

CASE NO. 95-345

SUPREME COURT OF FLORIDA

MCI WORLDCOM NETWORK SERVICES, INC.,

Plaintiff-Appellant,

v.

MASTEC, INC.,

Defendant-Appellee.

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

**AMICUS CURIAE BRIEF OF SPRINT CORP., SOUTHWESTERN BELL
TELEPHONE, L.P. AND BROADWING COMMUNICATIONS, LLC, IN
SUPPORT OF APPELLANT MCI WORLDCOM NETWORK
SERVICES, INC. FILED BY LEAVE OF COURT WITH CONSENT OF
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INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure 9.370, Sprint Corp., Southwestern Bell Telephone, L.P., and Broadwing Communications, LLC, respectfully submit this Amicus Curiae Brief in support of Appellant, MCI Worldcom Network Services, Inc. This matter involves a dispute between MCI, a telecommunications service provider, and Mastec, Inc., an excavator, arising out of Mastec's severance of an MCI fiber-optic cable carrying telecommunications traffic. The case comes to this Court on certified questions from the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit asks whether Florida law recognizes loss of use damages stemming from the cutting of a fiber-optic cable which is part of a modern nationwide telecommunications network and, if so, how such loss of use damages are to be calculated. *See MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 370 F.3d 1074 (11th Cir. 2004) (the "*Certification*").

The issues presented by this certification could affect the economics of Florida's telecommunications infrastructure and the consumers and businesses which rely upon it. The Florida Legislature has provided laws and procedures for preventing damage to underground facilities caused by excavation and construction. Telecommunications carriers recognize that, as was the case here, these laws are sometimes violated and these procedures are sometimes not followed.

Florida's common law of torts, specifically in the historic availability of loss of use recovery to one whose property has been damaged, provides the remedy for such situations. Together, the statutes and this traditional form of recovery properly allocate the benefits and burdens of the law. They also serve the important public policies of making excavators responsible for damages resulting from their failure to follow the law and encouraging carriers to have back-up systems in place so consumers and businesses are not shut down when a break occurs. Because the arguments raised by the excavator here attempt to disturb the balance of interests created by these laws and the public policies which support them, this brief is offered for the Court's consideration.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Sprint Corp., Southwestern Bell Telephone, L.P. and Broadwing Communications, LLC (collectively "Amicus") are telecommunications services carriers which operate and maintain considerable telecommunications networks, including networks in Florida. Each carrier utilizes buried fiber-optic cables to provide service. In addition, each has separate backup cables (installed at considerable expense) which are available if and when a fiber-optic cable is severed or damaged. Indeed, backup cables are the norm and not the exception in telecommunication networks made up of underground facilities.

Given that cable cuts occur often in Florida and excavation or construction activities by other parties are the number one cause of such damages, telecommunication companies must maintain backup systems in order to provide reliable service to consumers and businesses. The loss of use damages awarded in cable cut cases compensate for the backup systems necessitated by tortfeasors,¹ which in turn reduces both the amount of inconvenience suffered by consumers and the costs passed on to consumers to repair the damage caused by a cable cut.

Amicus each stand to lose significant revenue and suffer more damage to their systems as a result of careless excavations if Florida's law on loss of use damages in this scenario is diminished or abolished. If the persons damaging cables will no longer be held responsible for the loss of use of the underground facility simply because the owner has had the foresight to plan for such an event and invested in a backup or alternate cable, the economic incentive to comply with Florida's cable cut statute will be lost. Additionally, the costs of repair will now have to be borne by the owners of the damaged property or passed on to consumers.

This would be a wholly unjustified redistribution of the benefits and burdens set forth under the current state of the law in Florida. Amicus and their customers are

1. Given the importance of avoiding cable damage and resulting interruptions in service, telecommunications companies typically spend loss of use damages recovered on future damage prevention measures.

without fault in cases where an excavator is presumptively liable for cutting a marked cable. In such a situation, Amicus have by definition followed the procedures under the Florida statute for marking their cables before the excavation. As the record shows here, loss of use damages represent only a fraction of the cost of the back-up systems. Following the excavator's logic results in a windfall to the wrongdoer and the loss of any meaningful incentive to dig carefully around a marked underground cable.

This brief is intended to assist this Court in preserving the value of the property right at issue, and to explain Florida law's recognition and reliance upon loss of use damages in cable cut cases as an important part of the Florida Underground Facility Damage Prevention and Safety Act (the "Act"). The Act, which creates a system for avoiding cable cuts and establishes a presumption of negligence if an excavator fails to follow its guidelines, works because loss of use damages are available if an excavator fails to follow its rules. Without the award of loss of use damages, much, if not all, of the incentive for compliance with the Act is lost and the parties filing this brief will stand to lose the true value of the significant property rights attached to their underground fiber-optic cables.

SUMMARY OF ARGUMENT

In determining whether Florida law recognizes loss of use damages when an

excavator severs a fiber optic cable carrying telecommunications, the historical common law concepts must be read together with the applicable statutes created based upon such jurisprudence. As to damages which excavators may cause to underground facilities, the Legislature has spoken and has properly allocated the benefits and burdens to be shared by excavators and owners of underground facilities.

The system in place is supported not only by Florida law, but also the public policies behind the law. Reliability of the telecommunications infrastructure in Florida is important to both consumers and businesses alike and the ability of the owner of underground facilities to be able to use their property should be protected. This Court should not disturb the balance of rights recognized in Florida which consistently makes the wrongdoer, whether it be the excavator or the owner, responsible for the foreseeable damages which they cause, including the loss of use of the affected property.

ARGUMENT

I. THE FLORIDA UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT

A. Creation and Purpose

Building upon the foundation of the loss of use damage theory created by Florida jurisprudence, the Legislature created a system which allocates responsibilities between excavators and carriers in this situation. The purpose of the Act 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.” § 556.101(3)(a), FLA. STAT. (2003). In creating the Act in 1993, the Legislature intended to provide excavating contractors with a free-access system to give notice of their intent to engage in excavation and for member operators, including companies providing telecommunication services, to have the opportunity to identify and locate their underground facilities. § 556.101(2), FLA. STAT. (2003); Ch. 93-240, § 1, at 2413, Laws of Fla. Funding for the system is provided by the operators of underground facilities, who share proportionately in its cost. §§ 556.103(3) and 556.110, FLA. STAT. (2003).

Given the success of the system and continued public policy interests in protecting underground facilities and providing contractors with a free and easy way to avoid damage, in 1997, membership in the system created by the Act became mandatory for all underground facility owners. *See* § 556.103(1), FLA. STAT. (2003); Ch. 97-306, § 2, at 5454, Laws of Fla.

As the Attorney General has explained, the Act “allows the owners of underground facilities an opportunity to identify their facilities before excavation occurs in order to avoid damage, injury or service interruption caused by an excavator who may cause damage to the underground facilities by digging into them.” Op. Att’y

Gen. Fla. 95-04 (1995). “[T]he act recognizes that excavators who do not follow the procedures prescribed therein may be found liable for the damages they cause.” *Id.* at *3.

In 2002, the Legislature once again built upon the causes of action supported by the Act, strengthening the requirements for both excavators and operators to comply with the system of managing excavations. *See* Ch. 2002-234, § 4, at 1689-92, Laws of Fla. In doing so, the Legislature detailed the method in which excavators and operators must prepare for and carry out excavations in close proximity to underground facilities such as cables. *Id.*

B. Definition of the Chattel at Issue

The “chattel in the instant case consists of a single fiberoptic cable.” *AT&T Corp. v. Lanzo Constr. Co.*, 74 F.Supp.2d 1223, 1225 (S.D. Fla. 1999). “The fact that [a telecommunications company is] able to reroute calls and utilize other fiberoptic cables in its system is irrelevant because the chattel in question is not the entire phone system.” *Id.* This holding is consistent with the Act.

In defining the property right it seeks to protect, the Act does not speak of networks as a whole or even a “ring system” of cables which provide backup for damaged cables. Instead, the Act defines “underground facility” as follows:

“Underground facility” means any public or private personal property which is buried, placed below ground, or

submerged on any member operator's right-of-way, easement, or permitted use which is being used or will be used in connection with the storage or conveyance of water; sewage; electronic, telephonic, or telegraphic communication; electric energy; oil; petroleum products; natural gas; optical signals; or other substances, and includes, but is not limited to, pipelines, pipes, sewers, conduits, cables, valves, and lines.

§ 556.102(13), FLA. STAT. (2003) (emphasis added). The definition of the chattel at stake is the cable itself, as opposed to the system of which it is a part.

C. Mandatory Excavation Procedures

While the cost of providing the notification system is carried by operators of underground facilities, excavators must also participate in order to avoid liabilities which can arise from improper excavation. Section 556.105, Florida Statutes, sets forth the procedures which must be followed by companies who engage in excavation that may affect underground facilities. The process begins when an excavator notifies Sunshine State One-Call of Florida, Inc. (“One-Call”), a Florida agency charged with administering the Act, of a proposed excavation by submitting specific information regarding the project. *See* §§ 556.101(3)(b), 556.105(1)(a) and (b), FLA. STAT. (2003); Op. Att’y Gen. Fla. 95-04 (1995). The statute requires “[n]ot less than 2 nor more than 5 business days before beginning any excavation or demolition.” § 556.105(1)(a), FLA. STAT. (2003). Each notification received by an excavator is recorded to document compliance with the Act, and the company giving notification is provided

with the names of the operators of underground facilities who will be advised of the notification. *See* § 556.105(2) and (3), FLA. STAT. (2003).

Based upon the information received from the excavator, One-Call then notifies all operators of underground facilities within the area of proposed excavation through what is called a locate ticket. EXCAVATION GUIDE, SUNSHINE STATE ONE-CALL OF FLORIDA, INC. (Oct. 2002) at 2. Operators whose facilities are in proximity to a proposed excavation must then identify and mark their facilities within two business days after they have been notified. *See* § 556.105(5), FLA. STAT. (2003). During this time, the excavator must avoid excavation in the area until all member operators' underground facilities have been marked and located, or removed. *See* § 556.105(6)(a) and (b), FLA. STAT. (2003).

Once these obligations have been fulfilled, the excavator must proceed with reasonable care, avoiding the marked areas and using increased caution in tolerance zones through the use of hand-digging and detection equipment where appropriate. *See* § 556.105(4) and (5), FLA. STAT. (2003). The failure of either an excavator *or* operator of underground facilities to follow all procedures set forth in the Act, including an excavator's failure to use due care in proceeding with excavation or the failure of an operator to properly locate and mark its facilities, carries with it both penalties as well as presumptions against them under Florida's loss of use damage

model. *See* § 556.106, FLA. STAT. (2003).

D. Failure to Follow Procedures - Rebuttable Presumption of Negligence

Recognizing the importance of underground facility property rights and the public interests in not disturbing them, the Legislature has authorized criminal prosecution for the knowing and willful removal or destruction of flags or markings of underground facilities. *See* § 556.107(2), FLA. STAT. (2003). As the Florida Attorney General has observed in the context of this Act, “[w]here the Legislature has prescribed the manner in which a thing is to be done . . . it is, in effect a prohibition against its being done in any other way.” *Op. Att’y Gen. Fla. 95-04* (1995). In addition to the criminal violation, the Act also authorizes penalties ranging from \$250 to \$5,000 for less egregious behavior. *See* § 556.107(1), FLA. STAT. (2003).

The Legislature also altered Florida’s law on damages to chattels and loss of use by increasing the likelihood that an excavator will be found liable if it fails to follow the procedures set forth in the Act. More specifically, Section 556.106(2), Florida Statutes, provides:

(a) In the event any person violates s. 556.105(1) or (5), and subsequently . . . performs an excavation or demolition which damages an underground facility of a member operator, it shall be rebuttably presumed that such person was negligent. Such person, if found liable, shall be liable for the total sum of the losses to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use shall not exceed

\$500,000 per affected underground facility. . .

(b) If any excavator fails to discharge a duty imposed by the provisions of this act, such excavator, if found liable, shall be liable for the total sum of the losses to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use shall not exceed \$500,000 per affected underground facility . . .

§ 556.106(2), FLA. STAT. (2003) (emphasis added).

The Act imposes similarly harsh standards on operators who run afoul of its requirements by providing:

If, after receiving proper notice, a member operator fails to discharge a duty imposed by the provisions of this act and an underground facility of such member operator is damaged by an excavator who has complied with the provisions of this act, as a proximate result of the member operator's failure to discharge such duty, such excavator shall not be liable for such damage and the member operator, if found liable, shall be liable to such person for the total cost of any loss or injury to any person or damage to equipment resulting from the member operator's failure to comply with this act. Any damage for loss of revenue and loss of use shall not exceed \$500,000 per affected underground facility . . .

§ 556.106(3), FLA. STAT. (2003) (emphasis added).

Thus, the Act mandates that excavators who do not follow the procedures prescribed may be found liable for the damages they cause, including loss of use.

E. Limitation on Loss of Use Damages

Recognizing that it has created a presumption of negligence in cable cut cases

and that loss of use damages will be awarded, the Legislature has also dictated that the loss of use damages to be awarded “shall not exceed \$500,000 per affected underground facility.” §§ 556.106(2) and (3), FLA. STAT. (2003). If loss of use damages were not available in cable cut cases or if they were limited to the pre-injury value of the length of cable damaged as if it were still on a spool as Mastec has argued, there would be no need to cap such damages at \$500,000. Thus, the Legislature has determined that the wrongdoer excavator’s liability is not unlimited. The excavator will be able to procure insurance for a defined risk. In other words, the excavator’s business is not at risk when it works near buried cables.

II. FLORIDA LAW ON DAMAGES TO CHATTELS AND LOSS OF USE

Florida law has long recognized loss of use damages and “has adopted the Restatement of Torts as the rule of damages applicable for injuries to chattels.” *Meakin v. Dreier*, 209 So. 2d 252, 253-54 (Fla. 2d DCA 1968) (explaining that where a plaintiff loses the use of their car, they are entitled to loss of use damages measured by the reasonable rental value, regardless of whether the plaintiff actually rents substitute property); *see also Airtech Serv. Inc. v. MacDonald Constr. Co.*, 150 So. 2d 465 (Fla. 3d DCA 1963); *Lanzo*, 74 F.Supp.2d 1223 (S.D. Fla. 1999). Indeed, Florida has expressly adopted the Restatement of Torts, specifically §§ 928 and 931(1979), as the rule of damage applicable to injuries to chattels. *Lanzo*, 74

F.Supp.2d at 1224-25; *Meakin*, 209 So.2d at 253-54.

As the 11th Circuit Court of Appeals observed in this case, “[u]nder Florida law, loss of use damages are available for an individual or entity whose chattel has been damaged by another party.” *Certification*, 370 F.3d 1074 (11th Cir. Fla.) (*citing Meakin*, 209 So.2d at 254). “This rule is pursuant to Florida’s adoption of the Restatement (Second) of Torts . . .” *Id.*

The recoverability of loss of use damages in this case is important because it serves to protect an important property right: the ability to use one’s property. It is the owner’s freedom to choose to use the property which is at stake.

The value of an article to its owner, as Sedgwick points out, lies in his right to use, enjoy, and dispose of it. There are the rights of property which ownership vests in him, and whether he, in fact, avails himself of his right to use does not in the least affect the value of his use. (1) Sedgwick on Damages (9th Ed.) § 243a. His right to the use of his property is not diminished by the use the owner makes of it. His right of user, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right renders himself liable for consequent damage.

Meakin, 209 So. 2d at 254.

The Restatement Section 931 demonstrates this point in an illustration in which the plaintiff was allowed to recover the reasonable rental value of a ship, even though he used one which he kept for emergency purposes as a substitute. Restatement (Second) of Torts, § 931 cmt. c, illus. 4 (1979).

Florida law allows, therefore, an owner whose property has been damaged by the tortious conduct of another to recover both the cost to repair the damaged property and the loss of use of the property during the time of repair. This principle represents sensible public policy because it is designed to encourage owners to repair property and it recognizes the importance of the property right which accompanies the ownership of property.

In this case, MCI has made a claim for the cost to repair the damaged fiber-optic cable and for the loss of use of that cable for the length of time it reasonably would take to repair the cable. Applying the principles of the Restatement (Second) of Torts and Florida law as set forth above, this case calls for the award of both the costs of repair and the loss of use damages claimed, limited only by the reasonableness of the repair time and the terms of the Underground Facility Damage Prevention and Safety Act discussed *supra*.

Mastec's claim that MCI is entitled only to the repair cost and limited in recovery to the \$4,800 paid for the length of cable replaced does not fit within this framework. Borrowing from the Restatement's replacement ship example, the pre-injury value of the chattel is not the sheet metal required to make the repair, but the ship itself and the owner's ability to use it as it saw fit. MCI lost the ability to use its main cable and was forced to rely temporarily on a back-up. That loss is and has

traditionally been compensated by loss of use damages.

III. FLORIDA PUBLIC POLICY

The Florida Legislature's interest in protecting these valuable property rights is consistent with the public policies of Florida, which include ensuring that the businesses dependent upon telecommunications here continue to grow. In 2003, spending in the United States telecommunications industry as a whole totaled \$721 billion, with spending on equipment topping \$140 billion. TELECOMM. INDUSTRY ASS'N ANN. REP. (2003) at 4. The telecommunications market is anticipated to grow at a projected 9.2 percent compound annual rate between 2004 and 2007, reaching \$1 trillion by 2007. *Id.*

One of the growing pains of Florida's telecommunications infrastructure is the greater risk of cable cuts by construction activities. Again, Florida's cable cut statute is aimed at addressing this problem. According to its annual report for the fiscal year 2002-03, "[o]ver the past five years, [One-Call] has evolved from a mid-sized, vendor run call center to a large, total damage prevention center offering the latest in technology and education to its members, excavators and the general public." SUNSHINE STATE ONE CALL OF FLA., INC. 2002-03 ANN. REP. 1 (2002/2003). During fiscal year 2002-03, One-Call experienced higher than ever notification ticket volume with incoming tickets totaling 1,325,602 and 8,118,999 transmissions to members

advising them of intended excavation activity. *Id.* at 1, 4. Underground facility operator membership grew to nearly 700 and fees paid by members to provide the system totaled \$4,910,889. *Id.* at 1, 12.

Over the years, Florida law has evolved in the areas of damages to chattels and loss of use, and now balances the specific needs of underground facility operators and excavators through the Act. More importantly, the system created by the Florida Legislature based upon established principles of chattel damage and loss of use is working. Sunshine State One-Call of Florida, Inc. has more members and is generating more locate tickets than ever. As a writer for the Palm Beach Daily Business Review observes:

Walk down the streets of your nearest central business district and just try not to notice the fluorescent paint markings on the sidewalks and streets. They're on almost every corner of South Florida's metropolitan areas.

The markings often consist of arrows and the names of telecommunications companies, and they let construction workers know that beneath the street lies very expensive fiber-optic cable. They also are visual symbols of a national phenomenon - a mad frenzy by the nation's telecommunications companies to lay fiber-optic cable and create technology savvy business centers.

And nowhere is the rush more apparent than in South Florida, an area virtually left behind in the early 1990s, when fiber-optic cable was being laid in major centers such as San Francisco and New York. Now playing catch-up in the fiber-optic race, South Florida has become a focal point for

more than a dozen companies laying more than 9,000 miles of the communications strands. In all, hundreds of millions of dollars are being spent on laying fiber in South Florida.

What's all the fuss about? Fiber-optic cable is considered the fastest and cheapest way to send data and voice transmissions from one point to another. Companies can also pack an almost unlimited amount of information on one fiber strand. And as cities vie to attract Internet companies and other industries that rely heavily on communications - which these days is nearly every business - the amount of fiber-optic cable streaming through a city becomes increasingly vital.

Frank Alvarado, *The Race for Fiberspace*, Palm Beach Daily Bus. Rev., Aug. 11, 2000, at 8.

Fiber-optic cables are becoming an increasingly important and valuable property right in Florida for many reasons. Not only are Florida businesses relying more and more on the dependability and capacity of fiber-optic cable, but South Florida will also soon be home to a NAP (network access point), which is a central gathering and distribution point for internet traffic. *Id.* The fiber-optic networks also attract data centers and Web-hosting facilities. *Id.*

Fiber-optic cables in Florida are an important property right which requires protection for another reason as well: South Florida serves as the optimal landing point for undersea fiber-optic cable runs between North and South America. *Id.* A large amount of telecommunications traffic from South America flows through Florida,

making Florida's fiber-optic routes even more valuable. *Id.*

Mastec's argument that despite its negligent severance of a fiber-optic cable carrying considerable amounts of telecommunications, it should be made to pay only the \$4,800 MCI paid for the length of cable replaced does not serve to further the public policies of Florida. Had the Legislature intended for damages in cable cut cases to be limited to the cost of the cable needed to repair the damage, it could have done so. The Legislature did not provide this limitation, however, because it would not have furthered the stated purposes of the Act and contractors would have little incentive to abide by its terms. Indeed, if this were the law, excavators could effectively "opt out" of the requirements of the Act by paying a relatively insignificant amount and dig at will without concern for underground facilities.

CONCLUSION

Amicus respectfully request that this Court answer the first question certified in the affirmative, and conclude that a telecommunications service carrier is entitled to damages for the loss of use of a fiber-optic cable damaged by a defendant, regardless of whether or not the carrier was able to redirect the cable's telecommunication traffic to another cable route and regardless of whether the carrier has proven an actual loss of revenue associated with the damage. This conclusion is consistent with Florida's public policy, case law and the intent of the Act.

Amicus further request that this Court conclude that the proper measure of damages for such loss of use is the fair market rental value of the equivalent capacity on a replacement cable for the time reasonably necessary to make repairs, limited only by the amounts set forth in the Act and not by the pre-injury value of the damaged cable alone.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Overnight Delivery to: **Alan J. Kluger, Esq.**, Kluger, Peretz, Kaplan & Berlin, P.A., The Miami Center, 17th Floor, 201 South Biscayne Boulevard, Miami, FL 33131; **Maria Ruiz, Esq.**, Clarke Silverglate Campbell, Williams & Montgomery, 799 Brickell Plaza, 9th Floor, Miami, FL 33131; **David Smorodin, Esq. and V. Nicole Bynum, Esq.**, Law & Public Policy Worldcom, Inc., 1133 19th Street, NW, Washington, D.C. 20036; and **James J. Proszek, Esq. and Anthony J. Jorgenson, Esq.**, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 320 South Boston Ave., Ste. 400, Tulsa, OK 74103-3708 this 9th day of July, 2004.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Amicus Curiae Brief of Sprint Corp., Southwestern Bell Telephone, L.P. and Broadwing Communications, LLC was prepared in Times New Roman 14-point font.

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