

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

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

3 Filing Date: December 21, 2018

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

1 **OPINION**

2 **KIEHNE, Judge.**

3 {1} Defendant Boris Tadjikov, Ph.D. appeals from a judgment awarding  
4 damages to his former employer, Plaintiff Lasen, Inc. and its subsidiary, Lasen  
5 ALPIS, LLC (collectively, “Lasen”), arising out of their lawsuit against him for  
6 breach of contract, breach of the duty of good faith and fair dealing,  
7 misappropriation of trade secrets, and for injunctive relief. After a bench trial, the  
8 district court found that Tadjikov had not misappropriated Lasen’s trade secrets,  
9 but that he had breached his employment agreement with, and his fiduciary duty to  
10 Lasen by wrongfully retaining intellectual property and trade secrets that belonged  
11 to Lasen (consisting of software source codes and related materials that Lasen used  
12 to operate its equipment), and also found that injunctive relief was proper. The  
13 district court entered a judgment awarding damages and a permanent injunction  
14 requiring Tadjikov to return any Lasen materials in his possession and preventing  
15 him from using or disclosing to others any of Lasen’s trade secrets or confidential  
16 information.

17 {2} On appeal, Tadjikov raises numerous claims, including legal challenges to  
18 the breach of fiduciary duty and breach of contract claims, challenges to the district  
19 court’s findings of fact, and factual and legal challenges to the award of damages.

1 He also claims that the grant of permanent injunctive relief was improper. Finally,  
2 he claims that Lasen is not entitled to attorney's fees.

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

## 9 **BACKGROUND**

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

16 {5} Lasen employed Tadjikov in 2004 as a research scientist. Tadjikov signed an  
17 employment agreement with Lasen, in which he agreed that "he [would] not, both  
18 during the term of his employment with [Lasen] and afterwards for a period of five  
19 (5) years from the date of termination disclose . . . [Lasen's] confidential or  
20 proprietary information to anyone." The agreement also stated that "[a]ny

1 intellectual property right that might accrue to . . . Tadjikov during his employment  
2 with [Lasen], or which he might thereafter have a right to due to ideas developed  
3 or explored while he was so employed, are hereby assigned to [Lasen]. . . .  
4 Tadjikov agrees that he will sign such documents as may be necessary to transfer  
5 such rights.” During the course of his employment, Tadjikov became a minority  
6 shareholder in Lasen.

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

17 {7} Once a programmer completes the source code for a program, the  
18 programmer will use two software components that work together, a “compiler”  
19 and one or more “libraries,” to convert the source code into an “executable file” or  
20 “object code.” The resulting executable file is expressed in binary code comprised

1 entirely of ones and zeroes, which a computer then uses to run the program.  
2 Programmers generally cannot read or edit an executable file. Compilers and  
3 libraries are available from third-party vendors under a variety of licensing  
4 agreements. It is virtually impossible to “decompile” an executable file and turn it  
5 back into source code. Lasen therefore needed the source code to update or modify  
6 the LIDAR units.

7 {8} The parties’ dispute stems from Lasen’s termination of Tadjikov’s  
8 employment in April 2009. Lasen sued Tadjikov fifteen months later, alleging that  
9 he violated the New Mexico Uniform Trade Secrets Act (the Act), NMSA 1978,  
10 §§ 57-3A-1 through -7 (1989), and that he breached his employment agreement,  
11 his duty of good faith and fair dealing to Lasen, and his fiduciary duty to Lasen by  
12 misappropriating the source codes he wrote for LIDARs 4, 5 and 6.

13 {9} According to Lasen, Tadjikov returned to Lasen’s office the day after his  
14 termination to retrieve his personal items. But Tadjikov instead took property and  
15 information that belonged to Lasen, including the source code that he had written  
16 for LIDARs 4, 5 and 6, and he failed to provide Lasen with a complete copy of the  
17 source code. Lasen presented evidence that during his employment, Tadjikov  
18 wrote the source code on his personal hard drive, but did not allow other  
19 employees or shareholders access to it. After his termination, Tadjikov refused to  
20 give Lasen the portable hard drive on which he wrote the source code, and that as

1 he was leaving, he told shareholders and employees of Lasen that it would cost half  
2 a million dollars to get rid of him. Lasen presented evidence that Tadjikov deleted  
3 portions of the source code in Lasen's possession, and that he failed to leave any  
4 sort of documentation to allow subsequent software engineers to understand and  
5 modify his source code, making it impossible for Lasen to upgrade and update the  
6 LIDARs. Lasen also presented testimony that Tadjikov tied the source code to  
7 specific serial numbers in the hardware of the LIDARs, making it impossible to  
8 transfer the programs to another hard drive, or to replace the equipment within the  
9 LIDARs without updating the source code, but did not tell anyone else he had done  
10 that. Moreover, Lasen offered proof that when Tadjikov returned two lab books  
11 that he used to document his work with the company, they were missing at least  
12 70-80 pages of information.

13 {10} Lasen's witnesses testified that Tadjikov failed to leave the libraries and  
14 compilers necessary to successfully run the source code, nor did Tadjikov indicate  
15 through documentation which libraries were needed to run the source code. Lasen  
16 also contended that Tadjikov attempted to use its trade secrets when seeking  
17 employment with a company that was in discussions to buy Lasen. Tadjikov  
18 offered to build a methane gas leak detection system for that company, and Lasen  
19 alleged that Tadjikov had suggested to the company that it could hire him to build  
20 a new system rather than purchase Lasen. Additionally, Lasen provided evidence

1 that Tadjikov had withheld source code from previous employers, relying on the  
2 testimony of Dr. Gary Eiceman, a professor at New Mexico State University who  
3 used to supervise Tadjikov, that when Tadjikov left Dr. Eiceman's laboratory, he  
4 refused to provide him with source code he had developed for the laboratory,  
5 arguing that it was his property.

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

17 {12} Litigation on the case continued for several years, and by the time of trial,  
18 the parties had stipulated that the source codes were trade secrets, and that they  
19 belonged to Lasen. The parties also stipulated that no single CD could possibly  
20 contain the entirety of the source codes, libraries, and compilers because of the

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

18 {13} The district court later entered judgment against Tadjikov in accord with its  
19 findings and conclusions on Lasen's damages claims, and also entered judgment  
20 that Lasen was entitled to recover attorney's fees, while reserving the amount of

1 those fees to a future hearing. The record on appeal, however, does not contain any  
2 order actually awarding attorney's fees to Lasen. The district court entered a  
3 permanent injunction prohibiting Tadjikov from disseminating, misappropriating,  
4 or retaining any trade secret of Lasen, and ordered Tadjikov to return any source  
5 code for LIDARs 4, 5, and 6 that Tadjikov has, or ever finds or creates. Tadjikov  
6 now appeals.

## 7 **DISCUSSION**

### 8 **I. Tadjikov has failed to demonstrate that he preserved the majority of his** 9 **claims, and we therefore decline to review them**

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

1 that are barred by the economic loss doctrine; (6) by awarding damages that  
2 amount to a double recovery in some instances; (7) by awarding damages that are  
3 arbitrary, based on an improper measure of damages, or unsupported by substantial  
4 evidence; (8) by ordering Tadjikov to disgorge an amount equal to one year of his  
5 salary at Lasen, although the award was unsupported by evidence that he derived  
6 any financial benefit from his retention of Lasen's source code; and (9) by entering  
7 judgment in favor of Lasen on its claim for attorney's fees, because the  
8 employment agreement did not provide for them, and because Lasen was not  
9 entitled to fees under the Act.

10 {15} Tadjikov must show that he preserved these claims for appellate review  
11 before we will address them. *See* Rule 12-321(A) NMRA. "To preserve an issue  
12 for review on appeal, it must appear that [the] appellant fairly invoked a ruling of  
13 the [district] court on the same grounds argued in the appellate court." *Benz v.*  
14 *Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation  
15 marks and citation omitted). "The primary purposes for the preservation rule are:  
16 (1) to specifically alert the district court to a claim of error so that any mistake can  
17 be corrected at that time, (2) to allow the opposing party a fair opportunity to  
18 respond to the claim of error and to show why the [district] court should rule  
19 against that claim, and (3) to create a record sufficient to allow this Court to make

1 an informed decision regarding the contested issue.” *Sandoval v. Baker Hughes*  
2 *Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

3 {16} An important provision of the Rules of Appellate Procedure helps this Court  
4 to determine whether an appellant’s claims have been preserved. Rule 12-  
5 318(A)(4) NMRA requires an appellant’s brief in chief to include, with respect to  
6 each claim raised on appeal, “a statement explaining how the issue was preserved  
7 in the court below, with citations to authorities, record proper, transcript of  
8 proceedings, or exhibits relied on.” Preservation statements help New Mexico’s  
9 appellate courts to more efficiently and effectively perform their function, not only  
10 to determine whether a particular claim has been preserved, but also to understand  
11 the context in which the claim arose and the reasoning underlying the district  
12 court’s decision. And, in a time of scarce judicial resources and a heavy docket,  
13 preservation statements help our appellate courts to work more efficiently. The  
14 importance of adequate preservation statements is underscored by our Supreme  
15 Court’s declaration that an appellant’s failure to include an adequate one may, by  
16 itself, justify an appellate court in declining to review a claim. *See Glaser v. LeBus*,  
17 2012-NMSC-012, ¶ 13, 276 P.3d 959 (stating that where a party fails to comply  
18 with requirement to demonstrate where a claim was preserved, an appellate court  
19 may decline to review that claim).

1 {17} Tadjikov’s brief in chief includes several nearly-identical preservation  
2 statements that purport to describe how his claims were preserved. These cite  
3 Tadjikov’s statement of the case in the pre-trial order, his proposed findings of fact  
4 and conclusions of law, and a post-trial brief as evidence that he preserved his  
5 claims. Given the novelty and complexity of his claims, we were interested in how  
6 they had developed and what the district court had said about them. But when we  
7 reviewed the documents that Tadjikov cited, we could find no reference to any  
8 claim or argument remotely similar to the ones that he raises now. Tadjikov’s  
9 statement of the case in the pretrial order did state generally that Lasen’s  
10 entitlement to damages was an issue to be determined at trial, and in his post-trial  
11 proposed findings of fact and conclusions of law, he asserted that Lasen was not  
12 entitled to damages because he did not misappropriate any trade secrets or breach  
13 any of his duties to Lasen, but these general statements were woefully insufficient  
14 to preserve the detailed and specific attacks on the damages awards that he now  
15 raises in this appeal. *See Crutchfield v. N.M. Dep’t of Taxation and Revenue*, 2005-  
16 NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (“[O]n appeal, the party must  
17 specifically point out where, in the record, the party invoked the court’s ruling on  
18 the issue. Absent that citation to the record or any obvious preservation, we will  
19 not consider the issue.”).

1 {18} Tadjikov’s preservation statements also assert that he raised his claims “in  
2 arguments to the [d]istrict [c]ourt, and testimony and evidence elicited” during two  
3 pre-trial hearings, and during the four-day bench trial. Although Rule 12-318(A)(4)  
4 required the preservation statements to include “citations to . . . [the] record proper,  
5 transcript of proceedings, or exhibits relied on[.]” Tadjikov has failed to cite the  
6 pages of these transcripts where he preserved his claims. By failing to include  
7 specific citations, Tadjikov invites this Court to review hundreds of pages of  
8 argument and testimony (the four-day trial transcript alone is 939 pages long) to  
9 figure out whether his claims were preserved. We may decline to review  
10 Tadjikov’s claims on this ground alone. *See In re Norwest Bank of N.M., N.A.*,  
11 2003-NMCA-128, ¶ 30, 134 N.M. 516, 80 P.3d 98 (stating that this Court will not  
12 search transcripts for evidence of preservation where the appellant refers generally  
13 to the transcripts, but fails to provide specific page numbers). Nevertheless,  
14 although not obligated to do so, we have reviewed these transcripts, and cannot  
15 find any reference to the claims that Tadjikov now presses on appeal.

16 {19} We conclude that Tadjikov’s brief in chief has failed to establish that he  
17 preserved the above-listed claims, as required by Rule 12-318(A)(4), and we  
18 therefore decline to review them. We rely on this rule although Lasen did not point  
19 out Tadjikov’s failure to follow it, much less his actual failure to preserve his

1 claims, because failure to comply with the Rule has obstructed our ability to  
2 conduct appropriate appellate review.

### 3 **II. Tadjikov’s challenges to the permanent injunction**

4 {20} Tadjikov objects to the district court’s entry of a permanent injunction  
5 against him on three grounds. First, he argues that the evidence was insufficient to  
6 demonstrate a “threatened misappropriation” of trade secrets, as required to  
7 support an injunction under the Act. Second, he argues that the injunction is  
8 improper because it is unlimited in time; that is, the injunction permanently  
9 precludes him from ever disclosing Lasen’s trade secrets or confidential  
10 information even though the parties’ employment contract only imposed a five-  
11 year post-termination period of confidentiality on Tadjikov. Finally, Tadjikov  
12 argues that injunctive relief was improper because Lasen had an adequate remedy  
13 at law. The first claim lacks merit and Tadjikov has failed to demonstrate how he  
14 preserved the third claim, but we conclude that the second claim is meritorious to  
15 the extent that it imposes an obligation of confidentiality on Tadjikov that is  
16 unlimited in time.

17 {21} “[I]njunctive remedies are harsh and drastic remedies which should issue only in  
18 extreme cases of pressing necessity and only where there is [a showing of  
19 irreparable injury for which there is] no adequate and complete remedy at law.”  
20 *Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 31, 302 P.3d 751 (internal

1 quotation marks and citation omitted). We review a district court’s decision to  
2 issue a permanent injunction for an abuse of discretion. *See Insure N.M., LLC v.*  
3 *McGonigle*, 2000-NMCA-018, ¶ 7, 128 N.M. 611, 995 P.2d 1053 (“The granting  
4 of an injunction is an equitable remedy, and whether to grant equitable relief lies  
5 within the sound discretion of the trial court.”). “[T]he trial court abuses discretion  
6 when it applies an incorrect standard, incorrect substantive law, or its discretionary  
7 decision is premised on a misapprehension of the law.” *Aragon v. Brown*, 2003-  
8 NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. To the extent that this case requires  
9 us to interpret the Act, statutory interpretation is a question of law which we  
10 review de novo. *State ex rel. Children, Youth & Families Dep’t. v. Maurice H.*,  
11 2014-NMSC-034, ¶ 65, 335 P.3d 746.

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

14 {22} The Act provides that “[a]ctual or threatened misappropriation [of a trade  
15 secret] may be enjoined.” NMSA 1978, § 57-3A-3(A) (1989). Tadjikov argues that  
16 the permanent injunction was improper. First, he argues that the injunction is not  
17 based on any actual misappropriation of a trade secret because the district court  
18 rejected Lasen’s misappropriation claim. Second, Tadjikov argues that evidence  
19 was insufficient to support the district court’s finding that threatened  
20 misappropriation existed, because he never made any threat to disclose Lasen’s  
21 trade secrets to a third party.

1 {23} We agree with Tadjikov that the permanent injunction is not based on any  
2 actual misappropriation of a trade secret. The district court found that Tadjikov  
3 “did not misappropriate Lasen’s trade secrets in that he did not receive some sort  
4 of unfair trade advantage, nor did he disclose them to a third person or otherwise  
5 place the information to commercial use,” and concluded that “[t]he evidence at  
6 trial did not place Lasen’s misappropriation claims within the coverage of the . . .  
7 Act.” But the district court also found that “the evidence is sufficient to require a  
8 need for continued injunctive relief under Section 57-3A-3.” Lasen does not appear  
9 to dispute Tadjikov’s argument that the injunction does not rest on any actual  
10 misappropriation under the Act.

11 {24} Accordingly, we turn to consider whether sufficient evidence of “threatened  
12 misappropriation” existed to support entry of the injunction. Tadjikov, quoting  
13 *Black’s Law Dictionary* 1030 (6th ed. 1991), argues that the word “threat” should  
14 be defined as “[a] communicated intent to inflict physical or other harm on any  
15 person or property.” And because Lasen offered no evidence that he ever  
16 communicated any such threat, Tadjikov argues that there was no “threatened  
17 misappropriation” under the Act. Lasen does not respond to Tadjikov’s  
18 interpretation of the Act.

19 {25} Despite Lasen’s failure to help us on this point, we conclude that Tadjikov’s  
20 interpretation of “threatened misappropriation” is too narrow. First, the plain

1 meaning of the word “threat” is broader than Tadjikov admits. To be sure, the term  
2 includes the communication of an explicit intent to harm, but it is also defined as  
3 “[a]n indication of approaching menace; the suggestion of an impending  
4 detriment,” and as “[a] person or thing that might well cause harm.” *Black’s Law*  
5 *Dictionary* 1708-09 (10th ed. 2014). Second, other courts have not limited the term  
6 to situations in which a defendant explicitly threatens to disclose trade secrets to  
7 others. Thus, for example, under California law, “[t]hreatened misappropriation  
8 may be demonstrated by showing either that the defendant possesses trade secrets  
9 and has misused or disclosed those secrets in the past, that the defendant intends to  
10 misuse or disclose those secrets, or that the defendant possesses trade secrets and  
11 wrongfully refuses to return them after a demand for return is made.” *Clorox Co. v.*  
12 *S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 968-69 (E.D. Wis. 2009). Without  
13 attempting to set forth a comprehensive definition of “threatened  
14 misappropriation,” we agree that it occurs when a defendant possesses trade secrets  
15 and wrongfully refuses to return them to the owner. This makes sense, because  
16 where a defendant has trade secrets and wrongfully refuses to return them to their  
17 owner, it is reasonable to infer that the defendant may intend to use them in a way  
18 that harms the owner, and reasonable to protect the trade secret owner against that  
19 risk.

1 {26} Here there was ample evidence that Tadjikov possessed Lasen’s trade  
2 secrets and wrongfully refused to return them after Lasen demanded their return.  
3 The district court found that Tadjikov “wrongfully failed to provide Lasen with the  
4 programming environment in which he created the source code;” that he “took  
5 possession of source codes, lab books and trade secrets of Lasen in defiance of the  
6 Lasen’s rights with intent to deprive and negate Lasen of its lawful property, and  
7 further wrongfully retained such property following multiple demands for their  
8 return[;]” and “engaged in this conduct so as to ensure Lasen would be without  
9 copies of the source code so as to impair and impede Lasen’s ability to repair,  
10 modify or improve the LIDAR units which [Tadjikov] had developed and upon  
11 which Lasen commercially relied on.” Tadjikov does not challenge these findings  
12 of fact, and accordingly we deem them conclusive. *See* Rule 12-318(A)(4) (stating  
13 that the argument in an appellant’s brief in chief “shall set forth a specific attack on  
14 any finding, or the finding shall be deemed conclusive”). We therefore hold that  
15 the evidence was sufficient to support the district court’s conclusion that  
16 Tadjikov’s “threatened misappropriation” of Lasen’s trade secrets supported a  
17 grant of injunctive relief under the Act.

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

19 {27} Tadjikov next argues that the permanent injunction violates the Act because  
20 it imposes obligations on him to protect Lasen’s trade secrets that are unlimited in

1 time, even though the parties themselves agreed that a five-year period post-  
2 termination was appropriate. We agree with Tadjikov that the injunction should not  
3 have extended his obligation not to disclose Lasen’s trade secrets and confidential  
4 information beyond the time that Lasen itself agreed was proper.

5 {28} The Act places a temporal limit on injunctive relief by stating that “[u]pon  
6 application to the court, an injunction shall be terminated when the trade secret has  
7 ceased to exist but the injunction may be continued for an additional reasonable  
8 period of time in order to eliminate commercial advantage that otherwise would be  
9 derived from the misappropriation.” Section 57-3A-3(A). Here, Tadjikov’s  
10 employment agreement states that “[Tadjikov] will not, both during the term of his  
11 employment with Lasen and afterwards for a period of five (5) years from the date  
12 of termination disclose [Lasen’s] confidential or proprietary information to anyone.  
13 Confidential and proprietary information includes any information that is not  
14 generally known and which is, or which may be, useful in the operation of [Lasen]  
15 or which may be beneficial to anyone in competition with Lasen. Such information  
16 includes, but is not limited to, information concerning projects being worked on or  
17 contemplated by Lasen, technical information, and information concerning the  
18 commercialization of Lasen’s products and Lasen’s financial affairs.” This  
19 obligation included Lasen’s trade secrets, which by definition are not generally  
20 known. *See* § 57-3A-2(D)(1) (defining “trade secret” as “information . . . that: (1)

1 derives independent economic value, actual or potential, from not being generally  
2 known to and not being readily ascertainable by proper means by other persons  
3 who can obtain economic value from its disclosure or use[.]”).

4 {29} Accordingly, because Lasen terminated Tadjikov’s employment in April  
5 2009, his contractual obligation not to disclose Lasen’s trade secrets or confidential  
6 information only extended through April 2014. The district court’s injunction,  
7 however, was entered in April 2015 and imposed a non-disclosure obligation on  
8 Tadjikov without any temporal limit. While Section 57-3A-3(A) allows an  
9 injunction to continue “for an additional reasonable period of time in order to  
10 eliminate commercial advantage” even after a trade secret no longer exists, Lasen  
11 itself agreed, in its employment agreement with Tadjikov, that a post-termination  
12 period of five years was reasonable. In its answer brief, Lasen does not respond to  
13 Tadjikov’s argument that the injunction’s unlimited time period is improper, much  
14 less offer any attempt to justify it. Moreover, the district court acknowledged at the  
15 hearing on the motion for reconsideration that the technology at issue “was already  
16 obsolete or becoming obsolete. So in essence, it’s really an injunction on obsolete  
17 technology or equipment.” We therefore conclude that it was improper for the  
18 district court to issue an injunction that protected Lasen’s trade secrets from  
19 disclosure beyond the five years that Lasen contracted for. *See In re N.M. Indirect*  
20 *Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 41, 140 N.M. 879, 149 P.3d 976

1 (“We will not rewrite a contract to create an agreement for the benefit of one of the  
2 parties that, in hindsight, would have been wiser.” (alteration, internal quotation  
3 marks, and citation omitted)).

4 {30} We do, however, affirm the district court’s injunction to the extent that it  
5 requires Tadjikov to turn over to Lasen any copies of the source code in his  
6 possession, or which he “may ever discover or create,” including “any reasonable  
7 facsimile of such source code[.]” The parties agreed that the source code was  
8 Lasen’s property. The district court found that Tadjikov wrongfully retained “the  
9 intellectual property rights and trade secrets which he had created and assigned to  
10 Lasen in accordance with their employment agreement.” The district court further  
11 found that his retention of the source code made it difficult for Lasen to modify or  
12 repair the LIDAR units on which its business relies. Tadjikov does not challenge  
13 these factual findings on appeal. We conclude that even if the source code no  
14 longer constituted a trade secret, and although Tadjikov no longer has an obligation  
15 to keep it confidential, it is still Lasen’s property, and Lasen is entitled to its return.  
16 Accordingly, we hold that it was reasonable for the district court to order Tadjikov  
17 to return to Lasen any source code in his possession or that he might obtain  
18 possession of in the future.

19 {31} We reverse the district court’s order issuing a permanent injunction against  
20 Tadjikov only to the extent it prevents him from disseminating source code to third

1 parties in the future. The portion of the injunction as it relates to Tadjikov's  
2 wrongful retention of the source code is affirmed.

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

5 {32} Tadjikov argues that the permanent injunction was improper because Lasen  
6 had an adequate remedy at law. As discussed above, we have reviewed the  
7 documents and transcripts that Tadjikov cited in his preservation statements  
8 contained in his brief in chief. We can find no reference to any argument that the  
9 permanent injunction should not have been granted because Lasen had an adequate  
10 remedy at law. Accordingly, we decline to review this claim due to Tadjikov's  
11 failure to demonstrate how and when it was preserved, as required by Rule 12-  
12 318(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  
3 award it attorney’s fees for this appeal. Rule 12-403(B)(3) NMRA allows this  
4 Court to award “reasonable attorney fees for services rendered on appeal in causes  
5 where the award of attorney fees is permitted by law.” Lasen, however, does not  
6 identify the legal basis on which it asks for attorney’s fees, and therefore we  
7 conclude that this 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**