IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 04-948

MCI WORLDCOM NETWORK SERVICES, INC.,
Plaintiff-Appellant,

v.

MASTEC, INC.,
Defendant-Appellee,

APPELLANT'S COMBINED BRIEF IN REPLY TO ANSWER BRIEF AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE SUPPORTING APPELLEE

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

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Appellant, MCI WORLDCOM Network Services, Inc. ("MCI"), submits this Combined Reply to the Answer Brief of Appellee Mastec, Inc. ("Mastec") and Response to the Brief of Amicus Curiae Supporting Mastec (the "Amicus").

I. THE CRITICAL UNDISPUTED FACTS SHOW THE UNFAIRNESS OF THE RESULT MASTEC AND THE AMICUS URGE

Mastec and the Amicus repeatedly ignore critical undisputed facts and offer rank speculation regarding the consequences that will purportedly result if this Court holds that the trier of fact can consider the rental value of substitute property in determining the reasonable amount of MCI's loss of use damages. It is therefore imperative to separate these facts and the real issues from the hyperbole:

1. No one disputes that MCI lost the complete use of the voice and data transmission carrying capacity of the cable Mastec severed. Answer Brief at 39; Mastec 11th Cir. Brief, App., at 39; see MCI WORLDCOM Network Services, Inc. v. Mastec, Inc., 370 F.3d 1074, 1076 (11th Cir. 2004).

2. MCI was able to avoid a substantial loss of revenues only because it had, prior to Mastec's severance of the cable, constructed a separate and distinct, spare cable route, as the Eleventh Circuit recognized, "precisely to ward off the possibility of an interruption in service due to the negligence or recklessness of third parties." [R4, D140, pp. 73-74 (¶¶ 7, 10), 122-24 (¶¶ 5-9)]; Mastec, 370 F.3d at 1076; see Amicus Brief at 5 ("[T]he frequency with which cables may be cut demonstrates that MCI must maintain, within its business system, a redundant

configuration in order to provide the telecommunications service it sells to its customers.").

3. MCI paid over $9.65 million to have this spare route available. [R4, D140, p. 124 (¶¶ 10-15)]; see Mastec, 370 F.3d at 1076.

4. MCI is not asking this Court to hold that the rental value of substitute property is the only measure of loss of use damages or to approve the amount of loss of use damages MCI seeks. Rather, MCI simply asks this Court to reaffirm long-standing Florida law that the rental value of substitute property is a measure of loss of use damages MCI is entitled to have the trier of fact consider in determining the reasonable amount thereof.

II. LOSS OF USE DAMAGES WILL NOT GIVE MCI A WINDFALL

Mastec and the Amicus argue that allowing MCI loss of use damages would somehow give MCI a "windfall." This argument ignores the undisputed fact that before Mastec severed MCI's cable, MCI spent $9.65 million to procure a substitute cable to reroute traffic and avoid a public catastrophe that would otherwise occur when a tortfeasor like Mastec severs MCI's cable. [R4, D140, pp. 73-74 (¶¶ 7, 10), 123-24 (¶¶ 5-15)].

Mastec and the Amicus rely heavily on Brooklyn Eastern Dist. Terminal v. United States, 287 U.S. 170 (1932). In that case, the Court addressed the issue of, "[W]hether the full-time hire of an extra boat must be charged to the respondent as

damage flowing from the collision when there was no need of such a boat to keep the business going, and none was in fact used or paid for." Id. at 174 (emphasis added). The Court stated that the loss of use of a boat will not sustain loss of use damages based on the rental cost of a substitute, "unless an award at such a rate can be seen to be reasonable when the disability is viewed in the setting of the circumstances." Id. The Court then went on to describe the circumstances in which such an award would be reasonable:

> The vessel may have been employed in a business of such a nature that for the avoidance of loss there is need of the employment of a substitute. In such circumstances the fair value of the hire may be an element of damage, and this whether the substitute is actually procured or not.

Id.

Here, the nature of the business is such that MCI was required to have a spare cable available to protect the public and to avoid a loss by ensuring continued telephone service in the event of a cable cut. Mastec, 370 F.3d at 1076; Amicus Brief at 5, 14-15. MCI paid over $9.65 million to have that spare cable in reserve to be utilized as a substitute in the contingency of damages to other cables. [R4, D140, pp. 123-24 (¶¶ 10-15)]. The circumstances here are thus precisely those the Brooklyn Eastern Court found would have justified an award of loss of use damages in that case.[1]

[1] The fact MCI obtained the spare, protect cable before the incident does not alter

MCI allocated over $9.65 million it could have used elsewhere to have the spare cable available. Awarding MCI loss of use damages does nothing more than allow MCI to recoup a portion of this up-front protective investment necessitated by the foreseeable negligence of tortfeasors such as Mastec. MCI will not receive a windfall if the trier of fact is allowed to consider the rental cost of substitute property as one measure in determining the amount of MCI's loss of use damages. There would be neither justice nor equity in allowing Mastec and similarly situated tortfeasors to reap the benefits of this large outlay MCI made to enable it to serve the public and provide telecommunications service without interruption. The Cayuga, 5 F. Cas. 329, 331 (C.C.N.Y. 1870), aff'd, 81 U.S. 270 (1871); Meakin v. Dreier, 209 So. 2d 252, 254 (Fla 2d DCA 1968); see also, MCI Initial Brief at 9-10, 24-28.[2]

Mastec and the Amicus also rely on three decisions from the United States District Court for the Southern District of Florida in cases involving severance of the same cable as examples of Florida courts that have stated that allowing MCI

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that result. Brooklyn Eastern, 287 U.S. at 177 ("The result is all one whether the substitute is acquired before or after the event.").

[2] The Amicus raise the specter of MCI's, over time, recovering more that it invested to have the spare cable by filing multiple suits for damage to the same cable. Amicus Brief at 6. This argument is based on pure speculation that this cable will be cut enough times that MCI could recover $9.65 million. With the $500,000 per incident cap on loss of use damages in Fla. Stat. § 556.106(2), MCI would have to win, at a minimum, 20 separate lawsuits in which the jury also awarded MCI the full cap amount.

loss of use damages would be a windfall. Answer Brief at 27-28, 35-36; Amicus Brief at 3-5. This statement in each of these three cases does not come from Florida law, but rather was based on a single decision of a New Jersey federal court in MCI WORLDCOM Network Services, Inc. v. Glendale Excavation Corp., 224 F. Supp. 2d 875 (D.N.J. 2002). Glendale did not, however, hold that a plaintiff can, as a matter of law, be denied the opportunity to present the rental cost of substitute property as a measure of loss of use damages to the trier of fact the reasonable amount of such damages.[3]

In Glendale, both parties sought summary judgment regarding loss of use damages. Id. at 880. The Court denied both parties' motions regarding loss of use and held that while the rental value of substitute property was not the conclusive measure of MCI's loss of use damages, the trier of fact could consider it in determining whether the amount of loss of use damages MCI sought was reasonable. Id. at 880-81. At a minimum, whether MCI's claimed loss of use damages are excessive or constitute a windfall is a question of fact for the trier of fact to decide upon hearing all of the evidence.

[3] The Morris Court was the first of the three to utter this statement. The sole case it relied upon in so doing was Glendale. The Krantz and Lind opinions, both of which were authored by the same district judge, in turn relied upon Morris. See Answer Brief at 27-28; Amicus Brief at 3-4. All three Miami federal court cases thus turn on a misinterpretation of what the Glendale Court actually held.

III. MCI SUFFERED ACTUAL, COMPENSABLE DAMAGES REGARDLESS OF WHETHER IT SHOWS LOST REVENUE OR OTHER PECUNIARY LOSS

A. The Fact MCI Continued To Serve The Public Through Spare, Protect Cables Does Not Preclude Loss Of Use Damages

Mastec and the Amicus claim that because MCI continued to provide service to the public through spare cables it had installed prior to the cut, MCI incurred no lost profits, therefore suffered no damages from losing the use of its cable. This argument overlooks the crucial fact that MCI was able to continue to serve the public and avoid interruption of its business only because it had invested over $9.65 million to have a spare cable available.

The fact MCI was able to use other cables to perform the function of the cable Mastec severed does not mean MCI suffered no damages from being deprived of the use of the cable Mastec severed. Nor does it mean MCI should not be allowed to have the trier of fact consider the rental value of substitute property in determining the amount of such damages.[4] MCI's ability here to continue to

[4] E.g., The Cayuga, 5 F. Cas. 329, 331 (C.C.N.Y. 1870), aff'd 81 U.S. 270 (1871) (rental cost of substitute was a proper measure of loss of use damages even though the shipowner used its own substitute ferry and continued to serve the public without interruption); Kuwait Airways Corp. v. Ogden Allied Aviation Services, 726 F. Supp. 1389, 1390-96 (E.D.N.Y. 1989) (rental cost of substitute could be a measure of loss of use damages even though the airline was able to accommodate all passengers who would have flown on the damaged plane on another plane it already owned); Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S. 2d 918, 919-21 (N.Y. Sup. App. Div. 1984) (rental cost of substitute was proper measure of loss use damages even though the bus company continued to serve the public with another bus it already owned).

provide service to the public through a spare cable is no different from the shipowner, the airline, or the bus company in The Cayuga, Kuwait Airlines and Storms. All continued to serve the public by using spare property they already owned. All were, nonetheless, still entitled to have the trier of fact consider the rental cost of a substitute in determining the amount of their loss of use damages.

Moreover, while MCI was able to continue serving the public by using the separate, spare cables it had installed precisely to ward off service interruptions, the loss of the use of the cable Mastec severed did compromise MCI's network and place it in extreme jeopardy. In a Report and Order issued August 19, 2004, the Federal Communications Commission ("FCC") described a DS-3[5] as "a communications highway" that has been put in place to provide services essential to Homeland security and our Nation's economy by carrying traffic ranging from simple alarm and control circuits to voice circuits, to radio and television programs, to circuits carrying ATM or credit card transactions, to FAA flight control circuits, to Department of Defense circuits to circuits transferring billions of dollars from one Federal Reserve Bank to another, to circuits critical to the operation of the stock and bond markets. In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, ET Docket

[5] The DS-3 is the common denominator throughout the communications industry as a measure of the traffic-carrying capacity of a telecommunications cable. Id. at 128.

No. 04-35, FCC 04-188 (Aug. 19, 2004) ("FCC Report") at ¶¶ 127, 136. The actual impact of a DS-3 failure "is that a communications highway that is a part of this nation's communications infrastructure is no longer available." Id.

Some DS-3's are built strictly as protection in the case of the failure of another DS-3. Id. However, "When a DS-3 is part of a protection scheme such as a SONET ring, it will frequently switch to a protect-path within seconds of a failure in the primary path. The communications services being provided over the DS-3 will not be immediately effected, but they will no longer be protected." Id. at ¶ 134 (emphasis in original). The FCC has thus determined that a cable cut like that at issue here has a significant impact on the nation's vital telecommunications infrastructure which continues until the cable is repaired, even though the traffic carried on that cable switches to a protect path within seconds.[6]

B. Florida Law Does Not Distinguish Between Commercial And Pleasure Property In Determining The Availability Or Measure Of Loss Of Use Damages

Mastec contends that Florida law does not allow loss of use damages for commercial, revenue-generating property unless the plaintiff also suffers lost

[6] The United States Supreme Court has repeatedly emphasized that the FCC's judgment regarding how the public interest is best served is entitled to substantial deference. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981). This Court has similarly held that the interpretations of administrative agencies which have developed special expertise in the areas they are charged to administer are entitled to great judicial deference. E.g., Laborers' Int'l Union v. Greater Orlando Aviation Auth., 869 So. 2d 608, 610 (Fla. 2004), Raffield v. State, 565 So. 2d 704, 706 (Fla. 1990).

profits or some other pecuniary loss. Contrary to Mastec's assertion, Florida courts have found damages for loss of use of damaged commercial property or property used for business even though there were no lost profits awarded.[7]

Contrary to Mastec's assertion, Cook v. Packard Motor Car Co. of New York, 92 A. 413 (Conn. 1914), does not support its argument. While the Cook Court did, as Mastec contends, state that the character of the use of the property will effect the amount of loss of use damages, the Court made abundantly clear that the character of the use, i.e., whether for pleasure or for profit, did not effect the entitlement to such damages.

> We fail to see why the character of the intended use should determine the right to a recovery . . ..[8]
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> . . .

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[7] See, e.g., AT&T v. Lanzo Constr. Co., 74 F. Supp. 2d 1223, 1225 (S.D. Fla. 1999) (telecommunications cable); A. Mortellaro & Co. v. Atlantic Coast Line R.R., 107 So. 528 (Fla. 1926) (automobile delivery truck); Maryland Casualty Co. v. Florida Produce Dist., Inc., 498 So. 2d 1383, 1384 (Fla. 5th DCA 1986) (semi-trailer); Meakin, 209 So. 2d at 255 (vehicle used for pleasure "and some business"); Alonso v. Fernandez, 379 So. 2d 685, 687 (Fla. 3d DCA 1980) (lunch truck); Wajay Bakery, Inc. v. Carolina Freight Carriers Corp., 177 So. 2d 544, 546 (Fla. 3d DCA 1965) (commercial bakery equipment). The plain language of Meakin quoted above disposes of Mastec's argument that Meakin applies only to the loss of use of a pleasure vehicle. Contrary to Mastec's assertion, there is also absolutely no statement or even indication in Meakin that the plaintiff was indigent or otherwise unable to afford to rent a substitute vehicle.

[8] This language, in fact, is a part of the same sentence Mastec quoted at the bottom of page 9 and the top of page 10 of its Answer Brief. Mastec, however, selectively omitted this language when it quoted that sentence.

> [I]t is equally clear that such considerations as these [the character of the use] effect only the amount of compensatory damages which ought to be awarded in this case, and do not touch the underlying question whether the plaintiff is entitled to compensatory damages as far as they can be ascertained. We think there can be no doubt on this point. An automobile owner, who expects to use his car for pleasure only, has the same legal right to its continued use and possession as an owner who expects to rent his car for profit; and a legal basis for substantial recovery, in the case of a deprivation of the use of the car, is the same in one case as in the other. . . .

92 A. at 415-16 (emphasis added).

C. Loss Of Use Damages Are Not Only To Compensate For "Inconvenience," But Also For Lost Opportunity Costs

Mastec argues loss of use damages measured by rental value are available only where the property is for pleasure because the loss of use of such property involves a unique inconvenience to the owner. See Answer Brief at 8. This argument ignores Florida decisions holding that damages for "inconvenience" are separate and distinct items for which recovery is available. See North American Van Lines, Inc. v. Roper, 429 So. 2d 750, 752 (Fla. 1st DCA 1983) (allowing for loss of use damages measured by amount to rent a similar article, but finding no authority for recovery for "inconvenience"); cf. Nitram Chemicals, Inc. v. Parker, 200 So. 2d 220, 227-28 (Fla. 2d DCA 1967) (damages for temporary nuisance include loss of use as measured by rental value; inconvenience is a separate item of special damages).

Moreover, loss of use damages exist to compensate for the deprivation of the

owner's right to use its chattel as the owner sees fit. Kuwait Airways, 726 F. Supp. at 1396. "This right has a value, and its deprivation necessarily entails what economists call 'opportunity cost.'" Id. "Any particular allocation of a resource necessarily costs the owner the opportunity to put that resource to other, competing uses. ..." Id. (emphasis in original). Here, MCI was deprived of the opportunity to use the cable Mastec severed in the manner MCI desired. Loss of use damages simply compensate MCI for a portion of that lost opportunity.

D. The Admiralty And Collateral Source Cases On Which Mastec And The Amicus Rely Are Inapposite

Mastec seeks to rely on Brooklyn Eastern and other admiralty cases to argue that where the property at issue is commercial property, loss of use damages are not allowed absent lost profits. Answer Brief at 14-19. That line of cases, however, does not apply where the plaintiff uses a spare boat (or in this case a spare cable) to continue to serve the public and thereby avoid lost profits.[9]

The Amicus also cite a number of collateral source rule cases. Amicus Brief at 11-12. The *sine qua non* of those cases was that the plaintiff received payments,

[9] E.g., The Favorita, 85 U.S. 598, 603-04 (U.S. 1873); The Cayuga, 81 U.S. 270, 278-79 (U.S. 1871) (adopting the reasoning of the Circuit Court set forth at 5 F. Cas. 329, 331); The Providence, 98 F. 133, 135-36 (lst Cir. 1899); The Emma Kate Ross, 50 F. 845, 846-48 (3d Cir. 1892); The Mayor, 36 F. 716, 717-18 (S.D.N.Y. 1888); see Brooklyn Eastern, 287 U.S. at 175-76 (where the nature of the business is such that a spare boat is kept in reserve to avoid a loss if other vessels are damaged, the fair value of the hire of a substitute can be an element of loss of use damages regardless of whether the substitute is actually procured).

or forgiveness, of medical bills from another person or entity. That did not occur here. Rather, MCI was able to avoid substantial lost profits only because MCI itself paid over $9.65 million to have a spare cable to restore traffic in the event of an outage. "MCI should not be penalized for having a separate infrastructure in place to respond to emergency situations." MCI WorldCom v. Kramer Tree Specialists, 2003 WL 22139791 (N.D. Ill. Aug. 15, 2003) at 2.

IV. THE RENTAL VALUE OF SUBSTITUTE PROPERTY IS A PROPER MEASURE OF MCI'S LOSS OF USE DAMAGES

Florida courts have not only rejected Mastec's argument that loss of use damages are not available for commercial property absent lost profits (Mortellaro, 107 So. at 529 (affirming the dismissal of a "loss of business" claim, but holding that loss of use based on the rental cost of a substitute would have been proper); Meakin, 209 So. 2d at 255 (plaintiff was entitled to "recover as damages for the loss of the value of the use, at least the rental value of the chattel," even though no evidence of any pecuniary loss)), they have expressly rejected the use of lost profits in measuring damages for loss of use of business property in favor of actual or theoretical rental value. Maryland Casualty, 498 So.2d at 1384 (citing Mortellaro and Meakin). This is consistent with courts from other jurisdictions which have also held that loss of use damages are better measured by the rental

value of substitute property than lost profits.[10]

Contrary to Mastec and the Amicus' assertions, MCI WORLDCOM Network Services, Inc. v. OSP Consultants, Inc., 585 S.E. 2d 540 (Va. 2003) ("OSP Virginia"), is distinguishable. Here, MCI offered evidence that the spare capacity built into MCI's network in Miami in the form of the redundant side of the ring is maintained specifically for restoration purposes and not for the general use of its business. [R4, D140, pp. 8, 73-74 (¶¶ 7, 10), 123-24 (¶¶ 5-10)]. Mastec and the Amicus cite no evidence that MCI had this spare capacity for the general use of its business. This case is thus like the "spare boat" cases such as The Cayuga. Mastec can therefore find no support in OSP Virginia.

V. MCI WAS COMPLETELY DEPRIVED OF THE USE OF ITS PROPERTY

Mastec cites Schryburt v. Olesen, 475 So. 2d 715 (Fla. 2d DCA 1985), for the proposition that because MCI did not lose the use of its entire local ring, MCI cannot recover damages for loss of use. Mastec's argument misses the point. MCI is not claiming damages for the loss of the entire ring, but rather only the cable that was damaged. The relevant property is therefore that single MCI cable Mastec

[10] E.g., Pusey & Jones Co. v. Combined Locks Paper Co., 255 F. 700, 705 (E.D. Wis. 1918); Hippard Coal Co. v. Illinois Power & Light Corp., 45 N.E. 2d 701, 705 (Ill. App. 1942); Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W. 2d 71, 75-76 (Iowa 1967); Knaus Truck Lines v. Commercial Freight Lines, 29 N.W. 2d 204, 210 (Iowa 1947); Commonwealth v. Nantz, 421 S.W. 2d 579, 580 (Ky. App. 1967); National Dairy Products Corp. v. Jumper, 130 So. 2d 922, 923 (Miss. 1961); Kunkel v. Cohagen, 39 N.W. 2d 609, 612 (Neb. 1949).

severed. Lanzo, 74 F. Supp. 2d at 1225[11]; see also MCI WORLDCOM Network Services, Inc. v. Von Behren Elec. Co., 2002 WL 32166535 (N.D. Ga. May 21, 2002) at 7.

Indeed, Mastec itself defines the relevant property as only the cable it severed when attempting to limit MCI's loss of use damages to the pre-injury value of the damaged property. Answer Brief at 7, 47-48. However, Mastec wants the relevant property to be the entire ring when determining whether MCI lost the complete use of its property. Answer Brief at 38-40. Mastec cannot have it both ways.[12]

CONCLUSION

Mastec and the Amicus' arguments that MCI should not be allowed to have the trier of fact consider the rental value of substitute property as a measure of MCI's loss of use damages ignore the undisputed facts and are based purely on unjustified speculation concerning a "potential windfall" (see Amicus Brief at 3 (emphasis added)) that might result if the trier of fact were allowed to consider the

[11] The district court here found that MCI's system here is similar to the AT&T system in Lanzo. [R4, D165, pp. 9-10].

[12] Mastec also argues that the value of the cable should only be $4,840.00, the alleged cost of 1,000-foot patch cable MCI spliced into the line to repair the damage Mastec had caused. MCI offered evidence that the value of the cable was, in fact, over $8.2 million when Mastec severed it. [R-140-124 (¶ 15)]. This is thus not an issue that should have been decided on summary judgment as the district court did.

rental cost of substitute property in determining the amount of those damages. MCI submits that speculation wholly contrary to the undisputed facts in the record is an improper basis to depart from long-settled Florida law as Mastec and the Amicus urge. MCI, therefore, respectfully requests that the Court answer the Eleventh Circuit's question as suggested in MCI's opening brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on October 8, 2004, the above and foregoing APPELLANT'S COMBINED BRIEF IN REPLY TO ANSWER BRIEF AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE SUPPORTING APPELLEE was sent via e-mail to e-file@flcourts.org and an original and seven (7) copies of same were sent via Federal Express overnight delivery, to:

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I further certify that on October 8, 2004, true and correct copies of the above and foregoing APPELLANT'S COMBINED BRIEF IN REPLY TO ANSWER BRIEF AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE SUPPORTING APPELLEE were sent by e-mail and by U.S. Mail, with proper postage thereon fully paid, to:

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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 in a proportionally spaced typeface using Microsoft Word 2000 in 14 pt. Times New Roman type style.

/s/
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