

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico

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Mark Reynolds

4 **No. A-1-CA-34744**

5 **LASEN, INC., and LASEN**

6 **ALPIS, LLC,**

7 Plaintiffs-Appellees,

8 v.

9 **BORIS TADJIKOV,**

10 Defendant-Appellant.

11 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

12 **Manuel I. Arrieta, District Judge**

13 Lilley and O'Connell, P.A.

14 Jerome O'Connell

15 Erin O'Connell

16 Las Cruces, NM

17 Joel T. Newton, P.A.

18 Joel T. Newton

19 Las Cruces, NM

20 for Appellees

21 L. Helen Bennett, LLC

22 L. Helen Bennett

23 Albuquerque, NM

1 E.F. Messett, LLC  
2 Edward F. Messett  
3 Albuquerque, NM  
4 for Appellant

## OPINION

**KIEHNE, Judge.**

{1} Defendant Boris Tadjikov, Ph.D. appeals from a judgment awarding damages to his former employer, Plaintiff Lasen, Inc. and its subsidiary, Lasen ALPIS, LLC (collectively, “Lasen”), arising out of their lawsuit against him for breach of contract, breach of the duty of good faith and fair dealing, misappropriation of trade secrets, and for injunctive relief. After a bench trial, the district court found that Tadjikov had not misappropriated Lasen’s trade secrets, but that he had breached his employment agreement with, and his fiduciary duty to Lasen by wrongfully retaining intellectual property and trade secrets that belonged to Lasen (consisting of software source codes and related materials that Lasen used to operate its equipment), and also found that injunctive relief was proper. The district court entered a judgment awarding damages and a permanent injunction requiring Tadjikov to return any Lasen materials in his possession and preventing him from using or disclosing to others any of Lasen’s trade secrets or confidential information.

{2} On appeal, Tadjikov raises numerous claims, including legal challenges to the breach of fiduciary duty and breach of contract claims, challenges to the district court’s findings of fact, and factual and legal challenges to the award of damages. He also claims that the grant of permanent injunctive relief was improper. Finally, he claims that Lasen is not entitled to attorney’s fees.

1 {3} We reverse the district court’s entry of a permanent injunction against  
2 Tadjikov to the extent that it prevents him from disseminating Lasen’s confidential  
3 information, because his employment contract only prohibited him from doing so  
4 for a five-year period that expired in April 2014. We affirm the rest of the permanent  
5 injunction. We affirm the remainder of the judgment due to Tadjikov’s wholesale  
6 failure to establish that he preserved his claims for appeal.

7 **BACKGROUND**

8 {4} Lasen is engaged in the business of detecting methane gas leaks in natural gas  
9 pipelines, which it does using a well-known technology called “light detection and  
10 ranging” or “laser imaging detection and ranging” (LIDAR). Lasen asserts that its  
11 business is unique because it is able to mount the LIDAR equipment onto a  
12 helicopter, and, thanks to its own proprietary technology, it can inspect pipelines  
13 more quickly and accurately than its competitors.

14 {5} Lasen employed Tadjikov in 2004 as a research scientist. Tadjikov signed an  
15 employment agreement with Lasen, in which he agreed that “he [would] not, both  
16 during the term of his employment with [Lasen] and afterwards for a period of five  
17 (5) years from the date of termination disclose . . . [Lasen’s] confidential or  
18 proprietary information to anyone.” The agreement also stated that “[a]ny  
19 intellectual property right that might accrue to . . . Tadjikov during his employment  
20 with [Lasen], or which he might thereafter have a right to due to ideas developed or

1 explored while he was so employed, are hereby assigned to [Lasen]. . . . Tadjikov  
2 agrees that he will sign such documents as may be necessary to transfer such rights.”  
3 During the course of his employment, Tadjikov became a minority shareholder in  
4 Lasen.

5 {6} Though the parties disagree about whether Tadjikov’s position officially  
6 included software engineering as part of his job, it is undisputed that Tadjikov wrote  
7 the source code needed to update and repair the three devices that Lasen uses to  
8 conduct its business (known as LIDAR 4, LIDAR 5 and LIDAR 6). Source code is  
9 defined as “[t]he non-machine language used by a computer programmer to create a  
10 program.” *Black’s Law Dictionary* 1610 (10th ed. 2014). It can be edited by a  
11 computer programmer. Tadjikov never received any formal training as a computer  
12 programmer, but taught himself how to code in the Delphi programming language,  
13 a language intended to be easy to use, but which is now essentially obsolete.

14 {7} Once a programmer completes the source code for a program, the programmer  
15 will use two software components that work together, a “compiler” and one or more  
16 “libraries,” to convert the source code into an “executable file” or “object code.” The  
17 resulting executable file is expressed in binary code comprised entirely of ones and  
18 zeroes, which a computer then uses to run the program. Programmers generally  
19 cannot read or edit an executable file. Compilers and libraries are available from  
20 third-party vendors under a variety of licensing agreements. It is virtually impossible

1 to “decompile” an executable file and turn it back into source code. Lasen therefore  
2 needed the source code to update or modify the LIDAR units.

3 {8} The parties’ dispute stems from Lasen’s termination of Tadjikov’s  
4 employment in April 2009. Lasen sued Tadjikov fifteen months later, alleging that  
5 he violated the New Mexico Uniform Trade Secrets Act (the Act), NMSA 1978,  
6 §§ 57-3A-1 through -7 (1989), and that he breached his employment agreement, his  
7 duty of good faith and fair dealing to Lasen, and his fiduciary duty to Lasen by  
8 misappropriating the source codes he wrote for LIDARs 4, 5 and 6.

9 {9} According to Lasen, Tadjikov returned to Lasen’s office the day after his  
10 termination to retrieve his personal items. But Tadjikov instead took property and  
11 information that belonged to Lasen, including the source code that he had written  
12 for LIDARs 4, 5 and 6, and he failed to provide Lasen with a complete copy of the  
13 source code. Lasen presented evidence that during his employment, Tadjikov wrote  
14 the source code on his personal hard drive, but did not allow other employees or  
15 shareholders access to it. After his termination, Tadjikov refused to give Lasen the  
16 portable hard drive on which he wrote the source code, and that as he was leaving,  
17 he told shareholders and employees of Lasen that it would cost half a million dollars  
18 to get rid of him. Lasen presented evidence that Tadjikov deleted portions of the  
19 source code in Lasen’s possession, and that he failed to leave any sort of  
20 documentation to allow subsequent software engineers to understand and modify his

1 source code, making it impossible for Lasen to upgrade and update the LIDARs.  
2 Lasen also presented testimony that Tadjikov tied the source code to specific serial  
3 numbers in the hardware of the LIDARs, making it impossible to transfer the  
4 programs to another hard drive, or to replace the equipment within the LIDARs  
5 without updating the source code, but did not tell anyone else he had done that.  
6 Moreover, Lasen offered proof that when Tadjikov returned two lab books that he  
7 used to document his work with the company, they were missing at least 70-80 pages  
8 of information.

9 {10} Lasen's witnesses testified that Tadjikov failed to leave the libraries and  
10 compilers necessary to successfully run the source code, nor did Tadjikov indicate  
11 through documentation which libraries were needed to run the source code. Lasen  
12 also contended that Tadjikov attempted to use its trade secrets when seeking  
13 employment with a company that was in discussions to buy Lasen. Tadjikov offered  
14 to build a methane gas leak detection system for that company, and Lasen alleged  
15 that Tadjikov had suggested to the company that it could hire him to build a new  
16 system rather than purchase Lasen. Additionally, Lasen provided evidence that  
17 Tadjikov had withheld source code from previous employers, relying on the  
18 testimony of Dr. Gary Eiceman, a professor at New Mexico State University who  
19 used to supervise Tadjikov, that when Tadjikov left Dr. Eiceman's laboratory, he

1 refused to provide him with source code he had developed for the laboratory, arguing  
2 that it was his property.

3 {11} Tadjikov denied these accusations. He testified that he provided a CD  
4 containing a copy of the source code to his direct supervisor, Dr. Egor Degtiarev,  
5 and to the former CEO of Lasen, Inc., Bob Reich. He further testified that he had  
6 placed copies of the source code directly onto the LIDAR units until he was  
7 instructed by Mr. Reich to delete it from the units for security purposes. Tadjikov  
8 contended that he used his own personal academic version of the libraries and  
9 compilers to create a prototype of the software, which he obtained during his time  
10 as an assistant professor at New Mexico State University, and that he had provided  
11 a copy of the libraries and compliers to Lasen. Tadjikov argued that Lasen failed to  
12 purchase a commercial license for the libraries and compliers, and was operating the  
13 LIDAR units illegally due to the lack of proper software licensing.

14 {12} Litigation on the case continued for several years, and by the time of trial, the  
15 parties had stipulated that the source codes were trade secrets, and that they belonged  
16 to Lasen. The parties also stipulated that no single CD could possibly contain the  
17 entirety of the source codes, libraries, and compilers because of the limited storage  
18 capacity of CDs at the time. After a four-day bench trial, the district court issued  
19 findings of fact and conclusions of law in which it generally accepted Lasen's  
20 version of the facts. It concluded that Tadjikov had breached both his employment



1 agreement with, and his fiduciary duty to, Lasen, by wrongfully retaining Lasen's  
2 source code, and that he did so with the intent to use the source codes for his own  
3 financial gain or for some other improper motive, such as retaliating against Lasen  
4 for terminating him. The district court, however, found that Tadjikov had not  
5 committed any actual misappropriation of trade secrets under the Act because he did  
6 not actually disclose them to a third party or put them to commercial use. As a result  
7 of Tadjikov's wrongful retention of the source code, the district court concluded that  
8 the following damages were appropriate: \$170,000 for the 3,293 hours expended by  
9 Lasen to repair the LIDAR units as a result of not having the source codes; \$395,000  
10 for the value of LIDAR 6, which had to be decommissioned, minus its salvage value;  
11 disgorgement of one year of Tadjikov's salary (\$72,000) for breach of the  
12 employment agreement and breach of fiduciary duty; and \$100,000 in punitive  
13 damages. The district court reserved its decision about whether Lasen was entitled  
14 to attorney's fees to a later date.

15 {13} The district court later entered judgment against Tadjikov in accord with its  
16 findings and conclusions on Lasen's damages claims, and also entered judgment that  
17 Lasen was entitled to recover attorney's fees, while reserving the amount of those  
18 fees to a future hearing. The record on appeal, however, does not contain any order  
19 actually awarding attorney's fees to Lasen. The district court entered a permanent  
20 injunction prohibiting Tadjikov from disseminating, misappropriating, or retaining

1 any trade secret of Lasen, and ordered Tadjikov to return any source code for  
2 LIDARs 4, 5, and 6 that Tadjikov has, or ever finds or creates. Tadjikov now appeals.

### 3 **DISCUSSION**

#### 4 **I. Tadjikov has failed to demonstrate that he preserved the majority of his** 5 **claims, and we therefore decline to review them**

6 {14} Tadjikov's brief in chief raises numerous, complex, and sometimes novel  
7 claims, arguing that the district court erred: (1) by finding that he breached a  
8 fiduciary duty as either an employee or a shareholder, where he owed no such duty  
9 since he was a minority shareholder in Lasen, did not occupy any position of  
10 managerial authority, and did not benefit from the source codes that he wrongfully  
11 retained; (2) by imposing on Tadjikov an obligation to provide Lasen with a copy of  
12 the source codes and related materials, thereby improperly rewriting Tadjikov's at-  
13 will employment contract with Lasen to add terms that the parties never bargained  
14 for; (3) by awarding consequential damages that were unsupported by any evidence  
15 that the parties contemplated those damages at the time of contracting; (4) by  
16 entering self-contradictory findings of fact and conclusions of law that do not  
17 support the judgment; (5) by awarding damages against Tadjikov that are barred by  
18 the economic loss doctrine; (6) by awarding damages that amount to a double  
19 recovery in some instances; (7) by awarding damages that are arbitrary, based on an  
20 improper measure of damages, or unsupported by substantial evidence; (8) by  
21 ordering Tadjikov to disgorge an amount equal to one year of his salary at Lasen,

1 although the award was unsupported by evidence that he derived any financial  
2 benefit from his retention of Lasen’s source code; and (9) by entering judgment in  
3 favor of Lasen on its claim for attorney’s fees, because the employment agreement  
4 did not provide for them, and because Lasen was not entitled to fees under the Act.

5 {15} Tadjikov must show that he preserved these claims for appellate review before  
6 we will address them. *See* Rule 12-321(A) NMRA. “To preserve an issue for review  
7 on appeal, it must appear that [the] appellant fairly invoked a ruling of the [district]  
8 court on the same grounds argued in the appellate court.” *Benz v. Town Ctr. Land,*  
9 *LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation marks and citation  
10 omitted). “The primary purposes for the preservation rule are: (1) to specifically alert  
11 the district court to a claim of error so that any mistake can be corrected at that time,  
12 (2) to allow the opposing party a fair opportunity to respond to the claim of error and  
13 to show why the [district] court should rule against that claim, and (3) to create a  
14 record sufficient to allow this Court to make an informed decision regarding the  
15 contested issue.” *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-  
16 095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

17 {16} An important provision of the Rules of Appellate Procedure helps this Court  
18 to determine whether an appellant’s claims have been preserved. Rule 12-318(A)(4)  
19 NMRA requires an appellant’s brief in chief to include, with respect to each claim  
20 raised on appeal, “a statement explaining how the issue was preserved in the court

1 below, with citations to authorities, record proper, transcript of proceedings, or  
2 exhibits relied on.” Preservation statements help New Mexico’s appellate courts to  
3 more efficiently and effectively perform their function, not only to determine  
4 whether a particular claim has been preserved, but also to understand the context in  
5 which the claim arose and the reasoning underlying the district court’s decision.  
6 And, in a time of scarce judicial resources and a heavy docket, preservation  
7 statements help our appellate courts to work more efficiently. The importance of  
8 adequate preservation statements is underscored by our Supreme Court’s declaration  
9 that an appellant’s failure to include an adequate one may, by itself, justify an  
10 appellate court in declining to review a claim. *See Glaser v. LeBus*, 2012-NMSC-  
11 012, ¶ 13, 276 P.3d 959 (stating that where a party fails to comply with requirement  
12 to demonstrate where a claim was preserved, an appellate court may decline to  
13 review that claim).

14 {17} Tadjikov’s brief in chief includes several nearly-identical preservation  
15 statements that purport to describe how his claims were preserved. These cite  
16 Tadjikov’s statement of the case in the pre-trial order, his proposed findings of fact  
17 and conclusions of law, and a post-trial brief as evidence that he preserved his  
18 claims. Given the novelty and complexity of his claims, we were interested in how  
19 they had developed and what the district court had said about them. But when we  
20 reviewed the documents that Tadjikov cited, we could find no reference to any claim

1 or argument remotely similar to the ones that he raises now. Tadjikov’s statement of  
2 the case in the pretrial order did state generally that Lasen’s entitlement to damages  
3 was an issue to be determined at trial, and in his post-trial proposed findings of fact  
4 and conclusions of law, he asserted that Lasen was not entitled to damages because  
5 he did not misappropriate any trade secrets or breach any of his duties to Lasen, but  
6 these general statements were woefully insufficient to preserve the detailed and  
7 specific attacks on the damages awards that he now raises in this appeal. *See*  
8 *Crutchfield v. N.M. Dep’t of Taxation and Revenue*, 2005-NMCA-022, ¶ 14, 137  
9 N.M. 26, 106 P.3d 1273 (“[O]n appeal, the party must specifically point out where,  
10 in the record, the party invoked the court’s ruling on the issue. Absent that citation  
11 to the record or any obvious preservation, we will not consider the issue.”).

12 {18} Tadjikov’s preservation statements also assert that he raised his claims “in  
13 arguments to the [d]istrict [c]ourt, and testimony and evidence elicited” during two  
14 pre-trial hearings, and during the four-day bench trial. Although Rule 12-318(A)(4)  
15 required the preservation statements to include “citations to . . . [the] record proper,  
16 transcript of proceedings, or exhibits relied on[,]” Tadjikov has failed to cite the  
17 pages of these transcripts where he preserved his claims. By failing to include  
18 specific citations, Tadjikov invites this Court to review hundreds of pages of  
19 argument and testimony (the four-day trial transcript alone is 939 pages long) to  
20 figure out whether his claims were preserved. We may decline to review Tadjikov’s

1 claims on this ground alone. *See In re Norwest Bank of N.M., N.A.*, 2003-NMCA-  
2 128, ¶ 30, 134 N.M. 516, 80 P.3d 98 (stating that this Court will not search transcripts  
3 for evidence of preservation where the appellant refers generally to the transcripts,  
4 but fails to provide specific page numbers). Nevertheless, although not obligated to  
5 do so, we have reviewed these transcripts, and cannot find any reference to the  
6 claims that Tadjikov now presses on appeal.

7 {19} We conclude that Tadjikov’s brief in chief has failed to establish that he  
8 preserved the above-listed claims, as required by Rule 12-318(A)(4), and we  
9 therefore decline to review them. We rely on this rule although Lasen did not point  
10 out Tadjikov’s failure to follow it, much less his actual failure to preserve his claims,  
11 because failure to comply with the Rule has obstructed our ability to conduct  
12 appropriate appellate review.

13 **II. Tadjikov’s challenges to the permanent injunction**

14 {20} Tadjikov objects to the district court’s entry of a permanent injunction against  
15 him on three grounds. First, he argues that the evidence was insufficient to  
16 demonstrate a “threatened misappropriation” of trade secrets, as required to support  
17 an injunction under the Act. Second, he argues that the injunction is improper  
18 because it is unlimited in time; that is, the injunction permanently precludes him  
19 from ever disclosing Lasen’s trade secrets or confidential information even though  
20 the parties’ employment contract only imposed a five-year post-termination period

1 of confidentiality on Tadjikov. Finally, Tadjikov argues that injunctive relief was  
2 improper because Lasen had an adequate remedy at law. The first claim lacks merit  
3 and Tadjikov has failed to demonstrate how he preserved the third claim, but we  
4 conclude that the second claim is meritorious to the extent that it imposes an  
5 obligation of confidentiality on Tadjikov that is unlimited in time.

6 ¶21} “[I]njunctive remedies are harsh and drastic remedies which should issue only in  
7 extreme cases of pressing necessity and only where there is [a showing of irreparable  
8 injury for which there is] no adequate and complete remedy at law.” *Luginbuhl v.*  
9 *City of Gallup*, 2013-NMCA-053, ¶ 31, 302 P.3d 751 (internal quotation marks and  
10 citation omitted). We review a district court’s decision to issue a permanent  
11 injunction for an abuse of discretion. *See Insure N.M., LLC v. McGonigle*, 2000-  
12 NMCA-018, ¶ 7, 128 N.M. 611, 995 P.2d 1053 (“The granting of an injunction is an  
13 equitable remedy, and whether to grant equitable relief lies within the sound  
14 discretion of the trial court.”). “[T]he trial court abuses discretion when it applies an  
15 incorrect standard, incorrect substantive law, or its discretionary decision is  
16 premised on a misapprehension of the law.” *Aragon v. Brown*, 2003-NMCA-126,  
17 ¶ 9, 134 N.M. 459, 78 P.3d 913. To the extent that this case requires us to interpret  
18 the Act, statutory interpretation is a question of law which we review de novo. *State*  
19 *ex rel. Children, Youth & Families Dep’t. v. Maurice H.*, 2014-NMSC-034, ¶ 65,  
20 335 P.3d 746.

1 **A. Lasen proved the existence of “threatened appropriation” sufficient to**  
2 **support an injunction against Tadjikov**

3 {22} The Act provides that “[a]ctual or threatened misappropriation [of a trade  
4 secret] may be enjoined.” NMSA 1978, § 57-3A-3(A) (1989). Tadjikov argues that  
5 the permanent injunction was improper. First, he argues that the injunction is not  
6 based on any actual misappropriation of a trade secret because the district court  
7 rejected Lasen’s misappropriation claim. Second, Tadjikov argues that evidence was  
8 insufficient to support the district court’s finding that threatened misappropriation  
9 existed, because he never made any threat to disclose Lasen’s trade secrets to a third  
10 party.

11 {23} We agree with Tadjikov that the permanent injunction is not based on any  
12 actual misappropriation of a trade secret. The district court found that Tadjikov “did  
13 not misappropriate Lasen’s trade secrets in that he did not receive some sort of unfair  
14 trade advantage, nor did he disclose them to a third person or otherwise place the  
15 information to commercial use,” and concluded that “[t]he evidence at trial did not  
16 place Lasen’s misappropriation claims within the coverage of the . . . Act.” But the  
17 district court also found that “the evidence is sufficient to require a need for  
18 continued injunctive relief under Section 57-3A-3.” Lasen does not appear to dispute  
19 Tadjikov’s argument that the injunction does not rest on any actual misappropriation  
20 under the Act.



1 {24} Accordingly, we turn to consider whether sufficient evidence of “threatened  
2 misappropriation” existed to support entry of the injunction. Tadjikov, quoting  
3 *Black’s Law Dictionary* 1030 (6th ed. 1991), argues that the word “threat” should  
4 be defined as “[a] communicated intent to inflict physical or other harm on any  
5 person or property.” And because Lasen offered no evidence that he ever  
6 communicated any such threat, Tadjikov argues that there was no “threatened  
7 misappropriation” under the Act. Lasen does not respond to Tadjikov’s  
8 interpretation of the Act.

9 {25} Despite Lasen’s failure to help us on this point, we conclude that Tadjikov’s  
10 interpretation of “threatened misappropriation” is too narrow. First, the plain  
11 meaning of the word “threat” is broader than Tadjikov admits. To be sure, the term  
12 includes the communication of an explicit intent to harm, but it is also defined as  
13 “[a]n indication of approaching menace; the suggestion of an impending detriment,”  
14 and as “[a] person or thing that might well cause harm.” *Black’s Law Dictionary*  
15 1708-09 (10th ed. 2014). Second, other courts have not limited the term to situations  
16 in which a defendant explicitly threatens to disclose trade secrets to others. Thus, for  
17 example, under California law, “[t]hreatened misappropriation may be demonstrated  
18 by showing either that the defendant possesses trade secrets and has misused or  
19 disclosed those secrets in the past, that the defendant intends to misuse or disclose  
20 those secrets, or that the defendant possesses trade secrets and wrongfully refuses to

1 return them after a demand for return is made.” *Clorox Co. v. S.C. Johnson & Son,*  
2 *Inc.*, 627 F. Supp. 2d 954, 968-69 (E.D. Wis. 2009). Without attempting to set forth  
3 a comprehensive definition of “threatened misappropriation,” we agree that it occurs  
4 when a defendant possesses trade secrets and wrongfully refuses to return them to  
5 the owner. This makes sense, because where a defendant has trade secrets and  
6 wrongfully refuses to return them to their owner, it is reasonable to infer that the  
7 defendant may intend to use them in a way that harms the owner, and reasonable to  
8 protect the trade secret owner against that risk.

9 {26} Here there was ample evidence that Tadjikov possessed Lasen’s trade secrets  
10 and wrongfully refused to return them after Lasen demanded their return. The district  
11 court found that Tadjikov “wrongfully failed to provide Lasen with the programming  
12 environment in which he created the source code;” that he “took possession of source  
13 codes, lab books and trade secrets of Lasen in defiance of the Lasen’s rights with  
14 intent to deprive and negate Lasen of its lawful property, and further wrongfully  
15 retained such property following multiple demands for their return[;]” and “engaged  
16 in this conduct so as to ensure Lasen would be without copies of the source code so  
17 as to impair and impede Lasen’s ability to repair, modify or improve the LIDAR  
18 units which [Tadjikov] had developed and upon which Lasen commercially relied  
19 on.” Tadjikov does not challenge these findings of fact, and accordingly we deem  
20 them conclusive. *See* Rule 12-318(A)(4) (stating that the argument in an appellant’s

1 brief in chief “shall set forth a specific attack on any finding, or the finding shall be  
2 deemed conclusive”). We therefore hold that the evidence was sufficient to support  
3 the district court’s conclusion that Tadjikov’s “threatened misappropriation” of  
4 Lasen’s trade secrets supported a grant of injunctive relief under the Act.

5 **B. The injunction is improperly unlimited in time**

6 {27} Tadjikov next argues that the permanent injunction violates the Act because  
7 it imposes obligations on him to protect Lasen’s trade secrets that are unlimited in  
8 time, even though the parties themselves agreed that a five-year period post-  
9 termination was appropriate. We agree with Tadjikov that the injunction should not  
10 have extended his obligation not to disclose Lasen’s trade secrets and confidential  
11 information beyond the time that Lasen itself agreed was proper.

12 {28} The Act places a temporal limit on injunctive relief by stating that “[u]pon  
13 application to the court, an injunction shall be terminated when the trade secret has  
14 ceased to exist but the injunction may be continued for an additional reasonable  
15 period of time in order to eliminate commercial advantage that otherwise would be  
16 derived from the misappropriation.” Section 57-3A-3(A). Here, Tadjikov’s  
17 employment agreement states that “[Tadjikov] will not, both during the term of his  
18 employment with Lasen and afterwards for a period of five (5) years from the date  
19 of termination disclose [Lasen’s] confidential or proprietary information to anyone.  
20 Confidential and proprietary information includes any information that is not

1 generally known and which is, or which may be, useful in the operation of [Lasen]  
2 or which may be beneficial to anyone in competition with Lasen. Such information  
3 includes, but is not limited to, information concerning projects being worked on or  
4 contemplated by Lasen, technical information, and information concerning the  
5 commercialization of Lasen's products and Lasen's financial affairs." This  
6 obligation included Lasen's trade secrets, which by definition are not generally  
7 known. *See* § 57-3A-2(D)(1) (defining "trade secret" as "information . . . that: (1)  
8 derives independent economic value, actual or potential, from not being generally  
9 known to and not being readily ascertainable by proper means by other persons who  
10 can obtain economic value from its disclosure or use[.]").

11 {29} Accordingly, because Lasen terminated Tadjikov's employment in April  
12 2009, his contractual obligation not to disclose Lasen's trade secrets or confidential  
13 information only extended through April 2014. The district court's injunction,  
14 however, was entered in April 2015 and imposed a non-disclosure obligation on  
15 Tadjikov without any temporal limit. While Section 57-3A-3(A) allows an  
16 injunction to continue "for an additional reasonable period of time in order to  
17 eliminate commercial advantage" even after a trade secret no longer exists, Lasen  
18 itself agreed, in its employment agreement with Tadjikov, that a post-termination  
19 period of five years was reasonable. In its answer brief, Lasen does not respond to  
20 Tadjikov's argument that the injunction's unlimited time period is improper, much

1 less offer any attempt to justify it. Moreover, the district court acknowledged at the  
2 hearing on the motion for reconsideration that the technology at issue “was already  
3 obsolete or becoming obsolete. So in essence, it’s really an injunction on obsolete  
4 technology or equipment.” We therefore conclude that it was improper for the  
5 district court to issue an injunction that protected Lasen’s trade secrets from  
6 disclosure beyond the five years that Lasen contracted for. *See In re N.M. Indirect*  
7 *Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 41, 140 N.M. 879, 149 P.3d 976  
8 (“We will not rewrite a contract to create an agreement for the benefit of one of the  
9 parties that, in hindsight, would have been wiser.” (alteration, internal quotation  
10 marks, and citation omitted)).

11 {30} We do, however, affirm the district court’s injunction to the extent that it  
12 requires Tadjikov to turn over to Lasen any copies of the source code in his  
13 possession, or which he “may ever discover or create,” including “any reasonable  
14 facsimile of such source code[.]” The parties agreed that the source code was Lasen’s  
15 property. The district court found that Tadjikov wrongfully retained “the intellectual  
16 property rights and trade secrets which he had created and assigned to Lasen in  
17 accordance with their employment agreement.” The district court further found that  
18 his retention of the source code made it difficult for Lasen to modify or repair the  
19 LIDAR units on which its business relies. Tadjikov does not challenge these factual  
20 findings on appeal. We conclude that even if the source code no longer constituted

1 a trade secret, and although Tadjikov no longer has an obligation to keep it  
2 confidential, it is still Lasen's property, and Lasen is entitled to its return.  
3 Accordingly, we hold that it was reasonable for the district court to order Tadjikov  
4 to return to Lasen any source code in his possession or that he might obtain  
5 possession of in the future.

6 {31} We reverse the district court's order issuing a permanent injunction against  
7 Tadjikov only to the extent it prevents him from disseminating source code to third  
8 parties in the future. The portion of the injunction as it relates to Tadjikov's wrongful  
9 retention of the source code is affirmed.

10 **C. We decline to address Tadjikov's argument that the injunction was**  
11 **improper because Lasen had an adequate remedy at law**

12 {32} Tadjikov argues that the permanent injunction was improper because Lasen  
13 had an adequate remedy at law. As discussed above, we have reviewed the  
14 documents and transcripts that Tadjikov cited in his preservation statements  
15 contained in his brief in chief. We can find no reference to any argument that the  
16 permanent injunction should not have been granted because Lasen had an adequate  
17 remedy at law. Accordingly, we decline to review this claim due to Tadjikov's  
18 failure to demonstrate how and when it was preserved, as required by Rule 12-  
19 318(A)(4).

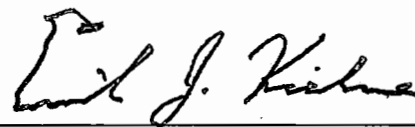
1 **III. Lasen’s request for appellate attorney’s fees is unsupported**

2 {33} In the concluding paragraph of its answer brief, Lasen asks this Court to award  
3 it attorney’s fees for this appeal. Rule 12-403(B)(3) NMRA allows this Court to  
4 award “reasonable attorney fees for services rendered on appeal in causes where the  
5 award of attorney fees is permitted by law.” Lasen, however, does not identify the  
6 legal basis on which it asks for attorney’s fees, and therefore we conclude that this  
7 request lacks merit.

8 **CONCLUSION**

9 {34} We reverse the district court’s imposition of a permanent injunction against  
10 Tadjikov to the extent that it requires him to maintain the confidentiality of Lasen’s  
11 trade secrets in perpetuity. We affirm the judgment and permanent injunction in all  
12 other respects. Lasen’s request for appellate attorney’s fees is denied.

13 {35} **IT IS SO ORDERED.**

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EMIL J. KIEHNE, Judge

16 **WE CONCUR:**

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JULIE J. VARGAS, Judge

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DANIEL J. GALLEGOS, Judge