entitlement to loss of use damages which did not occur.

Conspicuously, the frequency with which cables may be cut demonstrates that MCI must maintain, within its business system, a redundant configuration in order to provide the telecommunications service it sells to its customers. The fact that cable

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denial of loss of use damages calculated based upon rental value. The Krantz and Lind appeals before the Eleventh Circuit, MCI Worldcom Network Servs., Inc. v. Lewis E. Krantz, d/b/a Treasure Coast Directional Drilling, Case No. 03-14008-H and MCI Worldcom Network Servs., Inc. v. Michael A. Lind, d/b/a Pipeline Directional Services, Inc., Case No. 03-14003-H, were consolidated. Following briefing, and upon issuing its opinion in this case certifying questions to this Court, the Eleventh Circuit stayed the appellate proceedings in Krantz and Lind pending this Court's decision in this case. Krantz and Lind requested that the Eleventh Circuit certify to this Court the same questions as in the instant case. However, such request was denied.

cuts are so commonplace also demonstrates the financial bonanza which would result if a carrier is entitled to loss of use damages where no actual damages are incurred.

If MCI's theory is adopted, combining the cases of Mastec, Krantz and Lind alone, MCI would be entitled to over two million dollars from these three cases alone, despite suffering no loss of use damages and despite being fully compensated for the actual cost to repair the cables. As cable cuts occur regularly, it is obvious that MCI seeks to utilize these accidents to reap an unwarranted fortune from the construction companies who unintentionally sever its cables. Moreover, the damages sought by MCI are essentially an attempt to obtain punitive damages following the accidental cutting of a cable, where no entitlement to punitive damages exists.

The briefs filed in support of MCI attempt to sway this Court with broad brush statements and the implication that persons damaging cables will not be held responsible for any damages they cause if this Court finds that no loss of use damages are warranted in this case. MCI and its amicus fail to note that Mastec is not arguing that loss of use damages are never appropriate, as they obviously are where such damages are incurred. Thus, this Court's ruling, upon a record and certified questions demonstrating that MCI admitted that no loss of use damages were incurred, will have no impact on a carriers' ability to recover loss of use damages where it presents evidence that such damages actually occurred.

ARGUMENT

IN FLORIDA, A PARTY IS NOT ENTITLED TO MONETARY COMPENSATION FOR DAMAGES NOT ACTUALLY SUFFERED AND FLORIDA'S UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT DOES NOT CHANGE THAT WELL ESTABLISHED LEGAL PRINCIPLE.

Krantz and Lind agree with the statements in MCI's amicus brief that the purpose of § 556.101, Florida Statutes is to "[a]id the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations." These amicus further agree that the Act specifically permits recovery of damages for "loss of revenue and loss of use [not] to exceed $500,000 per affected underground facility." § 556.106(2), Fla. Stat.; see also § 556.106(3), Fla. Stat. However, these amicus disagree with the proposition espoused by MCI and its amicus suggesting that a decision in this case forbidding MCI from recovering loss of use damages where none where actually incurred is indicated by the legislature's cap on damages of $500,000[5] and that a decision to the contrary would diminish Florida law on loss of use damages and result

[5]A "cap" is just that. It does not create rights where none existed before. For example, if MCI's argument is correct, a victim of medical malpractice who would otherwise not have actual damages could claim Florida's new medical malpractice cap, contained in § 766.118, Florida Statutes, gave them an entitlement to damages because there is a $500,000 cap on noneconomic damages per medical provider.

in tortfeasors not being responsible for damages they caused.

Rather, the plain language of § 556.106 demonstrates that the statute simply explains the type of economic damages which may be available if losses are actually incurred. See A & L Underground, Inc. v. City of Port Richey, 732 So. 2d 480, 481 (Fla. 2d DCA 1999) (explaining that § 556.106 (3), Fla. Stat., "allows recovery for purely economic losses"). The statute does not create an entitlement to recovery for loss of use where no actual loss of use damages are incurred.

Since MCI suffered no loss of use damages in these cases it has no right to such recovery. Furthermore, the record facts demonstrate that MCI is trying to recover loss of use damages in circumstances where the concepts of loss of use damages are inapplicable. Consequently, a finding by this Court that MCI has no right to loss of use damages premised on a record where it conceded it did not incur such damages is not only correct, but contrary to MCI's position, would also have no impact on a case where a telecommunications carrier presents evidence that it actually suffered loss of use damages.

Loss of use damages are a type of compensatory damage. See De Pantosa Saenz v. Rigau & Rigau, P.A., 549 So. 2d 682, 685 (Fla. 2d DCA 1989), rev. denied, 560 So. 2d 234 (Fla. 1990) ("It appears possible that the plaintiff may be able to prove damages for loss of use or other compensatory damages which are available under the theories

of negligence and fraud."); Roger Holler Chevrolet Co., v. Arvey, 314 So. 2d 633, 633-34 (Fla. 4th DCA 1975) ("Among the compensatory damages awarded is an item for loss of use of the automobile."). Therefore, an examination of Florida law on the purpose of loss of use and other compensatory type damages is instructive in demonstrating why MCI is not entitled to loss of use damages under the circumstances presented here.

"The rule of damages recoverable in cases where one's property has been destroyed or damaged by the wrongful or negligent act or omission of another is no different from that applied in all tort cases, that is, just compensation for the damages sustained." 17 Fla. Jur. 2d Damages, § 60 (2004). Further, "[t]he purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs." Cooperative Leasing, Inc., v. Johnson, 872 So. 2d 956, 958 (Fla. 2d DCA 2004) ("It appears possible that the plaintiff may be able to prove damages for loss of use or other compensatory damages which are available under the theories of negligence and fraud."). Accordingly,"the primary basis for an award of damages is compensation. That is, the objective to make the injured party whole to the extent that it is possible to measure his injury in terms of money." Fisher v. City of Miami, 172 So. 2d 455, 457(Fla. 1965) (distinguishing compensatory damages from punitive damages); see also Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545,

547 (Fla. 1981).

When ruling in Krantz and Lind, the district court applied these principles and recognized that Florida law does not allow a party to recover windfall damages or use the legal system to obtain a "financial bonanza." It would be impossible to address all case law containing examples of why a plaintiff is not entitled to a windfall in this brief as such examples are almost boundless. However, for purposes of illustration, amicus will offer a few examples.

The legal principles that a party may not recover a windfall are ingrained in the historic development of the law distinguishing compensatory damages from punitive damages discussed above on pages 8 and 9 of this brief. These principles have also been recognized in the context of the collateral-source rule which prevents a party from recovering damages it did not incur. See Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515-16 (Fla. 1984) (recognizing evidence may be submitted to the jury showing that a plaintiff incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation as alleged future damages); Goble v. Frohman, 848 So. 2d 406, 409-10 (Fla. 2d DCA 2003), rev. granted, 865 So. 2d 480 (Fla. 2004) (recognizing that awarding a plaintiff damages which include a contractual discount for an HMO in excess of $400,000, results in a windfall to the injured party for damages that have not been incurred); §768.76 (1), Fla. Stat. (requiring

a trial court to reduce a jury verdict by the amounts which have been paid by a collateral source for which the plaintiff owes no reimbursement).

Most recently, the Florida courts have reiterated that the purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall to plaintiffs, in finding that a plaintiff may not recover the full amount of a medical provider's charges where the medical provider accepts a lesser sum in satisfaction of his charges from Medicare. See Cooperative Leasing, Inc., 872 So. 2d at 958-60 (a plaintiff is not entitled recover as compensatory damages the difference between the amount that the Medicare providers agreed to accept and the total amount of the plaintiff's medical bills); Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547, 549-50 (Fla. 4th DCA 2003), rev. dismissed, 873 So. 2d 1225 (Fla. 2004) (permitting a plaintiff to recover expenses she was not obligated to pay would provide an undeserved and unnecessary windfall).

These principles have also been applied in the context of the measure of loss of use damages in the commercial arena. In Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc., 589 F. Supp. 1076, 1082 (M.D. Tenn 1984), the court recognized that "[t]he purpose of awarding damages is to compensate for damages actually incurred, not to provide a plaintiff with a windfall." Thus, in the context of the loss of use of an airplane, loss of use damages are inappropriate where no substitute is rented

as "[t]he plaintiffs cannot be awarded damages for losses they did not incur." Id. at 1082.

Likewise, in Brooklyn Eastern Dist. Terminal v. United States, 287 U.S. 170, 174-77 (1932), which is extensively discussed in Mastec's answer brief, the owner of a damaged tugboat was not entitled to loss of use damages when it did not charter a replacement vessel, but rather used another tugboat in its fleet at little or no cost. The Brooklyn Eastern Dist Terminal court recognized that an award of loss of use damages when lost profits are avoided is "[e]rroneous and extravagant." Id. at 174

In light of the fact that a plaintiff, such as MCI, is not entitled to compensation for damages it did not actually suffer, the automobile loss of use cases relied upon by MCI to support its claim of entitlement to such damages are easily distinguished. As fully discussed in Mastec's answer brief, Florida's loss of use doctrine developed in automobile cases. See, e.g., A. Mortellaro & Co. v. Atl. Coast Line R. Co., 107 So. 528 (Fla. 1926); Badillo v. Hill, 570 So. 2d 1067 (Fla. 5th DCA 1990); Maserati Autos., Inc. v. Caplan, 522 So. 2d 993 (Fla. 3d DCA 1988); Meakin v. Dreier, 209 So. 2d 252 (Fla. 2d DCA 1968); Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. App. 1972), reh'g denied, and opinion modified, 294 N.E.2d 617 (Ind. App. 1973); Antokol v. Barber, 143 N.E. 350 (Mass. 1924).

However, the policy underlying these cases and the loss of use damages

discussed therein is that an owner of an automobile who is deprived of the use of the automobile suffers the loss of the inherent value of being able to transport himself with that automobile. Thus, even where a person does not rent a replacement automobile because he cannot afford to do so because of his financial circumstances, he is entitled to compensation for the inconvenience caused by the depravation of the use of the automobile. The courts allowed loss of use measured by the fair rental of a substitute vehicle during the time of repairs primarily because conditioning recovery on financial ability to rent a substitute would cause the law to favor the wealthy. See Meakin, 209 So. 2d at 254; accord Badillo, 570 So. 2d at 1068 ("This makes the law uniform … for persons who can afford to rent a substitute car and those who cannot."). However, the Meakin court recognized that rental cost is not the equivalent of loss of use and that "'rent' and 'loss of use' are not interchangeable terms." Meakin, 209 So. 2d at 254. Thus, these cases do not provide an inflexible rule requiring awards of loss of use damage in all cases without regard to whether personal property is damaged or whether such damages are necessary to make the property owner whole.

In fact, the case law regarding the recovery of damages for the inconvenience caused when one is deprived of the inherent value of use of his automobile has no relevance to MCI's ability to use a cable which it admittedly maintained as a necessary part of its business, the loss of which impaired neither service nor revenue, and which

has no inherent value absent its integration as one of many cables in MCI's ring system. As noted by the district court in Krantz and Lind, an award of loss of use damages based on rental value of a replacement system would be inappropriate in the MCI cases because the public policy in automobile cases of awarding loss of use damages in order to avoid discrimination against the poor is inapplicable. Krantz, at 6; Lind, at 6.

That the legal concepts behind loss of use damages are inapplicable in cases where MCI is able to absorb any traffic carried on the cut cable within its existing system has been recently recognized in MCI v. OSP Consultants, Inc.,585 S.E. 2d 540 (Va. 2003). In OSP, the Virginia Supreme Court addressed facts almost identical facts to those presented here and held that MCI was not entitled to the damages claimed because MCI "simply made additional use of the available capacity on its own network, extra capacity that was 'acquired and maintained for the general uses of the business'" during repairs. Id. at 544. In OSP, as here, MCI did not lose any revenue as a result of the damage.

MCI attempts to distinguish OSP by claiming that in OSP it did not offer evidence that it reserves cables exclusively for emergencies, but claiming that here spare cables were installed to "'ward off the possibility of interruption in service due to the negligence or recklessness of third parties.'" [MCI Initial brief at n.3, citing MCI Worldcom Servs., Inc. v. Mastec, Inc., 370 F.3d 1074, 1076 (11th Cir. 2004)]. MCI's

attempt to distinguish this case from OSP is unfounded. The record evidence demonstrates that MCI and other telecommunications carriers build into their systems a redundancy to "ensure that there is no loss of service when there is damage to a cable that might otherwise interrupt service." [R3-99-11-12, Ex. D]. The record further demonstrates that redundancy is necessary to prevent disruptions for various reasons, including MCI's choice, and not just cable cuts caused by third parties. Id. The redundant cable is not sitting dormant waiting for a failure of another part of the system before it comes into service. Rather, it is part of the "ring" system wherein each cable can be utilized as a backup cable because the system connects back to itself. [See generally, R3-99-7, Ex. L ¶ 4]. Thus, as in OSP, loss of use damages are not warranted.

CONCLUSION

Amicus Curiae, Lewis E. Krantz, d/b/a Treasure Coast Directional Drilling and Michael A. Lind, d/b/a Pipeline Directional Services, Inc., respectfully request this Court to answer the first certified question in the negative and conclude that a telecommunications service carrier is not entitled to damages for the loss of use of a fiber-optic cable damaged by a defendant when the carrier is able to accommodate the telecommunications traffic carried on the damaged cable within its own network and where the carrier presented no evidence that it suffered any actual loss of use damages

during the time the cable was unavailable. Thus, it is unnecessary for the Court to reach the second certified question.

In the alternative, if this Court answers the first certified question affirmatively and finds that loss of use damages are applicable despite a record demonstrating that the carrier suffered no actual loss of use, amicus respectfully request, as set forth in Mastec's answer brief, that as to the second certified question, this Court conclude that the carrier is not entitled to loss of use damages measured by the fair market rental value of an equivalent replacement cable for the time reasonably necessary to make repairs. Rather, damages should not exceed the cost to repair the actual damage and should not exceed the pre-injury value of the cut cable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of September 2004 to all counsel on the service list below.

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CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Amicus Curiae, Lewis E. Krantz, d/b/a Treasure Coast Directional Drilling and Michael A. Lind, d/b/a Pipeline Directional Services, Inc., certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

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