

**MCI WORLDCOM NETWORK SERVICES, INC., Appellant, vs. MASTEC,  
INC., Appellee.**

**SUPREME COURT OF FLORIDA**

**995 So. 2d 221, July 10, 2008**

**The following is an excerpt from the opinion of Justice Lewis who concurred in the result (denying the loss of use claim) but dissented from the reasoning of the majority opinion. Justice Lewis's opinion has been sharply redacted, edited and excerpted by Michael LaPlaca, Esq., LaPlaca Law PC, Rockville, MD for the sole use and edification of clients of LaPlaca Law, PC. and readers of Auto Rental News.**

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LEWIS, J.

I dissent with regard to the majority's reasoning . . . . because the majority incorrectly concludes--contrary to well-established Florida law--that evidence of lost profits or revenue has now become part of the analysis, and is apparently required as a predicate for loss-of-use damages for the personal property at issue here. The majority reaches this result without reliance on a single Florida case.

I would . . . . hold that loss-of-use damages are, and always have been, recoverable under Florida law for injury to personal property. I find no basis to exclude fiber-optic cable from this category, and Florida law has never required evidence of loss of revenue, loss of profits, or other similar injury as a condition precedent to such recovery.

This general loss-of-use damage law applies when personal property is damaged but not totally destroyed. One might imply from the majority opinion that the Court has now excluded a damaged individual cable that is part of a larger network from existing loss-of-use damage law. However, there is no express statement in the majority opinion that such property is excluded from the general category in which all other forms of personal property are considered in Florida, *nor is there any reason provided for this exclusion*. The majority diverges off into a tangential discussion of proof of loss, revenue, and profits, which are not, in my view, controlling in consideration and application of the general rule of law in Florida with regard to damage to personal property and loss-of-use damages. The majority has created at least an impression or appearance that the elements for evaluation or the measurement of loss-of-use damages are now somehow different in this particular case without addressing or applying the available, relevant, and controlling Florida law in this area.

I would not exclude cable from the general category of personal property to which general Florida loss-of-use damages law applies. I see no distinction with any significant difference between an individual cable and other types of personal property, and neither party nor the majority provides any sound distinction or test to separate any particular personal property into a distinct, singular category to which general Florida law on this issue does not

apply. In my view, there are various and multiple types of personal property that are singular or individual in nature, but may become integrated into or within a system or network of service, that do not and should not receive different treatment (e.g., a single bolt within a larger network system, a motor-vehicle taxi within a taxi-transport system, an individual aircraft integrated into an airline-transport system, an individual computer integrated into a larger technology system, etc.). These individual components should not receive different treatment than other types of personal property. Damage to individual and singular items of personal property should receive *consistent treatment* under Florida law with regard to the general issue of loss-of-use damages (and this has been the case until today)--even if the personal property is connected within a larger system or network.

The Restatement (Second) of Torts, which the majority correctly recognizes as governing actions that involve loss of use damages in Florida, states:

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

We recognized the validity of the above-quoted Restatement (Second) provision when we approved an amended standard jury instruction that included an instruction for loss of use in cases involving damage to personal property. *See Standard Jury Instructions (Civil Cases)*, 290 So. 2d 49 (Fla. 1974); *see also* Fla. Std. Jury Instr. (Civ.) 6.2(h) (instructing the jury to take into consideration any loss (claimant) sustained . . . by being deprived of the use of his property during the period reasonably required for its replacement or repair. This Court and all Florida district courts of appeal follow this Restatement (Second) principle. *See, e.g., Badillo v. Hill*, 570 So. 2d 1067, 1068 (Fla. 5th DCA 1990), *cited with approval in, Fla. Drum Co. v. Thompson*, 668 So. 2d 192 (Fla. 1992) (Florida appellate courts follow the Restatement (Second) of Torts section 928 when assessing loss-of-use damages); *Travelers Indem. Co. v. Parkman*, 300 So. 2d 284, 285 (Fla. 4th DCA 1974) (same); *Meakin v. Dreier*, 209 So. 2d 252, 253-54 (Fla. 2d DCA 1968) (same); *Airtech Serv., Inc. v. MacDonald Constr. Co.*, 150 So. 2d 465, 466 (Fla. 3d DCA 1963) (same); *McMinis v. Phillips*, 351 So. 2d 1141, 1141 (Fla. 1st DCA 1977) (applying Restatement (Second) of Torts section 928). However, neither the comments to this section of the Restatement (Second), the comments to Florida's standard jury instruction, nor any of the existing Florida decisions state that a loss of profits or loss of revenue is an essential element for the recovery of loss-of-use damages.

I write to voice my concern with the majority's broad reasoning that appears to now inject into Florida law a requirement that a showing of lost profits or revenue is a prerequisite to the recovery of any loss-of-use damages in Florida. The analysis of the majority is disconcerting because it relies on non-Florida cases which, in my view, are contrary to the well-established law of this jurisdiction.

I find no support in Florida jurisprudence for the proposition that an owner of damaged personal property must demonstrate that the damage has resulted in an actual loss of profits or revenue as a condition precedent to recovery of loss-of-use damages. Rather, Florida precedent time and again has held, consistent with the Restatement (Second), that recovery for the loss of use of an item of personal property is proper when it is demonstrated that the personal property has been harmed by the conduct of another but has not been totally destroyed. This is a

completely separate issue from whether loss of profits or revenue has been or can be established. See *AT&T Corp. v. Lanzo Constr. Co.*, 74 F. Supp. 2d 1223 (11th Cir. 1999); *Merrill Stevens Dry Dock Co. v. Nicholas*, 470 So. 2d 32 (Fla. 3d DCA 1985); *Ft. Lauderdale Transfer & Rigging, Inc. v. Callahan Motor Co., Inc.*, 446 So. 2d 138 (Fla. 4th DCA 1983); *Meakin v. Dreier*, 209 So. 2d 252 (Fla. 2d DCA 1968); *Airtech Serv., Inc. v. MacDonald Constr. Co.*, 150 So. 2d 465 (Fla. 3d DCA 1963). Moreover, this Court has held that even where damages for lost profits may not be recoverable due to the doctrine of avoidable consequences, an owner may still be entitled to loss-of-use damages measured by the rental value of a substitute item. See *A. Mortellaro & Co. v. Atl. Coast Line R.R. Co.*, 91 Fla. 230, 107 So. 528 (Fla. 1926). In my view, the extra-jurisdictional cases upon which the majority relies--*Brooklyn Eastern District Terminal v. United States*, 287 U.S. 170, 53 S. Ct. 103, 77 L. Ed. 240 (1932); *The Cayuga*, 5 F. Cas. 326, F. Cas. No. 2535 (E.D.N.Y. 1868), *aff'd*, 5 F. Cas. 329, F. Cas. No. 2537 (C.C.E.D. N.Y. 1870), *aff'd*, 81 U.S. (14 Wall.) 270, 20 L. Ed. 828 (1871); *Southwestern Bell Telephone Co. v. Harris Co.*, 353 Ark. 487, 109 S.W.3d 637 (Ark. 2003); and *MCI Worldcom Network Services, Inc. v. OSP Consultants, Inc.*, 266 Va. 389, 585 S.E.2d 540 (Va. 2003)--do not reflect the law of Florida and, more importantly, *are actually contrary to Florida law*. Therefore, these non-Florida cases should not provide the basis for our decision.

Thus, while the majority may ultimately arrive at the correct result this case, the supporting legal analysis is, in my view, severely flawed, misdirected, and contrary to longstanding Florida law. This case should be resolved within, and the majority should address, the *measure* or *extent* of the loss-of-use damages, and not by eliminating that category of damages from Florida law.