IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-948

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

ANSWER BRIEF OF APPELLEE MASTEC, INC.

Attorneys for Appellee

Alan J. Kluger, Esq.
Steve I. Silverman, Esq.
Kluger, Peretz, Kaplan & Berlin, P.L.
The Miami Center - 17th Floor
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 377-9000

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

STATEMENT OF CASE AND FACTS 1

I. NATURE OF THE CASE 1

II. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW . 1

III. STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 5

I. MASTEC'S SUGGESTED ANSWERS TO CERTIFIED QUESTIONS 5

II. LOSS OF USE DOCTRINE IN FLORIDA 5

III. RENTAL VALUE IS NOT AN APPROPRIATE MEASURE OF DAMAGES 5

IV. MCI'S CLAIMED DAMAGES WOULD RESULT IN A WINDFALL 6

V. MCI WAS NOT COMPLETELY DEPRIVED OF ITS PROPERTY . 6

VI. MCI CANNOT RECOVER DAMAGES THAT EXCEED THE PRE-INJURY VALUE OF THE CABLE 7

ARGUMENT AND CITATIONS OF AUTHORITY 7

I. ABSENT ACTUAL DAMAGES, MCI IS NOT ENTITLED TO LOSS OF USE DAMAGES 7

A. Florida Law Generally, and the Loss Of Use Doctrine 7

B. Loss of Use and Commercial Property . . 14

C. AT&T v. Lanzo Was Wrongly Decided . . . 22

II. RENTAL VALUE IS NOT AN APPROPRIATE MEASURE OF DAMAGES HERE 25

A. Florida Does Not Require Loss of Use Damages to be Calculated Using Rental Value 25

B. MCI's Reliance On The Restatement is Misplaced 28

C. The Underground Prevention and Safety Act 31

D. Public Policy Requires MCI be Denied Loss of Use Damages Because MCI Did Not Suffer any Such Damages 35

1. MCI's Claimed Damages Would Result in a Windfall 35

2. Denying Loss of Use Damages Does Not Encourage Damage To Telecommunications Lines 37

III. MCI WAS NOT COMPLETELY DEPRIVED OF ITS PROPERTY 38

IV. MCI CANNOT RECOVER DAMAGES WHICH EXCEED THE PRE-INJURY VALUE OF THE CABLE 42

CONCLUSION 48

CERTIFICATE OF COMPLIANCE 49

CERTIFICATE OF SERVICE 50

TABLE OF CITATIONS

CASES **PAGE(S)**

Airtech Service, Inc. v. MacDonald Construction Co., 150 So.2d 465 (Fla. 3d DCA 1963) 29

Allstate Ins. Co. v. Reep, 454 N.E.2d 580 (Ohio App. 10th 1982) 44

Alonso v. Fernandez, 379 So. 2d 685 (Fla. 3d DCA 1980) 29, 30, 39, 46

American Tel. & Tel. Co. v. Connecticut Light & Power Co., 470 F. Supp. 105 (D.C. Conn. 1979) 21, 27

American Tel. & Tel. Corp. v. Thompson, 227 N.W.2d 7 (Neb. 1975) 25, 26, 27

Antokol v. Barber, 143 N.E. 350 (Mass. 1924) 8

Apostle v. Prince, 279 S.E.2d 304 (Ga. App. 1981) 43

Ashland Pipeline Co. v. Indiana Bell Telephone Co., Inc., 505 N.E.2d 483 (Ind. 1st DCA 1987) 21, 22

AT&T Corp. v. Lanzo, 74 F. Supp. 2d 1223 (S.D. Fla. 1999) . . . 14, 22, 23, 24, 28, 30, 40

Badillo v. Hill, 570 So. 2d 1067 (Fla. 5th DCA 1990) . . 8, 9, 10, 25, 26, 29, 31, 32, 42, 43, 44, 45, 46, 47

Bolivar County Gravel Co. v. Thomas Marine Co., 585 F. 2d 1306 (5th Cir. 1978) 16, 24

Brooklyn Eastern Dist. Terminal v. United States, 287 U.S. 170 (1932) 15, 16, 17, 18, 19, 24, 36

Camaraza v. Bellavia Buick Corp.,

523 A.2d 669 (N.J. App. 1987) 12

Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.,
206 F. 3d 1373 (11th Cir. 2000) 15, 23, 24, 25

Continental Oil Co. v. S.S. Electra,
431 F.2d 391 (5th Cir. 1970) 19

Cook v. Packard Motor Car Co. of New York,
92 A. 413 (Conn. 1914) 9, 10

Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc.,
589 F. Supp. 1076 (M.D. Tenn. 1984) 18, 37

CTI Intern., Inc. v. Lloyds Underwriters,
735 F.2d 679 (2d Cir. 1984) 20

Dow Chemical Co. v. The M/V Roberta Tabor,
815 F. 2d 1037 (5th Cir. 1987) 15

Ellis v. King,
400 S.E.2d 235 (W. Va. 1990) 43

Fairchild v. Keene,
416 N.E.2d 748 (Ill. App. Ct. 4th 1981) 44

Fanfarillo v. East End Motor Co.,
411 A.2d 1167 (N.J. Super. Ct. App. Div. 1980) 44

Finkel v. Challenger Marine Corp.,
316 F. Supp. 549 (S.D. Fla. 1970) 23

Frichelle Limited v. Master Marine, Inc.,
99 F. Supp. 2d 1337 (S.D. Ala. 2000) 16

Hanna v. Martin,
49 So. 2d 585 (Fla. 1950) 7

Holmes v. Raffo,
374 P.2d 536 (Wash. 1962) 29

In re Florida Airlines, Inc.,
64 B.R. 199 (M.D. Fla. 1986 30

Jerry Alderman Ford Sales, Inc. v. Bailey,
291 N.E.2d 92 (Ind. App. 1972) 8

Kim v. American Family Mut. Ins. Co.,
501 N.W.2d 24 (Wisc. 1993) 13

Koninklijke Luchtvaart Maatschaapij, N. V. v.
United Technologies Corp.,
610 F.2d 1052 (2d Cir. 1979) 19, 20

Kopischke v. Chicago, St. P. M. & O. Ry.,
40 N.W.2d 834 (Minn. 1950) 45

Kuwait Airways Corp. v. Ogden Allied Aviation Services,
726 F. Supp. 1389 (E.D.N.Y. 1989) 19

Maryland Cas. Co. v. Florida Produce Distributors, Inc.,
498 So. 2d 1383 (Fla. 5th DCA 1983) 13, 25, 26

Maserati Automobiles, Inc. v. Caplan,
522 So. 2d 993 (Fla. 3d DCA 1988)8, 24, 25, 44, 45, 46, 48

MCI Worldcom Network Services, Inc. v.
Glendale Excavation Corp.,
224 F. Supp. 2d 875 (D.N.J. 2002) 28

MCI Worldcom Network Services v. Kramer
Tree Specialists, Inc.,
No. 02 C 7150 (N.D. Ill. June 19, 2003) 20, 21

MCI Worldcom Network Services, Inc. v. Krantz,
Case No. 00-04249-CIV-Jordan 22, 35, 36

MCI Worldcom Network Services, Inc. v. Lind,
S.D. Fla. Case No. 00-4407-Civ-Jordan . . 7, 22, 28, 36

MCI Worldcom Network Services, Inc. v. MasTec, Inc.,
370 F.3d 1074 (11th Cir. 2004) 3, 4, 17, 18, 38

MCI Worldcom Network Services, Inc. v. Morris Plumbing
and Electric Co., Inc.,
Case No. 00-04250-CIV-Garber 22, 27, 28, 36

MCI Worldcom Network Services, Inc. v.
OSP Consultants, Inc.,
585 S.E.2d. 540 (Va. 2003) 3, 17, 18, 36, 37

MCI Worldcom Network Services, Inc. v. OSP Consultants, Inc., 78 Fed. Appx. 876; 2003 U.S. App. LEXIS 21858 (4th Cir. 2003) 3

MCI Worldcom Network Services, Inc. v. OSP Consultants, Inc., Case No. CV-00-919-P(J) (N.D. Okla. 2002) 20, 21

MCI Worldcom Network Services, Inc. v. Von Behren Electric, Inc., No. 1:00-CV-3911-JTC (N.D. Ga. 2002) 21, 42

Meakin v. Dreier, 209 So. 2d 252 (Fla. 2d DCA 1968) 8, 9, 10, 11, 13, 23, 25, 26, 29, 30, 39, 42, 44, 46

Mercury Motors, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981) 7

Meyers v. Bradford, 201 P. 471 (Cal. 3d DCA 1921) 12

Mortellaro & Co. v. Atlantic C.L.R. Co., 107 So. 528 (Fla. 1926) 8, 24

Mountain View Coach Lines, Inc. v. Gehr, 439 N.Y.S.2d 632 (App. Div. 1981) 19

Mountain View Coach Lines, Inc. v. Hartnett, 415 N.Y.S.2d 918 (Co. Ct. 1978) 19

Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996) 43

Nolan v. Auto Transporters, 597 P.2d 614 (Kan. 1979) 44

Northamerican Van Lines, Inc. v. Roper, 429 So. 2d 750 (Fla. 1st DCA 1983) 7, 26

Schryburt v. Olesen, 475 So. 2d 715 (Fla. 2d DCA 1985) 39, 41, 48

Schwartz v. Crozier,

565 N.Y.S.2d 567 (N.Y.A.D.3d 1991) 43

Snavely v. Lang,
592 F. 2d 296 (6th Cir. 1979) 15

State Farm Mut. Auto. Ins. Co. v. Berthelot,
732 So.2d 1230 (La. 1999) 43

Stephens v. Foster,
51 P.2d 248 (Ariz. 1935) 12

The Cayuga,
81 U.S. 270 (1871) 36

The Clarence,
3 W. Rob. Adm. 283 15

The Conqueror,
166 U.S. 110 (1897) 15, 16, 23

The Emma Kate Ross,
50 F. 845 (3d Cir. 1892) 36, 37

The Ove Skou v. United States,
478 F. 2d 343 (5th Cir. 1973) 16

The Potomac,
105 U.S. 630 (1881) 14

Tolin v. Doudov,
626 So. 2d 1054 (Fla. 4th DCA 1993) 26

Travelers Indem. Co. v. Parkman,
300 So.2d 284 (Fla. 4th DCA 1974) 42

Wajay Bakery, Inc. v. Carolina Freight Carriers Corp.,
177 So. 2d 544 (Fla. 3d DCA 1965) 45

Wambles v. Davis,
405 So. 2d 945 (Ala. Civ. App. 1981) 44

Wolsum v. United States,
14 F. 2d 371 (5th Cir. 1926) 16

STATUTES

Fla. Stat. § 556.102 (2003) 40

Fla. Stat. § 556.106 (2000) 1, 2, 32, 34

Fla. Stat. § 681.104 (1983) 44

The Underground Facility Damage Prevention and Safety Act, Chapter 556, Florida Statutes 31

RULES

Fla. R. App. P. 9.210(a)(2) 49

MISCELLANEOUS

Alan E. Brownstein, What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages, 37 Rutgers L. Rev. 433 (1985) 12, 13

Restatement (Second) of Torts § 928 . . . . 9, 29, 30

Restatement (Second) of Torts § 931 . . . . 29, 30, 31

STATEMENT OF THE CASE AND FACTS

I. **NATURE OF THE CASE**

MasTec agrees with Appellant's statement on this issue.

II. **COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW**

MCI Worldcom Network Services, Inc. ("MCI") sued MasTec, Inc. ("MasTec") for negligence and trespass after MasTec accidentally severed MCI's underground telecommunications cable. (R1-1-2-4).[1] MCI sought approximately $23,000 in actual repair costs to the cable and over $860,000 for the alleged loss of use of the damaged cable during the time it took to repair it. (R3-99-4, 5).

The parties moved for summary judgment on numerous issues, including MCI's entitlement to loss of use damages, the issue on appeal. MasTec argued that MCI was not entitled to loss of use damages or, alternatively, that any loss of use damages must be limited to the pre-injury value of the cable, or capped at $500,000 under Fla. Stat. § 556.106(2)(a)(2000). The district court denied MCI's motion for partial summary judgment and granted, in part, MasTec's motion. (R4-165-1). The court held

---

[1] Citations are to volume, document number and page number from the appellate record. For example, citation to "R1-1-1," is a citation to record Volume 1, Document 1, Page 1.

that MCI was not entitled to loss of use damages, for several reasons:

First, that MCI did not suffer a complete deprivation Of property because the damaged cable was part of MCI's "integrated system." (R4-165-10). Second, that MCI was not entitled to loss of use damages because such damages would exceed the pre-injury value of the cable. (R4-165-12). Third, that an award of loss of use damages to MCI would be "grossly unfair," (R4-165-7) and result in an "unfair windfall" to MCI (R4-165-10). Fourth, that Florida law does not require that loss of use damages be calculated by using rental value. (R4-165-12). Finally, the court held that Fla. Stat. § 556.106(2)(a)(2000) limits any award of loss of use damages to $500,000. (R4-165-13).[2]

The parties subsequently agreed to the entry of judgment against MasTec on liability for repair costs while preserving MCI's right to appeal the district court's rulings on loss of use damages. (R6-206-1). MCI appealed to the Eleventh Circuit and on May 19, 2004, that Court rendered an opinion certifying the following two questions to this Court:

---

[2] MCI did not appeal the district court's holding that loss of use damages in any event are limited to $500,000 under Fla. Stat. § 556.106(2)(a) (2000).

IS A TELECOMMUNICATION SERVICES CARRIER ENTITLED TO DAMAGES FOR THE LOSS OF USE OF A FIBER-OPTIC CABLE DAMAGED BY A DEFENDANT WHEN THE CARRIER INTENDED TO HAVE THE FULL CAPACITY OF THE DAMAGED CABLE AVAILABLE FOR ITS USE SHOULD THE NEED HAVE ARISEN, BUT THE CARRIER WAS ABLE TO ACCOMMODATE WITHIN ITS OWN NETWORK THE TELECOMMUNICATIONS TRAFFIC CARRIED BY THE DAMAGED CABLE AND THE CARRIER PRESENTED NO EVIDENCE THAT IT SUFFERED LOSS OF REVENUE OR OTHER DAMAGES DURING THE TIME THE CABLE WAS UNAVAILABLE?[3]
IF THE TELECOMMUNICATIONS CARRIER IS ENTITLED TO LOSS OF USE DAMAGES, DOES THE PRE-INJURY VALUE OF THE DAMAGED CABLE ESTABLISH A LIMIT TO THOSE DAMAGES, OR SHOULD THE FAIR MARKET RENTAL VALUE OF AN EQUIVALENT REPLACEMENT CABLE FOR THE TIME REASONABLY NECESSARY TO MAKE REPAIRS SERVE AS THE MEASURE OF LOSS OF USE DAMAGES?

MCI Worldcom Network Services, Inc. v. MasTec, Inc., 370 F.3d 1074, 1078-79 (11th Cir. 2004).

III. STATEMENT OF FACTS

On July 13, 2000, MasTec was directional boring[4] in Miami, Florida. (R3-99-2). MasTec's bore struck and severed MCI's

---

[3] In a footnote to this question, the Eleventh Circuit noted that "the phrasing of this question replicates the terms of the Fourth Circuit's certification to the Virginia Supreme Court in a case involving very similar, if not quite identical, facts." See, MCI v. OSP Consultants, Inc., 78 Fed. Appx. 876, 2003 U.S. App. LEXIS 21858 (4th Cir. 2003) ("OSP II"), MasTec, 370 F.3d at 1079 n.3. As discussed below, MasTec submits that reliance upon MCI v. OSP Consultants, Inc., 585 S.E.2d. 540 (Va. 2003)("OSP I")and OSP II is appropriate.

[4] Directional boring is a method to install underground pipes and utilities without significantly disturbing the surface of the land as would normally result from typical trenching operations. (R3-99-2).

cable. (R3-99-3).[5] The damaged fiber optic cable is part of a "ring" technology system that MCI uses and refers to as the "North Highspeed Backbone Loop." (R3-99-7). This system design is referred to as a "ring" because it connects back to itself. (R3-99-7).

The ring transmits telecommunication signals to customers. Along the ring there are several nodes, that contain the electrical equipment that sends and receives the signals. (R3-99-7). The nodes are connected by fiber optic cables which transmit the signals. Id. The fiber optic cable, such as the one at issue in this appeal, in and of itself, has little intrinsic value. Id. It serves only as a conduit to transmit the signals sent and received by the nodes located along the ring. Id. If the cable were not connected to the nodes, it would have no functional use or value. Id.

In the event of damage to a signal-carrying cable, the "ring" configuration allows traffic to be immediately rerouted without any interruption in service. (R3-99-8). Because of this design, MCI's customers lost no service and MCI did not lose any revenue when its cable was severed. (R3-99-8). Thus,

---

[5] MasTec assumed for purposes of the summary judgment proceedings below (and assumes for purposes of this appeal), without admitting, that it negligently struck MCI's cable.

MCI suffered no actual damages as a result, aside from repair costs.

MCI's claimed loss of use damages of $868,517.31 represents MCI's hypothetical cost "to retain replacement capacity for the services normally carried on the cable that was severed, during the reasonable period of time it took [MCI] to repair the cable and to restore traffic to its normal paths on [MCI's] system" even though MCI's customers did not suffer service interruption and MCI had no need to actually rent substitute capacity during the time the cable was being repaired. (R3-99-4; R4-165-3). Moreover, MCI admits that there was no substitute fiber optic cable system available to be rented during the ninety-six hours in which repairs were completed. (R3-99-4).

SUMMARY OF ARGUMENT

I. MASTEC'S SUGGESTED ANSWERS TO CERTIFIED QUESTIONS.

1. A TELECOMMUNICATIONS SERVICES CARRIER IS NOT ENTITLED TO DAMAGES FOR THE LOSS OF USE OF A FIBER-OPTIC CABLE DAMAGED BY A DEFENDANT WHEN THE CARRIER INTENDED TO HAVE THE FULL CAPACITY OF THE DAMAGED CABLE AVAILABLE FOR ITS USE SHOULD THE NEED HAVE ARISEN, EVEN IF THE CARRIER WAS ABLE TO BE ACCOMMODATED WITHIN ITS OWN NETWORK THE TELECOMMUNICATIONS TRAFFIC CARRIED BY THE DAMAGED CABLE AND THE CARRIER PRESENTED NO EVIDENCE THAT IT SUFFERED LOSS OF REVENUE OR OTHER DAMAGES DURING THE TIME THE CABLE WAS UNAVAILABLE.

2. IF THE TELECOMMUNICATIONS CARRIER IS ENTITLED TO LOSS OF USE DAMAGES, THE PRE-INJURY VALUE OF THE DAMAGED CABLE ESTABLISHES A LIMIT TO THOSE DAMAGES, AND NOT THE FAIR MARKET

RENTAL VALUE OF AN EQUIVALENT REPLACEMENT CABLE FOR THE TIME REASONABLY NECESSARY TO MAKE REPAIRS.

II. LOSS OF USE DOCTRINE IN FLORIDA

Florida law limits damages for loss of use to cases where the plaintiff is completely deprived of use of the property. MCI is not entitled to loss of use damages because it was not completely deprived of the use of its property. And in the case of commercial, revenue-generating property, recovery of loss of use damages is further limited to situations where the plaintiff suffers pecuniary loss. Even if MCI was completely deprived of its property, it suffered no actual pecuniary loss. Having failed to meet these thresholds of recovery, MCI is not entitled to loss of use damages.

III. RENTAL VALUE IS NOT AN APPROPRIATE MEASURE OF DAMAGES.

In cases where loss of use damages are appropriate, Florida law does not require that rental value be used as the exclusive measure. Rent and loss of use are not interchangeable terms. Rather, rental value may be a reflection of loss of use damages in an appropriate case, which this is not. Even if rental value were an appropriate measure of damage here, the proper measure of damage would be the rental value of the severed cable, not the theoretical value of the severed cable's capacity, as MCI is claiming. MCI's alleged damages based on rental value of the

severed cable’s capacity are speculative and conjectural and therefore not recoverable.

IV. <u>MCI’S CLAIMED DAMAGES WOULD RESULT IN A WINDFALL</u>.

Repairs to the damaged cable cost MCI $23,000. MCI seeks in loss of use damages, however, 37 times the amount of its actual damages. Because these damages are purely hypothetical, they can only be characterized as a windfall. The district court correctly found, as have other courts throughout the country in other identical cases brought by MCI, that an award of loss of use damages would be grossly unfair and result in a windfall.

V. <u>MCI WAS NOT COMPLETELY DEPRIVED OF ITS PROPERTY</u>.

The damaged cable was part of an integrated system that instantly rerouted MCI's telecommunications traffic. MCI's customers suffered no service interruption. The district court correctly found that MCI was not completely deprived of the use of its property and therefore is not entitled to loss of use damages.

VI. <u>MCI CANNOT RECOVER DAMAGES THAT EXCEED THE PRE-INJURY VALUE OF THE CABLE.</u>

Where loss of use damages are recoverable, Florida law limits recovery of those damages to the pre-injury value of the property. MCI does not dispute that the value of the cable was

$4,840, the amount MCI incurred in replacing it. The district court correctly found that MCI's claimed damages of over $860,000 exceeded the pre-injury value of the cable.

ARGUMENT AND CITATIONS OF AUTHORITY

I. ABSENT ACTUAL DAMAGES, MCI IS NOT ENTITLED TO LOSS OF USE DAMAGES.

A. Florida Law Generally, and the Loss of Use Doctrine.

There are circumstances under Florida law where loss of use damages are appropriate. But as recently stated in a case with nearly identical facts where loss of use damages were denied:

> The fundamental principle of the law of damages is that the person injured by . . . negligent act or omission shall have fair and just compensation commensurate with the loss sustained . . . . In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained.

MCI Worldcom Network Services, Inc. v. Lind, Case No. 00-04407-CIV-Jordan, (S.D. Fla. February 27, 2003) (citing Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1950)); Mercury Motors, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981); Northamerican Van Lines, Inc. v. Roper, 429 So. 2d 750, 752 (Fla. 1st DCA 1983). MCI is not entitled to loss of use damages in this case.

Florida's loss of use doctrine has its roots in automobile cases.[6] MCI mistakenly contends that these automobile cases,

---

[6] See, e.g., Mortellaro & Co. v. Atlantic C.L.R. Co. 107 So. 528 (Fla. 1926); Badillo v. Hill, 570 So. 2d 1067 (Fla. 5th DCA 1990); Maserati Automobiles, Inc. v. Caplan, 522 So.

which involve a unique inconvenience to the owner justifying an award of the cost to rent a substitute vehicle even when rental cost is not actually incurred, should provide the rule of law here. In fact, these cases emphasize that rental cost is not the equivalent of loss of use.

"'[R]ent' and 'loss of use' are not interchangeable terms." Meakin, 209 So. 2d at 254. The automobile cases relied on by MCI do not provide an inflexible rule requiring awards of loss of use damages in all cases, and without regard to whether personal or commercial property is damaged, or whether such damages are necessary to make the property owner whole. The concept of loss of use has little relevancy to a temporarily damaged telecommunications cable which impaired neither service nor revenue, as is the case here.

In Meakin, the plaintiff did not rent a substitute vehicle because she could not afford to. The court allowed loss of use damages 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 automobile would cause the law to favor the wealthy. Meakin, 209 So. 2d at

---

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); and Antokol v. Barber, 143 N.E. 350 (Mass. 1924).

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.").

MCI suggests that Meakin's citation to § 928 of the Restatement (Second) of Torts means that Florida would blindly apply a rule that the owner of damaged property is always entitled to recover the rental cost of a substitute regardless of the circumstances. Meakin goes nowhere near that far. To the contrary, Meakin relied heavily on the concurring opinion of Justice Wheeler in Cook v. Packard Motor Car Co. of New York, 92 A. 413 (Conn. 1914), in analyzing the policy foundation for loss of use damages. Cook also involved damage to a personal vehicle. Justice Wheeler said that the value of an article to its owner " . . . lies in his right to use, enjoy and dispose of it . . . . His right of use, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right renders himself liable for consequent damage." Id. at 418 (citations omitted). The court noted, however, that "the only difficulty in applying the rule of compensatory damages to cases of this character is the very practical difficulty of estimating the actual damages in money," Id. at 415, and that the character of the intended use "will, of course, affect the amount of recoverable damages." Id. The "character of the use"

here is transmission of telecommunications signals which was not interrupted. Accordingly, under Cook and, by implication, Meakin, the recovery to MCI would be zero.

These cases establish a broad public policy against denying the owner of personal property held for pleasure a remedy when the owner does not rent a replacement. The policy is grounded in the notion that the right to presently use or enjoy possession of such property has value to the owner, and deprivation of that right may be compensable. Meakin and Badillo emphasize the additional injustice of depriving a poor person of compensation simply because she cannot afford to rent a replacement.

As discussed more fully, infra, the policy rationale for these cases did not define loss of use damages as the cost of renting a substitute chattel. Notably, Meakin states that "'rent' and 'loss of use' are not interchangeable terms." 209 So. 2d at 254. As observed in Cook, "[m]anifestly, no general rule for this class of cases can be laid down, except that the jury should award fair and reasonable compensation according to the circumstances of each case. If the actual injury is trifling, the damage will be small, but in any event they are in the nature of substantial, and not nominal damages." Cook, 92 A. at 416.

Here, MCI's actual loss of use damages is indeed trifling. MCI is hardly a destitute entity which could not afford to replace its severed cable. To the contrary, MCI built into its fiber optic system an excess capacity so that, in case of a malfunction of part of the ring for any reason, service to its customers would be unimpaired. If MCI's loss of use damages are to be measured by the standard for commercial property, the situation which reflects the economic and business realities of this case, they are the lost profits incurred during the period of repair, which are non-existent. Meakin states that an owner is entitled "to compensation for the reasonable value of the loss of use of a pleasure vehicle during the time of repair even though no substitute car is used." 209 So. 2d at 254. Automobile transportation has inherent value, the deprivation of which constitutes compensable loss. But there is no "value" intrinsic to telecommunications cable in the absence of lost revenue.

As explained by a noted commentator, decisions on loss of use were shaped by "the idiosyncratic role of the automobile in American society" and have limited application, if any, in a commercial context:

> The manner in which courts calculated damages based on lease-out rental value became increasingly divorced from any accurate measurement of lost opportunity costs in order to provide substantial awards for the

> loss of use of autos. The newer cases compounded this error by completely ignoring the relevance of the owners' intended use of their chattels, and the value of that use, to the plaintiffs' awards.
>
> * * *
>
> Perhaps such rules would be reasonable in those contexts in which courts could be certain that a chattel's availability for use represented substantial value to its owner during any loss of use period. <u>The extension of such doctrines to cover the loss of use of all commercial chattels, however, presented a much less defensible position</u>.

Alan E. Brownstein, <u>What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages</u>, 37 Rutgers L. Rev. 433, 495 (1985) (emphasis added).

The rationale repeatedly articulated in automobile cases for awarding loss of use damages is to compensate for "inconvenience:"

> To deprive one of the use of his automobile means, . . . he must rely upon a public carrier. He cannot go and come at his convenience, but must conform his movements to the convenience of others. The natural and immediate consequences of a wrongful taking or detention of one's automobile is to subject him to great inconvenience and leave him dependent upon others for transportation.

<u>Stephens v. Foster</u>, 51 P.2d 248, 251 (Ariz. 1935). Recognizing the difficulty in assigning a value to inconvenience (in the absence of any evidence of out-of-pocket loss), <u>Stephens</u> likened the approach to awarding pain and suffering damages. "It is quite as impossible to definitely or accurately estimate in

money the damages one suffers in the way of inconvenience when he is deprived of his automobile as it is to estimate in money the damages for pain and suffering . . . ." Id.[7]

Although MCI cites Mr. Brownstein's article in its brief, Mr. Brownstein notes that the "inconvenience" rationale for making loss of use compensable in the context of the personal automobile makes no sense in a commercial context where no substitute property is rented or available for rental and no inconvenience is suffered.[8] Florida courts have adopted the rule that rental cost is the measure of loss of use in automobile cases instead of the more subjective standard of inconvenience,

---

[7] See also Meyers v. Bradford, 201 P. 471, 472 (Cal. 3d DCA 1921) (plaintiff "suffers an equal detriment if he chooses to do without a machine while his is being repaired"); Camaraza v. Bellavia Buick Corp., 523 A.2d 669, 671-672 (N.J. App. 1987) (plaintiff "may suffer substantial personal inconvenience due to the lack of an automobile." Kim v. American Family Mut. Ins. Co., 501 N.W.2d 24, 27 n.5 (Wisc. 1993) (same, citing Brownstein, supra, "a family car is the chattel most likely to produce a substantial injury if unavailable for use"); Brownstein, supra, at 462 n. 64 ("Most people rely on the constant availability of their cars . . . . Any unexpected deprivation . . . will be experienced as troublesome . . . . It is not nearly as easy to compensate for the loss of as functional a device as the automobile by using alternative means of transportation.").

[8] See Brownstein, supra, at 500 ("It is one thing to recognize that the loss of use of a family car may represent a substantial injury even though no pecuniary loss results and quite another to contend that the owner of an unprofitable commercial aircraft deserves substantial compensation for the loss of its use.").

but, recognizing the unique role that automobiles play in our everyday lives, these cases uniformly admonish that rental cost is not the only measure of loss of use. Meakin, 209 So. 2d 252.[9]

Florida courts that have awarded loss of use damages have done so when the property in question was unusable until repaired. No Florida appellate court and no court applying Florida law (with the exception of Lanzo, discussed, infra) has addressed whether damages for loss of use in the absence of lost profits are appropriate when the damaged commercial property is part of a larger system whose functionality is undisturbed by damage to the property, and which continues to provide uninterrupted service. Cases assessing loss of use of property whose purpose is personal or pleasure simply miss the mark when the damage is to commercial property whose purpose is generation of revenue.

---

[9] MCI cites to cases (MCI Brief, 18, n.8) in an attempt to discredit the distinction that MasTec and Florida courts make between loss of use damages with respect to pleasure and commercial property. For example, in Maryland Cas. Co. v. Florida Produce Distributors, 498 So. 2d 1383, 1384 (Fla. 5th DCA 1986), the plaintiff presented "evidence of loss of *profits* of $2,702 per month for the seven months the trailer was out of use while being repaired." (emphasis in original.) Other than Lanzo, discussed, infra, which MasTec submits was wrongly decided, MCI cites no authority stating that loss of use damages in a commercial context should be awarded unless there were actual loss of use damages suffered (and not just hypothetical loss of use damages, like MCI's alleged damages in this case).

B. Loss of Use and Commercial Property.

The doctrine of loss of use damages for damage to commercial property originated in maritime law. Early cases awarded loss of use damages only when the plaintiff could prove lost profits resulting from damage to the vessel. See The Potomac, 105 U.S. 630 (1881)(loss of use damages for damaged vessel measured by either replacement cost of another vessel or, absent a market price for the vessel, the profits lost due to the damage);[10] see also The Conqueror, 166 U.S. 110 (1897)(well settled that loss of use damages will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven within reasonable certainty). Loss of use without a corresponding commercial loss was not compensable. Id. at 133. To avoid a windfall, the Court required that "[t]here must be actual loss, and reasonable proof of the amount. In other words, there must be a loss of profits in its commercial sense." Id.[11]

---

[10] The idea of cost of a replacement commercial vessel is grounded in the notion that the owner must mitigate damages. An owner who can avoid lost revenue by chartering another vessel and completing his contracts of carriage must do so or be limited in damages to what the charter would have cost. Brooklyn Eastern Dist. Terminal v. United States, 287 U.S. 170 (1932); Continental Oil Co. v. S.S. Electra, 431 F.2d 391, 393 (5th Cir. 1970).

[11] The Conqueror cited with approval The Clarence, 3 W. Rob. Adm. 283, one of the earliest English cases discussing

The Conqueror has been repeatedly followed, with court after court holding that plaintiffs must prove lost profits to sustain a claim for loss of use.[12] The Supreme Court followed The Conqueror's reasoning in Brooklyn Eastern Dist. Terminal v. United States, 287 U.S. 170 (1932) where the Court held that the owner of a damaged tugboat was not entitled to the charter hire of a comparable tugboat as loss of use damages when it did not charter one but simply used other tugboats in its fleet to

---

the subject of loss of use damages for a detained or damaged vessel. In The Clarence the court ruled that recovery for loss of use of a vessel required proof of lost profits and proof of the amount. The Conqueror, 166 U.S. at 125. The Court noted that, according to this analysis, there could be situations where a vessel was detained or damaged and no damages would result. Id.

[12] See Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc., 206 F. 3d 1373 (11th Cir. 2000)(owner of private pleasure vessel held for charter not entitled to damages for loss of use of vessel pending repairs, absent proof that profits had actually been, or could reasonably be supposed to have been, lost); Dow Chemical Co. v. The M/V Roberta Tabor, 815 F. 2d 1037, 1042 (5th Cir. 1987)(citing with approval The Conqueror); Snavely v. Lang, 592 F. 2d 296, 299 (6th Cir. 1979)("the Court is constrained to view The Conqueror as retaining its full vitality"); Bolivar County Gravel Co. v. Thomas Marine Co., 585 F. 2d 1306, 1308 (5th Cir. 1978)(citing as authority The Conqueror); The Ove Skou v. United States, 478 F. 2d 343, 345 (5th Cir. 1973)(citing with approval The Conqueror); Wolsum v. United States, 14 F. 2d 371, 377 (5th Cir. 1926)(damages for loss of use of vessel pending repairs arising from collision only allowable when profits have actually been lost and amount can be proven with reasonable certainty); Frichelle Limited v. Master Marine, Inc., 99 F. Supp. 2d 1337 (S.D. Ala. 2000)(vessel owner must prove with reasonable certainty profits had actually been, or may reasonably be supposed to have been, lost).

absorb the towage demand at little or no extra cost. Thus, the plaintiff was not entitled to loss of use damages when it was not obligated to incur replacement expenses. Id. at 174. When a replacement vessel must be retained to avoid loss of profit, the fair value of a replacement is an appropriate damage. Id. at 175. Awarding damages for loss of use when loss of profits is avoided, however, is "erroneous and extravagant." Id. at 174. Thus,

> [d]emurrage on the basis of the cost of a substitute, actual or suppositious, may be no more than fair indemnity when gains have been lost or enjoyment seriously disturbed. Demurrage on a like basis may be so extravagant as to outrun the bounds of reason when loss of profit has been avoided without the hire of a substitute and the disturbance of enjoyment has been slight or perhaps fanciful.

Id. at 176 (emphasis added). These cases compel the finding that MCI is not entitled to any damages for loss of use.

As the Eleventh Circuit noted, the Virginia Supreme Court recently decided MCI v. OSP Consultants, Inc., 585 S.E.2d 540 (Va. (2003). ("OSP I"). MasTec, 370 F.3d at 1079, n.3. OSP I was based upon identical facts[13] and held that MCI was not

---

[13] In OSP I, MCI claimed loss of use damages measured by the costs of replacing a severed cable, even though MCI accommodated within its own network all of the telecommunications traffic carried by the damaged cable. In OSP I, the court relied on Brooklyn Eastern Dist. Terminal for the proposition that the expenses MCI saved by minimizing its exposure to damages are not to be charged to the excavator as if the damages had not been saved at all.

entitled to loss of use damages because, like the plaintiff in Brooklyn Eastern Dist. Terminal, 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" while the damaged cable was being repaired. OSP I at 396. In the Virginia case, as here, MCI did not lose any revenue as a result of the damage.

MCI seeks to distinguish OSP I, stating that "in [OSP I], MCI did not offer any evidence that it reserves "particular cables for use exclusively in emergencies, as in the 'spare boat' cases," but that here, "MCI offered evidence, and the Eleventh Circuit has found, that, '[t]he spare cable was installed precisely to ward off the possibility of an interruption in service due to the negligence or recklessness of third parties.' Mastec, 370 F.3d at 1076." MCI Brief, 2, n. 3. However, MCI (like all other telecommunications carriers) built into its system a redundancy to "ensure there is no loss of service when there is damage to a cable that might otherwise interrupt service." (R3-99-11,12, Ex. D). This redundancy is necessary to prevent disruptions caused by any reason, including by MCI's choice, and not just cable cuts caused by third parties. Id. Moreover, the "redundant" cable did not remain idle awaiting failure in some other part of the system before it

gained utility. Rather, as part of a "ring" system, each cable can be used as a backup cable at any given time because the system ultimately connects back to itself. (See generally, R3-99-7, Ex. L ¶ 4). Accordingly, as the Eleventh Circuit noted by its express reference to OSP I, this case is quite identical to OSP I, and MasTec respectfully submits that this case should be resolved as OSP I was.

Other decisions have also rejected awards of loss of use damages in the commercial context in closely analogous circumstances, recognizing that "[t]he purpose of awarding damages is to compensate for damages actually incurred, not to provide a plaintiff with a windfall." Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc., 589 F. Supp. 1076, 1082 (M.D. Tenn. 1984)(applying Brooklyn Eastern and denying loss of use damages where no substitute was rented: "The plaintiffs cannot be awarded damages for losses they did not incur.").[14]

---

[14] See also Continental Oil Co. v. S.S. Electra, 431 F.2d 391, 393 (5th Cir. 1970)("If the shipowner is carrying his own cargo and has another vessel available as a temporary replacement for the one under repair[,] he has a duty to use it to mitigate damages and, having earned the profit with the otherwise idle replacement, cannot recover for detention of the vessel being repaired."); Mountain View Coach Lines, Inc. v. Hartnett, 415 N.Y.S.2d 918 (Co. Ct. 1978),(denying loss of use damages to bus line operator where no replacement bus rented and bus operator had extra buses not in use when damaged bus was unusable: "Damages are to restore injured parties not to reward them. Plaintiff would not be made whole by recovering loss of use but would be paid for the use of a

Moreover, recovery of loss of use damages in the absence of loss of profits or revenue and in light of a redundant system that is specifically designed to prevent loss of customer services would result in an improper windfall to MCI. As in Brooklyn Eastern Dist. Terminal, compensating MCI for the theoretical rental cost of a replacement cable in the absence of lost profits is extravagant and unconscionable.[15]

MCI cites Koninklijke Luchtvaart Maatschaapij, N.V. v. United Technologies Corp., 610 F.2d 1052 (2d Cir. 1979)("KLM"), and Kuwait Airways Corp. v. Ogden Allied Aviation Services, 726 F. Supp. 1389 (E.D.N.Y. 1989), both applying New York law, for the proposition that loss of use damages are compensable regardless of whether the owner suffered actual pecuniary loss. MCI Brief, 11. The Second Circuit, however, receded from KLM in CTI Intern., Inc. v. Lloyds Underwriters, 735 F.2d 679 (2d Cir. 1984), finding that "the development of New York law since KLM points decisively to a rejection of loss of use damages in this case." Id. at 684. CTI states that at most, the loss of use

---

bus that would otherwise have stood idle. Surely the law requires every citizen to minimize damages and this case is no exception."); Mountain View Coach Lines, Inc. v. Gehr, 439 N.Y.S.2d 632 (App. Div. 1981) (same).

[15] MCI most certainly has built into its rate structure an amount sufficient to recover its capital expenditures, including whatever redundancy it deemed prudent.

doctrine creates a rebuttable presumption that loss of use resulted in economic loss. Id. In CTI, the plaintiff failed "to establish actual financial loss," and therefore was not entitled to loss of use damages. Id.

MCI cites numerous other cases for the general proposition that "loss of use is an appropriate item of recovery for damage to a telecommunications cable." MCI Brief, 12, n. 7. In none of these cases, however, was service uninterrupted as a result of the damage. For example, MCI cites MCI Worldcom Network Services, Inc. v. OSP Consultants, Inc., Case No. CV-00-919-P(J) (N.D. Okla. 2002) ("OSP Oklahoma") ("The cable was severed . . . over 15,000 calls were blocked or lost as a result . . . ." Id. at 7-8), and MCI Worldcom Network Services v. Kramer Tree Specialists, Inc., No. 02 C 7150 (N.D. Ill. June 19, 2003)("MCI was unable to reroute eight systems on its long distance network to alternative sources, including its own restoration." Id. at 8). Because the decisions in OSP Oklahoma and Kramer Tree are premised entirely on Oklahoma and Illinois law (respectively), and are factually distinguishable from the instant case, they do not support MCI's position. In OSP Oklahoma and Kramer Tree, calls were blocked or lost as a result of the cable damage. In the instant case, there was no interruption of service whatsoever. To the extent these cases

can be read to mandate rental value of a substitute cable as the measure of damage when there is an interruption of service, they conflict with Florida cases holding that rental value is not the equivalent of loss of use and all the commercial cases cited above holding that only a proven financial loss is compensable.

MCI also cites MCI Worldcom Network Services, Inc. v. Von Behren Electric, Inc., No. 1:00-CV-3911-JTC (N.D. Ga. 2002)(MCI Brief, 12, n. 7), a discovery order applying Georgia law, which states unremarkably that loss of use damages are generally available in property damage cases. That court did not find that MCI was entitled to loss of use damages as that issue was not before it. Further, it is not apparent from the order whether MCI lost calls as a result of the damage. That order therefore also provides no support for MCI.

Although American Tel. & Tel. Co. v. Connecticut Light & Power Co., 470 F. Supp. 105, 109 (D.C. Conn. 1979), states that loss of use damages are generally available in property damage cases, plaintiff's customers in that case actually lost service as a result of the cable damage. Id. at 107, n. 1. Finally, Ashland Pipeline Co. v. Indiana Bell Telephone Co., Inc., 505 N.E.2d 483 (Ind. 1st DCA 1987), involved lost revenue from telephone calls not connected. The damages consisted of the lost revenue and the cost of repair. Thus, plaintiff recovered

its actual out-of-pocket loss which the court characterized as " loss of use." Even if Ashland Pipeline were applied here, MCI would recover only its cost of repair, not an issue on this appeal. The absence of actual damage here distinguishes this case from those MCI cites.

C. **AT&T v. Lanzo Was Wrongly Decided.**

MCI relies heavily on an order from the Southern District of Florida denying defendant's motion for partial summary judgment. AT&T Corp. v. Lanzo, 74 F. Supp. 2d 1223 (S.D. Fla. 1999). Although Lanzo is arguably factually similar to this case, MasTec submits that Lanzo was wrongly decided. Indeed, other judges in the Southern District have explicitly disagreed with and refused to adopt Lanzo in several identical cases.[16] In Lanzo, the defendant damaged an AT&T fiber optic cable during the construction of a sewer. AT&T sued, seeking, in part, damages for loss of use of its cable. Lanzo held that AT&T was entitled to recover such damages measured by the reasonable rental value of a substitute cable.

---

[16] See MCI Worldcom Network Services, Inc. v. Krantz, Case No. 00-04249-CIV-Jordan, Order Denying Motion for Summary Judgment (R-4-139-9); MCI Worldcom Network Services, Inc. v. Morris Plumbing and Electric Co., Inc., Case No. 00-04250-CIV-Garber, Order [on the parties' respective Motions for Summary Judgment and MCI's Motion for Reconsideration] (R4-126-1, Exhibit 2); MCI Worldcom Network Services, Inc. v. Lind, Case No. 00-04407-CIV-Jordan, Order Denying Motion for Summary Judgment (R4-143-10).

Lanzo relied heavily on Meakin in reaching its conclusion.[17] Meakin awarded loss of use damages because plaintiff was deprived of the use of her vehicle for fourteen days, and she was compensated for that unique inconvenience and hardship. Here, because there was a redundancy built into MCI's system, there was no functional deprivation of use and no comparable hardship.

Lanzo also relied on Finkel v. Challenger Marine Corp., 316 F. Supp. 549 (S.D. Fla. 1970). Finkel allowed recovery for the loss of use of a pleasure yacht. In Finkel, the plaintiff sought damages for loss of use of his yacht while it underwent repairs caused by plaintiff's negligence. Id. at 555. Subsequent to the opinion in Lanzo, however, the Eleventh Circuit expressly overruled Finkel because of direct conflict with The Conqueror. The Eleventh Circuit found that the holding in The Conqueror remains valid and binding, and that "[a]ppellant thus is entitled to receive loss of use damages

[17] As previously discussed, Meakin involved loss of use of a personal vehicle while being repaired. Plaintiff could not afford to rent a substitute vehicle so she had no actual out-of-pocket loss other than the cost of repair. The court nonetheless allowed plaintiff to recover rental value as damages, primarily to advance the social policy of not discriminating against the poor. Id. at 254 ("to accept any other point of view would condition recovery upon the financial ability to hire another automobile"). In a commercial setting, concerns for an indigent plaintiff are normally absent.

only if able to prove, with reasonable certainty, that profits had actually been, or may reasonably be supposed to have been, lost." Central State Transit, 206 F.3d at 1376 and at n. 3. The vessel owner in Central State continued to receive fees from the corporations which used the yacht while it was under repair. "Because [Central State] did not prove, with reasonable certainty, that profits had actually been or may reasonably supposed to have been lost," it was denied loss of use damages. Id. at 1376-77. The vessel owner in Central State, like MCI, used its property to derive revenue and, like MCI, lost no revenue as a result of damage to that property.

Thus, in the Eleventh Circuit, the owner of commercial property who loses no revenue while the property is under repair suffers no compensable damages for loss of use. See also Brooklyn Eastern Dist. Terminal, 287 U.S. 170; Bolivar County Gravel, 585 F.2d 1306 (company could not collect damages for loss of use of dredge when company had no pecuniary loss, filled all orders for clients and was in same position it would have been without accident). These cases, although arising in the maritime context, are persuasive. They highlight the most basic premise underlying an award of damages: that a plaintiff should be made whole for its actual, not theoretical, losses. Lanzo did not address this issue.

Finally, Lanzo misconstrues the relation between rental value and loss of use under Florida law. It cites Mortellaro & Co., 107 So. 528, and Maserati Automobiles, 522 So. 2d 993, as if they were similar to the case under review. These cases, again involving damage to vehicles, simply hold that rental value may be the measure of loss of use damages in a proper case. In Maserati Automobiles, the court cited Meakin for the proposition that the measure of damage is loss of use, not rental value. "Rental value is merely indicative of loss of use." Maserati Automobiles, at 995. Here, awarding MCI the hypothetical rental value of a substitute cable is clearly not indicative of loss of use. Lanzo infers that Florida law mandates an award for loss of use measured by rental cost whenever there is a deprivation of property. That is not the law in Florida, nor in the Eleventh Circuit. Accordingly, this Court should apply well-established Florida law and the holding in Central State, and find that loss of use damages are inappropriate in this case.

II. RENTAL VALUE IS NOT AN APPROPRIATE MEASURE OF DAMAGES HERE.

A. Florida Does not Require Loss of Use Damages to be Calculated Using Rental Value.

Although the district court correctly held that "Florida law does not mandate a strict adherence to the practice of using

rental value to determine loss of use damages," (R4-165-12), MCI continues to seek the replacement rental value of the cable simply because it alleges entitlement to loss of use damages.

The Florida cases MCI cites do not mandate that the measure of loss of use damages is the cost of renting a substitute chattel.[18] To the contrary, rental value is not the equivalent of loss of use damages and is merely indicative of loss of use value. Meakin, 209 So. 2d at 254 ("rent and loss of use are not interchangeable terms."); e.g., Tolin v. Doudov, 626 So. 2d 1054 (Fla. 4th DCA 1993)(approving jury instruction describing alternate methods for calculating loss of use damages). Florida courts in automobile cases uniformly admonish that rental value and loss of use are not equivalent. This suggests that in other types of cases - commercial cases, for example, where the damaged property generates revenue - the measure of damages is different and requires actual loss.

---

[18] Neither Badillo nor Maryland Cas. Co. v. Florida Produce Distributors, Inc., 498 So. 2d 1383 (Fla. 5th DCA 1983) dictate that rental value be awarded in awarding damages for loss of use. Badillo says that rental value may be "considered" in making such an award and Maryland Casualty merely states that rental value is "evidence" of the measure of damages. Northamerican Van Lines, Inc. v. Roper, 429 So. 2d 750 (Fla. 1st Dist. 1983) merely states that loss of use damages are generally measured by rental value, not that calculation of damages using rental value is mandatory in making such an award.

Additionally, in allowing rental value not actually incurred for loss of use of an automobile, Florida courts are clearly motivated by the social policy of not discriminating against the poor who could not afford to actually rent a substitute. See, e.g., Meakin; Badillo, 570 So. 2d 1067 ("this makes the law uniform . . . for persons who can afford to rent a substitute car and those who cannot."). That policy consideration plainly has no application to a multi-million dollar corporation such as MCI.

Even cases MCI cites to support its position that "loss of use damages are an appropriate item of recovery of damage to a telecommunications cable" MCI Brief, 12 (and cases cited at n. 7), recognize that rental value is not the only measure of loss of use damages. "The market rental value, however, is not conclusive as to the value of the use, for the rental value may include an allowance for depreciation as well as for the overhead expenses and profits of carrying on the business of renting telephone cables." American Tel. & Tel. Co. v. Connecticut Light & Power Co., 470 F. Supp. at 109 (internal citations omitted)(awarding $1 nominal loss of use damages); see also American Tel. & Tel. Corp. v. Thompson, 227 N.W.2d 7, 9 (Neb. 1975)("rental value is not necessarily the 'measure' of damages, rather, proof of what the item whose use has been lost

would have rented for is admitted as evidence of value"). Such "evidence" is simply not relevant in a commercial case where the property has no intrinsic value and there has been no lost profit.

Judges in the Southern District of Florida, applying Florida law, have addressed this issue in identical lawsuits brought by MCI against contractors for similar damage to an MCI fiber optic cable. See, e.g., MCI WorldCom Network Services, Inc. v. Morris Plumbing and Elec. Co., Inc., S.D. Fla. Case No. 00-4250-CIV-Garber. (R4-126-1, Exhibit 2). In Morris, as here, MCI's system contained sufficient capacity to carry telecommunication traffic without interruption despite a damaged cable. Morris concluded that even if MCI was entitled to loss of use damages, it would not be entitled to replacement rental value. Awarding replacement rental value would be "grossly unfair," and the court commented that MCI probably would not be entitled to loss of use damages at trial, or at most, only nominal loss of use damages. Id.[19]

---

[19] Citing MCI Worldcom Network Services, Inc. v. Glendale Excavation Corp., 224 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 actual 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.)

In another identical case, MCI Worldcom Network Services, Inc. v. Lind, S.D. Fla. Case No. 00-4407-Civ-Jordan (R4-143-10), the court also found that an award of rental value to MCI would be inappropriate, and explicitly rejected the holding and analysis in Lanzo. "Rental value does not define loss of use, but is only one method" to determine loss of use damages. Lind, 5. Lind explained that although awarding rental cost not actually incurred is appropriate under Florida law to vindicate the public policy of not discriminating against the poor, this rationale "does not support a conclusion that rental value is indicative of loss of use damages in the present case." Lind, 6.

B. MCI's Reliance On The Restatement is Misplaced.

MCI also claims that Florida adopted §§ 928 and 931 of the Restatement (Second) of Torts "as the rule of damage applicable to injuries to chattels." Florida cases discussing the Restatement show that its "adoption" is not as broad as MCI suggests. Meakin, an automobile case, is the only Florida case cited by MCI which quotes the comment to clause (a) of § 931, to the effect that an owner may recover rental value of damaged chattel even though there has been no deprivation. Meakin, 209 So. 2d at 254. Badillo v. Hill, supra, cites Meakin for this proposition. 570 So. 2d at 1068. But, as previously indicated,

Meakin also explained that "[t]he measure of damage is 'loss of use' not rental value." 209 So. 2d at 254 (emphasis added). The policy reason for permitting rental cost as loss of use damages in Meakin was to avoid discriminating against a poor vehicle owner who could not afford to rent a substitute. Id.; citing Holmes v. Raffo, 374 P.2d 536 (Wash. 1962). For reasons previously explained, there is no reason to believe that the Meakin court would have concluded that the same social policy should apply to MCI's inconsequential deprivation of the use of its redundant cable which caused neither loss of service, loss of revenue nor inconvenience.

The other Florida appellate decisions cited by MCI for the proposition that §§ 928 and 931 of the Restatement are dispositive of this issue are of no assistance to MCI. Alonso v. Fernandez, 379 So. 2d 685 (Fla. 3d DCA 1980) and Airtech Service, Inc. v. MacDonald Construction Co., 150 So. 2d 465 (Fla. 3d DCA 1963) involve damages to chattels not totally destroyed and adopt § 928 (a) as the correct calculation. Neither case discusses § 928 (b), "loss of use," except that Alonso notes that the plaintiff rented a substitute lunch truck and was entitled to the rental cost actually incurred as loss of use damages.

MCI also cites two additional federal cases from Florida. The first is Lanzo discussed at length, supra. The second is In re Florida Airlines, Inc., 64 B.R. 199 (M.D. Fla. 1986), where the court merely noted that Florida had adopted the Restatement as the rule for calculating compensation for damaged chattel. Loss of use was not an issue and Florida Airlines does not, therefore, support MCI's position.

Neither Section 928 nor 931 address any context comparable to that presented here: a telecommunications network with built-in redundancy whose damaged cable caused no loss of service, loss of revenue or inconvenience. Moreover, the Comment in Clause (a) to § 931 qualifies the application of the rental value rule: "The use to which the chattel or land is commonly put . . . [is] to be taken into consideration as far as these factors bear upon the value of the use to the owner or the rental value." Severance of MCI's cable deprived it of no "value" in the absence of lost revenue.

Meakin states the law will not condone depriving a poor vehicle owner of a remedy for the inconvenience of not being able to afford to rent a substitute. So too the law will not condone a windfall to a major corporation which has not been

inconvenienced by damage to its property.[20] MCI's interpretation of Section 931 is illogical and ill-suited to the commercial context.

Moreover, loss of use damages are inextricably intertwined with the concept of mitigation of damages. "If a person has been deprived of a chattel . . . being used in a business that would suffer from the deprivation, the rule of avoidable consequences requires that he should make reasonable efforts to procure a substitute to prevent the harm." Restatement (Second) of Torts § 931, Comment C. Here, MCI had no need to rent a substitute to avoid the harm of lost service to customers. Thus, it suffered neither loss of revenue nor the cost to rent a substitute. Awarding MCI loss of use damages defies logic and common sense.

C. The Underground Prevention and Safety Act.

The Underground Facility Damage Prevention and Safety Act, Chapter 556, Florida Statutes (the "Act"), was not intended to be a source of windfalls, despite MCI's, Sprint Corp.'s,

---

[20] Section 931 is more equivocal than MCI suggests. Comment C explains that one may not recover the reasonable rental value of a substitute greater than the value of what it was substituted for where "the value [of the substitute] is greater than the harm that would have been suffered without a substitute." Restatement (Second) of Torts § 931, Comment C (emphasis added). The comment is consistent with Florida law expressed in Badillo, that loss of use damages cannot exceed the value of the chattel.

Southwestern Bell Telephone, L.P.'s and Broadwing Communications, LLC's arguments to the contrary.[21] Fla. Stat. § 556.106 (2000) states:

> Such person [who damages an underground facility]. . . 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 . . . .

MCI incorrectly argues that because the Act separates loss of use and loss of revenue from each other, and from repair costs, Badillo (which, as discussed, supra, holds that a plaintiff cannot recover a sum greater than the chattel's pre-injury value) is overruled (MCI Brief, 37), and that MCI is entitled to loss of use damages up to the statutory cap of $500,000 even though it suffered no actual loss of use damages. (MCI Brief, 23-24).

The Act does not statutorily overturn Badillo, as MCI urges. The district court never held, nor does MasTec argue, that loss of use damages in addition to repair damages, under the Act, cannot ever exceed the pre-injury value of the cable. Rather, MasTec's only contention on appeal, as the district court correctly held, is that loss of use damages alone cannot exceed

[21] Sprint Corp., Southwestern Bell Telephone, and Broadwing Communications have filed an Amicus Curiae Brief in Support of MCI.

the pre-injury value of the chattel.[22] Thus, the district court's ruling and MasTec's position do not conflict with the Act.

Moreover, the clear language of the Act demonstrates that there is absolutely no basis for MCI's and the Amicus Parties' proposition that the Legislature intended for operators to recover loss of use or loss of revenue damages when there were no actual damages suffered. MCI illogically states that by the Legislature failing to cap repair costs at $500,000, but capping the limitation on loss of use and loss of revenue damages at $500,000, the Legislature intended MCI to recover loss of use damages that exceed repair costs even when no loss of use damages were actually suffered. MasTec does not dispute that loss of use damages can, in certain circumstances, exceed repair costs or revenue loss. However, MCI is not entitled to loss of use damages here because it did not suffer such damages. There is no support for the proposition that the Act intended to award operators loss of use damages when they did not suffer any. Recovery for loss of use <u>could have occurred</u> if MCI actually

---

[22] For example, if an underground facility was damaged by a negligent excavator and cost $600,000 to repair, the operator would be entitled to $600,000 to repair the cable, but only up to $500,000 in loss of use or loss of revenue, <u>if there were actual loss of use or loss of revenue damages suffered by the operator</u>.

rented a substitute cable, but it did not. Recovery for loss of revenue <u>could have occurred</u> if MCI had lost calls or customers, but it did not. These possible loss of use damages are capped at $500,000, but there is no support for MCI's position that $500,000 is recoverable whenever an operator internally reroutes its telecommunications signals due to unintentional damage to a cable by an excavator.

Furthermore, the requirement of Fla. Stat. § 556.106 that the sum of losses to damaged operators are determined "as those costs are normally computed" indicates that the Legislature intended that there be an actual loss suffered for there to be a recovery. MCI does not contend that it "normally computed" its hypothetical losses in anticipation of a severed cable. The purpose of this language in § 556.106 appears to be to protect excavators from operators arguing, upon severance of a cable, that they are entitled to an inflated amount of their actual damages. Because MCI suffered no actual loss of use nor loss of revenues, there are no costs to compute, and there can therefore be no award to MCI.

MCI's conclusion that the statutory separation of loss of use and loss of revenue damages mandates the windfall it is seeking is wrong because MCI did not actually suffer any damages. The $500,000 cap on loss of use and loss of revenue

damages in § 556.106 is intended to limit damages when there are actual damages suffered. There is no authority for MCI's proposition that the Legislature intended that the $500,000 cap affirmatively entitles MCI up to $500,000 in loss of use damages when an operator is able to reroute traffic and avoid any damages, as MCI did in the instant case.

D. Public Policy Requires MCI be Denied Loss of Use Damages Because MCI Did Not Suffer any Such Damages.

1. MCI's Claimed Damages Would Result in a Windfall.

Although repairs to the damaged cable cost MCI about $23,000, MCI seeks over $860,000 in loss of use damages. Stated another way, MCI seeks almost 37 times the amount of its actual damages in "loss of use" damages. Because MCI's claimed loss of use damages are not based on amounts MCI actually lost, these "damages" can only be characterized as an unfair windfall. The district court correctly concluded that (1) if it "were to accept MCI's calculation as the amount of loss of use damages, the result would be grossly unfair because MCI seeks damages in excess of $800,000 when, . . . MCI did not suffer any commercial loss as a result of the damage to the cable" (R4-165-7); and (2) "it would certainly be an unfair windfall for [MCI] to receive over $800,000 in damages for harm that only cost them $23,000."

(R4-165-10). Other judges in the Southern District of Florida, applying Florida law, have agreed in identical cases:

> It is well-settled that the objective of compensatory damages is to make the injured party whole. Awarding 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 Worldcom Network Services, Inc. v. Krantz, S.D. Fla. Case No. 00-4249-CIV-Jordan, Order Denying Motion for Summary Judgment, 6 (R4-139-9). "Some of the record evidence suggest[s] that MCI was indeed looking for a financial bonanza." Lind, Order Denying Motion for Summary Judgment, 7, n. 3 (R4-143-10). "Indeed, as pointed out in the prior order, the record evidence indicates that MCI is strenuously fighting for rental value in order to unjustifiably 'cash in.'" Lind, Order Denying Motion for Reconsideration, 8, n. 2 (R4-161-10).[23]

---

[23] At the time of the hearing on the Motions for Partial Summary Judgment, there were at least three other cases, identical to this one, pending in the Southern District of Florida alone, in which MCI sought damages for "loss of use" measured by the hypothetical cost of renting capacity from BellSouth. In each case, it was undisputed that MCI never rented substitute capacity from another carrier or lost any revenue or profit. Nonetheless, if MCI prevails on its damage theory, it could be awarded almost $3 million in loss of use damages alone, despite not having incurred even $1 to rent capacity. See MCI Worldcom Network Services, Inc. v. Krantz, Case No. 00-04249-CIV-Jordan; MCI Worldcom Network Services, Inc. v. Morris Plumbing and Electric Co., Inc., Case No. 00-04250-CIV-Garber; and MCI Worldcom Network Services,; Inc. v. Lind, Case No. 00-04407-CIV-Jordan.

MCI argues that, like the "spare boat" cases such as The Cayuga, 81 U.S. 270 (1871),[24] and The Emma Kate Ross, 50 F. 845 (3d Cir. 1892), it used its "spare cable and/or capacity" and it should therefore be awarded loss of use damages to compensate for its use of its spare capacity. These cases are distinguishable because, rather than using a "spare cable," "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." OSP I, 585 S.E.2d 540.

In any event, the court in Emma Kate Ross awarded plaintiff rental value as loss of use damages because, unlike MCI in this case, plaintiff actually rented a substitute for a portion of the repair period. "The purpose of awarding damages is to compensate for damages actually incurred, not to provide a plaintiff with a windfall." Corporate Air Fleet of Tennessee, 589 F. Supp. at 1076. An award of 37 times the amount of actual damages in loss of use damages would be a grossly unfair windfall.

---

[24] MCI urges the Court to rely upon The Cayuga, despite that it has been implicitly overruled. In The Cayuga, the owner was awarded the reasonable cost of renting a substitute boat, even though one was not actually rented. However, as the court in OSP I stated, Brooklyn Eastern Dist. Terminal was decided 60 years after The Cayuga, with "the Supreme Court reaching a different result on somewhat similar facts." Id. at 394-5. Accordingly, MCI's reliance on a case which the Supreme Court impliedly overruled is misplaced.

2. Denying Loss of Use Damages Does Not Encourage Damage to Telecommunications Lines.

MCI's argument that denying loss of use damages will encourage excavators to intentionally damage cable lines is specious, at best. MCI's position that workers are encouraged to damage telecommunications cables as a result of the "measure of damages" employed by the court is not the basis of a jurisprudential argument, and is nothing more than speculation. No evidence exists that MasTec severed MCI's cable because it was less expensive than digging around the cable, or that MasTec's workers will be encouraged to do so if it receives a favorable ruling in this case. Furthermore, even if loss of use damages are not recoverable, companies that damage telecommunications cables are exposed to significant repair and replacement costs. Here, MasTec was exposed to the costs of replacing the damaged cable valued at $4,840 and $23,000 in repair costs, in addition to administrative and other costs. MasTec, 370 F.3d at 1076. Clearly, the cost to MasTec when it accidentally severs a cable is not insignificant.

Accordingly, MCI's argument should be considered in light of what it is; non-jurisprudential, speculative and legally baseless. This argument is certainly not the basis upon which the Court should decide this case.

III. **MCI WAS NOT COMPLETELY DEPRIVED OF ITS PROPERTY.**

The district court found that MCI suffered "no complete loss of use of property that would necessitate loss of use damages." (R4-165-10). The court so found because the damaged cable was part of an integrated, "ring system," which allows network traffic to be re-routed, and service maintained, in the event of an outage in one part of its network. This finding was based upon undisputed evidence (R4-165-10) ("During oral argument, however, the plaintiff, MCI admitted that the fiber-optic cable damaged is indeed part of an integrated system of cables.").[25]

To recover loss of use damages, a plaintiff must have been completely deprived of the use of the property in question. Schryburt v. Olesen, 475 So. 2d 715, 717 (Fla. 2d DCA 1985). Schryburt is dispositive and precludes recovery for loss of use

---

[25] It is undisputed that the damaged fiber optic cable was part of a "ring configuration" system that was designed to automatically reroute telecommunications traffic instantaneously in the event of damage to any cable on the system. (R3-99-8, Ex. J, p. 27). MCI's drawing of its Miami network upon which the cable at issue rested demonstrates that the cable was part of a larger system of integrated cables. (R3-99-7, Ex. K). MCI has never disputed that the cable was part of its "North Highspeed Backbone Loop." (R3-99-7). Because MCI's system was not rendered inoperable by the cable cut, the district court correctly found that there was "no complete loss of use of property that would necessitate loss of use damages." (R4-165-10).

damages because MCI was not completely deprived of the use of its property.

In Schryburt, the plaintiffs purchased a home which had a small area of roof leakage. The roof began to leak severely, eventually requiring the plaintiffs to construct an internal framework to prevent the roof from collapsing. The plaintiffs sued the sellers and sought, among other things, loss of use damages for the time their house was under repair, even though they continued to live in the house. In denying these damages, the Second District determined that the plaintiffs suffered "no such deprivation of the complete use" of their home, and therefore distinguished Meakin and Alonso v. Fernandez, 379 So. 2d 685 (Fla. 3d DCA 1980). Schryburt, 475 So. 2d at 717.

Although the severed cable itself was inoperable during the time that it was being repaired, MCI was not, however, completely deprived of the use of its telecommunications ring which consisted of the damaged cable, undamaged cables and nodes. It is undisputed that the ring continued to function and continued to provide the identical service to all of MCI 's customers as was being provided before the damage. The analysis in Lanzo that the chattel at issue was a "single fiber optic cable" and not the entire system does not reflect reality, nor

does it comport with the Act.[26] MCI's cable, unattached to its ring network, serves no purpose and has no intrinsic value. (R3-99-26, Exhibit L, ¶ 7). The fiber optic cable has value as revenue generating property only when it is part of a larger system. The cable must be integrated into MCI's ring network to fulfill its intended purpose.

Contrary to MCI's assertion, MasTec never claimed, and the district court did not hold, that MCI must be deprived of the complete use of its entire telecommunications system, which presumably spans the United States, before it can recover loss of use damages. Rather, had MCI lost the complete use of the specific ring which included the subject cable and suffered lost communications as a result, then loss of use damages might be appropriate if quantifiable by lost profits resulting from interruption of service to customers.

Schryburt is analogous to the instant case. There the plaintiffs lived in those portions of the house unaffected by

---

[26] The Act defines "Underground Facility," not as a single cable, but as "personal property . . . which is being used . . . in connection with the . . . conveyance of . . . electronic, telephonic or telegraphic communication . . . and includes, but is not limited to, cables . . .and lines." Fla. Stat. § 556.102 (13) (2003). Notably, an Underground Facility is not defined as a single cable in isolation, but as cables and/or lines used in connection with the conveyance of communication signals. This comports with the undisputed evidence that the single severed cable did not completely deprive MCI of the use of its telecommunications ring.

the roof leak during the time of repair. Similarly, during repairs to the severed cable, MCI moved its telecommunications traffic to another cable which was part of its integrated system.

A commercial analogy would be a twin screw cargo vessel which suffered damage to a propeller shaft in a collision but was able to continue the voyage on one engine while the crew repaired the shaft. The owner would not be entitled to loss of use damages not actually incurred. He would have suffered no compensable loss under the maritime cases cited above and, under Schryburt, would not have been completely deprived of the use of the vessel.

To avoid this argument, MCI asserts it was completely deprived of the use of the entire cable as opposed to the telecommunications ring of which it was a part. The patent fallacy of this argument is that the sine qua non of loss of use of revenue generating property is the reduction or elimination of revenue. That did not happen here. At the same time, however, MCI does not claim the rental value of the single fiber optic cable. Rather, it seeks the rental value of the intangible telecommunications service that was carried on that cable but was successfully re-routed after the damage. MCI cannot have it both ways. If it seeks loss of use damages for

the intangible service carried through the cable, it necessarily concedes that the cable is part of an integrated system without which there would be no service. MCI was not deprived of the complete use of the cable, and the court did not err in holding that loss of use damages were inappropriate.

MCI cites MCI Worldcom Network Services, Inc. v. Von Behren Electric, Inc., supra, for the proposition that "the property in question was the single cable that the defendant had severed, not MCI's entire 'ring' system." MCI Brief, 22. Contrary to MCI's assertion, however, Von Behren involved a discovery order applying Georgia law, and does not discuss the relevant property. It merely states that MCI seeks damages for loss of use and goes on to discuss loss of use damages generally in Georgia. Von Behren therefore provides no support for MCI's erroneous position that it was completely deprived of the use of its property.

IV. MCI CANNOT RECOVER DAMAGES WHICH EXCEED THE PRE-INJURY VALUE OF THE CABLE.

Florida law allows limited recovery of damages for loss of use based on the rental of substitute property in certain cases. Meakin, 209 So. 2d 252; Travelers Indem. Co. v. Parkman, 300 So. 2d 284 (Fla. 4th DCA 1974); Badillo, 570 So. 2d 1067. Badillo, however, limits the total measure of damages for loss

of use when based on the rental of a substitute chattel. In Badillo, the plaintiff could not afford the cost of repairs to her damaged vehicle and rented various cars for the nine month period between the accident and trial. After analyzing Florida law, the district court reversed the trial court's decision to award loss of use damages for the entire nine month period. The court adopted the "objective" approach to loss of use damages, limiting them to the time period when repairs could reasonably be effectuated. There was another basis, however, for reversing the decision that the plaintiff was entitled to loss of use damages for the entire time period:

> The total damages awarded here exceed the value of the [vehicle] prior to its accident. . . . a plaintiff cannot recover a sum greater than the chattel's pre-injury value. The rationale is that damages for the greater injury (total destruction of the chattel) should exceed those for the lesser (injury to the chattel).

Id. at 1069 (citations omitted). The court cited as authority Apostle v. Prince, 279 S.E.2d 304 (Ga. App. 1981), which held:

> Under Georgia law a plaintiff may recover the reasonable and necessary length of time during which the vehicle is being repaired. However, the aggregate of the amount for loss of use together with the amount of the repairs made necessary by the accident and the value of any permanent impairment may not exceed the value of the automobile before the injury . . . .

Id. at 306. Indeed, the established rule throughout the United States is that the loss of use of the chattel, along with the

cost of repairs, cannot exceed the value of the chattel before the injury.[27] In Badillo, the total damages improperly awarded by the trial court exceeded the value of the vehicle prior to the accident. Applying Badillo here, MCI cannot recover as loss of use damages, if anything at all, more than the difference between the pre-injury value of the severed cable and the cost of repairs.

Moreover, MCI is really seeking loss of use damages for the intangible "capacity" that can be processed through its cable and not for the tangible cable itself. MCI does not cite cases which permit recovery of loss of use damages for an intangible property right. Florida cases only discuss recovery of damages for loss of use of tangible property. See Meakin, 209 So. 2d 252, and Badillo, 570 So. 2d 1067.

MCI cites to Maserati Automobiles for the proposition that MCI is entitled to recover more than the pre-injury value of the cable in loss of use damages. MCI's reliance is misplaced. In

---

[27] See generally, State Farm Mut. Auto. Ins. Co. v. Berthelot, 732 So. 2d 1230 (La. 1999); Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996); Schwartz v. Crozier, 565 N.Y.S.2d 567 (N.Y.A.D.3d 1991); Ellis v. King, 400 S.E.2d 235 (W. Va. 1990); Allstate Ins. Co. v. Reep, 454 N.E.2d 580 (Ohio App. 10th 1982); Wambles v. Davis, 405 So. 2d 945 (Ala. Civ. App. 1981); Fairchild v. Keene, 416 N.E.2d 748 (Ill. App. Ct.4th 1981); Fanfarillo v. East End Motor Co., 411 A.2d 1167 (N.J. Super. Ct. App. Div. 1980); Nolan v. Auto Transporters, 597 P.2d 614 (Kan. 1979).

Maserati Automobiles, the plaintiff sued Maserati under Florida's Lemon Law, Fla. Stat. §681.104 (1983). The court found that Maserati violated the Lemon Law and awarded plaintiff the value of the automobile in addition to loss of use damages. The statutory remedy discussed in Maserati Automobiles has no application here. Moreover, the court in that case required plaintiff to return the vehicle to Maserati to prevent a double recovery. 533 So. 2d at 996, n. 4. Here, MCI retained and used the cable after the repair period and thus cannot recover any amount beyond the pre-injury value of the cable.[28]

Even the Minnesota case involving a truck, Kopischke v. Chicago, St. P. M. & O. Ry., 40 N.W.2d 834 (Minn. 1950), which MCI cites in its brief, does not provide support for its position that it is entitled to damages of over 37 times the value of the cable. In that case, the court expressly found that "up to the time of the accident, [the truck] had earned him

---

[28] MCI cites Wajay Bakery, Inc. v. Carolina Freight Carriers Corp., 177 So. 2d 544 (Fla. 3d DCA 1965) for the proposition that "a plaintiff can recover loss of use damages where the aggregate recovery (value of property and loss of use) would exceed the pre-injury value of the property." MCI Brief, 36. The district court never held, and MasTec does not argue on appeal, that loss of use damages in addition to repair damages cannot exceed the pre-injury value of the cable. The only contention on appeal, as the district court correctly held, is that loss of use damages, in and of themselves, cannot exceed the pre-injury value of the chattel.

$920.98 in clear profit," indicating that plaintiff's recovery for loss of use damages was in effect an award of lost profits.[29] This comports with Florida law on loss of use damages. Badillo, 570 So. 2d at 1069.

Finally, MCI claims that Badillo is contrary to decisions of other Florida District Courts of Appeal, and that Florida courts have inconsistently ruled on whether loss of use damages can exceed the pre-injury value of the cable. MCI Brief, 34. To the contrary, Badillo is binding Florida precedent, and the district court based its holding that MCI cannot recover more than the pre-injury value of the cable in loss of use damages in part on Badillo. Despite MCI's argument, no Florida court has held that loss of use damages can exceed the pre-injury value of the cable. Nowhere does Meakin state that an injured party can recover more than the pre-injury value of the chattel in loss of use damages. As for Maserati Automobiles, supra, which MCI cites to support its claim that Badillo is the sole opinion in Florida supporting MasTec's position, that case does not support MCI's position for the reasons discussed above. The law in Florida on this issue is clear: a "plaintiff cannot recover a

---

[29] The plaintiff in Kopischke was permitted an award of $100 over the pre-injury value of the truck. Kopischke, 40 N.W.2d at 840 ("The value of the truck before the accident was $2,100. The jury returned a verdict of $2,200".

sum greater then the chattel's pre-injury value." Badillo, 570 So. 2d at 1069.

MCI also cites to Alonso for the proposition that the plaintiff need not present evidence of the market value of a damaged truck before and after the accident, and that the plaintiff may recover, as a separate claim, "loss of use damages amounting to the reasonable rental value of a substitute vehicle during the time the plaintiff's vehicle is being repaired . . . ." Id. at 687.[30] However, Alonso actually states:

> Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm, or, at the plaintiff's election, the reasonable costs of repair or restoration when feasible, with due allowance for any difference between the original value and the value after repairs, and (b) the loss of use.

Id. Most importantly, Alonso nowhere authorizes the recovery of damages greater than the chattel's pre-injury value, as reaffirmed later in Badillo, 570 So. 2d at 1069. Moreover, MCI cites to no authority which persuasively indicates that this

---

[30] As more fully discussed above, the plaintiff in Alonso rented a substitute truck and was entitled to the rental cost actually incurred as loss of use damages. In the instant case, MCI rented no substitute and incurred no actual loss of use damages.

Court should disapprove Badillo, which accurately reflects Florida law.

In this case, the district court correctly found that "MCI seeks damages that exceed the value of the cable pre-injury, even when MCI did not suffer any actual loss of business." (R4-165-9). As discussed above, a fiber optic cable, such as the one at issue here, in and of itself has little intrinsic value. (R3-99-7). MCI does not dispute that the value of the cable itself is $4,840, the amount MCI incurred in replacing it. (R7-210-22). MCI mistakenly claims that the cost of engineering, installing and testing the cable and associated equipment (MCI Brief, 7-8) of over $8.2 million should be included in the value of the cable itself.

There is no record evidence that MCI "engineered" the fiber optic cable. It is a commodity which can be purchased by anyone. MCI may well have engineered the associated equipment along the "11.78 route miles" upon which the damaged cable ran, (R4-140-16, Ex. L ¶9), but that fact reinforces MasTec's point that the cable was only one part of an integrated system which precludes recovery under Schrybert. If MCI's theory were correct, then the plaintiff in every loss of use case would be awarded not only the value of the property, but the costs of design as well. Applying MCI's reasoning to Maserati

Automobiles, for example, plaintiff would have been awarded the cost of designing ("engineering") the Maserati in addition to the cost of replacing it. Such an absurd result is unsupported by any case MCI cites.

CONCLUSION

For the reasons discussed above, MasTec respectfully requests the Court answer the Eleventh Circuit's certified questions as follows:

1. A telecommunications services carrier is not entitled to damages for the loss of use of a fiber-optic cable damaged by a defendant when the carrier intended to have the full capacity of the damaged cable available for its use should the need have arisen, even if the carrier was able to be accommodated within its own network the telecommunications traffic carried by the damaged cable and the carrier presented no evidence that it suffered loss of revenue or other damages during the time the cable was unavailable; and

2. If the telecommunications carrier is entitled to loss of use damages, the pre-injury value of the damaged cable establishes a limit to those damages, and not the fair market rental value of an equivalent replacement cable for the time reasonably necessary to make repairs.

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements of Fla. R. App. P. 9.210(a)(2) because this brief has been prepared an a proportionally spaced typeface in WordPerfect 9 format, compatible with WordPerfect 10 in 12 pt. Courier New type style.

KLUGER, PERETZ, KAPLAN & BERLIN, P.L.

By:___________________________________

Alan J. Kluger, Esq.
Florida Bar. No. 200379
Steve I. Silverman, Esq.
Florida Bar No. 516831
201 South Biscayne Blvd. 17th Floor
Miami, Florida 33131
Telephone: (305) 379-9000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August __, 2004, an original and seven (7) copies of the above and foregoing ANSWER BRIEF OF APPELLEE, together with a copy of the brief on a DOS formatted 3 ½ inch diskette in WordPerfect 9 format, compatible with WordPerfect 10.0, was sent by overnight delivery via FedEx, fully paid, to:

Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

I FURTHER CERTIFY that a true and correct copy of the foregoing was mailed and e-mailed on August ___, 2004, to: Steven Wisotsky, Esq., Zuckerman Spaeder LLP, 201 South Biscayne Blvd., Suite 900, Miami, Florida 33131; and mailed to James J. Proszek, Esq. and Anthony Jorgenson, Esq., Hall, Estill, *et al.*, 320 South Boston Avenue, Ste 400, Tulsa, Oklahoma 74103-3708; David Smorodin, Esq. and V. Nicole Bynum, Law and Public Policy, MCI Worldcom, Inc., 1133 19th Street, N.W., Washington, D.C. 20036; and Maria Ruiz, Esq., Clarke Silverglate Campbell Williams & Montgomery, 799 Brickell Plaza, Suite 900, Miami, Florida 33131.

KLUGER, PERETZ, KAPLAN & BERLIN, P.L.

By: ______________________________

Steve I. Silverman
Florida Bar. No 516831
201 South Biscayne Blvd., 17th Floor
Miami, Florida 33131
Telephone: (305) 379-9000