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IN THE IOWA SUPREME COURT
23–0239

THE UNIVERSITY OF IOWA, BOARD OF REGENTS, and STATE OF IOWA,

Counterclaim Defendants–Appellants,

vs.

MODERN PIPING, INC.

Intervenor/Plaintiff–Appellee.

Appeal from the Iowa District Court
For Johnson County, EQCV078007
The Honorable Chad A. Kepros, District Judge

APPELLANTS' AMENDED FINAL REPLY BRIEF

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ARGUMENT

I. The temporary injunction delayed but did not extinguish Modern Piping's ability to arbitrate a claim against the University for breaching the partial-occupancy clause, so Modern Piping cannot recover unjust enrichment damages for that breach in a wrongful-injunction claim.

In the principal brief, the University began by explaining that the temporary injunction against the AAA "*delayed but did not extinguish* Modern Piping's ability to arbitrate disputes," including the alleged breach of the partial-occupancy clause. Appellant Br., at 15 (emphasis added). Modern Piping took offense to that statement, calling it "argument, not fact," which was "improper" for the fact section. Appellee Br., at 25. But it *is* a fact—an undisputed fact—and Modern Piping's recoil sums up this entire case.

Modern Piping's theory for obtaining over $12.7 million in disgorgement-of-profit damages (a remedy that would not have been available through a breach-of-contract claim) was based on the premise that, because of the temporary injunction, Modern Piping lost its ability to arbitrate against the University for a breach of the partial-occupancy clause. But that is wrong—the temporary injunction did no such thing.

The University sought to prevent the Hancher arbitration proceedings from encompassing new disputes over the hospital, which were beyond those covered by the prior motion to compel

arbitration. (App. Vol. I, at 9–13). That's what the district court's injunction ordered—the AAA was temporarily enjoined from arbitrating the Children's Hospital dispute. (App. Vol. I, at 14–15). The injunction affected the *timing of* arbitration. It did not alter any substantive contract obligations.

Modern Piping was delayed in being able to arbitrate a breach-of-contract claim with the AAA, if it had wanted to do so (though there was no injunction prohibiting arbitration with someone other than the AAA).[1] But during the temporary injunction, Modern Piping could have started the AAA dispute-resolution process by submitting its breach claim to the Design Professional. (Tr. Vol. 2, 105:1-12). And, most important, when the temporary injunction lifted, Modern Piping was free to arbitrate a breach of the partial-occupancy clause with the AAA. (Appellee Br., at 33; Tr. Vol. 2 123:5-9). In other words, Modern Piping had the ability to arbitrate the very dispute that formed the basis for its

[1] Modern Piping incorrectly states that only AAA had jurisdiction over the dispute. Appellee Br., at 46. The contract instead states: "If the parties mutually agree, the arbitration may be carried out in accordance with the Construction Industry Arbitration *Rules of* the American Arbitration Association." (App. Vol. III, at 137) (emphasis added). So the parties agreed that the AAA's *rules* govern the arbitration, not that AAA itself had exclusive jurisdiction to arbitrate. And Justice Streit agreed that another arbitrator could have arbitrated the dispute. (Tr. Vol. 2, 120:22–121:6).

wrongful-injunction damages—which necessarily means that the temporary injunction did not cause the "unjust enrichment" that was awarded by the jury. The breach of contract caused the unjust enrichment, and if Modern Piping wanted to sue for breach of contract, it could have done so.

If that were not already clear as a matter of law, Modern Piping's expert witness, Justice Streit, crystallized that point in his testimony. When asked about the effect that the temporary injunction had on Modern Piping's ability to arbitrate the partial-occupancy breach with the University, Justice Streit stated that "[w]ell, they—by not arbitrating the dispute on the temporary occupancy, it *delayed* Modern Piping from being paid what they were supposed to be paid for the temporary occupancy." (Tr. Vol 2 108:8-19 (emphasis added)).

"Delayed" not "extinguished." As Justice Streit testified, Modern Piping "could have submitted the early occupancy" claim in the very arbitration proceeding that occurred after the temporary injunction was dissolved (Tr. Vol. 2, 123:5-9), and the AAA "would have determined the damages or costs of the early occupancy." (Tr. Vol. 2, 112:14-20). When asked again whether Modern Piping could have brought its claim for breach of the partial-occupancy clause in arbitration after the temporary injunction was dissolved, Justice

Streit said “Yes, but they were not required to.” (Tr. Vol. 2, 123:5-9).

That sentiment—that they could have brought the claim but did not *have to*—is repeated in Modern Piping’s brief, and it shows that the company misses the point. Modern Piping of course never had to sue the University for breach of the partial-occupancy clause. Suing is always a choice. But the fact that Modern Piping still had that choice—that it could have sought full damages in the AAA arbitration—shows, as a matter of fact and law, that these unjust enrichment damages were not caused by the temporary injunction. The breach caused the unjust enrichment; the remedy for a breach of contract is to sue for breach of contract; and that remedy still existed in full after the temporary injunction was lifted.

Modern Piping acknowledges as much, but then says that the inability to arbitrate the breach of the partial-occupancy clause during the temporary injunction came at a “critical time.” Appellee Br., at 46. But there is no evidence that the value of the partial occupancy (the damages from the breach) changed because Modern Piping could not immediately arbitrate the dispute with the AAA. So Modern Piping cannot claim that the “delay in adjudication rendered the outcome meaningless.” *Id.*

Rather, Modern Piping put a value on the partial occupancy—$2.5 million—and provided no evidence that the temporary

injunction prohibited it from seeking that amount in a AAA arbitration after the injunction lifted. (Tr. Vol. 2, 45:12-46:1). Again, Justice Streit admitted as much. (Tr. Vol. 2, 123:5-9). And when Modern Piping's owner and project manager, Michael Shive, was asked why Modern Piping did not add the breach of the partial-occupancy clause to the AAA arbitration, which occurred after the injunction was lifted, Shive said "I can't answer that question." (Tr. Vol. 2, 61:1-13.)

Also, Modern Piping has never said that it would have asked the AAA arbitration panel to enjoin the University from occupying the partially completed hospital if the temporary injunction would not have been entered. Instead, Shive stated that he just wanted the University to pay for that early occupancy. (Tr. Vol. 79:11-14). And Modern Piping's expert witness, Chad Salsbery, stated: "In my opinion, MPI would have proposed a bid estimate in April 2016 in the amount of $2,502,068 to account for its increased risk related to the Defendant's early occupancy of the UICH." (Dkt. 280, Trial Exh. 18, at 4). In other words, this was about money, and Modern Piping had every ability to seek those money damages for the breach of contract in arbitration. The temporary injunction did not change that.

Modern Piping also tries to frame this as a mitigation-of-damages issue, but that too is wrong. Because Modern Piping did

not permanently lose its ability to arbitrate against the University for breach of the partial-occupancy clause, the temporary injunction did not cause any damage in that regard, so there is no damage to mitigate.

It was a similar scenario in *Shadle v. Borrusch*, 125 N.W.2d 507, 510 (1963). In that case, the injunction dictated the timing in which the tenant could harvest his crop, but it did not entirely prevent him from doing so; he just had to harvest the landlord's section first. For that reason, this Court said that the landowner (who had obtained the injunction) was not liable for the corn that the tenant left rotting in the field.

Of course, like in this case, the tenant was not *required* to ever harvest his corn; he was free to leave it rot in the field, just as Modern Piping was free not to sue the University in arbitration after the injunction was lifted. But the fact that the tenant had that choice—that the temporary injunction delayed but did not eliminate his ability to harvest his corn—meant that the tenant could not recover damages in a wrongful-injunction action for the corn left in the field. True, the tenant could not have harvested the corn immediately when he wanted to; just as Modern Piping could not have litigated the breach issue in a AAA arbitration as soon as it might have wanted to. But that did not make the landlord responsible for the tenant's choice to leave the corn in the field, just

as it does not make the University responsible for Modern Piping's failure to file the arbitration action once the injunction lifted.

Modern Piping also argues that it should be able to sue for unjust enrichment (through a wrongful-injunction theory) because unjust enrichment damages are not available in a breach-of-contract action. But that is not an argument of legal significance; it is an explanation for why Modern Piping keeps trying to put its remedial square peg in a round hole. Modern Piping could have sued in arbitration for breach of the partial occupancy clause—an option that was *not* foreclosed by the temporary injunction—but it saw a larger opportunity. Modern Piping now claims entitlement to profits it never would have earned or been owed. That was creative, but not legally proper.

Finally, Modern Piping conflates witness testimony and questions of law. Modern Piping claims, for example, that the "trial evidence showed that without the wrongful inunction, the University could not have partially occupied the Hospital and opened to patients in February 2017, eight months earlier than the absent injunction." Appellee Br., at 40. That is not tenable—the injunction did not affect partial occupancy at all. The temporary injunction's terms dictate its effect. *Shadle*, 125 N.W.2d at 510. And the face of the injunction did not say anything about partial

occupancy; it merely temporarily delayed arbitration over any alleged breach of the Children's Hospital construction contract.

The University would go on to breach that agreement through its partial occupancy (as alleged by Modern Piping and accepted for purposes of this appeal), but the breach was not sanctioned by the injunction. The eventual arbitration over that breach was delayed, but Modern Piping's only complaint was that it was not paid for that breach (i.e., that it was not compensated for the partial occupancy). Again, the injunction did not foreclose payment for that breach, it just delayed it.

Modern Piping also says that "the purpose of the injunction was to enable the University to occupy the Hospital sooner." Appellee Br., at 41. But if that was its purpose, the injunction would have said so. Instead, the purpose of the injunction is clear on its face: keep AAA from adding the dispute over the Children's Hospital to the Hancher arbitration proceeding. (App. Vol. I, at 14–15). So the injunction delayed arbitrating the Children's Hospital disputes, that is all. And the only effect of that delay was to make it so that Modern Piping would get paid for any breach later than it otherwise might have.

The lone piece of evidence Modern Piping points to support its purpose argument is an affidavit of the University's senior vice president for finance and operations, who urged the district court

to enjoin the then-pending arbitration because it would "cause great or irreparable harm to the University." Appellee Br., at 41. But the affidavit says nothing about partial occupancy. (App. Vol. I, at 12–13). And the arbitration the University employee was referring to is the very arbitration that eventually took place, and which compensated Modern Piping for its damages, proving that the temporary injunction only changed the timing of arbitration.

Modern Piping also says that, after the district court issued the temporary injunction, "the University 'shut down' communications on the topic" of paying Modern Piping for partial occupancy. Appellee Br., at 31. But that was a choice by the University, not a dictate of the temporary injunction, so that could not be evidence of any damage that the injunction caused. And perhaps that is the problem: Modern Piping itself was confused and remains confused about what the temporary injunction did. Consider this exchange at trial between the University's counsel and Modern Piping's Shive:

> Q: Okay. I guess my first question to you, sir, if this was so important to Modern Piping, why didn't you arbitrate this particular contract provision with everything else in the fall of 2017?
>
> A: I couldn't get a design professional to force it to arbitration, because the injunction shut off any communication on change orders with the University of Iowa and myself.

> Q: Tell me the date you submitted this issue to the design professional.
>
> A: I did not submit this to the design professional.

(Tr. Vol. 1, 101:19–102:4).

What frustrated Modern Piping was that the University would not talk to them. Shive repeated it time and again on the stand. But communicating was neither prohibited by the injunction nor required by the contract.[2]

The injunction was narrow: it temporarily enjoined the AAA from conducting an arbitration between the University and Modern Piping over the dispute at Children's Hospital. It did not prohibit the parties from entering into a partial-occupancy agreement; it did not void the partial-occupancy clause of the contract such that the University could move in without breaching the agreement; it did not prohibit the University from talking with Modern Piping; it did not prohibit Modern Piping from submitting change orders to be paid for additional labor caused by partial occupancy; it did not prohibit Modern Piping from immediately compelling arbitration with an organization other than the AAA; and it did not prohibit Modern Piping from ultimately arbitrating the breach of the partial-occupancy clause with the AAA.

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[2] And Shive admitted that he was wrong; they did in fact have conversations about, and received payments for, change orders. (Tr. Vol. 2, 39:20–43:9).

Again, the only effect of the temporary injunction was to delay arbitration, and that delay did not permanently alter Modern Piping's remedies. Those remedies remained intact, and so the University was not unjustly enriched. The only damage to Modern Piping was the costs it incurred in dissolving the injunction.

Because Modern Piping cannot show causation, it grasps at its $12.7 million verdict by contending that the "University did not preserve error on most of its 'causation' argument." Appellee Br., at 36. That is incorrect. In its motion for directed verdict, the University stated that Modern Piping did not present "substantial evidence to show that it conferred a benefit on the University of Iowa *in compliance* with the wrongful injunction"—i.e., that the temporary injunction did not cause the unjust enrichment damages. (App. Vol. I, at 116).

The University repeatedly explained the deficiencies in Modern Piping's causation argument. The University explained that "Justice Streit conceded that the University and Modern Piping had agreed to arbitrate contract disputes, including the contract provision governing the partial use occupancy agreement" and that, despite the delay in arbitration, Modern Piping could have gone to arbitration on the partial-occupancy dispute. (App. Vol. I, at 118). The University renewed those arguments in its brief in support of its motion notwithstanding the verdict. (App. Vol. I,

at 153–54). The argument is the same now as it was then: the temporary injunction did not cause the alleged unjust enrichment (here, profits) that the University earned during the partial occupancy. The alleged breach of contract did, and the Modern Piping did not lose the ability to sue for that breach in arbitration.

What Modern Piping means when it says that the University did not preserve error "on most of its 'causation' argument," Appellee Br., at 36, is that, on appeal, the University offers "additional ammunition for the same argument," which is commonly done and accepted by this Court. *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016) (holding that party preserved argument on applicability of Code section despite party not discussing it below, as party merely added additional weight to its same argument). If it were otherwise—if error preservation prohibited parties from providing additional reasoning or, as this Court has put it, from providing "additional ammunition for the same argument"—then there would be no need for new briefing on appeal; this Court could simply review the record exactly as it is. But that is not what is required because that would serve no purpose.

Instead, once a case reaches appeal the parties almost always further flesh out the issues—a practice that this Court likely appreciates and perhaps expects. *See id.*; *see also Ames 2304, LLC*

v. City of Ames, Zoning Bd. of Adjustment, 924 N.W.2d 863, 868 (Iowa 2019) ("Ames 2304's reliance on the Municipal Code's definition of 'intensity' on appeal is simply additional ammunition for the same argument it made below—not a new argument advanced on appeal.") (cleaned up). Thus, the error was preserved, and it requires reversal of the verdict.

Because the injunction delayed but did not prohibit Modern Piping form arbitrating the issue of the partial occupancy, the district court erred by allowing the jury to award damages that were caused by that alleged breach.

II. Modern Piping's authorities show its restitution theory is categorically inapplicable here.

Even if Modern Piping could show causation, its restitution theory fails as a matter of law. Modern Piping argues that restitution is always available following overturned injunctions, but none of its cited authorities support that principle, let alone support authorizing restitution here.

To begin, *Shadle* in no way recognized restitution as a remedy for wrongful-injunction plaintiffs. 125 N.W.2d at 510–11. There, the tenant *lost* his wrongful-injunction claim, as his failure to harvest his share of the crop was not caused by the injunction. *Id.* Separately, the landlord conceded his duty to remit half the value of the harvested corn, which arose from established landlord–

tenant rights. *Id.* Here, conversely, the University does not concede any duty to remit its Children's Hospital revenue, nor does any separate legal doctrine provide that Modern Piping is otherwise owed the University's profits.

Turning to Modern Piping's central argument, the Restatement (Third) contradicts, rather than supports, Modern Piping's restitution theory. "If there has been no transfer in consequence of the judgment that is later set aside, there is naturally no issue of restitution." Restatement (Third) of Restitution & Unjust Enrichment § 18 cmt. a. Here, the injunction did not compel any transfer of property from Modern Piping to the University, so there is no issue of restitution.

Each of the Restatement's examples for when restitution is appropriate involve a party paying money or affirmatively transferring property in compliance with a court order that is later overturned. *See id.* illus. 1–5 (providing restitution is appropriate when (1) a party satisfied damages judgment pending appeal and judgment is reversed; (2) an order dispossessed a party of land and order is reversed; (3) an order required party to assign nonexclusive IP license to competitor and competitor sells goods pending appeal, order is reversed; (4) order granted price increase to regulated entity, consumer pays higher price pending appeal, order is

reversed; and (5) order delayed reducing an entity's tariff, consumer paid higher price while appeal pending, order is reversed).[3]

And each of Modern Piping's cited cases turn on an initial court order or injunction that compelled a party to transfer of funds or property. *See Muchmore Equip., Inc. v. Grover*, 334 N.W.2d 605, 607 (Iowa 1983) (finding restitution was required when party was ordered to pay punitive damages after trial, party satisfied judgment pending appeal, and the punitive damages award was overturned on appeal); *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 225–29, 244 (8th Cir. 1970) (finding restitution required when injunction required shippers to pay higher rates to motor carriers, explaining "[r]estitution is the proper remedy to return the parties to the position they would have been in had the [defendant] . . . not been judicially restrained"); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1061–64 (Del. 1988) (finding restitution required when injunction compelled company to relinquish exclusive rights to baseball cards and to assign nonexclusive rights to its competitor, and competitor "manufactured and marketed baseball cards under its own

[3] The Restatement (First) of Restitution also cabins restitution rights to orders compelling a transfer of funds or property, with every illustration involving court-ordered payments or property transfers. *See* Restatement (First) of Restitution, § 74, illus. 1–32.

trademark" while injunction was in effect); *AgStar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 483 P.3d 415, 421–26 (Idaho 2021) (finding restitution required when order authorized creditor to liquidate debtor's business equipment, while appeal was pending the equipment was taken and sold, and order was later reversed); *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 743 F. Supp. 2d 1136, 1150 (C.D. Cal. 2010) (finding restitution required when trial court order compelled sale of company to buyer, buyer executed judgment while appeal was pending, and court order later reversed).

The University's principal brief recognized this point when discussing *In re UAL Corp.* 412 F.3d 775 (7th Cir. 2005); Appellant Br., at 37–38. There, Judge Easterbrook gave other examples of when restitution could be appropriate after an overturned injunction—each of which involved an injunction compelling the transfer of property or payment of funds to the enjoining party. 412 F.3d at 779–80. And while recognizing that restitution *could* be available after overturned injunctions, Judge Easterbrook found the enjoined party's theory of restitution did "not rely on any legal right to compensation that it would have enjoyed had this suit never been filed. Nor [did] it contend that the injunction required a reversible transaction." *Id.* at 780. Instead, "the harms . . . that investors suffered do not correspond to any gain United enjoined, nor does United's gain . . . match any investor's loss." *Id.*

Modern Piping agrees that sometimes an injunction "may have given rise to damages, but not restitution." Appellee Br., at 59. And recognizing that restitution is awarded only when an injunction or court order compels the transfer of funds or property,[4] Modern Piping argues in a footnote that the injunction here accomplished a "transfer or taking" of property. Appellee Br., at 52 n.8. But this argument is without merit. The injunction exclusively concerned the timing of arbitration. It did not transfer Modern Piping's property to the University. Indeed, Modern Piping's own expert rejected this premise, testifying the injunction allowed the parties to use another arbitrator at any time, did not enjoin Modern Piping, nor did it prevent the parties from entering into a partial occupancy agreement. (Tr. Vol. 2, 120:22–121:6). The injunction resulted in, at most, a delay in arbitration, which cannot give rise to a claim for restitution.

An early Fifth Circuit case illustrates why such a delay cannot give rise to restitution damages. *See Tenth Ward Rd. Dist. No. 11 of Avoyelles Par. v. Texas & P. Ry. Co.*, 12 F.2d 245 (5th Cir. 1926). In *Tenth Ward*, a railway company obtained a temporary restraining order barring a tax collector from collecting certain

[4] Modern Piping relies on section 18 of the Restatement (Third), which is within Topic 3, "Transfers under Legal Compulsion."

taxes in support of newly created road districts. *Id.* at 246. The company did not post a bond. *Id.* After years of litigation, some of road districts and accompanying taxes were upheld as valid. *Id.* at 246–47. Later, a road district sued the railway company for obtaining the erroneous injunction. *Id.* at 247. The road district "did not rely on malicious prosecution but upon the doctrine of restitution." *Id.* As Modern Piping does here, the road district "contended that the fruits of an erroneous decree, received by the party in whose favor it was rendered, will be ordered restored (especially in a court of equity), when the decree has been reversed." *Id.*

The Fifth Circuit disagreed. *Id.* "Restitution of the amount received under a decree, afterwards reversed, will be ordered in equity, and will sustain a cause of action at law. But the condition of the restoration is always that the party against whom restitution is sought shall have received, by virtue of the decree, what he is asked to restore." *Id.* The order imposed only "a *delay* in the collection of the tax, while the restraining order was in force. It is conceded that this is not susceptible to restoration in kind. It is not in the power of the court to order appellee to turn the clock back." *Id.* (emphasis added).

Significantly, the court rejected the road district's proposed "graft on the doctrine of restitution," finding "no support in reason

or authority for an extension of the doctrine of restitution to cover an award of damages, which the restorer never received, and so in no true sense could restore." *Id.* at 248; *see also United Motors Servs. v. Tropic-Aire*, 57 F.2d 479, 483–84 (8th Cir. 1932) ("Nothing was taken from [defendant] by the injunction and given to plaintiff. We see no room for the application of the doctrine of restitution here.").

So too here. The injunction delayed, but did not deprive, Modern Piping of any right to obtain redress for breach of contract. When the injunction was lifted, Modern Piping's ability to arbitrate any contract disputes, and thereby obtain complete partial-occupancy-breach relief plus interest for the period of delay, was wholly restored. *Middlewest*, 433 F.2d at 244 ("Restitution is the proper remedy to return the parties to the position they would have been in had the [defendant] . . . not been judicially restrained").

Modern Piping asks for more—it wants the University's profits. Yet in every case Modern Piping cites where profits were disgorged, the party would have earned those profits but for an erroneous court order curbing its conduct or depriving it of the use of its property, so restoring those profits was just. *See Fleer*, 539 A.2d at 1061–64 (ordering competitor to return profits when competitor obtained an injunction compelling company to relinquish its exclusive licenses to sell baseball cards, competitor

sold baseball cards while appeal was pending, and the injunction was vacated on appeal); *PSM Holding Corp.*, 743 F. Supp. 2d at 1150 (ordering buyer to return profits when buyer obtained a court order compelling its purchase of a company, the order was reversed, so buyer on remand needed to return shares of company and any profits earned during period of erroneous ownership); *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1294, 1302 (8th Cir. 1980) (ordering profit forfeiture when company submitted fraudulent contract bid and the second-lowest bidder would have received the contract, explaining unjust enrichment requires "prov[ing] that a defendant has received money which in equity and good conscience *belongs to plaintiff*." (emphasis added)). Those cases can't help Modern Piping, as the University's profits do not "in equity and good conscience" belong to it. *Iconco*, 622 F.2d at 1302.

Finally, Modern Piping contends "two other considerations" mandate that it receives the University's $12.7 million in profits. Appellee Br., at 58. First, Modern Piping points to *Zimmerman v. National Bank of Winterset* for the proposition that the "University's obtaining benefits from a subsequently[ ]dissolved injunction was 'without legal authority.'" *Id.* (quoting 8 N.W 807, 808 (Iowa 1881)).

But Modern Piping misconstrues *Zimmerman*. There, the court explained that once "the judgment under which the defendant

acted was reversed, it became the legal duty of the defendant to restore to the plaintiff all property, or the value thereof, taken under the judgment. The continuing to hold the property after the reversal of the judgment was without legal authority and wrongful." 8 N.W. at 808. Again, the University never received any of Modern Piping's property under the injunction, and Modern Piping has no property interest in the University's profits. Nothing rightfully owned by Modern Piping has been wrongfully retained by the University.

Second, Modern Piping contends the University's "misuse of the legal system" warrants disgorgement. Appellee Br., at 58 (citing Restatement (Third) of Restitution & Unjust Enrichment § 18, cmt. e). But again, Modern Piping misconstrues its source. The Restatement (Third) comment discusses property transfers under legal compulsion, specifically when a "debtor has been compelled by law to pay a claim that is not legally enforceable." Restatement (Third), § 18, cmt. e. There, the debtor is entitled to restitution of the claim amount, and restitution serves the additional public purpose of "remedy[ing] th[e] misapplication of the legal process—so that the law not stultify itself by requiring what it has declared may not be required." *Id.* Returning an unlawfully compelled payment satisfies the "public concern with the integrity and proper application of legal coercion." *Id.* Yet here, the injunction did not

coerce Modern Piping to satisfy an illegal damages judgment, nor has the University refused to return an illegally awarded damages sum. Modern Piping is without any authority to support it's claim to the University's profits.

Ultimately, neither the Restatement nor Modern Piping's other cited authorities require this Court to forge new law here and expand the remedies previously authorized in *City of Corning v. Iowa-Nebraska Light & Power Co.*, 282 N.W. 791, 794 (Iowa 1938) (limiting damages to those that are the "*necessary and proximate result of such deprivation*") (internal quotation omitted).

Modern Piping could have sought these established remedies but opted to shoot the moon, gambling on an untested theory of disgorgement. Yet the injunction did not compel Modern Piping to transfer funds or property to the University, nor did the University earn a profit that Modern Piping would have earned but for the injunction. So the Restatement's restitution principles are not in play and offer no foothold to expand Iowa's wrongful-injunction remedies. Modern Piping's disgorgement restitution theory therefore fails as a matter of law.

III. Because the district court's jurisdiction was limited to enforcing the judgment, which included attorney's fees, the district court was wrong to add the wrongful-injunction claim to this dead lawsuit.

Modern Piping makes two arguments in defense of the district court's ruling allowing Modern Piping to add a new claim to this lawsuit following final judgment and affirmance on appeal.

First, Modern Piping says that the University waived this issue because it raised it only in resistance to Modern Piping's motion for leave to add a counterclaim. That is incorrect. The point at which the legal error occurred was when the court allowed Modern Piping to add the claim, because the "district court's decision on that motion was definitive and dispositive of the issue." *Schooler v. Iowa Dep't of Transp.*, 576 N.W.2d 604, 607 (Iowa 1998). As this Court has already held, "[r]equiring a party to file additional motions [regarding the court's authority] when the district court has already addressed the precise issue in a prior ruling would be a waste of judicial resources." *Id.* The same logic applies here. Moreover, "[a]uthority of the court over certain matters is conferred by law and cannot be conferred by waiver or consent." *Rerat L. Firm v. Iowa Dist. Ct. for Pottawattamie Cnty.*, 375 N.W.2d 226, 231 (Iowa 1985).

Second, Modern Piping contends that the case was still alive on remand because of its request for attorney's fees. But that

request, as explained in the University's principal brief, was merely an issue that was ancillary to dissolving the temporary injunction and entering judgment. And while the district court was generally stripped of its jurisdiction once the appeal was filed and the judgment affirmed, the court still had the *limited* "jurisdiction during and after appeal from its final judgment to enforce the judgment itself." *Waterhouse v. Iowa Dist. Ct. for Linn Cnty.*, 593 N.W.2d 141, 142 (Iowa 1999).

Because the request for attorney's fees and costs was part of the judgment, the district court maintained jurisdiction to set those fees and costs. (Dkt. 41). But because the new wrongful-injunction claim—which alleged millions of dollars in damages—was a new claim that was not associated with enforcing the judgment, the district court was without jurisdiction or authority to litigate that claim *in this case*.

Because the district court lacked jurisdiction and authority to litigate the wrongful-injunction claim in this case, the judgment must be reversed.

IV. Modern Piping's artful pleading cannot defeat sovereign immunity.

Finally, Modern Piping appeals to the common law to avoid the State's sovereign immunity. But Modern Piping misunderstands the history of its own claim.

"Injunctions were first used by the English High Court of Chancery as early as the fourteenth century." *Gaume v. New Mexico Interstate Stream Comm'n*, 450 P.3d 476, 480 (N.M. Ct. App. 2019). Early injunctions often issued without requiring the requestor to post a security. *Id.* And if the injunction were later deemed erroneous, "the chancellor had limited power to award damages for the wrongful injunction." *Id.* The sole remedy at common law was an action for malicious prosecution, which required the enjoined party to "prove the plaintiff obtained the injunction through malice or want of probable cause—a difficult burden to meet." *Id.* Accordingly, "where a plaintiff requested an injunction to which he or she was not entitled (but did so in good faith) the wrongfully enjoined defendants had no remedy." *Id.* at 481.

The lack of a remedy reflected the lack of a party at fault—"[c]ourts characterized the defendant's damages as *damnum absque injuria*, that is, damage without a wrongful act for which there was no legal redress, because courts regarded the damages caused by the injunction as flowing from *judgment of the court*, rather than the plaintiff." *Id.* (emphasis added). Indeed, "*neither law nor equity* furnished a remedy to a wrongfully enjoined defendant if the plaintiff requested the injunction in good faith because the damages were regarded as flowing from the court's order." *Id.* (emphasis added) (citing 1 Charles Fisk Beach, Jr.,

Modern Equity: Commentaries on the Law of Injunctions § 158, at 177–78 (Albany, H.B. Parsons 1895)). The injunction bond was created to remedy the "defect" in the common law and provide an enjoined party with a limited remedy outside of malicious-prosecution actions. *Id.*

Currently every state has some version of a bond security, with some states requiring mandatory bonds and others allowing courts to waive bond requirements. *Id.* at 481–82. And this pathway allowed enjoined parties to recover damages without having to "prove the plaintiff's malice or lack of probable cause." *Id.* at 482. Yet, "in cases where the trial court did not require the plaintiff to post security, courts continue to adhere to the historical practice of denying damages to the wrongfully enjoined party." *Id.* (collecting cases).

Again, courts limit post-injunction recovery to ensure the party paying damages is indeed a party at fault. To allow damages outside of a bond "would be 'tantamount to permitting a malicious[ ]prosecution action against a plaintiff without allowing him the usual common[ ]law shields of good faith and probable cause.'" *Id.* at 483 (quoting Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 343–44 (1959)) (alterations in original).

That is precisely what the district court permitted here. Modern Piping tried a malicious-prosecution case, overwhelmingly

focusing on the University's alleged conduct in obtaining the injunction. Justice Streit accused the University avoiding arbitrator immunity by only suing AAA, rather than Modern Piping—despite AAA being in the best position to assert its own immunity. (Tr. Vol. 2, 93:2–8). He couldn't "imagine" the University "didn't know" that arbitrator immunity applied—despite the Iowa Court of Appeals explaining "no Iowa case has addressed the issue" of whether it applied here. *Univ. of Iowa v. Am. Arb. Ass'n*, No. 17-0949, 2019 WL 141003, at *2 (Iowa Ct. App. Jan. 9, 2019). Justice Streit believed the University "knew" its success-on-the-merits statement was false. (Tr. Vol. 2, 99:3-12).

None of that evidence is relevant—the injunction addressed only the timing of any arbitration over Children's Hospital disputes, and the injunction was later vacated. Under existing law, an Iowa wrongful-injunction claim asks only whether a temporary injunction was vacated, and if so, whether the defendant is "entitled to such damages as are the necessary and proximate result of such deprivation." *City of Corning*, 282 N.W. at 794 (internal quotation omitted). But Modern Piping had no damages from the delay in arbitration—any separate instance of breach-of-contract could be fully remedied in arbitration, with interest to cover the period of delayed arbitration. So instead, Modern Piping tried a malicious-

prosecution case, repeatedly telling the jury that the University sought an injunction in bad faith.

Parties cannot artfully plead around state immunity. *Minor v. State*, 819 N.W.2d 383, 406 (Iowa 2012). And this Court gives "great weight to relevant federal decisions interpreting the" Federal Tort Claims Act, as "the legislature intended the ITCA to have the same effect." *Id.* Federally, the government is immune from wrongful-injunction claims because they are torts arising out of malicious-prosecution and abuse-of-process. *See Fed. Trade Comm'n v. Apply Knowledge, LLC*, No. 2:14-cv-00088, 2015 WL 12780893, at *1–2 (D. Utah Apr. 9, 2015) ("Congress has not waived through the FTCA the United States' sovereign immunity from claims for money damages based on allegations of malicious prosecution or wrongful use of civil proceedings, regardless of whether such claims are labeled wrongful injunction claims or otherwise."); *Fed. Trade Comm'n v. BF Labs Inc.*, No. 4:14-CV-00815, 2015 WL 12834056, at *2 (W.D. Mo. June 15, 2015). The same result is appropriate here.

Modern Piping next argues that even if immunity could apply, the University waived its immunity by seeking an injunction in the first instance. But Modern Piping's waiver argument swallows the exemption. Abuse-of-process and malicious-prosecution claims exclusively turn on affirmative litigation conduct. *See Fuller v.*

Local Union No. 106, 567 N.W.2d 419, 421 (Iowa 1997) ("The tort of abuse of process is 'the use of legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed.'" (quoting *Palmer v. Tandem Management Servs., Inc.,* 505 N.W.2d 813, 817 (Iowa 1993)); *Venckus v. City of Iowa City*, 990 N.W.2d 800, 807–08 (Iowa 2023) ("A malicious prosecution is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure." (quoting *Liberty Loan Corp. of Des Moines v. Williams*, 201 N.W.2d 462, 465–66 (Iowa 1972)).

If initiating a legal action categorically waived immunity over damages for such legal action, then the State or its employees could never be immune from the claims. Every instance of filing criminal charges would constructively waive sovereign immunity over malicious-prosecution or abuse-of-process suits against the complaining officer. But the Legislature made the policy choice to immunize the State from claims alleging the State misused the legal process, so Modern Piping's suit is barred.

At bottom, Modern Piping brought a defective suit. Either Modern Piping seeks damages against the State stemming from an erroneous injunction, in which case the claim arises out of malicious prosecution or abuse of process and is barred by Iowa Code section 669.14(4). Or Modern Piping purely seeks the equitable relief of

restitution, in which case the injunction did not compel any transfer of funds or property from Modern Piping to the University, so there is no issue of restitution. Restatement (Third) of Restitution & Unjust Enrichment § 18 cmt. a. No matter Modern Piping's theory of the case, its claim fails as a matter of law.

CONCLUSION

For the reasons herein, and all the reasons in the University's principal brief, the verdict and award must be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 6,539 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 5th day of October, 2023, this Amended Final Reply Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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