IN THE SUPREME COURT OF IOWA

NO. 23-0239

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

Appellant/Counterclaim-Defendant,

v.

MODERN PIPING, INC.,

Appellee/Intervenor-Plaintiff.

Appeal from the Iowa District Court in and for Johnson County
The Honorable Chad A. Kepros
No. EQCV078007

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1 Dan B. Dobbs, THE LAW OF REMEDIES (2d ed. 1993).

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1 Dan B. Dobbs, THE LAW OF REMEDIES (2d ed. 1993).

11A Wright & Miller, *Federal Practice and Procedure* § 2973.

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43A C.J.S. Injunctions §§ 506, 509.

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4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769).

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1 Dan B. Dobbs, THE LAW OF REMEDIES (2d ed. 1993).

ROUTING STATEMENT

This case should be transferred to the Court of Appeals. Although the factual context in which the legal issues in this case arise is unusual, those legal issues are not novel and are instead controlled by settled Iowa precedent. This appeal therefore presents "the application of existing legal principles." IOWA R. APP. P. 6.1101(3)(a). Additionally, because the factual construct of this case is unusual, it does not present the sort of substantial or recurring questions that warrant retention by the Supreme Court.

STATEMENT OF THE CASE

This lawsuit is about a temporary injunction obtained by the Appellant University of Iowa (the "University") and the consequences of that injunction. The University instituted this lawsuit against the American Arbitration Association ("AAA"). The only relief the University sought was to enjoin the AAA from arbitrating a dispute between the University and Appellee Modern Piping, Inc. ("Modern"). That dispute arose from a contract for Modern's work on the University's new Children's Hospital next to Kinnick Stadium (the "Hospital"). On the strength of a petition of scarcely more than four pages, and a two-page affidavit, the University obtained an *ex parte* injunction on the day it filed the lawsuit, April 1, 2016.

While the University did not name Modern as a party, the University's stated purpose of obtaining the injunction was to allow it to partially occupy the Hospital before construction was completed by prohibiting the AAA from ordering otherwise. The University represented that arbitration "[would] cause great or irreparable harm to the University" by "delay[ing] completion" of the Hospital. App. Vol. II, p. 70; App. Vol. II, p. 73. The district court did not require the University at any point to post a bond.

Modern moved to intervene in this action on November 2, 2016. The district court permitted intervention and later granted Modern's motion to dissolve the injunction on January 10, 2017. By that time, the construction of the Hospital was nearly completed. On March 17, 2017, the AAA moved for summary judgment on the University's injunction claim, and the district court granted that motion on April 27, 2017. Modern then filed a motion to be awarded its fees and costs for challenging the temporary injunction on May 8, 2017. The following day the University filed a post-judgment motion challenging the summary judgment. After that motion was denied, the University moved to continue the hearing on Modern's motion for attorney's fees and, the next day, the University filed its notice of appeal. That halted progress on Modern's motion. In 2019, the Court of Appeals affirmed the summary judgment. *See Univ. of Iowa v. Am. Arb. Ass'n*, No. 17-0949, 927

N.W.2d 215 (table), 2019 WL 141003 (Iowa Ct. App. Jan. 9, 2019). On February 11, 2019, the Court of Appeals issued a procedendo that "directed [the district court] to proceed in the manner required by law and consistent with the opinion of the court." App. Vol. I, p. 22.

On remand, Modern moved on March 26, 2019 to add a counterclaim for the damages it incurred as a result of the wrongful injunction. Modern particularly sought "compensatory, consequential, and restitutionary" damages from the University. App. Vol. I, p. 58. Over the University's resistance, the district court allowed Modern to add its counterclaim. The court explained that the appeal pertained only to AAA's motion for summary judgment, which was not "the only issue raised in this case." App. Vol. I, p. 48. The court thus retained its authority on remand, consistent with the procedendo, as the "entire case was not dismissed to the extent that there were pending issues besides the [University's] claims against the AAA." App. Vol. I, p. 48. The trial court also held that the University waived any sovereign immunity by obtaining the temporary injunction. App. Vol. I, pp, 50-51.

A three-day jury trial was held on October 25 – 27, 2022. Modern called three live witnesses and presented three witnesses by deposition. Modern introduced 35 exhibits. The University produced no witness testimony and introduced two exhibits. The sole claim before the jury was Modern's

wrongful injunction claim; Modern did not bring a claim at any point for breach of contract. More than six months before trial, the court rejected the University's attempt to amend its answer to add the affirmative defense of failure to mitigate damages. App. Vol. I, pp. 84-86; App. Vol. I, pp. 106-108.

At the conclusion of the evidence, the University moved for a directed verdict arguing insufficient evidence to generate a jury issue. App. Vol. I, pp, 113-121. In the written motion for directed verdict, the University included footnotes referencing and incorporating two objections to jury instructions. App. Vol. I, p. 114-115; App. Vol. I, p.116. At the conference on jury instructions, the University argued about sovereign immunity without any nexus to a specific jury instruction and only objected to Jury Instruction No. 10 regarding Modern's entitlement to restitution. App. Vol. IV, pp. 55-59, 24:3 – 28:16. The University never objected to Jury Instruction Nos. 5 (admissions in pleadings are binding), 11 (factors proving wrongfulness), 12 (the elements of restitution and calculation of restitution), 14 (Modern has standing although not named as a defendant in the wrongful injunction), or the verdict form. App. Vol. IV, p. 59, 28:15 – 16.

The district court denied the University's motion for directed verdict, stating "the evidence is substantial that attempts were made to talk to the University of Iowa, that the University of Iowa would not talk to them, and

even evidence suggesting that the University of Iowa had a plan that they would not engage in that discussion. However, I think that is in some ways irrelevant because the right to submit something to the design professional only has significant meaning if disputes could then be arbitrated. Arbitration was enjoined as a result of the injunction." App. Vol. IV, p. 54, 12:6 – 14.

The jury returned a verdict in favor of Modern and against the University, finding: (1) the University wrongfully obtained an injunction; (2) as a result of the injunction, Modern's property rights were taken; (3) circumstances surrounding the University's receipt of the benefit made it inequitable for the University to retain the benefit; (4) the University was unjustly enriched by $12,784,177 due to the wrongful injunction; and (5) $21,784.50 were the reasonable and necessary costs, expenses, and attorney's fees to dissolve the wrongful injunction. App. Vol. I. pp. 143-144.

STATEMENT OF THE FACTS

The first paragraph of the University's Statement of Facts is inaccurate, does not comply with the rules, and contains improper argument. Nothing in that paragraph is supported by a reference to the record. *See* IOWA R. APP. P. 6.903(2)(f) (requiring "All portions of the statement shall be supported by appropriate references to the record or the appendix…."). Further, nearly everything in that paragraph is argument, not fact: The University's view that

Modern's wrongful injunction claim is covertly a "breach of contract" claim is argument, and the University's view that the wrongful injunction did not "extinguish" Modern's ability to stop the University's partial occupancy is also argument. *See id.* That paragraph, and other parts of the Statement that are not supported by proper cites to the record, should be disregarded.

The facts of this case, as found by the jury, are straightforward. The University obtained an *ex parte* temporary injunction. The injunction prohibited the AAA from arbitrating the dispute between the University and Modern. Before the injunction, Modern already had initiated an arbitration. App. Vol. II, pp. 59-66. It had done so pursuant to the parties' agreement, which provided for arbitration to occur under the auspices of the AAA.[1] App. Vol. III, p. 135. All claims, disputes, and other matters "relating to the execution or progress of the Work or the interpretation of the Contract Documents" were to be resolved in arbitration. Vol. III, p. 135. The agreement first required the parties to refer the dispute to the designated Design Professional before submitting a matter to arbitration. Vol. III, p. 135. The agreement also prohibited the University's partial occupancy of the Hospital while construction was in progress without express approval by Modern. App.

[1] In response to Modern's motion to compel arbitration, the University contended "at most, the contract requires [the University] to agree to arbitration under the AAA." App. Vol. II, p. 61.

Vol. III, p. 149. That prohibition on partial occupancy is significant because partial occupancy—the provision of medical care alongside ongoing construction work—posed a tremendous risk to Modern. App. Vol. IV, pp. 9-13, 82:24 – 86:9. For example, during partial occupancy Modern remained responsible for medical gas and ventilation, not only in the areas still under construction but also the patient areas. App. Vol. IV, pp. 9-13, 82:9 – 86:9).

To obtain the *ex parte* injunction, the University represented that the AAA had no authority to proceed. It did not disclose that the same district court, only six weeks earlier, had ordered arbitration before the AAA based on identical contract language. App. Vol. IV, pp. 23-25, 90:19 – 92:13. It also represented, through the affidavit of Rod Lehnertz, that arbitration between Modern and the University regarding the Hospital "will cause great or irreparable harm to the University." App. Vol. II, p. 73. The affidavit explained that the irreparable harm would arise from a delay in the University's ability to occupy the Hospital. App. Vol. II, p. 73. It also stated that such a delay in occupancy would, in turn, "necessarily impact patient care." App. Vol. II, p. 73.

Counsel for the University knew the *ex parte* injunction ultimately was meritless. App. Vol. IV, pp. 26-31, 99:3 – 104:19. Yet it obtained the injunction to delay the arbitration. App. Vol. IV, pp. 26-31, 99:3 – 104:19.

The injunction was designed to allow partial occupancy by precluding the arbitration that would have enforced the contractual prohibition on partial occupancy. The University's view was that "as soon as the Hospital is open, [the University] can fight [the contractors] for years if needed." App. Vol. II, p. 74. It simply needed to outlast Modern in litigation and put Modern "out of business with the way they handled this project." App. Vol. II, p. 77; App. Vol. II, p. 137, 23:21 – 24:23.

Modern attempted to enforce its right to avoid partial occupancy "many, many times." App. Vol. II, p. 141, 47:8 - 24. Modern had "weekly conversations with the University and with . . . the construction manager" on the project regarding the partial occupancy issue. App. Vol. IV, p. 07, 79:8 – 15. The injunction, however, "shut down any conversation" between Modern and "the construction segment at the University of Iowa." App. Vol. IV, p. 20, 35:12 – 17. "[A]s soon as the injunction went into place, the University shut things down" with Modern on such topics. App. Vol. IV, p. 21, 42:14 – 23. Other than some minor change orders, observed Modern's project manager, "they wouldn't talk to me." App. Vol. IV, p. 21, 42:14 – 23.

The result of the injunction was to preclude Modern from enforcing the partial use and occupancy provision of the contract to prevent the University's early occupation of the hospital. "[B]y ordering the AAA not to arbitrate this

dispute, [the injunction] also stopped Modern in their tracks, because they could only go to the AAA because their agreement specified here is how we resolve our disputes; we go to arbitration. . . . They were just frozen with no remedy to the early occupancy issue…" App. Vol. IV, p. 23, 90:10 – 18. The injunction enjoined Modern from enforcing the prohibition on partial use and occupancy. App. Vol. IV, pp, 35-36, 110:20 – 111:4. By virtue of the injunction, "there was no remedy to be obtained in the arbitration process" and there was no other forum for dispute resolution that was available to Modern, either. App. Vol. IV, pp. 33-34, 108:8 – 19, 109:9 – 16.

As a result, Modern's expert concluded that the wrongful injunction primarily allowed the University to complete the Hospital, App. Vol. IV, p. 36, 111:10 – 12, and "resulted in damages and injury to Modern Piping," App. Vol. IV, pp. 32-33, 107:25 – 108:7. This roadblock on Modern's ability to challenge the University's partial use and occupancy of the Hospital in turn conferred a benefit on the University because "they were able to get all their equipment, everything moved in way before the final completion date, and they would eventually get patients coming in, which would bring in revenue." App. Vol. IV, pp. 37-38, 112:10 – 113:13; App. Vol. IV, pp. 41-43, 141:20 – 143:25.

It was only after the injunction was dissolved that Modern regained its right to seek an arbitration award prohibiting partial use and occupancy.[2] At that point, though, the right was meaningless since construction had nearly achieved substantial completion. App. Vol. IV, pp. 35-37, 110:20 – 112:9. Modern's right to prohibit partial use and occupancy through an arbitration order was of value only during the critical period when the University partially occupied the Hospital. App. Vol. IV, p. 37, 112:8 – 9.

When it sought the injunction, the University told the court the injunction was imperative for the University to occupy the Hospital. App. Vol. II, pp. 72-73. Without the injunction, the University could not have partially occupied the Hospital. App. Vol. IV, pp. 36-38, 111:23 – 113:13; App. Vol. IV, pp. 41-43, 141:20 – 143:25; App. Vol. II, p. 89. Partial occupancy accelerated the date when the Hospital could open and treat patients and earn profits by eight months. *Id*. It is undisputed the University earned millions of dollars of profits in these eight months. The University profited $1,598,022 per month with early partial occupancy of the Hospital. App. Vol. II, p. 119.

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[2] To the degree the University might have argued that Modern should have attempted to dissolve the injunction sooner, the district court ruled the University could not belatedly allege failure to mitigate damages as an affirmative defense. App. Vol. I, pp. 106-108. The district court thus ruled *in limine* that the University was precluded from introducing evidence or argument about the timing of Modern's challenge to the injunction. App. Vol. I, pp. 109-112. The University does not challenge either ruling here.

That amount, calculated by Modern's economist expert, was confirmed by the University's CFO. App. Vol. II, p. 129, 21:19 – 22:7. The wrongful injunction thus permitted the University to earn $12,784,177 in profits. App. Vol. II, p. 119. The $12,784,177 is purely profit, because the University recovered all its costs as part of the calculation. App. Vol. IV, pp. 44-45, 147:1 – 148:2). The University does not challenge that evidence. Appellant's Br. 28. In addition, the University's partial occupancy shifted millions of dollars in expenses and risk to Modern. App. Vol. IV, pp. 08-13, 81:8 – 86:21. It resulted in $2.5 million in impacts in the form of labor inefficiency, service, and extended warranty costs plus unquantifiable risk to life, health, and safety associated with performing construction work around Hospital employees and patients. App. Vol. II, p. 108; App. Vol. IV, 14, 93:9 – 93:22. This, too, is unchallenged by the University here. Appellant's Br. at 28.

SUMMARY OF THE ARGUMENT

Following a three-day trial, the jury unanimously found the wrongful injunction that enjoined arbitration unjustly enriched the University by $12,784,177. The jury credited the evidence that showed (1) the University would not have partially occupied the Hospital without the wrongful injunction and (2) partial use and occupancy unjustly enriched the University by allowing it to obtain $12,784,177 in wrongful profits. That the wrongful

injunction caused profits of this magnitude was a feature, not a bug, of the University's litigation strategy. In its *ex parte* request, the University represented to the trial court in a supporting affidavit that without the injunction, the arbitration would delay the Hospital opening.

The University did not dispute at trial that due to partial use and occupancy, it earned $12,784,177; rather, its argument was that restitution was not supported by the evidence. Its argument, though, fails to acknowledge that this is not a breach of contract case. It is a wrongful injunction case, in which the jury was asked whether and to what extent the University profited from a misapplication of the legal process. The jury's answer—that the University pay restitution of its $12,784,177 in wrongful profits—follows Iowa law, along with the Restatement and federal law, by ensuring that a party not be allowed to retain profits from a subsequently-dissolved wrongful temporary injunction. Prejudgment interest was proper for much the same reason, because without such an award the University would retain vestiges of the wrongful injunction.

The University's other arguments to avoid the jury's verdict are similarly baseless. The trial court properly allowed Modern's restitution claim—a claim that had not ripened until after the appeal of the injunction—to proceed on remand. Sovereign immunity has no role in this case, as that has

never been a defense to restitution for subsequently-reversed judgments and, even if it were, the University constructively waived such immunity by itself obtaining a temporary injunction. Sovereign immunity doctrine does not allow the government to use the legal system to gain wrongful profits by enjoining its own citizens and then to cry immunity when it is made to restore those profits.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY VERDICT FINDING THE WRONGFUL INJUNCTION UNJUSTLY ENRICHED THE UNIVERSITY.

A. Error Preservation. The University did not preserve error on most of its "causation" argument. It preserved error only to the degree that it argued Modern (1) did not try to negotiate a partial use occupancy agreement with the University or (2) present the dispute about partial occupancy to the Design Professional overseeing the project.[3] App. Vol. I, pp. 115-117, pp. 118-119; App. Vol. IV, pp. 52-53, 8:9 – 9:11. Any additional error regarding a causation defense is waived.

[3] The former of those assertions is factually incorrect. App. Vol. II, p. 141, 47:8 – 24; App. Vol. IV, p. 07, 79:8 – 15. The latter is of no legal consequence as the injunction enjoined arbitration regardless of the status of referrals to the Design Professional.

The University's causation challenge seeks review of the district court's ruling on its motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict "must stand or fall on the grounds asserted in the motion for directed verdict." *Schlegel v. Ottumwa Courier,* 585 N.W.2d 217, 221 (Iowa 1998). Appellate review is limited to those grounds. *Id.*; *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001).

Moreover, the University's "causation" argument is in fact largely a claim that Modern failed to mitigate damages or avoid consequences. *See RET Corp. v. Frank Paxton Co., Inc.*, 329 N.W.2d 416, 422 (Iowa 1983) (mitigation/avoidable consequences defense must be pleaded and proven). The University attempted to add a mitigation defense shortly before trial, however, the court did not allow it. App. Vol. I, pp. 109-112. The University never requested a jury instruction on mitigation or avoidance of consequences. Error was not preserved on either defense. *Hansen Co., Inc. v. RedNet Envt'l Servs.*, No. 16-0735, 909 N.W.2d 228 (table), 2017 WL 4570406, at *4 (Iowa Ct. App. Oct. 11, 2017).

B. Standard of Review. Modern's claim was tried at law. "Restitution claims for money are usually claims 'at law.'" 1 Dan B. Dobbs, THE LAW OF REMEDIES § 4.1(1), at 556 (2d ed. 1993) ("Dobbs"); RESTATEMENT (THIRD)

OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. d (2011) ("If restitution to the claimant is accomplished exclusively by a judgment for money, without resort to any of the ancillary remedial devices traditionally available in equity but not at law, the remedy is presumptively legal."). As an action at law, a wrongful injunction plaintiff is entitled to a jury trial. *See, e.g.*, *Parker v. Slaughter*, 24 Iowa 252 (Iowa 1868); *Chrisman v. Schmickle*, 209 Iowa 1311, 230 N.W. 550, 551 (1930); *City of Corning v. Iowa-Nebraska Light & Power Co.*, 225 Iowa 1380, 282 N.W. 791, 793 (1938). Modern demanded a jury trial and the University never moved to strike the jury demand or argued Modern's claim should be tried in equity. *Cf.* IOWA R. CIV. P. 1.903(1); Iowa Code § 611.10.

The hallmarks of an action at law are whether a jury trial occurred and whether evidentiary objections were made. *Dix v. Casey's General Stores, Inc*., 961 N.W.2d 671, 680 (Iowa 2021); *see also Van Sloun v. Agans Bros*., 778 N.W.2d 174, 178 (Iowa 2010). Both occurred here. While the case was captioned in equity, that reflects only that the initial claim brought by the University was for injunctive relief. That the case was initially docketed in equity is irrelevant to determining whether Modern's counterclaim is a claim at law. *Longfellow v. Sayler*, 737 N.W.2d 148, 152–53 (Iowa 2007).

A district court's ruling on a motion for judgment notwithstanding the verdict is for correction of errors at law. *Channon*, 629 N.W.2d at 859 (citing *Gibson v. ITT Hartford Ins. Co.,* 621 N.W.2d 388, 391 (Iowa 2001)). The inquiry is whether substantial evidence exists to support the plaintiff's claim, justifying submission of the case to the jury. *Id.* In making this determination, this Court views the evidence in the light most favorable to the nonmoving party. *Id.*

C. The Trial Evidence Was More Than Sufficient to Generate a Jury Question of Whether the Wrongful Injunction Proximately Caused the University's Profits.

The University's first assignment of error presents a straightforward causation argument. Of its $12,784,177 in profits (and Modern's $2.5 million in losses), the University says, "those numbers are not *causally connected to the injunction*." Appellant's Br. at 28 (emphasis supplied). "Generally, causation presents a question of fact." *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000); *Sallee v. Stewart*, No. 14-0734, 2015 WL 1817094, at *3 (Iowa Ct. App. 2015). Therefore, "[c]ausation is a question for the jury, '*save in very exceptional cases* where the facts are so clear and undisputed, and the relation of cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn therefrom.'" *Thompson v.*

Kaczinski, 774 N.W.2d 829, 836 (Iowa 2009) (emphasis in original) (quoting *Lindquist v. Des Moines Union Ry.*, 30 N.W.2d 120, 123 (Iowa 1947)).

Modern presented ample evidence from which the jury could find that the University's wrongful injunction caused its unjust enrichment. The trial evidence showed that without the wrongful injunction, the University could not have partially occupied the Hospital and opened to patients in February 2017, eight months earlier than absent the injunction. App. Vol. IV, pp. 35-36, 110:20 – 111:15; App. Vol. IV, p. 38, 113:8 – 113:17; App. Vol. IV, p. 43, 143:10 – 25. In those eight months, the University earned wrongful profit. It was undisputed the profits from the early occupancy of the Hospital were $12,784,717. App. Vol. IV, pp. 46-48, 150:25 – 152:10. The jury accordingly found that (1) the University obtained a wrongful injunction; (2) "[a]s a result of the injunction," Modern conferred a benefit on the University; and (3) the amount of that benefit was $12,784,717—exactly the University's profits from its early partial occupancy. App. Vol. I, pp. 143-144; App. Vol. I, pp. 132 & 134.

That the wrongful injunction caused the University's enrichment was no surprise to anyone. The purpose of the injunction was to enable the University to occupy the Hospital sooner. The University's own affidavit, submitted to obtain the *ex parte* injunction, foretold the causation in this case.

That affidavit, from the Senior Vice President for Finance and Operations for the University, claimed that arbitration between Modern and the University regarding the Hospital "will cause great or irreparable harm to the University" because the arbitration would "delay completion" of the Hospital project, and that "delay will necessarily impact patient care." App. Vol. II, p. 73.

Essentially, the affidavit represented that the injunction was necessary so that the University *could open the Hospital sooner and start making money.* The University's admission in that affidavit is binding. *See* Jury Instruction No.5; *Beyer v. Todd*, 601 N.W.2d 35, 41 (Iowa 1999) (quoting *Miller v. AMF Harley-Davidson Motor Co., Inc.*, 328 N.W.2d 348, 352 (Iowa Ct. App. 1982)). The University's argument that contradicts its own admission "is entitled to no consideration." *Miller*, 328 N.W.2d at 352.

Even without that binding admission, the evidence at trial more than created a jury question on the issue of causation. Mike Shive, Modern's manager on the project, testified without contradiction that the issuance of the injunction caused a sea change in the University's dealings with Modern when he attempted to enforce Modern's right to avoid partial occupancy. While he was repeatedly attempting to communicate with the University about this topic (a fact confirmed by the University's own construction manager, App. Vol. II, p. 141, 47:8 – 24, after the injunction the University "shut down"

communications on the topic. App. Vol. IV, p. 20, 35:12 – 17, App. Vol. IV, p. 21, 42:20 – 23.[4]

Having reviewed the entire record, Modern's liability expert retired Justice Michael Streit stated plainly that the injunction left Modern with no forum and no remedy against the University's encroachment into the Hospital to enable its early opening. App. Vol. IV, p. 23, 90:7 – 18; App. Vol. IV, p. 33-37, 108:8 – 112:9. But for the injunction, that would not have been possible. App. Vol. IV, p. 23, 90:7 – 18; App. Vol. IV, p. 33-37, 108:8 – 112:9.[5] Justice Streit further testified—without objection or contradiction—directly that the injunction caused both damage to Modern and benefit to the University. App. Vol. IV, pp. 32-33, 107:25 – 108:7; App. Vol. IV, pp. 38, 113:8 – 13. Not only did this evidence easily create a jury question, is little surprise on this record that the jury found in Modern's favor.

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[4] The University's various claims in its directed verdict motion or its motion for JNOV that Modern "did not even attempt to enter into a partial use occupancy agreement" are flatly contradicted by this evidence. App. Vol. I, p. 115.

[5] Specifically, the wrongful injunction started on April 1, 2016 and the Arbitration Panel accepted jurisdiction over the Hospital dispute on March 13, 2017. App. Vol. II, pp. 18-23. This enabled the University to start partial occupancy two months after obtaining the injunction, in June 2016, and continue through May 2017.

The University has no response to this causation logic or the evidence that supported it. Instead, it concocts a causation argument based on two things not decided by the jury. ***First*****,** it argues that the injunction did not cause the University to be enriched by pointing to Modern's failure to mitigate its damages as the cause. Even if that argument were supported by the evidence, the University cannot rely on it because it failed to plead the requisite affirmative defenses. *Murphy v. City of Waterloo*, 255 Iowa 557, 123 N.W.2d 49, 54 (Iowa 1963) (affirmative defense not timely raised cannot be later argued). The University cannot circumvent its own failure to plead defenses by rebranding those defenses as "causation" arguments.

The evidence (and law) does not support this argument, however. The University principally claims that Modern failed to submit its claim about partial use and occupancy to the Design Professional as a precondition to seeking arbitration before the AAA. But the University took immediate steps upon the issuance of the injunction to shut down the Design Professional as an avenue for Modern. The University's in-house counsel on the project in early April 2016 directed University management employees that "it is imperative that Heery, the Design Professional, not accept nor analyze any claims submitted by Modern Piping." App. Vol. II, p. 79. Moreover, submission of the dispute to the Design Professional would have been a futile

act for Modern since the injunction barred any arbitration that would have had to follow consideration by the Design Professional to provide Modern with relief. Modern had no obligation to perform a futile act. *See Steele v. Northup*, 259 Iowa 443, 143 N.W.2d 302, 306-07 (1966); *Thompson v. Hirt*, 195 Iowa 582, 191 N.W. 365, 368 (1923).

***Second*,** the University describes the trial as being about a breach of contract instead of a wrongful injunction. This description is inaccurate and irrelevant because the jury decided the wrongful injunction claim. The University focuses on its breach of the partial occupancy clause, as if that breach spontaneously happened, ignoring partial occupancy could not occur without the wrongful injunction. The right question, to which the University has no argument, is what resulted from the wrongful injunction. The verdict form properly asked: "How much was the University of Iowa unjustly enriched due to the wrongful injunction?" That is the question to which the jury answered $12,784,717.

This ceased to be about contractual rights when the University obtained a wrongful injunction enjoining access to a dispute resolution forum. That wrongful injunction, not a breach of the contract, is what caused the University's unjust enrichment. The injunction benefited the University by accelerating completion of the hospital. The University offered no evidence

to the contrary; for example, it did not offer evidence that it could or would have partially occupied the Hospital absent the injunction. The evidence offered by Modern, and credited by the jury, was that the injunction left Modern with no options except to wait it out, and the University reaped $12,784,177 in wrongful profits while Modern's hands were tied.

The University's myopic focus on Modern's "ability to obtain breach-of-contract damages," Appellant's Br. at 28, after the injunction was dissolved misses the point. The wrongful profits the University obtained never should have happened in the first place; not that they can be compensated sometime later. The University's argument is like saying that if technology company named UI steals the only copy of an invention from technology company named MP, MP should not *now* be able to enjoin UI's ongoing profitable use of the invention because MP someday *later* could sue UI for the damages. And never mind that due to its different structure, UI can make five times more money with the same invention. Intellectual property law does not work that way. Neither does the law of wrongful injunctions.

On the record here, the wrongful injunction enjoined Modern from enforcing the prohibition on partial occupancy at the "critical time." App. Vol. IV, p. 23, 90:7 – 18. By the time the injunction was dissolved and the Arbitration Panel assumed jurisdiction, the University occupied the Hospital,

making "partial occupancy [] somewhat academic by then." App. Vol. IV, pp. 36-37, 111:24 – 112:9. The delay in adjudication rendered the outcome meaningless. Again, this was no surprise to anyone because that was the purpose of the injunction—to allow the University to occupy the Hospital while precluding Modern from obtaining a prohibitory order from the Arbitration Panel. App. Vol. II, pp. 72-73; App. Vol. IV, p. 23, 90:7 – 18.

The University's related speculation about the potential outcome of more, different, or later arbitrations, Appellant's Br. at 28-29, is also beside the point because none of those actions could have prevented its unjust enrichment. The trial evidence showed that the wrongful injunction denied Modern's access to the only available tribunal during the critical time-period.[6] Modern could not seek redress to a different arbitration tribunal because no arbitration tribunal other than the Arbitration Panel had jurisdiction over the

[6] By not arguing Modern had a legal duty (1) to arbitrate at a different time or (2) to arbitrate in a different tribunal in its written motion for directed verdict, the University never preserved error on these arguments. App. Vol. I, pp. 113-121. Moreover, Justice Streit explained that there was no agreement to arbitrate the wrongful injunction and thus no ability for Modern to do so. App. Vol. IV, pp. 39-40, 124:10 – 125:3. The district court is not divested of jurisdiction over a wrongful injunction action because the parties could refer disputes to a Design Professional about the execution or progress of construction work.

dispute.[7] And, of course, Modern could not seek redress in the Arbitration Panel, which the district court had enjoined from acting, without being in contempt of the district court. *See Walker v. City of Birmingham*, 388 U.S. 307, 317-21 (1967).

The University's argument about the wrongful injunction merely affecting the time of arbitration suffers from other fatal flaws as well. It ignores applicable law because the University must account for Modern's deprivation as a result of the injunction *plus* any advantage or benefit the University obtained from the wrongful injunction before its dissolution. *See Muchmore Equipment, Inc. v. Grover*, 334 N.W.2d 605, 608 (Iowa 1983); *Schoonover v. Osborne*, 90 N.W. 844, 846-47 (Iowa 1902); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1063 (Del. 1988).

And the University's timing argument does not comport with the chronology of events. The wrongful injunction action only became ripe after "the final disposition of the main case." *Western Fruit & Candy Co. v. McFarland*, 174 N.W. 57, 62 (Iowa 1919). The wrongful injunction action was not yet ripe when the Arbitration Panel issued the awards in December 2017 and March 2018. App. Vol. II, pp. 5-17; App. Vol. II, pp. 24-58. Modern

[7] The University only consented to arbitration under the AAA. App. Vol. II, p. 61. The Arbitration Panel ruled it had jurisdiction over the Hospital dispute. App. Vol. II, pp. 18-23; App. Vol. II, pp. 24-58.

promptly pursued the wrongful injunction claim upon its ripening in 2019 after the Court of Appeals' ruling.

Shadle v. Borrusch, cited by the University, supports Modern's claim. 255 Iowa 1122, 125 N.W.2d 507, 508 (1963). *Shadle* holds that a party that obtains a subsequently-reversed injunction must provide an accounting for the value or profits earned to avoid unjust enrichment. 125 N.W.2d at 510. On the issue of causation, *Shadle* is distinguishable. *Shadle*'s holding was based on the nature of the injunction, which simply enforced the parties' preexisting rights rather than enjoining a party from taking action that would prevent the unjust enrichment. The injunction enjoined the tenant "from picking the corn then standing on plaintiff's land *in any manner different from* that provided in the quoted agreement." *Id.* at 509 (emphasis added). This Court held that the injunction did not cause the enjoined party's half of the corn to go unpicked. *Id.* at 510. In other words, the injunction in *Shadle* did not cause the harm for which the enjoined party sought recovery; i.e., there was no causation. Here, the injunction did cause the harm for which Modern obtained restitution; i.e., the University obtained $12,784,177 in wrongful profits. This distinguishes *Shadle* and the other cases cited by the University. *Cf. Marks v. Jordan*, 208 N.W. 296, 296 (Iowa 1926) (not officially reported) (plaintiff did not present evidence about how much the odor increased as a result of the injunction and

therefore had no basis to calculate damages); *Schmidt v. Meredith*, 209 Iowa 621, 228 N.W. 568, 569 (1930) (no damage because plaintiff admitted she did not intend to sell or pledge the mortgage which were the only enjoined acts); *Behrens v. McKenzie*, 23 Iowa 333, 341 (1867) (no damage because injunction did not prevent plaintiff from protecting their bricks from the rain).

Most of the University's "causation" argument is waived because it was not asserted below. But even without that failing, the argument is meritless. Viewed in the light most favorable to the verdict, there was substantial evidence in the record to permit the jury to find that the wrongful injunction enabled the University to earn $12,784,177 in wrongful profits. That is all this Court needs to affirm on this issue.

II. RESTITUTION OF UNJUST ENRICHMENT IS AN APPROPRIATE REMEDY FOR THE WRONGFUL INJUNCTION.

A. Error Preservation. The University misstates the record when it claims that it sought a directed verdict and a judgment notwithstanding the verdict on the basis that unjust enrichment damages are not available for a wrongful injunction. The University did not seek relief on that basis in either motion. App. Vol. I, pp. 113-121; App. Vol. IV, pp. 52-53, 8:9 – 9:11; App. Vol. I, pp. 148-157.

The University did object to Jury Instruction No.10 and thereby the University preserved error on the issue of Modern's entitlement to a jury

instruction about restitution, but only for purposes of the University's motion for new trial or remittitur. App. Vol. IV, pp. 56-59, 25:23 – 28:16; App. Vol. I, pp. 158-186. By not objecting to Jury Instruction No.12 regarding the amount of restitution or the verdict form, the University waived any objection and Jury Instruction No.12 (and all Jury Instructions other than Jury Instruction No.10) became the law of the case. *See* IOWA R. CIV. P. 1.924; *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 916 (Iowa 2017). "Once the law of this case is settled by failure to object to the instructions, the parties may argue only that the jury did not play its proper part." *Bogan v. Stroud*, 958 F.2d 180, 184 (7th Cir. 1992). Remittitur cannot be based on a jury instruction that is the law of the case. *Id.* at 185.

B. Standard of Review. A motion for new trial based on an alleged legal error in jury instructions is reviewed for correction of errors at law. *Rivera v. Woodward Resource Ctr.*, 865 N.W.2d 887, 891 (Iowa 2015). Remittitur rulings are reviewed for abuse of discretion. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007).

C. Jury Instruction No. 10 Properly Instructed the Jury that Restitution is an Available Remedy for Wrongful Injunctions.

The University concedes enrichment of $12,784,717 due to partial use and occupancy. Appellant's Br. 26. And it cannot dispute that occupancy and making money was the point of the injunction: the University's affidavit in

support of the *ex parte* injunction said as much. So, the University is left to argue, as it does, that despite the University's windfall in the form of wrongful profits, Modern cannot recover restitution from the University. Such an argument is contrary to sixty years of Iowa law.

Starting with *Shadle*, the Iowa Supreme Court has recognized restitution to avoid unjust enrichment as an appropriate remedy for wrongful injunctions. 125 N.W.2d at 510. Then, in *Schwennen v. Abell*, 471 N.W.2d 880, 883–84 (Iowa 1991), the Court adopted the RESTATEMENT (FIRST) OF RESTITUTION § 74, titled "Judgments Subsequently Reversed," which provides: "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." *Id.*

The current version of the Restatement, as before, "gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment" for a temporary judicial order later reversed, including a dissolved "preliminary injunction." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 cmt. a (2011).[8] Section 18 recognizes "[t]he

[8] Before the district court, but not in Appellant's Brief, the University argued the wrongful injunction never accomplished a transfer or taking of

need to remedy the misapplication of the legal process . . . constitutes an important reason for restitution that is independent of the individualized equities of the parties." *Id.*[9]

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property. This is without merit for four reasons. ***First***, the wrongful injunction deprived Modern of its rights to seek redress in arbitration. Modern's cause of action in arbitration was a "chose in action" or "thing in action." *See Arbie Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677, 680 (Iowa 1990). "[A] chose in action is sufficiently recognized in our law as property." *Kemin Indus., Inc. v. KPMG Peat Marwick LLP*, 578 N.W.2d 212, 221 (Iowa 1998). ***Second***, "rights arising out of contracts have long been recognized as property rights." *Fleer*, 539 A.2d at 1062. ***Third***, a wrongful injunction that compels providing services justifies restitution. *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 143 (2d Cir. 2014); *Adirondack Transit Lines, Inc. v. Greyhound Lines, Inc.*, No. 1:22-CV-1662-RCL, 2023 WL 196245, at *12 (D.D.C. Jan. 17, 2023). ***Fourth***, the contractor has a common law right to exclude the owner from the worksite during construction. *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 479 (Iowa 1980). By enjoining Modern from seeking redress in arbitration, the wrongful injunction deprived Modern of its property rights.

[9] Because Modern's claim was for a wrongful injunction, not a breach of contract, Section 18 is the relevant Restatement section. However, even had the claim been for breach of contract, the Restatement allows "a recovery of profits in wrongdoing" for an "opportunistic breach." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (2011). As that part of the Restatement explains, "the common rationale of every instance in which restitution allows a recovery of profits from wrongdoing, in the contractual context *or any other*, is the reinforcement of an entitlement that would be inadequately protected if liability for interference were limited to provable damages." *Id.* cmt. b (emphasis added).

The involvement of contracts in cases involving reversed judgments, including wrongful injunctions, have never precluded an award of restitution to avoid unjust enrichment under Section 74 of the RESTATEMENT (FIRST) OF RESTITUTION. *See, e.g.*, *Muchmore Equip.*, 334 N.W.2d at 607–08; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 226–27 & 242–44 (8th Cir. 1970); *Fleer*, 539 A.2d at 1062; RESTATEMENT (FIRST) OF

Likewise, Dobbs instructs that restitution for unjust enrichment is an appropriate remedy for wrongful injunctions:

> If the plaintiff gains something of value by reason of the erroneous provisional relief, the defendant has a restitutionary claim based on the amount the plaintiff gained. The restitution claim is not a damages claim, not based on the bonding requirement, and not limited to the amount of the bond.

Dobbs, § 2.11(3), at 266; *see also* 11A Wright & Miller, *Federal Practice and Procedure* § 2973; Am.Jur.2d Injunctions § 315.

RESTITUTION § 74 illus. 6. Cases applying Section 18 of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT are in accord. *See, e.g.*, *AgStar Fin. Servs. v. Nw. Sand & Gravel, Inc.*, 483 P.3d 415, 424 (Idaho 2021); *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 743 F.Supp.2d 1136, 1140–50 & 1154–55 (C.D. Cal. 2010), *aff'd in relevant part* 884 F.3d 812, 821 (9th Cir. 2018); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 illus. 2 (2011).

Before the district court, but not in the Appellant's Brief, the University cited *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 807–08 (Iowa 2018) to argue an express contract and an implied contract cannot govern the same subject matter. "[C]ontracts, torts, or other predicate wrongs" may justify claims for unjust enrichment. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). A wrongful injunction is one example of a predicate wrong. Dobbs, § 2.11(3), at 266. Indeed, the parties' contract contemplates and expressly allows cumulative remedies, including equitable remedies. App. Vol. III, p. 156 at § 13.4.1. Courts interpret such provisions liberally to permit justice. *See, e.g.*, *Brenton State Bank of Jefferson v. Tiffany*, 440 N.W.2d 583, 587 (Iowa 1989) (applying cumulative remedies provision of contract to permit equitable relief); *see also Rambo Assocs., Inc. v. S. Tama Cnty. Cmty. Sch. Dist.*, 487 F.3d 1178, 1188 (8th Cir. 2007) (applying Iowa law and limiting application of the rule "an express contract necessarily trumps any implied one" to terms controlled by the express contract).

The cases to which the University cites are inapposite. The federal case out of the Central District of California does not say what the University claims it does. *See* Appellant's Br. 36 (citing *Bryant v. Mattel, Inc.*, Case No. CV 04-9049, 2010 WL 11463865 (C.D. Cal. Oct. 5, 2010)). That case does not hold that unjust enrichment is unavailable for a wrongful injunction. *Id.* at *8. The excerpt quoted by the University had nothing to do with what remedy is available but instead was a statement about causation—specifically, a problem with that plaintiff's "attenuated causation theory [that] would allow [the plaintiff] to seek recovery from *every other market participant*," not simply the party that obtained the wrongful injunction. *Id.* at *8.[10]

Likewise, *City of Corning* does not say what the University claims. In that case, the Court rejected the defendants' attempts to limit the types of damages available, holding damages for wrongful injunction "are not governed by arbitrary rules, but proceed upon equitable principles." 282 N.W. at 794. A damages award for the enjoined party's losses resulting from a wrongful injunction in one situation is not proof damages is the sole available

[10] The Ninth Circuit, in a subsequent case, affirmed another district court's order permitting restitution for the defendant's profits arising from the subsequently-reversed judgment. *PSM Holding Corp.*, 743 F.Supp.2d at 1140–50 & 1154–55, *aff'd in relevant part* 884 F.3d at 821 (9th Cir. 2018).

remedy or restitution is inappropriate in other situations. *See, e.g.*, 11A Wright & Miller, *Federal Practice and Procedure* § 2973; Dobbs, § 1.1, at 5–6.

The University's request to align Iowa law with federal law results in affirmance. The Supreme Court of the United States and the Eighth Circuit have held restitution is an appropriate remedy to avoid unjust enrichment from wrongful injunctions. *See Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.,* 249 U.S. 134, 145 (1919); *Middlewest Motor Freight Bureau,* 433 F.2d at 243. Under federal precedent, the injunction bond caps an enjoined party's damages claim at the bond amount, however, this rule "has no application to a claim for restitution of amounts subsequently found to have been undue." *Newfield House, Inc. v. Mass. Dep't of Pub. Welfare*, 651 F.2d 32, 39 n.12 (1st Cir. 1981); *accord Caldwell v. Puget Sound Elec. Apprenticeship & Training Tr.*, 824 F.2d 765, 766–67 (9th Cir. 1987); *Adirondack Transit Lines*, 2023 WL 196245, at *10 (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2973 (3d ed. April 2022) ("[E]ven when no bond has been required plaintiff still may be liable for any unjust enrichment that has resulted during the period the injunction was in effect."); Dobbs, § 2.11(3), at 266.[11] The liability of a governmental entity for wrongful

[11] The University's focus on whether there was a bond attempts to write an inexistent requirement into Iowa law and contradicts the University's

injunction is not dependent on it posting an injunction bond. *Marine Const. & Dredging, Inc. v. U.S. Army Corps of Eng'rs*, No. 88-3963, 892 F.2d 83 (table), 1989 WL 150651, at *2–3 (9th Cir. Dec. 13, 1989); *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So.2d 481, 486 (Fla. 2001).

D. The Jury Verdict Properly Awarded $12,784,177 in Restitution to Eliminate the University's Wrongful Profits.

The University's contention that restitution should simply return the enjoined party to its status quo is simply another way of arguing—contrary to Iowa law—that unjust enrichment is not available to the enjoined party. "[A] party obtaining through a judgment, before being reversed, any advantage or benefit, must restore what he got to the other party after reversal." *Schoonover*, 90 N.W. at 847; *see also Md. Dept. of Human Resources v. U.S. Dept. of Agriculture*, 976 F.2d 1462, 1482-83 (4th Cir. 1992) (Luttig, J.). The

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position to the district court. Nowhere does Iowa law suggest that a bond is necessary in order for the enjoined party to recover for unjust enrichment. Iowa law says the opposite. IOWA R. CIV. P. 1.1508; *Fin. Mktg. Servs., Inc. v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 450, 460 (Iowa 1999). Further, the University never argued to the district court that the amount, let alone the absence, of an injunction bond limited Modern's recovery. Instead, the University assured the district court that a bond was not necessary because the University "has the funds available to satisfy a judgment" and "is able to pay damages." App. Vol. I, pp. 41-43; App. Vol. I, pp. 145-147. That representation to the district court waives any argument that Modern's recovery is limited to a bond the University convinced the district court to forgo. That is particularly so where the University now reverses course and refuses to "pay damages."

advantage or benefit is both returning the property, *Schoonover*, 90 N.W. at 846, and providing an accounting for benefits enjoyed while possessing or using the property, *Muchmore Equip.,* 334 N.W.2d at 608; *see also Fleer*, 539 A.2d at 1063; *Windstream Commc'ns*, 775 F.3d at 143; Dobbs, § 2.11(3), at 266.

"Restitution measures the remedy by the gain obtained by the defendant, and seeks disgorgement of that gain." *Unisys Corp.*, 637 N.W.2d at 153 (citing Dobbs, § 4.1(1), at 555). It is not measured by economic loss of the party seeking relief. *Id.*; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. a; *id.* § 3 cmt. a ("[I]t is clear not only that there can be restitution of wrongful gain exceeding the plaintiff's loss, but that there can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever."); *Iconco v. Jensen Const. Co.*, 622 F.2d 1291, 1302 (8th Cir. 1980) (applying Iowa law and awarding to the second-low bidder that never performed any work restitution in the amount of the ineligible contractor's profits earned performing the work on a project when the ineligible contractor obtained the contract by misrepresenting its eligibility).

The reason unjust enrichment must focus on the defendant's gain, regardless of the amount of the plaintiff's loss, is obvious: it is the only way

to ensure that "[a] person is not permitted to profit by his own wrong." *Rilea v. State*, 959 N.W.2d 392, 394 (Iowa 2021) (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 3). "Restitution may be more than compensation to the plaintiff but under most measures of restitution it is not more than the defendant's unjust gain in the transaction. For this reason, such restitution is not punitive." Dobbs, § 4.1(4), at 567. An award that was limited to Modern's loss, and not on the University's unjust gain, would not be restitution as it would permit the University "to profit from [its] own wrong."

Two other considerations mandate $12,784,177 in restitution. ***First***, the University's obtaining benefits from a subsequently-dissolved injunction was "without legal authority." *Zimmerman v. Nat'l Bank of Winterset*, 8 N.W. 807, 808 (Iowa 1881). ***Second***, restitution of the entire benefit is required because the wrongful injunction harmed the public by misusing the judiciary's coercive power. This misuse of the legal system relegates restitution to be "independent of the individualized equities of the parties." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 18 cmt. e.

Neither *In re UAL Corp.* nor *Bryant v. Mattel* indicate the appropriate measurement of restitution is to return the enjoined party to its position without the wrongful injunction. *See* Appellant's Br. at 36-37. Rather these cases simply show restitution may not be appropriate in certain marketplaces. Both cases arose out of distinct marketplaces, one for United Airlines stock (*In re UAL Corp*.) and the other for children's dolls (*Mattel*). In each case, the wrongful injunction temporarily enjoined certain market activity, i.e., an ESOP from selling United Airlines stock (*In re UAL Corp*.) and a company from manufacturing, but not selling, a specific line of dolls (*Mattel*). Neither injunction enjoined an entire market; each market continued to function even though the enjoined parties could not participate for the durations of the injunctions. The value of United Airlines shares went down, and then up, but not because of the litigation. *In re UAL Corp.*, 412 F.3d 775, 777 (7th Cir. 2005). Other doll market participants continued to conduct business without the enjoined manufacturer. The inability to participate in the marketplace may have given rise to damages, but not restitution.

The illustrations to RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 18 include two examples of restitution of wrongful profits as the proper amount of restitution. "Illustration 3 is based on *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060 (Del. 1988)." *Id.* Reporter's Note

d. In *Fleer*, Topps had an exclusive license agreement with the Major League Baseball Players Association for baseball cards. 539 A.2d at 1061. Fleer obtained a wrongful injunction against Topps allowing Fleer to obtain non-exclusive contract rights from Topps to sell competing baseball cards. *Id*. at 1061–62. The wrongful injunction enabled Fleer to earn profits before dissolution. "Restitution has been recognized as a legitimate remedy when a court finds that a wrongfully issued injunction allowed the defendant to be unjustly enriched." *Id*. at 1062. "Restitution serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.'" *Id*. at 1063 (quoting D. Dobbs, *Handbook on the Law of Remedies* § 4[.]1 (1973)). Thus "a person who receives a benefit under a later reversed judgment must make restitution of money or property received under it." *Id*. The court held "an unjustly enriched defendant may be ordered to turn over to the plaintiff the profits earned through the use or possession of the plaintiff's property" whether or not the defendant is classified as a wrongdoer and remanded to the chancery court for an accounting. *Id*. The court rejected Fleer's argument that its profits were from its own "capital investment, distribution network, and sales efforts" rather than from Topps' property rights. *Id*.

"Illustration 5 is based on *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970)." *Id.* Reporter's Note d. In *Middlewest Motor Freight Bureau*, transportation carriers earned wrongful profits during a wrongful injunction that enjoined a decision from another tribunal. The other tribunal, the Interstate Commerce Commission ("ICC"), had ordered that certain tariffs increasing rates be canceled. *Id*. at 217. The ICC's order "would have caused cancellation of the tariffs in question absent the temporary restraining order." *Id*. at 224. After the injunction was dissolved, the court ordered restitution to undo the unjust enrichment to the carriers from the wrongful injunction. The carriers were to be returned to their position without the temporary injunction, which was "the immediate prior lower rates should have been in effect and would have been in effect had not the temporary restraining order been issued." *Id*. at 224–225. Profits "collected by virtue of a court's restraint of any order not proved to be invalid" were subject to restitution. *Id.* at 242.

The University has failed to justify a new trial pursuant to IOWA R. CIV. P. 1.1004(6) or 1.1004(8). Jury Instruction No.12 is the law of the case. The jury played its part by rendering a verdict awarding restitution in the amount of the University's wrongful profit. Neither a new trial nor remittitur is appropriate. *Bogan*, 958 F.2d at 184.

III. THE DISTRICT COURT RETAINED JURISDICTION TO AWARD RESTITUTION FOR A SUBSEQUENTLY REVERSED JUDGMENT.

A. Error Preservation. The University did not preserve error on a challenge to the district court's jurisdiction. While the University resisted Modern's motion for leave to add the restitution counterclaim, the University did not, in the remainder of these proceedings, file a motion to dismiss, for summary judgment, for directed verdict, or any other motion directly challenging the district court's jurisdiction. That is not sufficient to preserve error on the question of jurisdiction. *See Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 875–76 (Iowa 2007).

B. Standard of Review. Whether to grant leave to add or amend a claim is discretionary, and review of the district court's decision to grant leave to add a claim is for clear abuse of discretion, such as "clearly untenable grounds or to an extent clearly unreasonable." *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002).

C. The District Court Did Not Abuse its Discretion in Allowing Modern to Add Its Claim for Restitution for the Wrongful Injunction.

The district court was amply supported by the law and well within its discretion in permitting Modern to file its counterclaim. The University acts as though the procedendo issued by the Court of Appeals resolved every issue in this case and thus fully divested the district court of its jurisdiction. The

procedendo did no such thing. To the contrary, it "directed [the district court] to proceed in the manner required by law and consistent with the opinion of the court." App. Vol. I, pp. 22-24. That is what the district court did.

The only issue on appeal was whether the district court properly granted summary judgment to the AAA. But as the district court explained, the AAA's "Motion for Summary Judgment was not the only issue raised in this case and the entire case was not dismissed to the extent that there were pending issues besides the [University's] claims against the AAA." App. Vol. I, p. 48. At a minimum, one of those pending issues was Modern's motion for attorney's fees, which the University caused to be continued until after remand by filing its notice of appeal before the motion could be heard. App. Vol. I, p. 48. There was thus unfinished business in the district court and a live lawsuit to which claims could be added.

The rationale for adding those claims is particularly acute here because the claims did not ripen until after the appeal, and settled law provides for the litigation of those claims in the district court on remand. Regarding ripeness, the substantive law of wrongful injunctions required Modern, before recovering, to prove "the decree entered in the injunction action constitutes a final adjudication of all issues involved therein." *Chrisman*, 230 N.W. at 551. *See Western Fruit & Candy Co.*, 174 N.W. at 61-62 (holding "until the main

case was decided, it could not be known whether the temporary injunction was wrongful in its inception"); *Kinzler v. Pope*, No. 09-1818, 791 N.W.2d 427 (table), 2010 WL 3503453, at *4 (Iowa Ct. App. Sept. 9, 2010); Am.Jur.2d Injunctions § 317 ("If a final judgment has been entered in favor of the party enjoined but an appeal is pending, the party cannot sue on the bond."). Modern, therefore, could not assert its valid restitution claim springing from the wrongful injunction until the injunction had fully, finally, been adjudicated as wrongful.

The settled law permitting litigation of this restitution claim comes both from this Court and the relevant Restatements. In *Schwennen*, this Court quoted RESTATEMENT (FIRST) OF RESTITUTION section 74, comment a, regarding the procedure to secure restitution for subsequently reversed judgments:

> a. Procedure…. In such cases there are various methods which can be used for securing restitution. The reversing tribunal can itself direct restitution either with or without conditions, or the tribunal which is reversed can on motion or upon its own initiative direct that restitution be made....

471 N.W.2d at 880; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 cmt. b ("Restitution may therefore be decreed by an appellate court as an incident of its power to correct errors. It may be ordered by the original tribunal on remand (either sua sponte or on motion);

or following reversal even without remand, as an exercise of the court's inherent equitable powers; or in response to a collateral attack on the judgment. Restitution may also be sought in a separate action in any court having jurisdiction."). *Schwennen* made clear, per the Restatement, "the inherent power of the court is the basis for this rule." 471 N.W.2d at 884.[12] This is confirmed by the fact the earlier *Schwennen* opinion did not remand for restitution. 430 N.W.2d 98, 105-06 (Iowa 1988).

The district court did not, as the University suggests, permit the addition of the counterclaim merely because Modern was an intervenor. *See* Appellant's Br. 40 (arguing that the district court "claimed that it had authority to allow Modern Piping to add claims after judgment was entered because Modern Piping was an intervenor, not an original party"). The district court's point was that Modern remained a party in the case, already having intervened, who had unresolved matters that did not ripen until the Court of Appeals decided the injunction issue. App. Vol. I, p. 48. As the district court explained, the restitution claim arose "as a direct result of the petition for injunction" and

[12] Other federal and state courts have reached the same conclusion. *See, e.g.*, *Arkadelphia Milling*, 249 U.S. at 145–46; *PSM Holding*, 743 F.Supp.2d at 1140–44; *Gerald M. Moore & Son, Inc. v. Drewry & Assocs., Inc.*, 945 F.Supp. 117, 118–23 (E.D. Va. 1996); *Wheeler Springs Plaza, LLC v. Beemon*, 71 P.3d 1258, 1262–63 & n.16-17 (Nev. 2003); *Metro Real Est. Inv., LLC v. Siaway*, 247 A.3d 424, 429–30 (Pa. Super. Ct. 2021), *appeal denied,* 278 A.3d 855 (Pa. 2022).

was a "follow-up claim." App. Vol. I, p. 50. Thus, it was proper for the district court "to resolve the costs, attorney fees and damages resulting directly from the injunction sought and then dissolved by the [University] in this case." App. Vol. I, p. 50.

The University cites two cases on the merits of this issue. Neither is close to this one. Both involve jurisdiction over matters that could and should have been brought in the district court before the appeal. In *Wellmark*, *Inc. v. Iowa Dist. Ct. for Polk Cnty.,* the claim that the party attempted to bring following the appeal was ripe before the appeal. That claim, however, had not been brought, and instead the plaintiff had stipulated it was not asserting that particular antitrust claim. 890 N.W.2d 636, 640 (Iowa 2017). The district court granted summary judgment, which resolved all matters pending before it. *Id*. at 640-41. This Court affirmed summary judgment and "did not remand this civil action for any purpose." *Id*. at 641. Having failed to bring a ripe claim that was part of the same transaction or occurrence, the party in *Wellmark* was unable to revive that claim by attempting to attach it to a case that already was concluded by the appeal. Here, Modern's position is the opposite: Not only was it not precluded from bringing the wrongful injunction claim following appeal; it had to bring its claim then, whether as part of the existing case or in a separate action.

Franzen v. Deere & Co., 409 N.W.2d 672 (Iowa 1987), is distinguishable for much the same reason. In that case, the party seeking sanctions following the appeal had the ability to, but did not, seek sanctions before the appeal. *Id*. at 673. The Court thus concluded that "Deere's belated filing deprived the district court of authority to decide the attorney fees issue." *Id*. at 674.

Here, Modern's filing was not belated; it simply was not ripe until after the appeal. In *Waterhouse v. Iowa Dist. Ct. for Linn Cnty.*, 593 N.W.2d 141, 143 (Iowa 1999), this Court rejected a similar challenge to the district court's authority to address an issue following an appeal. The issue in that case, like the wrongful injunction claim in this case, was an indemnity obligation that was "premature for submission and resolution until" after the appeal. In *Waterhouse*, a coverage issue had to be resolved in the appeal; in the present case, the University's entitlement to an injunction had to be resolved in the appeal. The district court had authority to decide the wrongful injunction issue that only ripened after the appeal. Regardless, any error was harmless. *See* Iowa Code §§ 619.16 & 624.15.

IV. THE UNIVERSITY IS NOT IMMUNE.

A. Error Preservation. Although the University did not raise it in its directed verdict motion, *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa

2011), Modern does not contest error preservation regarding sovereign immunity.

B. Standard of Review. The district court's ruling is reviewed for corrections of errors at law. *See Lee v. State*, 844 N.W.2d 668, 683 (Iowa 2014) ("*Lee II*").

C. The University has no Sovereign Immunity.

Even if the University preserved error on sovereign immunity, its argument fails on its merits.

1. Since the Magna Carta, Sovereign Immunity has not Existed for Subsequently-Reversed Judgments.

Since the Magna Carta, the sovereign has not been immune from restitution for subsequently-reversed judgments. *See* Magna Carta of 1215, Clause 52 ("If anyone has been disseised or dispossessed by us, without lawful judgment of his peers, of lands, castles, liberties, or of his right, we will restore them to him immediately."). As Blackstone explained, "when judgment, pronounced upon conviction, is falsified or reversed, all former proceeds are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 386 (1769). English courts required restitution from the Crown in favor of its citizen for

subsequently-reversed judgments even if the Crown had sold the citizen's property to an innocent third party, holding:

> [I]n whosesoever hands the lands came, and by whatsoever consideration, the party shall be restored; for the outlawry being reversed, it is as if there were no record, and the Queen's interest was but conditional, viz. it is good if the outlawry be good; and therefore the term being sold, it is tied with the condition into whomsoever hands it cometh, that if the outlawry be reversed, the term is reduced to the owner.

Eyre v. Woodfine (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.). Through today, American legal precedent follows the English common law. *Nelson v. Colorado*, 581 U.S. 128, 142-43 (2017) (Alito, J., concurring in the judgment); *Bank of U.S. v. Bank of Washington*, 31 U.S. 8, 15 (1832). Allowing the University to assert sovereign immunity for a restitution claim arising from subsequently-reversed judgments against its own citizens would confer upon the University an immunity right that was foreign even to King Edward III.

2. The University Constructively Waived Immunity by Obtaining a Temporary Injunction.

The University waived sovereign immunity, if any, by assuming the legal obligations incident to obtaining a temporary injunction. "The defense of sovereign immunity is a shield and not a sword that may be used by the state when it invokes a court's equitable jurisdiction to enjoin a party and the injunction later turns out to be erroneous and causes damages to be incurred."

43A C.J.S. Injunctions § 509; *see also Provident Mgmt. Corp.*, 796 So.2d at 487.

The State constructively waives sovereign immunity by entering into contracts, *Kersten Co., Inc. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 120 (Iowa 1973), and relationships, *State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978). The State subjects itself to generally-applicable statutes for landowners when it purchases land. *Id.* The State waives immunity when it *voluntarily* enters into legal relationships with private citizens that subject it to liability. *See Lee v. State*, 815 N.W.2d 731, 738 (Iowa 2012) ("*Lee I*").

Iowa law recognizes that the State's sovereign immunity interest is at its weakest when, as here, it voluntarily enters the commercial marketplace as a participant with private citizens in furtherance of its own proprietary interests. *Wittmer v. Letts*, 80 N.W.2d 561, 563-64 (Iowa 1957); *see generally Bd. Of Regents v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 476-77 (7th Cir. 2011) (observing there is no apparent reason why "a state-owned hospital . . . should have a competitive edge over a private competitor").

Similarly to those relationships, by obtaining the *ex parte* temporary injunction, the University voluntarily assumed certain obligations, such as IOWA R. CIV. P. 1.1508's imposition of liability on the "petitioner" or principal, *Fin. Mktg. Servs.,* 588 N.W.2d at 460, and a condition that such

party assumes responsibility to pay or indemnify for damages resulting from the temporary injunction, *PIC USA v. N. Carolina Farm P'ship*, 672 N.W.2d 718, 727 (Iowa 2003); *Dennis v. Mantle*, 155 N.W. 830, 830 (Iowa 1916). To permit the University to invoke the injunctive power of the judiciary, yet repudiate the assumed obligations, would be "to sanction the highest type of governmental tyranny." *Kersten*, 207 N.W.2d at 120.

3. The University Constructively Waived Immunity by its Litigation Conduct.

The University also waived sovereign immunity by its litigation conduct. The University's litigation conduct—seeking a temporary injunction—was entirely voluntary. *See Lee II*, 844 N.W.2d at 683. The University did not have to obtain an injunction; it chose to involve the court. *State ex rel. Schmidt v. Nye*, 440 P.3d 585, 589–90 (Kan. Ct. App. 2019) ("[A] governmental entity seeking injunctive relief has the option not to seek a temporary injunction but instead to wait and obtain a permanent injunction after a full presentation of evidence and a determination of entitlement to the relief.").

The University's constructive waiver is especially pronounced because the action for which the University asserts immunity was in direct response to the University's voluntary litigation conduct. This Court has held that the State "waive[s] their objection" to an action brought by a party seeking to

enforce rights that the State itself prevented that party from exercising. *Lee II* at 681 (quoting *Lapides v. Bd. of Regents*, 535 U.S. 613, 624 (2002)).

Lee II is on point because there, like here, the State attempted to shield itself from liability for consequences that it had created by affirmatively seeking a stay. *Id.* There, the Court held that the State's act of obtaining a stay to preclude the opposing party from seeking reinstatement of her employment waived its right to later be immune from a claim by that party for lost wages. As the Court in *Lee II* pointed out, sovereign immunity does not allow the State to have its cake and eat it too by obtaining a stay based on assurances to the Court, only later to disavow responsibility for the impact of its court-ordered relief. *Id*. at 683 ("In granting the stay, we relied upon defendants' representation that Lee would 'not suffer any irreparable harm or injury' and would 'be made whole.' Defendants cannot now use the Eleventh Amendment to avoid honoring their promise."). Such a result would "permit States to achieve unfair tactical advantages." *Id.*

The University made similar assurances and representations in this litigation: (1) requesting the district court "balance the harm that a temporary injunction may prevent against the harm that may result from its issuance," App. Vol. II, pp. 67-71; (2) arguing "lack of potential injury to AAA and Modern" due to the injunction, App. Vol. I, p. 51; and (3) representing the

University "is an entity that will remain in existence after the finalization of this matter, and that has the funds available to satisfy a judgment, if any," App. Vol. I, p. 74. An "unfair tactical advantage" is the essence of the University's sovereign immunity argument: It wants to be allowed to use the coercive power of the judiciary like any other litigant but wants immunity for doing so. The University cannot have it both ways.

D. The Iowa Tort Claims Act ("ITCA") Does Not Apply.

The ITCA does not apply here for the simple reason that Modern's wrongful injunction claim is not a tort. "Section 669.14 is not worded as an all-encompassing barrier to liability, only as a bar to liability under chapter 669." *Thomas v. Gavin*, 838 N.W.2d 518, 523 (Iowa 2013). For example, "claims based on contract are clearly excluded" from the ITCA. *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626, 641 (1966).

A wrongful injunction claim has never been a tort under Iowa law. As discussed above, by obtaining a temporary injunction, the principal automatically assumes liability for or indemnifies for all damages resulting from the temporary injunction under Rule 1.1508. *See Fin. Mktg. Servs.*, 588 N.W.2d at 460; *PIC USA*, 672 N.W.2d at 727. Such liability is "an implicit condition of the granting of a temporary injunction that may be reversed later." *Provident Mgmt.*, 796 So.2d at 486. No Iowa court decision has equated

a wrongful injunction with a tort or applied tort principles to a wrongful injunction. *See, e.g., Fin. Mktg. Servs.*, 588 N.W.2d at 460; *Dennis*, 155 N.W. at 830; *Shenandoah Nat'l Bank v. Read*, 886 Iowa 136, 53 N.W. 96, 97 (1892).

"Almost all states classify a wrongful injunction action as an action in contract, not tort." *Marine Const. & Dredging,* 1989 WL 150651, at *3. Thus, courts faced with the question of whether their jurisdictions' tort claims acts apply to a wrongful injunction claim have held they do not. *See, e.g.*, *id*. at *3 ("[U]nder Washington law, a wrongful injunction claim is classified as a contract action"); *Provident Mgmt.*, 796 So.2d at 486 ("[T]he governmental entity is not being sued in tort, but rather it is being assessed damages after the reversal of a temporary injunction that it affirmatively sought. In cases such as this one, the responsibility to pay damages does not flow from wrongdoing or other tortious conduct by the party who obtained an injunction; instead, damages flow from the erroneous or 'wrongful' issuance of an injunction."). Consistent with other courts, the ITCA is inapplicable to a wrongful injunction action because it is not a tort.

Additionally, the University's argument about the intentional-tort exception mistakenly assumes the ITCA applies to wrongful injunctions. Even if it did, that exception is narrowly construed. *Walker v. State*, 801 N.W.2d 548, 567 (Iowa 2011). An action for wrongful injunction is not the

functional equivalent of the tort of abuse of process or malicious prosecution. The latter torts contain elements that the wrongful injunction claim does not have. *Compare Fin. Mktg. Servs*, 588 N.W.2d at 460, *Shenandoah Nat'l Bank*, 53 N.W. at 97 (requiring a showing of "wrongfully sued out" as proof in a wrongful injunction claim) & *Chrisman*, 230 N.W. at 552 (holding liability may be imposed without a showing of malice), *with Wilson v. Hayes*, 464 N.W.2d 250, 266–67 (Iowa 1990) (focusing on the process user's intent and "primary purpose" in an abuse of process tort) & *Whalen v. Connelly*, 621 N.W.2d 681, 687–88 (Iowa 2000) (requiring a showing of malice to support malicious prosecution). In contrast with those torts, a wrongful injunction claim focuses on the factual and legal merits of the temporary injunction and the judicial outcome, not the actions and intent of the party seeking the temporary injunction.

Depending on the jurisdiction, different remedies for wrongful injunctions may be available. ***First***, Iowa and certain other states permit a recovery against the principal not limited by the injunction bond. IOWA R. CIV. P. 1.1508; *Fin. Mktg. Servs*, 588 N.W.2d at 460; Am.Jur.2d Injunctions § 322. ***Second***, in contrast, under FED. R. CIV. P. 65 and in different states, the damages remedy is typically limited to the injunction bond, and the enjoined party can seek a recovery from the principal in excess of the injunction bond

amount by proving malicious prosecution. Am.Jur.2d Injunctions § 322. The malicious prosecution claim is different from the claim against the injunction bond in "the kind of wrong that must be shown to establish liability and in the amount of recovery." 43A C.J.S. Injunctions § 506. ***Third***, regardless of the jurisdiction, the remedy of restitution for wrongful injunctions is not dependent on either a malicious prosecution claim or the injunction bond acting as a cap on restitution. Am.Jur.2d Injunctions § 315.

The three federal cases cited by the University, Appellant's Br. at 43 – 44, are inapposite because in those cases the wrongfully-enjoined parties elected to plead intentional torts as part of their efforts to obtain damages above the injunction bond amount. They did so because FED. R. CIV. P. 65, unlike Iowa law, otherwise would limit their recovery to the amount of the injunction bond. Under Iowa law, the wrongfully-enjoined parties can recover damages without limitation against the principal with no requirement of evidence showing malice.

The evidence of the University's reasons for obtaining the *ex parte* temporary injunction was offered to prove the "wrongfulness" of the injunction. It does not indicate that Modern's claim was actually for malicious prosecution or abuse of process. *See Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003). That evidence was necessary because the University never

stipulated to the wrongfulness of the injunction. App. Vol. IV, p. 19, 24:4-5. The University's motion for directed verdict argued Modern failed to present substantial evidence of wrongfulness. App. Vol. II, p. 114. The University's refusal to stipulate to wrongfulness necessitated Justice Streit's opinions about wrongfulness, which themselves were tied to the factors listed in Jury Instruction No.11 which are law of the case. App. Vol. I, pp. 94-95.

V. MODERN IS ENTITLED TO PREJUDGMENT INTEREST.

Modern agrees the University preserved error on the prejudgment interest issue. Awards of prejudgment interest are reviewed for correction of errors at law. *See Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005).

The award of prejudgment interest is "mandatory and should be awarded even when interest has not been requested." *Hughes v. Burlington N. R.R. Co.*, 545 N.W.2d 318, 321 (Iowa 1996). Prejudgment interest is awarded "to prevent persons obligated to pay money to another from profiting through delays in litigation." *Id*. Prejudgment interest applies to judgments at law and in equity. *See, e.g., Rowen v. Lemars Mut. Ins. Co. of Iowa*, 347 N.W.2d 630, 641 (Iowa 1984).

Restitution requires prejudgment interest. *Schwennen*, 471 N.W.2d at 884; *Muchmore Equip.*, 334 N.W.2d at 608. This Court, in the context of awarding prejudgment interest for subsequently-reversed judgments, held "it

is essential the court assess interest on the restored amount." *Muchmore Equip.*, 334 N.W.2d at 608. The party that benefited from the subsequently-reversed judgment holds the benefit as a trustee "until the action becomes final and should account for its use and pay interest upon the proceeds." *Id*.

The University's explanation about the purpose of prejudgment interest is incomplete. In restitution cases, prejudgment interest serves three purposes: (1) "necessary to provide compensation," (2) "necessary to avoid unjust enrichment of a defendant who has had the use of money or things which rightly belong to plaintiff," and (3) "if interest is not awarded the defendant may be left with undesirable incentives to delay payment." Dobbs, § 3.6(3), at 348-49.

Prejudgment interest is allowed when "a definite amount of recovery has been fixed by the trier of fact for a damage item shown to be complete at a particular time[.]" *Gosch*, 701 N.W.2d at 92-93. "[I]nterest should be allowed as to that item from the time that the damage was shown to be complete." *Id.*

Unlike *Catipovic v. Turley*, Case No. C 11-3074, 2015 WL 670156 (N.D. Iowa 2015), a case cited by the University, *see* Appellant's Br. 49, here the amount of unjust enrichment was a definite amount per month as of December 31, 2017. For the time period starting in May 2017 and concluding

in December 2017, the University was enriched in the amount of $1,598,022 per month. App. Vol. pp. 96 & 119. The fact damages were ascertained later is not relevant when determining whether damages were liquidated and complete. *Vorthman v. Keith E. Meyers Enters.*, 296 N.W.2d 772, 778 (Iowa 1980). Thus, the district court properly awarded Modern Piping $3,082,217.60 in interest accruing from January 1, 2018, at the rate of 5% per annum pursuant to Iowa Code section 535.2(1). Absent the prejudgment interest award, the University would unjustly retain the time value of money on the $12,784,117 windfall it obtained because of its wrongful injunction. *In re Marriage of Baculis*, 430 N.W.2d 399, 401 (Iowa 1988).

CONCLUSION

Appellee/Intervenor-Plaintiff Modern Piping, Inc., respectfully requests that this Court affirm the judgment of the district court, and such other relief as this Court deems fair and just.

REQUEST FOR ORAL ARUGMENT

Appellee/Intervenor-Plaintiff requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of IOWA RS. 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 2010 in 14-point Times New Roman and contains 13,229 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(*g*)(1).

/s/ Jeffrey A. Stone

October 12, 2023
Date

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on October 12, 2023, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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