IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-948

MCI WORLDCOM NETWORK SERVICES, INC.
Plaintiff-Appellant,

v.

MASTEC, INC.
Defendant-Appelle,

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE AND FACTS

I. THE NATURE OF THE CASE

This case comes before the Court on two certified questions from the United States Court of Appeals for the Eleventh Circuit in Case No. 03-13022. MCI WORLDCOM Network Services, Inc. v. Mastec, Inc., 370 F.3d 1074 (11th Cir. 2004).

II. THE COURSE OF THE PROCEEDINGS

MCI sued Mastec in the United States District Court for the Southern District of Florida on theories of negligence and trespass. [R1, D1, pp. 3-4].[1] MCI sought actual damages consisting of repair costs and compensation for its loss of the use of the voice and data carrying capacity of the cable, not to exceed the statutory $500,000 cap in Fla. Stat. § 556.106(2). Id.

The parties filed motions for partial summary judgment on various issues, including MCI's loss of use damages. [R3, D96-99]. MCI sought judgment that the rental value of similar, substitute property was a proper measure of its loss of use damages. [R3, D96]. Mastec sought summary judgment that MCI was not entitled to loss of use damages or, alternatively, that any such damages must be limited to the pre-injury value of the damaged cable. [R3, D99, p. 2]. The parties submitted briefs and supplemental authority. [R3, D96-99, 122; R4, D126, 136, 138-140, 143-44, 161]. The District Court held oral argument [R4, D162; R7, D192] and issued an order

[1] Citations to the appellate record are to volume of the appellate record, "R__," the document within that volume, "D__," and then to the specific page or pages of that document, "p. __."

denying MCI's motion and granting Mastec's motion regarding loss of use damages. [R4, D162, pp. 22-23; R7, D192; R4, D165, pp. 22-23].

During trial on MCI's remaining claims, the parties agreed that judgment be entered against Mastec on liability and repair costs while preserving MCI's right to appeal the loss of use rulings. [R6, D206, p. 1]. MCI appealed the loss of use rulings to United States Court of Appeals for the Eleventh Circuit. [R7, D207, p. 1]. The parties submitted briefs[2] and presented oral argument to the Eleventh Circuit.

III. DISPOSITION OF THE ELEVENTH CIRCUIT COURT OF APPEALS

On May 19, 2004, the Eleventh Circuit rendered an opinion certifying the following two questions to this Court:

> IS A TELECOMMUNICATIONS 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]

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[2] The briefs MCI and Mastec filed with the Eleventh Circuit in this matter are included as Item Nos. 1-3 in the Appendix filed concurrently with this Initial Brief.

[3] The Eleventh Circuit states "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." Mastec, 370 F.3d at 1079 n.3. The facts of this case, however, are significantly different. Most notably, in the Virginia case, MCI did not offer evidence that it reserves "particular cables for use exclusively in emergencies, as in the 'spare boat' cases." MCI WORLDCOM Network Services, Inc. v. OSP Consultants, Inc., 585 S.E.2d 540, 544 (Va. 2003) ("OSP Virginia"). Here, MCI offered evidence, and the Eleventh Circuit has found, that "[t]he spare cable was

> 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?

Mastec, 370 F.3d at 1078-79.

IV. INTRODUCTORY STATEMENT

On July 13, 2000, Mastec severed an MCI underground fiber-optic cable worth over $8.2 million which ran between MCI's terminals at 8830 NW 18th Terrace ("MIA") and 2153 NW 22nd Street ("86M") in Miami, Florida. [R3, D98, pp. 1-2; R4, D140, pp. 123-24]; see Mastec, 370 F.3d at 1075. As a result, MCI lost the complete use of voice and data transmission carrying capacity of that cable until it was repaired some 97 hours later. [R4, D140, pp. 10, 14]; see Mastec, 370 F.3d at 1075-76.

Mastec does not dispute that MCI lost the use of the severed cable. [Mastec Eleventh Circuit Answer Brief, App., D2, p. 39]; see Mastec, 370 F.3d at 1076. Mastec, however, claims MCI is not entitled to loss of use damages because MCI used dedicated restoration capacity in MCI's own network that was available on a separate and distinct, spare cable route MCI had constructed at a cost of over $9.65 million to ensure the public did not lose vital telecommunications services if someone like Mastec

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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. Consequently, any reliance on OSP Virginia, except insofar as it serves as an exemplar of the phrasing of the first certified question, is misplaced.

severed the primary cable. Mastec, 370 F.3d at 1075-76.[4] Indeed, the Eleventh Circuit recognized in its opinion certifying the questions to this Court 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." Id., at 1076.

Based on the cost of replacement capacity from Bell South for 97 hours, MCI's loss of use damages totaled approximately $868,000. Id. at 1075-76. MCI does not seek that full amount because it recognizes its loss of use damages are capped at $500,000 by Fla. Stat. § 556.106(2). What MCI does seek, and what the trial court denied, is a ruling that: (1) MCI is entitled to loss of use damages; (2) the rental cost of substitute property is a proper measure of such damages; and (3) MCI is entitled to have the trier of fact consider that measure in determining the amount of MCI's loss of use damages, up to the $500,000 statutory limit.

Denying MCI loss of use damages because it made the substantial capital investment necessary to protect the public by providing a back-up cable route would be unfair to MCI and would, to the detriment of the public, discourage utilities from making such investments. It would also give Mastec and other negligent excavators a low-cost license to damage underground utilities, insulated from the real-world costs of the telecommunications company's protective investment, which is a form of self-insurance. See MCI WORLDCOM Network Services, Inc. v. Kramer Tree Specialists,

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[4] The dedicated restoration capacity in this case was a separate and distinct, alternate route from MIA to 86M consisting of two different cables. One cable ran from MIA to another MCI terminal at 2 Biscayne Boulevard in Miami ("MIB"). The second cable ran from MIB back to 86M. [R4, D140, pp. 123-24; see Mastec, 370 F.3d at 1075-76].

2003 WL 22139791 at 2 (N.D. Ill. Aug. 15, 2003) ("Kramer II") ("MCI should not be penalized for having a separate infrastructure in place to respond to emergency situations.").

V. STATEMENT OF FACTS

A. MCI Protects The Public With Its Own Dedicated Spare Routes

Mastec was excavating under a Miami street with a horizontal directional drilling rig when it severed MCI's cable. [R3, D98, pp. 1-2]; see Mastec, 370 F.3d at 1075. Horizontal directional drilling is an inherently risky procedure. It poses a risk of potential damage even under ideal conditions where there a minimum number of underground utilities. MCI WORLDCOM Network Services, Inc. v. Von Behren Electric, Inc., 2002 WL 32166535 at 1 (N.D. Ga. May 21, 2002).

Congress has found that unintentional damage to underground facilities during excavation is a significant cause of disruptions in telecommunications and other vital public services such as hospitals and air traffic control operations. Pub. L. 105-178, Title VII, § 7301, June 9, 1998, 112 Stat. 477, 49 U.S.C.A. § 6101, Historical and Statutory Notes. Excavation damage is, in fact, the single largest cause of interruptions to fiber cable service. [National Transportation Safety Board, Safety Study: Protecting Public Safety Through Excavation Damage Prevention, (Dec. 1997) (the "NTSB Safety Study") at 2; R3, D98, pp. 154-58; R3, D113, pp. 64, 67-68].

MCI installed the cable Mastec severed and the spare route containing the dedicated back-up capacity in 1998. [R3, D98, p. 79]. At that time, network reliability data compiled since 1993 showed that more than half of all facility outages were the

result of excavation damage. [NTSB Safety Study at 3; R3, D98, pp. 154, 157-58; R3, D113, pp. 64, 67-68]. A Federal Aviation Administration (FAA) study of cable cuts in 1993 documented 1,444 equipment outages or communications service disruptions resulting from 590 cable cuts nationwide over a 2-year period. The majority of cable cuts were related to construction and excavation activities. In 1995, cable cuts affected 32 air traffic control facilities, including 5 en route control centers. Cable cuts for the first 8 months of 1997 affected air traffic control operations for a total of 158 hours. [Id.]

A study performed by the Telecommunications Industry Benchmarking Consortium ("TIBC") at the behest of the Federal Communications Commission's Network Reliability Counsel found that it is often less expensive for an excavator simply to dig up telecommunications facilities and pay the price than it is to excavate safely. [TIBC Network Protection Practices for Subsurface Facilities (June 1994) (the "TIBC Study") at 56-57; R3, D112, pp. 54-55]. The study concluded that third-party damage to underground utilities will not be significantly reduced until the fundamental economics are changed and that certain excavators under pressure to earn a profit will continue to dig up facilities if it is the least expensive course of action open to them. [TIBC Study at 60; R3, D112, p. 56].

Here, Mastec failed to employ the safety measures its own procedures mandated when performing the work that resulted in its cutting MCI's cable. [R6, D201, pp. 21-31, 34-35]. The circumstances surrounding Mastec's July 13, 2000, cable cut are substantially similar to 91 other incidents in which Mastec damaged underground

utilities in Florida and Georgia between February 1997 and August 2002. [R6, D201, pp. 35-37].

In addition to the vital public interest in uninterrupted telecommunications services, MCI provides "service guarantees" to many of its customers in which MCI guarantees that there is a back-up route immediately available to carry their traffic if the primary cable becomes inoperable. [R4, D140, pp. 121-22]. Due to the competitive nature of the industry, even customers without "service guarantees" would leave MCI for other carriers if MCI did not have the protect routes to immediately restore their service in the event of a cut. [Id. at p. 122].

When an MCI cable is damaged, MCI cannot immediately obtain substitute capacity from other carriers to prevent a loss of vital service to the public or fulfill its promises to its customers. [Id.]. In addition to Mastec's July 13, 2000, severance of MCI's cable, four different excavators performing directional bores in Miami severed this same cable four separate times between January 4, and March 15, 2000. [R4, D140, pp. 72, 74]. These circumstances evidence MCI's need to have its dedicated restoration capacity on spare cable routes within its own network.

B. The Costs For The Cable Mastec Severed And For The Spare Or Protect Route

The cable Mastec severed runs for 11.78 miles between MCI's MIA and the 86M terminals. It cost MCI $185,510.48 per mile, or $2,185,313, to install that cable. [R4, D140, pp. 122-23]. MCI also incurred costs to engineer, install and test the equipment necessary to operate the cable. At today's prices, which are significantly lower than those at the time this cable was installed, the cost is approximately $11.00

per voice grade circuit. The transport systems active on the cable when Mastec severed it had a capacity of 816 DS-3's or 549,024 voice grade circuits. This makes the cost of the equipment necessary to operate the cable $6,039,264 or total cost of over $8.2 million for the cable Mastec severed. [Id. at p. 123]; see Mastec, 370 F.3d at 1078.

The separate protect route consists of two separate cables, one from MIA to MIB and one from MIB to 86M, totaling approximately 19.59 miles. [R4, D140, pp. 74, 123]. It cost MCI $185,510.48 per mile to construct these spare cables, or a total of $3,634,150.30, and $11.00 per voice grade circuit, or another $6,039,264, for the equipment necessary to make the protect route operational. The cost for the protect route MCI used to reroute traffic from the cable Mastec severed was thus over $9.65 million. [Id. at p. 123]; see Mastec, 370 F.3d at 1076.

While traffic was switched from the cable Mastec severed to the spare route, MCI's customers were affected. They may have experienced an interruption in their calls, particularly if the calls involved data transmission. [R4, D140, p. 74]. Beyond potential service disruptions, they no longer had the back-up security they had been promised. Their service was at risk of being completely lost if MCI suffered a cut on the protect cable before the main cable was repaired. [R3, D199, pp. 96, 99-102].

SUMMARY OF THE ARGUMENT

I. MCI urges the following answers to the two certified questions:

1. A telecommunications carrier is entitled to damages for loss of use of a telecommunications cable even if it reroutes traffic to other cables it already owns rather

than renting a substitute from another carrier and offers no evidence of lost revenue or out-of-pocket costs. The carrier is entitled to have the trier of fact consider the cost of renting a suitable substitute in determining the amount of those damages.

2. Loss of use damages are not limited to the cable's pre-injury value. The rental cost of replacement property to perform the services normally performed by the damaged cable for the time reasonably necessary to repair it is a proper measure of those damages, subject to the $500,000 cap in the Damage Prevention Act.

II. The bases for reaching these answers are as follows:

1. Under well established principles of law, MCI is entitled damages for loss of use of the cable Mastec severed. This is compelled by §§ 928 and 931 of the Restatement (Second) of Torts which have been adopted by the Florida District Courts of Appeal as the measure of damages for injuries to chattel and the Florida Underground Facility Damage Prevention and Safety Act, Fla. Stat. §§ 556.101, et seq. (the "Damage Prevention Act").

2. MCI is entitled to loss of use damages regardless of whether it was able to use other separate cables that it had installed "precisely to ward off the possibility of an interruption in service." Mastec, 370 F.3d at 1076. Those back-up cables were available only because MCI had the prudence to invest nearly $10 million to insure the public's interest in uninterrupted telecommunications service. MCI's maintenance of back-up cables is a costly form of self-insurance. Denying loss of use damages because MCI did not rent a substitute cable or capacity from another carrier or offer evidence of lost revenue will, to the public's detriment, discourage utility owners like

MCI from paying the millions of dollars necessary for this type of self-insurance because they will be unable to recover compensation through appropriate damage awards. On the contrary, such a rule of law will only encourage negligent excavators like Mastec to ignore safe excavation practices by limiting their liability to the costs of repairing the cable.

3. The cable Mastec severed is a distinct item of property that serves a vital function in transmitting telephone traffic separate and apart from the back-up cable. The cable Mastec severed, not MCI's entire Miami network, is the property to consider in determining whether MCI is entitled to loss of use damages. As both the District Court and the Eleventh Circuit found, MCI lost the complete use of the cable Mastec severed.

4. Florida law allows loss of use damages to exceed the pre-injury value of the damaged property. While the precise amount of MCI's loss of use damages is a question for the trier of fact, the cost of renting substitute property is a proper measure of such damages that MCI should be allowed to submit to the trier of fact.

ARGUMENT AND CITATION OF AUTHORITY

I. A TELECOMMUNICATIONS COMPANY IS ENTITLED TO LOSS OF USE DAMAGES WHEN A NEGLIGENT EXCAVATOR CUTS ITS CABLE

Ownership of an item of property carries with it the right to use that property.[5] When a defendant tortiously injures an item of property, there has been a loss of one of the valuable rights or interests in that property – the right to use that property.[6] Loss of use damages are awarded to provide reasonable compensation not only for pecuniary loss, but also for lost opportunity costs. Kuwait Airways Corp. v. Ogden Allied Aviation Services, 726 F. Supp. 1389, 1396 (E.D.N.Y. 1989); Fukida, 33 P.3d at 210-11; Cress v. Scott, 868 P.2d 648, 651 (N.M. 1994).

> The fact that the owner of a thing does not actually use nor enjoy it does not affect its value. Its value lies in the value of the assemblage of rights to use, enjoy, dispose of it, which constitutes its property. . . .[T]o employ the illustration used by the House of Lords, if a person takes away my chair, he cannot diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room.

1 Theodore Sedgwick, A Treatise on the Measure of Damages § 243a (9th ed. 1912); see Meakin v. Dreier, 209 So.2d 252, 254 (Fla. 2d DCA 1968).

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[5] E.g., American Tel. & Tel. Co. v. Connecticut Light & Power Co., 470 F. Supp. 105, 107 n.2 (D. Conn. 1979); Fukida v. Hon/Hawaii Service and Repair, 33 P.3d 543, 545 (Haw. Ct. App. 2001), aff'd in part & rev'd in part, 33 P.3d 204 (Haw. 2001); 22 Am. Jur. 2d Damages, § 294 (2003); see Meakin v. Dreier, 209 So.2d 252, 254 (Fla. 2d DCA 1968) (ownership of property vests certain rights or uses in the owner).

[6] E.g., Connecticut Light, 470 F. Supp. at 107 n.2; see Koninklijke Luchtvaart Maatschaapij, N.V. (K.L.M. Royal Dutch Airlines) v. United Technologies Corp., 610 F.2d 1052, 1056 (2d Cir. 1979) ("KLM"); Meakin, 209 So.2d at 254 (value of property to its owner lies in the right to use that property and one who injures him in that right renders himself liable for consequent damage).

Courts from both Florida and other jurisdictions have found that loss of use is a proper element of damages for injury to a telecommunications cable.[7] Many such courts which have addressed the issue have also held that the rental cost of a replacement cable or transmission capacity is the proper measure of the telecommunication company's loss of use damages. This is so even though the company rerouted the calls to other cables in its own network rather than actually renting substitute capacity from another carrier and did not offer any evidence of lost profits or revenues. E.g., Kramer I, 2003 WL 22139794 at 2; OSP Oklahoma, 2002 WL 32166536 at 3; Von Behren, 2002 WL 32166535 at 2, 7; Lanzo, 74 F. Supp. 2d at 1224-25.

In Lanzo, AT&T sought $20,569.02 repair costs and $548,640 loss of use damages. As MCI has done here, AT&T based the cost of a replacement cable on the cost of obtaining sufficient capacity from another carrier, measured by DS-3's, to replace the cable that was damaged. [R4, D140, pp. 80, 82, 88]. The defendant argued that AT&T did not suffer any loss of use because it was able to reroute all the calls to

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[7] E.g., MCI WORLDCOM Network Services, Inc. v. Kramer Tree Specialists, Inc., 2003 WL 22139794 (N.D. Ill. June 19, 2003) ("Kramer I") at 2; MCI WORLDCOM Network Services, Inc. v. OSP Consultants, Inc., 2002 WL 32166536 (N.D. Okla. Nov. 20, 2002) at 3 ("OSP Oklahoma"); Von Behren, 2002 WL 32166535 at 2, 7; AT&T Corp. v. Lanzo Constr. Co., 74 F. Supp. 2d 1223, 1224-25 (S.D. Fla. 1999); Connecticut Light, 470 F. Supp. at 105; Ashland Pipeline Co. v. Indiana Bell Tel. Co., 505 N.E.2d 483, 490 (Ind. Ct. App. 1987); Louisville & N.R. Co. v. Gillespie, 177 S.W. 451, 454 (Ky. Ct. App. 1915); American Tel. & Tel. Corp. v. Thompson, 227 N.W.2d 7, 8-9 (Neb. 1975); Weleetka Light & Water Co. v. Northrop, 140 P. 1140, 1141 (Okla. 1914); see 5 D. Dobbs, Law of Remedies: Damages – Equity – Restitution, § 5.15(1) at p. 875 n.13 (2d ed. 1993) ("[Loss of use claims] are appropriate in the case of . . . telephone cables . . .").

other cables in its own system. [8] The Court stated the fact AT&T was able to reroute calls and utilize other fiber optic cables in its own system was irrelevant. The Court then held that the proper measure of damages for loss of use was the cost of renting a replacement even though AT&T had been able to reroute all calls to other cables within its own system. 74 F. Supp. 2d at 1224-25.

In Kramer I, MCI sought loss of use damages based on the cost of leasing capacity from another carrier. The defendant sought summary judgment that MCI was not entitled to loss of use damages because it did not actually lease substitute capacity and offered no evidence of lost revenue or business. The Court denied the defendant's motion, holding that the measure of damages was the reasonable rental value of similar property for the period of deprivation and that MCI was not required to actually lease substitute capacity or show a loss of revenue or business to recover loss of use damages. 2003 WL 22139794 at 2-3. When the defendant subsequently argued that MCI was not entitled to loss of use damages because it was able to reroute traffic to other cables in its own network, the Court stated, "MCI should not be penalized for having a separate infrastructure in place to respond to emergency situations. Therefore, MCI was not required to seek substitute DS-3 capacity to recover loss of use damages." Kramer II, 2003 WL 2213991 at 2.

In OSP Oklahoma, MCI and OSP both sought summary judgment regarding MCI's loss of use damages. 2002 WL 32166536 at 1. MCI argued that the reasonable

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[8] The District Court here found that MCI's system is similar to the system in dispute in Lanzo. [R4, D165, pp. 9-10].

cost of renting a replacement cable or capacity was a proper measure of its loss of use damages. The defendant contended that MCI was not entitled to loss of use damages because MCI did not actually lease a substitute cable. Id. at 3. The Court held that loss of use damages could be measured by the fair rental value of a replacement cable during the period of repairs and that MCI was entitled to loss of use damages even though it did not actually rent substitute property. Id.

In Von Behren, MCI sought damages for loss of use of a severed cable based on the cost of obtaining replacement capacity, even though it was able to reroute all traffic to other cables in its own network. The defendant moved to compel MCI to provide information and produce documents concerning any profits or revenues it lost as a result of the fiber cut. It also moved for summary judgment on MCI's loss of use claim, arguing that MCI has not suffered any loss of use because MCI had a "ring" system and been able to reroute all the calls to other cables in its own system. The Court denied both motions, holding that the proper measure of damages for loss of use was the reasonable cost of comparable property; that information regarding lost profits was therefore irrelevant; and that because the property in question was the single cable the defendant had severed, the fact MCI had been able to reroute traffic to other cables in its own system was also irrelevant. 2002 WL 32166535 at 2, 7.

II. THE ANSWERS MCI URGES TO THE CERTIFIED QUESTIONS ARE COMPELLED BY THE RESTATEMENT, DECISIONS OF FLORIDA DISTRICT COURTS OF APPEAL, THE WEIGHT OF AUTHORITY FROM OTHER JURISDICTIONS, THE FLORIDA DAMAGE PREVENTION ACT, AND PUBLIC POLICY

The crux of MCI's argument is that this Court should adopt §§ 928 and 931 of the Restatement (Second) of Torts and the comments thereto as a measure of damages for loss of use of a telecommunications cable when answering the certified questions. In Kitchen v. K-Mart Corp., 697 So.2d 1200 (Fla. 1997), this Court, at the petitioner's urging, adopted § 390 of the Restatement (Second) of Torts as the legal standard for the matter at issue therein. Id. at 1207. In so doing, this Court analyzed the Restatement, Florida statutes, decisions from other Florida District Courts of Appeal that had previously adopted and applied the principles in § 390, decisions from other states that had done so, and public policy reasons for doing so. Id. at 1203-08.

Following that approach in the present case yields but one conclusion – in accordance with §§ 928 and 931 and the comments thereto, the rental value of a substitute cable or capacity sufficient to replace the capacity of the cable Mastec severed is a proper measure of damages which MCI is entitled to present to the trier of fact. That MCI was able to reroute traffic to back-up cables in its own network and presented no evidence of lost revenue is irrelevant in light of MCI's nearly $10 million investment to have that back-up capacity available.

A. This Court Consistently Follows The Restatement

This Court consistently looks to the Restatement and the comments thereto in enunciating Florida tort law.[9] This includes the Restatement pronouncements regarding damages. E.g., Hagan v. Coca-Cola Bottling Co., 804 So.2d 1234, 1237-38 (Fla. 2001) (citing §§ 569, 570 and 652H, cmt. b and recognizing their consistency with Florida law); Gross v. Lyons, 763 So.2d 276, 279 (Fla. 2000) (citing § 433A and comment i thereto regarding apportionment of damages for indivisible injuries and recognizing other states which apply the same rule).

B. Florida District Courts Of Appeal Have Adopted §§ 928 and 931 As The Measure Of Damage For Injury To Chattels

The Restatement view regarding damages to chattels is set forth in §§ 928 and 931 of the Restatement (Second) of Torts and the comments thereto.[10] Section 928 provides:

> When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for . . . (b) loss of use.

Restatement (Second) of Torts § 928 (1977) (emphasis added).

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[9] E.g., Gossard v. Adia Services, Inc., 723 So.2d 182, 183-84 and n.1 (Fla. 1998) (citing § 766, cmt. b and recognizing its consistency with Florida law); Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334, 339 (Fla. 1997) (adopting § 552 regarding negligent misrepresentation); West v. Caterpillar Tractor Co., 336 So.2d 80, 84, 87 (Fla. 1976) (adopting strict liability as stated in § 402A and recognizing the consistency of that action with decisions from other states); Manning v. Serrano, 97 So.2d 688, 689-90 (Fla. 1957) (citing § 899, cmt. b).

[10] Some Florida cases discuss the first Restatement of Torts which was in effect at the time of decision. The language of the relevant portions of §§ 928 and 931 of the Restatement of Torts and the comments thereto is nearly identical to the corresponding provisions in the Restatement (Second) of Torts. Compare Lanzo, 74 F. Supp. 2d at 1224-25, with Meakin, 209 So.2d at 254.

The elements to be considered in determining the value of the loss of use of the chattels are set forth in § 931. See Restatement (Second) of Torts § 928, cmt. b. Section 931 provides that damages for loss of use of land or chattels include compensation for "the value of the use during the period of . . . prevention or the value of the use of or the amount paid for a substitute . . . ."

> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel or land during the period of deprivation…. This is true even though the owner had a substitute that he used without additional expense to him.

Restatement (Second) of Torts § 931, cmt. b (emphasis added); see Meakin, 209 So.2d at 254.

> Use of substitute. If a person has been deprived of a chattel or land that was being used in a business that would suffer from the deprivation, the rule for avoidable consequences . . . requires that he should make reasonable efforts to procure a substitute to prevent the harm. If he uses a substitute of his own, he is entitled to its reasonable rental value in substitution for the rental value of that of which he was deprived. . . .

Restatement (Second) of Torts § 931, cmt. c (emphasis added); see also 22 Am. Jur. 2d Damages, § 295 (2003).

While this Court has not yet had occasion to do so, a number of Florida District Courts of Appeal have expressly recognized §§ 928 and 931 as the rule of damages for injuries to chattels. Badillo v. Hill, 570 So.2d 1067, 1068 (Fla. 5th DCA 1990); Meakin, 209 So.2d at 253-54; Airtech Service, Inc. v. MacDonald Constr. Co., 150 So.2d 465, 466 (Fla. 3d DCA 1963).[11]

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[11] See also, Lanzo, 74 F. Supp. 2d at 1224-25 (citing Meakin and applying § 928 to loss of use of a telecommunications cable); In re Florida Airlines, Inc., 64 B.R. 199, 204 (Bankr. M.D. Fla. 1986) (citing Airtech and applying § 928 to loss of use of airplane parts).

In Meakin, the plaintiff sought damages for loss of use of a vehicle that was used for both personal and some business purposes even though there was no evidence she rented a substitute or incurred any other expense as a result of being unable to use her vehicle. 209 So.2d at 253, 255. In holding the rental value of a substitute was, nonetheless, a proper measure of damages, the Court stated: "The owner of the subject matter is entitled to recover his damages for the loss of the value of the use, at least the rental value of the chattel . . .. Id. at 254 (quoting § 931, cmt b) (emphasis added). The defendant's argument that the plaintiff did not actually rent a substitute vehicle, "and thereby suffered no pecuniary loss," was "without merit." Id.[12]

Other Florida District Courts of Appeal, without citing the Restatement, have similarly held that the measure of damages for the loss of the use of personal property is the amount necessary to rent a similar article, regardless of whether the plaintiff actually rents a similar article. Northamerican Van Lines v. Roper, 429 So.2d 750, 752

[12] In its opinion, the Eleventh Circuit referred to "the Mortellaro/Meakin line of cases," which it characterized as involving "pleasure property, such as personal automobiles." Mastec, 370 F.3d at 1076-77. This is not correct. In Mortellaro, the damaged property was an automobile delivery truck used for business. A. Mortellaro & Co. v. Atlantic Coast Line R. Co., 107 So. 528, 528 (Fla. 1926). In Meakin, the plaintiff testified she used the car not only for pleasure, but also for "some business." 209 So.2d at 255. Other Florida District Courts of Appeal have similarly recognized loss of use as a proper element of damages for commercial property. E.g., Airtech Service, 150 So.2d at 465-66 (airplane); Alonso, 379 So.2d at 686-87 (commercial lunch truck); Maryland Casualty Co. v. Florida Produce Distributors, Inc., 498 So.2d 1383, 1384 (Fla. 5th DCA 1986) (semi-trailer); Wajay Bakery, Inc. v. Carolina Freight Carriers Corp., 177 So.2d 544, 545-46 (Fla. 3d DCA 1965) (machinery used in a bakery); see also, Lanzo, 74 F. Supp. 2d at 1223-24 (telecommunications cable); In re Florida Airlines, 64 BR at 204 (airplane parts).

(Fla. 1st DCA 1983); Alonso v. Fernandez, 379 So.2d 685, 687 (Fla. 3d DCA 1980);[13] see also Mortellaro, 107 So. at 528-29.[14] Indeed, Florida District Courts of Appeal have held that when property used in a business is involved, "the best evidence of lost use value of personal property is the actual or theoretical reasonable rental value of similar property." Maryland Casualty, 498 So.2d at 1384 (emphasis added); see also Mortellaro, 107 So. at 528 (syl. 1) (denying "loss of business" damages but holding the plaintiff could recover loss of use damages based on the amount necessary to rent a substitute).

C. Allowing Rental Value Of Substitute Property As A Measure Of Loss Of Use Damages Even Though MCI Did Not Actually Rent A Substitute Is Consistent With The Overwhelming Weight Of Authority From Other Jurisdictions

The vast majority of jurisdictions outside Florida that have addressed the issue have held it is not necessary to actually rent substitute property to recover loss of use

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[13] Accord, 17 Fla. Jur. 2d Damages, § 71 (2d ed. 2002) ("Damages are measured . . . by the amount necessary to rent a similar article or other suitable article with which to perform the services usually performed by the damaged article during the period of repair. . . even though a substitute article is not leased."). 2 Florida Civil Practice Guide § 50.223[b] (Matthew Bender 2003) ("The measure of damages is usually the amount necessary to rent a similar article. However, because the compensation is for loss of use, not the rental value, rental value is merely indicative of loss of use value and the injured party is not required to actually rent the article.") (citation omitted); Id. § 60.61[c] (same); 4 Florida Torts § 112.50[1][c] (Matthew Bender 2003) ("Loss of use is measured by the reasonable rental value of the injured property during the time it is being repaired or replaced." No actual replacement is necessary.

[14] In Mortellaro, the plaintiff sought damages for "loss of business" when his delivery truck was damaged. There is no indication the plaintiff actually rented a substitute truck. Id. at 528. This Court affirmed the trial court's dismissal of the "loss of business" claim, but held that loss of use based on the rental cost of a substitute truck with which to perform the services usually performed by the damaged truck would have been proper. Id. at 529.

damages.[15] Many of these jurisdictions have expressly relied on Restatement §§ 928 and/or 931 as the rationale for this holding.

For example, in Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918 (N.Y. Sup. Ct. App. Div. 1984), the plaintiff sought damages for loss of use of a bus. Citing § 928 and comment c to § 931 of the Restatement (Second) of Torts, the Court held that the plaintiff was entitled to loss of use damages even though it used another bus it had in reserve and did not hire a substitute. "There is no logical or practical reason why a distinction should be drawn between cases in which a substitute vehicle is actually hired and those in which the plaintiff utilizes a spare." Id. at 920-21. The

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[15] E.g., Kramer I, 2003 WL 22139794 at 2 (applying Illinois law); Craig Test Boring Co. v. Saudi Arabian Airlines Corp., 138 F. Supp. 2d 553, 561 (S.D.N.Y. 2001) (applying New York law); OSP Oklahoma, 2002 WL 32166536 at 3 (applying Oklahoma law); Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1045 (Alaska 1984); Aries v. Palmer Johnson, Inc., 735 P.2d 1373, 1383 (Ariz. Ct. App. 1987); Tremeroli v. Austin Trailer Equipment Co., 227 P.2d 923, 935 (Cal. App. 1951); Meyers v. Bradford, 201 P. 471, 472-73 (Cal. App. 1921); Hillman v. Bray Lines, Inc., 591 P.2d 1332, 1336 (Colo. App. 1978); Fairchild v. Keene, 416 N.E.2d 748, 749-50 (Ill. 4th DCA 1981); Hamacher v. Decker Livestock, Inc., 536 N.E.2d 304, 305 (Ind. Ct. App. 1989); Chriss v. Manchester Ins. & Indemnity Co., 308 So.2d 803, 806 (La. App. 1975); Pope's Adm'r v. Terrill, 214 S.W.2d 276, 278 (Ky. App. 1948); National Dairy Products Corp. v. Jumper, 130 So.2d 922, 923 (Miss. 1961); Camaraza v. Bellavia Buick Corp., 523 A.2d 669, 671 (N.J. Superior Ct. 1987); Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918, 920-21 (App. Div. 1984); Perry v. Harris, 197 N.E.2d 416, 419 (Ohio App. 1964); DTS Tank Service, Inc. v. Vanderveen, 683 P.2d 1345, 1347 (Okla. 1984); Graf v. Don Rasmussen Co., 592 P.2d 250, 254 (Or. App. 1979); Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 118-19 (Tex. 1984); Southwestern Bell Tel. Co. v. Hamil, 116 S.W.3d 798, 800-01 (Tex. App. – Ft. Worth 2003); Castillo v. Atlanta Cas. Co., 939 P.2d 1204, 1209 (Utah Ct. App. 1997); Holmes v. Raffo, 374 P.2d 536, 541 (Wash. 1962); Kim v. American Family Mutual Ins. Co., 501 N.W.2d 24, 28 (Wis. 1993); see also Restatement of Torts (Second) § 931, cmt. b, c; 22 Am. Jur. 2d Damages §§ 295, 298 (2003); Dobbs, Law of Remedies, § 5.15(2), p. 880; C. McCormick, Handbook on the Law of Damages, § 124, p. 474 (1935) (denying recovery for loss of use because the plaintiff did not actually rent substitute property "is untenable").

Court further stated that this holding "is in accord with the overwhelming weight of authority elsewhere." 476 N.Y.S.2d at 921.[16]

In Ben Lomond, Inc. v. Campbell, 691 P.2d 1042 (Alaska 1984), the plaintiff sought damages for loss of use of a generator. The defendant argued that the plaintiff was not entitled to loss of use damages unless the plaintiff proved he would have used the generator during the period he was deprived of its use and that he incurred expense in obtaining a substitute generator. Id. at 1044-45. The Court, noting that Alaska case law was entirely consistent with § 931 of the Restatement (Second), held that rental value was a permissible measure of loss of use damages even though the plaintiff did not establish he in fact hired a replacement and that the defendant's position was "without merit." Id. The Court, in fact, cited Meakin as support for its holding. Id. at 1046 n.1.

Texas, like Florida, has adopted § 928 as the measure of damages for injury to personal property. Pasadena State Bank v. Isaac, 228 S.W.2d 127, 128-29 (Tex. 1950); Chemical Express Carriers, Inc. v. French, 759 S.W.2d 683, 687 (Tex. App. – Corpus Christi 1988), writ denied. Texas courts have held that the reasonable rental value of the property or a substitute is a proper measure of damages, regardless of whether the plaintiff procured a replacement or suffered any lost revenues or business

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[16] See also, KLM, 610 F.2d at 1057 (under both New York and Connecticut law, the owner of a commercial vehicle may recover loss of use damages based on rental value without proving actual financial loss or that he needed a substitute vehicle to cover the loss of the damaged vehicle); Craig Test Boring, 138 F. Supp. 2d at 560 (plaintiff awarded damages for loss of use of a 747 airplane based on the cost to rent a similar 747 even though it did not actually rent a replacement, but rather rearranged the schedule of its remaining aircraft to compensate for the missing 747).

in a variety of contexts other than automobiles. E.g., Southwestern Bell Tel., 116 S.W.3d at 800-01(real property); Elias v. Mr. Yamaha, Inc., 33 S.W.3d 54, 57, 60-62 (Tex. App. - El Paso 2000) (jet ski); Unitrust, Inc. v. Jet Fleet Corp., 673 S.W.2d 619, 622 (Tex. App. – Dallas 1984) (airplane); Texas Tool Traders, Inc. v. Mosley Machinery Co., 422 S.W.2d 229 (Tex. App. Waco 1967) (machine tools).

Other jurisdictions, while not relying on § 928 or § 931, have reached similar conclusions. E.g., Lamb v. R.L. Mathis Certified Dairy Co., 359 S.E.2d 214, 216 (Ga. Ct. App. 1987); Gent v. Collinsville Volkswagen, Inc., 451 N.E.2d 1385, 1390 (Ill. 5th DCA 1983); DTS Tank Service, 683 P.2d at 1347. Courts in those states have also held that a telecommunications company is entitled to damages for loss of use based on the reasonable cost of renting a substitute cable or capacity, even though the telecommunications company used other cables or capacity in its own network rather than actually procuring a substitute cable or capacity from another carrier and did not offer any evidence of lost revenue. Von Behren, 2002 WL 32166535 at 2, 7; Kramer I, 2003 WL 22139794 at 2; OSP Oklahoma, 2002 WL 32166536 at 3. The answers MCI urges are thus consistent with the vast majority of jurisdictions outside Florida as well as with those of the Florida courts.

D. The Answers MCI Urges To The Certified Questions Are Compelled By The Florida Damage Prevention Act

The Florida Legislature enacted the Damage Prevention Act in 1993. One of the express purposes of the Damage Prevention Act is to, "Aid the public by preventing injury to . . . property and the interruption of services resulting from damage to an underground utility facility caused by excavation . . .." Fla. Stat. § 556.101(3)(a).

At that time, the Florida District Courts of Appeal had already adopted §§ 928 and 931 of the Restatement as the rule of damages for the loss of use of personal property, including comment b to § 931, and held that a plaintiff need not show pecuniary loss to recover loss of use damages. Meakin, 209 So.2d at 253-54; Airtech, 150 So.2d at 466. In enacting the Damage Prevention Act, the Legislature statutorily applied this rule of law to damages to underground utility facilities.[17]

The statute provides that an excavator who violates certain specific sections of, or fails to discharge duties imposed by, the Damage Prevention Act "shall be liable for the total sum of the losses to all parties involved as those costs are normally computed." Fla. Stat. § 556.106(2)(a), (b). The Legislature, however, specifically limited certain elements of such losses: "Any damage for loss of revenue and loss of use shall not exceed $500,000 per affected underground facility . . .." Id. (emphasis added).

In limiting loss of revenue and loss of use damages to $500,000, but not similarly limiting repair costs, the Legislature recognized that loss of revenue and loss of use are elements of damage separate and apart from repair costs. By including both the terms "loss of revenue" and "loss of use," the Legislature evidenced its understanding that

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[17] The Legislature is presumed to know existing law when it enacts a statute, including judicial decisions on the subject of that statute. E.g., Seagrave v. State, 802 So.2d 281, 290 (Fla. 2001). The Legislature is also presumed to know the meaning of the words it employs in a statute and that those words properly express legislative intent. E.g., King v. Ellison, 648 So.2d 666, 668 (Fla. 1994). Moreover, when the Legislature creates a statutory cause of action, it is presumed to know the common law of contract and tort and the limitations on such remedies created by judges. Facchina v. Mutual Benefits Corp., 735 So.2d 499, 502 (Fla. 1998).

those are different measures of damages a utility operator is entitled to recover, and that neither is dependent upon the other.

The $500,000 limit on loss of use damages evidences the Legislature's recognition that loss of use damages can be substantial and can greatly exceed repair costs or revenue loss. The Legislature saw, correctly, that loss of use damages should be compensated independently from repair costs or lost revenue.

E. Denying MCI Loss Of Use Damages Because It Was Able To Reroute Traffic To A Separate Spare Cable Is Contrary To Public Policy

1. Denying MCI Loss Of Use Damages Would Be Unfair To MCI And Would Give Mastec A Windfall

A recurring theme in the District Court's order denying MCI loss of use damages is that it would somehow be grossly unfair to award MCI substantial loss of use damages when MCI incurred repair costs of only $23,000 and purportedly suffered no commercial loss. [R4, D165, pp. 3-5, 7, 10]. As discussed above, this conclusion is contrary to Florida law which allows loss of use damages up to $500,000 regardless of whether the plaintiff rents substitute property or incurs any pecuniary loss. E.g., Fla. Stat. § 556.106(2); Meakin, 209 So.2d 253-54. It is also incorrect because it will be Mastec who receives an unfair windfall if MCI is denied loss of use damages.

The undisputed evidence here shows MCI provided dedicated restoration capacity in its own network by building two separate paths to the same destination, i.e., twice the capacity it would otherwise have needed. [R4, D140, pp. 121-23]. This gave MCI the infrastructure necessary to quickly reroute traffic to other cables in its own network and protect the public and its customers from loss of vital telecommunications

service – something MCI could not do if it waited until after a cable was cut to attempt to obtain a substitute from another carrier.

In Kuwait Airways, the Court held that the owner of an aircraft could recover damages for loss of use of that aircraft even though it used one of its own planes it kept in reserve and set forth the rationale for its decision:

> [C]onsider the case in which an airline maintains one or more airplanes that are normally held in reserve. When a front-line plane is damaged, the airline presses the reserves into service. As Justice Cardozo observed, that "result is all one" whether the replacement plane is rented from a lessor or moved from reserve status into active duty.
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> . . .
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> The concept of opportunity cost makes it easy to see how the airline using a spare plane suffers a genuine loss even though it does not spend money to rent an aircraft. Any prudent airline that is obligated to fly, say, 100 planes to meet its daily schedule, will own more than 100 airliners in recognition of the actuarial inevitability that some planes will be out of service on some days. The airline might determine, for example, that to be reasonably secure from the risk of flight cancellation, it would need to own 110 planes to cover a 100-plane daily need. . . . If an airline could be certain that its planes would never be damaged by the fault of tortfeasors, it would be able to get by with a smaller reserve fleet.

726 F. Supp. at 1397. That same reasoning applies here. If MCI could be certain the cable would never be damaged by tortfeasors like Mastec, it might be able to get by without the protect cable. However, five cuts of the same cable in a six and one-half month period by Mastec and four other excavators shows that this is not possible.

The District Court's reasoning also ignores the fact having back-up cables available to carry traffic if one cable is damaged comes only at a significant cost to MCI. MCI expended over $9.65 million to have the protect cables available. [R4, D140, p. 123]. Both courts and learned commentators have stated that in such

circumstances, the unfairness comes from denying the party damages for loss of use because he used his own property as a substitute rather than procuring substitute property from another.

In The Cayuga, 5 F. Cas. 326 (E.D.N.Y. 1868), aff'd 5 F. Cas. 329 (C.C.N.Y. 1870), aff'd 81 U.S. 270 (1871), the owners of a ferry boat, the James Watt, sought damages resulting from a collision between their ferry boat and the Cayuga. They did not rent or hire a replacement during the time the James Watt was undergoing repairs, but rather used another boat they already owned to perform the work of the James Watt. The Cayuga, 5 F. Cas. at 327. The district court, nonetheless, awarded the plaintiff $75.00 per day for loss of use of the ferry boat during the seventeen days required for repairs. 81 U.S. at 278; 5 F. Cas. at 331. In affirming, the circuit court gave this rationale for allowing loss of use damages even though the plaintiff used its own spare boat rather than hiring a substitute:

> The [plaintiffs] did not hire, and possibly might have been unable to hire, another ferry-boat to take their place on the ferry. These very reasons have compelled the [plaintiffs] to build and keep another boat, which they can use when accident or other cause disables one which they have in daily use.
> It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the [plaintiffs] to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the [plaintiffs'] possession, and was used, therefore the [plaintiffs] sustained no pecuniary loss by the delay. . . . The principle of indemnity is uniformly recognized as just, and its measure must be the same, whether a substitute is furnished by the [plaintiff] or procured from another. . . .To withhold compensation is, to my mind, obvious injustice.

5 F. Cas. at 331.[18]

In A. Brownstein, What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages, 37 Rutgers L. Rev. 433 (1985), the author discussed an award of loss of use damages in a case where the plaintiffs operated lightships to guide navigation into a port and kept spare vessels available to ensure that service would not be interrupted:

> The case could have been decided by analogy to the collateral source rule. The plaintiffs essentially insured themselves against loss at considerable expense by purchasing and maintaining a spare boat. The defendant should not, therefore, reap the benefits of the plaintiffs' prudence by having the damage recovery reduced by the 'payout' of such self-insurance, the availability of a substitute vehicle to replace the damaged vessels.

Id. at 486. In his treatise on damages, Professor Dobbs reached the same conclusion:

> Under the spare boat doctrine, if the plaintiff keeps a spare chattel specifically for the purpose of replacing those out of service, he may, after all, recover the cost of the substitute and he is not limited to the wear and tear on the substitute chattel. As Professor Brownstein points out, the plaintiff's maintenance of back-up equipment is a form of self-insurance and the rule allowing full recovery of substitute chattel costs works exactly like the collateral source rule. The fact that the plaintiff has purchased protection against the defendant's tort by insurance or by back-up equipment does not reduce the damages otherwise recoverable in either case.

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[18] The United States Supreme Court adopted the circuit court's reasoning in affirming the award of damages for loss of use. 81 U.S. at 278; see also The Emma Kate Ross, 50 F. 845, 847 (3d Cir. 1892) ("The [plaintiffs] were entitled to the market value of the services rendered by their substitutes, – regardless of the fact that they might otherwise have been idle. The vessels represented a large investment made in preparation for contingencies which might require their services. Why then should the [defendant] have its use without paying for it?").

Dobbs, Law of Remedies, § 5.15(2), p. 880-81; see also McCormick, Law of Damages, § 124, p. 474 (denying recovery for the loss of use because the plaintiff did not actually rent substitute property "is untenable.").

As in The Cayuga, MCI insured itself by building and maintaining dedicated restoration capacity on separate cables to avoid the disruption of vital public service in the event of cable cuts like those by Mastec. Whether it be the use of the plaintiffs' own spare boat as in The Cayuga, or MCI's use of its own spare cables, which were available only at a significant cost to MCI, the result is the same. Denying MCI loss of use damages would allow Mastec to impermissibly "reap the benefits of [MCI's] prudence" and work "an obvious injustice" to MCI. See The Cayuga, 81 U.S. at 278, 5 F. Cas. at 331; Meakin, 209 So.2d at 254; Brownstein, 37 Rutgers L. Rev. at 486.

2. Denying MCI Loss Of Use Damages Will Remove The Incentive For Excavators To Dig Safely Around Telecommunication Lines

Both Congress and the Florida Legislature have recognized that damage to underground utility facilities, including telecommunications cables, poses a serious threat of disruption to telecommunications and other vital public services. Pub. L. 105-178, Title VII, § 7301, June 9, 1998, 112 Stat. 477, 49 U.S.C.A. § 6101, Historical and Statutory Notes; Fla. Stat. § 556.101(3)(a). Studies by the NTSB and the FAA, Mastec's history of frequently damaging underground utilities, and MCI's experience of having this same cable severed five times in a six and one-half month period, show the validity of Congress' and the Florida Legislature's concerns.

An excavator who strikes an underground electrical or gas line faces immediate and severe consequences in the form of damage to its own equipment and/or serious injury or even death to its employees. That same risk, and thus the commensurate level of care in excavating around such lines, is not present when an excavator works near an underground telecommunications line. Studies have shown that it is often less expensive for an excavator to damage underground facilities that do not pose a threat of damage to its equipment or harm to its operators than it is to dig safely. These studies have concluded that damage by excavators to underground utilities, particularly telecommunication lines, will continue as long as digging up such facilities is less expensive than excavating safely. TIBC Study at 56-57, 60. [R3, D112, pp. 54-56].

The record on appeal evidences the prescience of the TIBC Study. Mastec severed the cable here because it did not want to invest the time and money to employ the safety measures its own procedures mandated. [R6, D201, pp. 21-31, 34-35]. The circumstances surrounding Mastec's July 13, 2000, cable cut are substantially similar to 91 other incidents in which Mastec damaged underground utilities in Florida and Georgia between February 1997 and August 2002. [R6, D201, pp. 35-37]. It is apparent Mastec considers damaging underground utilities simply a cost of doing business. Mastec's record for safety, or lack thereof, and the history of the cable Mastec severed are thus ample evidence of MCI's need to have its dedicated restoration capacity on spare cable routes within its own network.

Telecommunications companies are entitled to loss of use damages because they had the prudence to protect the public from service disruptions by investing millions

of dollars in dedicated restoration capacity available on spare cables. To deny such damages would be contrary to the important public policy of protecting the public's interest in uninterrupted telecommunication service. It would, as Mastec's history of damaging utilities, MCI's experience in Miami, and studies have shown, allow excavators like Mastec to continue to damage underground utilities with impunity because it is cheaper to dig and cut than to excavate safely, a factor the Florida Legislature undoubtedly recognized when it decided to allow loss of use damages of up to $500,000 per affected utility regardless of the amount of repair costs or lost revenues. The result MCI urges here is thus compelled by the Restatement, Florida District Courts of Appeal decisions, decisions of courts from other jurisdictions, the Damage Prevention Act and public policy.

III. MCI SUFFERED A COMPLETE LOSS OF THE RELEVANT PROPERTY

In Schryburt v. Olesen, 475 So.2d 715, 717 (Fla. 2d DCA 1985), the Court held that loss of use damages are not recoverable where an owner suffers a partial deprivation of his property. In Schryburt, the plaintiffs sought loss of use damages because the roof of the home they had purchased leaked. The Court held that the plaintiffs were not entitled to loss of use damages because they continued to live in, and therefore had not suffered a complete loss of use of, their home. 475 So.2d at 717. Here, it is undisputed that MCI completely lost the ability to use the cable between MIA and 86M when Mastec severed it. Mastec, 370 F.3d at 1075-76. Unlike the plaintiffs in Schryburt, MCI did not continue to use the damaged property.

Mastec therefore attempts to equate the ability to use the cable Mastec severed with MCI's ability to continue to provide service through separate and distinct cables and characterizes the relevant property as MCI's entire local network. Mastec, 370 F.3d at 1077 MCI's ability to provide service through its own substitute property does not alter the fact MCI lost the complete use of the cable between MIA and 86M when Mastec severed it. In Lanzo, the Court rejected the same argument Mastec has made:

> [Defendant's] argument…misses the point. AT&T's chattel in the instant case consists of a single fiber optic cable. AT&T was completely deprived of the use of the particular fiber optic cable. The fact that AT&T was able to reroute calls and utilize other fiber optic cables in its system is irrelevant because the chattel in question is not the entire phone system. Therefore, the Schryburt case is inapplicable and there is no basis for denying AT&T loss of use damages with respect to the fiber optic cable.

Lanzo, 74 F. Supp. 2d at 1225.

Lanzo is not alone in this conclusion. In Von Behren, the defendant argued MCI had not suffered any damage because the cable it severed was part of a "ring" system and MCI was able to reroute traffic that would have been carried on the severed cable to other cables in the "ring." The Court rejected this argument, holding that the property in question was the single cable the defendant had severed, not MCI's entire "ring" system, and the fact MCI had rerouted traffic to other cables in its own system was, therefore, irrelevant. 2002 WL 32166535 at 7.

MCI's installing and maintaining spare or protect cables to reroute traffic when a cable is damaged is analogous to an airline which maintains spare aircraft or a bus company which maintains spare buses for use in the event one of their planes or buses is damaged. Both the damaged plane or bus and the spares are part of larger, integrated

fleets. The fact the airline or bus company has a spare as part of its integrated fleet does not alter the fact it has completely lost the use of the plane or bus that was damaged. The fact the airline or bus company used its own spare does not alter the fact it suffered damages by being deprived of the loss of the use of the damaged plane or bus or preclude it from recovering loss of use damages. E.g., Kuwait Airways, 726 F. Supp. at 1397-98 (owner of an aircraft could recover damages for loss of use of an aircraft even though it did not obtain a substitute plane, but rather used one of its own it kept in reserve); Mountain View, 476 N.Y.S.2d at 920-21 (bus company was entitled to damages for loss of use even though it used one of its own spare buses rather than obtaining a substitute).[19]

Moreover, nothing in Schryburt indicates that the Court would have denied loss of use damages had the plaintiffs sought only recovery for that portion of their house or the rooms that were rendered uninhabitable by the roof leak. Cf., Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064, 1069 (Colo. Ct. App. 1990) (affirming damages for loss of use of basement where plaintiffs continued to reside in house); Nisbet v. Yelnick, 464 N.E.2d 781, 785 (Ill. 1st DCA 1984) (same). Because the Schryburt plaintiffs sought damages for the loss of the entire house and not only those portions of the house rendered uninhabitable, loss of use damages were denied. 475 So.2d at 717.

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[19] Under Mastec's reasoning, because MCI's cables are part of an integrated nationwide network, MCI could never recover damages for loss of use of a damaged cable unless that cut left all MCI's customers across the country without service.

Here, MCI is not seeking damages for loss of use of its entire local network, but rather only for the separate, distinct cable Mastec severed. The fact MCI was able to reroute traffic to other within its own network is thus wholly irrelevant to whether MCI lost the complete use of the cable Mastec damaged. Von Behren, 2002 WL 32166535 at 7; Lanzo, 74 F. Supp. 2d at 1225.

IV. FLORIDA LAW DOES NOT LIMIT MCI'S LOSS OF USE DAMAGES TO THE PRE-INJURY VALUE OF THE CABLE MASTEC SEVERED

In the second certified question, the Eleventh Circuit asks whether the pre-injury value of the cable limits MCI's loss of use damages. Florida law does not so limit MCI's damages.

As set forth above, Florida District Courts of Appeal have adopted Restatement of Torts §§ 928 and 931 as the rule applicable to damages to chattels. The Restatement does not limit loss of use damages to the pre-injury value, but rather allows the injured party to recover as loss of use damages "at least the rental value of the chattel…." See Meakin, 209 So.2d at 254 (quoting § 931, cmt. b (1939)); Lanzo, 74 F. Supp. 2d at 1223-24. In Meakin, the Court affirmed the trial court's award of loss of use damages without regard to the value of the plaintiff's vehicle either before or after the repairs. 209 So.2d at 255. In Lanzo, the Court, quoting Meakin and § 928, held that the cost of renting substitute property was the proper measure of damages. The Court did not limit AT&T's recovery to the value of the cable the defendant damaged. Lanzo, 74 F. Supp. 2d at 1225.

MCI was not able to locate a reported Florida decision considering whether § 928 limits loss of use damages to the pre-injury value of the damaged property.

However, in Kopischke v. Chicago, St. P., M. & O. Ry., 40 N.W.2d 834 (Minn. 1950), the Minnesota Supreme Court held that loss of use damages were not so limited under § 928. Id. at 840.

Minnesota, like Florida, has adopted Restatement of Torts § 928 as the rule applicable to damages to chattels. Id. at 838-39. In Kopischke, the defendant contended the verdict was excessive because the amount exceeded the value of the property before the accident. Id. at 840. In rejecting this argument, the Court noted that Section 928 places no ceiling on the amount of recovery. The Court stated that limiting recovery to the value of the plaintiff's truck would deny full compensation for the loss. Id.

Badillo is the sole Florida decision Mastec cited to support its argument MCI's loss of use damages cannot exceed the pre-injury value of its severed cable. Badillo is a minority of one. Badillo is also contrary to the Damage Prevention Act, public policy, and other Florida District Courts of Appeal decisions.

In Meakin, the Second District stated that an injured party is entitled to recover "at least the rental value of the chattel." 209 So.2d at 254 (emphasis added). In Maserati Automobiles, Inc. v. Caplan, 522 So.2d 993, 995-96 (Fla. 3d DCA 1988), the Third District allowed recovery not only of the full purchase price of a car, but also $17,000 for loss of use. In Alonso, the trial court directed a verdict against the plaintiff on the ground he failed to present any evidence of the market value of the damaged lunch truck before and after the accident. 379 So.2d at 687. The District Court of Appeals, however, reversed the directed verdict regarding loss of use damages, holding

that the loss of use claim did not require evidence of the vehicle's market value and that a 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.

The Badillo Court based its limitation of damages on the rationale that "damages for the greater injury (total destruction of the chattel) should exceed those for the lesser (injury to chattel)." Id. at 1069. Stated differently, the rationale is that by being permitted to recover the full market value of the chattel, the plaintiff has been made whole thereby.[20] See Bartlett v. Garrett, 325 A.2d 866, 867 (N.J. Super. Ct. 1974).

Generally, the pre-injury value limitation announced in Badillo is followed in jurisdictions that allow loss of use damages where the property is partially, but not totally, destroyed. Such a limitation fails to distinguish between economic loss and property damage. "It is illogical and unjust to make recovery of this component of economic loss depend on the extent of property damage to the vehicle." Bartlett, 325 A.2d at 867. For example, the owner of a badly used Yugo is no less damaged by the loss of the use of her car than the owner of a new Rolls Royce. Yet the pre-injury value limitation would bar the Yugo owner from recovery of most, if not all of her loss of use damages, whereas the Rolls Royce owner would like be fully compensated. See Fukida, 33 P.3d at 204.

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[20] Moreover, the Fifth District itself was divided in Badillo. In his dissent, Judge Dauksch stated that he would uphold the trial court's award even though the trial court's award exceeded the fair market value of the car. 570 So.2d at 1069-70.

The better view – and the modern trend – is to permit the recovery of loss of use damages even in total destruction cases. See Long v. McAllister, 319 N.W.2d 256, 261 (Iowa 1982) (citing cases); Dobbs, Law of Remedies, § 5.15(2), p. 891 and cases cited therein ("[C]ourts today appear to have very generally allowed rental value claims even in cases of complete destruction of the chattel."). Jurists and legal scholars alike have recognized Florida is among the pioneers in adopting this enlightened approach. See, e.g., Dennis v. Ford Motor Co., 332 F. Supp. 901, 905 (W.D. Pa. 1971); Long, 319 N.W.2d at 261; Brownstein, Loss of Use Damages, 37 Rutgers L. Rev. at 439 n.14 (all citing the Florida District Court of Appeals' Wajay decision).

Under Florida law, the fact that property has been totally destroyed by the negligence of a tortfeasor does not preclude recovery of damages for loss of use:

> There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction.

Wajay, 177 So.2d at 546. Consequently, 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. Id.

In jurisdictions like Florida, courts have concluded that damages for loss of use of partially destroyed property are not limited to the pre-injury value of the chattel on the ground that such a rule is inequitable, unjust and does not permit full compensatory recovery of damages in a large number of cases. "[T]he idea that the market value of

the property is a ceiling on the recovery for loss of use has been firmly rejected in strong opinions of recent years." Dobbs, Law of Remedies, § 5.15(2), p. 892.

Finally, the Florida Legislature enacted the Damage Prevention Act three years after Badillo was decided. In so doing, the sole limitation the Legislature placed on loss of use damages is that they "shall not exceed $500,000 per affected underground facility… ." Fla. Stat. § 556.106(2)(a), (b). There is nothing in § 556.106(2), or any other provision of the Damage Prevention Act, that limits an underground utility's recovery for loss of the use of one of its facilities to the pre-injury value. The Legislature is the master of its statutory creations. Facchina, 735 So.2d at 502. Had the Legislature intended to limit recovery for loss of the use of an underground utility facility to the facility's market value, it could have done so. It did not. The Legislature has, in the Damage Prevention Act, therefore statutorily overruled any Badillo pre-injury value limitation on loss of use damages for injuries to an underground utility facility.

The overwhelming weight of authority is that the amount MCI is entitled to recover as damages for the loss of the use of the cable Mastec severed is not limited by the pre-injury value of the cable. Based on nearly forty years of Florida jurisprudence and the Damage Prevention Act, MCI is entitled to recover its repair costs and the amount necessary to rent a substitute cable or capacity for the time necessary to repair MCI's cable, subject only to the $500,000 limitation in § 556.106(2)(a), (b).

CONCLUSION

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

1. A telecommunications carrier is entitled to damages for the loss of use of a fiber-optic cable even though the carrier was able to reroute traffic that would normally have been carried on the damaged cable to other cables in its own network and presents no evidence that it suffered lost revenue or other pecuniary damages during the time that cable was unavailable. The carrier is entitled to have the trier of fact consider the cost of renting suitable replacement property in determining the amount of such damages.

2. The telecommunications carrier's loss of use damages are not limited to the pre-injury value of the damaged cable. The rental value of replacement property suitable to perform the services normally performed by the damaged cable for the time reasonably necessary to make the repairs is a proper measure of the carrier's loss of use damages, subject to the $500,000 limitation in Fla. Stat. § 556.106(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on July 1, 2004, an original and seven (7) copies of the above and foregoing INITIAL BRIEF OF APPELLANT, together with a copy of the brief on a DOS formatted 3 ½ inch diskette in WordPerfect 5.1 format, compatible with WordPerfect 10, was sent by overnight delivery via FedEx, fully paid, to:

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