The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
November 5, 2026

2026 COA 81

No. 25CA1935, *Huset v. EIS Ultimate Holding, LP* — Labor and Industry — Covenants Not to Compete — Attempt to Enforce Covenant That is Void

Section 8-2-113, C.R.S. 2026, governs covenants not to compete between an employer and an employee. The statute generally provides, subject to certain exceptions, that "a covenant not to compete that restricts the right of an individual to receive compensation for performance of labor is void." § 8-2-113(2)(a).

In 2022 the General Assembly adopted H.B. 22-1317. It added section 8-2-113(8)(a), which now states that "[a]n employer shall not enter into, present to a worker or prospective worker as a term of employment, or attempt to enforce any covenant that is void under this section." H.B. 22-1317 stated, "This act applies to covenants not to compete entered into or renewed on or after the

applicable effective date of this act." Ch. 441, sec. 2(2), 2022 Colo. Sess. Laws 3099.

Section 8-2-113(8)(b), which was also created by H.B. 22-1317, states that "[a]n employer that violates subsection (8)(a) of this section is liable for actual damages and a penalty of five thousand dollars per worker or prospective worker harmed by the conduct." For the first time in a published Colorado opinion, a division of the court of appeals addresses whether the bar against attempting "to enforce any covenant that is void under this section" applies to an effort to enforce a restrictive covenant that was entered into before the adoption of section 8-2-113(8)(a) and (b) and was void under the statute as it existed before and after the 2022 amendments. The division concludes that the clause of section 8-2-113(8)(a) prohibiting an "attempt to enforce any covenant that is void under this section" and the remedies contained in section 8-2-113(8)(b) apply to a covenant not to compete that was void when adopted if the employer attempts to enforce the void covenant after the act's effective date.

COLORADO COURT OF APPEALS **2026 COA 81**

Court of Appeals No. 25CA1935
Weld County District Court No. 23CV30661
Honorable Shannon Lyons, Judge

Scott Huset and Impact Industrial Services, LLC, a Colorado limited liability company,

Plaintiffs-Appellees,

v.

EIS Ultimate Holding, LP, a Delaware limited partnership; EIS Operating Enterprises, LLC, a Delaware limited liability company; and Earth Services & Abatement, LLC, a Colorado limited liability company,

Defendants-Appellants.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE SCHUTZ
Dunn and Berger*, JJ., concur

Announced November 5, 2026

Venable LLP, Emily F. Keimig, Carissa J. Davis, Denver, Colorado, for Plaintiffs-Appellees

Kutak Rock LLP, Thomas W. Snyder, Reid A. Page, Denver, Colorado, for Defendants-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2026.

¶ 1 Defendants, EIS Ultimate Holding, LP and EIS Operating Enterprises, LLC (collectively, EIS) and Earth Services & Abatement, LLC (ESA), appeal the trial court's entry of a declaratory judgment requested by plaintiffs, Scott Huset and Impact Industrial Services, LLC (Impact). Defendants contend that the trial court erred by denying their motion to dismiss and compel arbitration, by denying their motion to dismiss the case as moot, and by making various factual findings, evidentiary rulings, and legal conclusions. We affirm.

I. Factual Background

¶ 2 The factual and procedural history of this case is lengthy. We begin with a brief description of the parties' organizational structures and their relationships.

¶ 3 Brothers Kory and Kristian Mitchell founded ESA in 2006; they each owned 50% of the company. ESA provided asbestos abatement, demolition, and soil and water remediation services.

¶ 4 Huset began working for ESA in 2009 when it was still a small business. He started as a project manager for soil remediation projects and then became a superintendent, project manager, senior project manager, and — beginning in July 2021 —

operations manager. However, the court determined that Huset's job duties were most closely aligned with that of a senior project manager.

¶ 5 In 2019, the Mitchell brothers sold their majority interest in ESA to EIS (or its predecessor), a holding company owned by the Mitchells and several other investors and small business owners. Kory Mitchell testified that, aside from ownership, "nothing really changed at that point from a corporate structure" for ESA.

¶ 6 EIS continued to own and control ESA. EIS also owned and oversaw several environmental service companies across the country. The trial court noted that there was some uncertainty regarding the particular subsidiaries that are held under the EIS umbrella.

¶ 7 Huset did not work for any EIS entities other than ESA. While working for ESA, Huset signed a "Management Incentive Unit Grant Agreement" (agreement), which contains both trade secret and related noncompete provisions, as well as an arbitration requirement.

¶ 8 These lengthy provisions are set forth in section six of the agreement (the restrictive covenants). Section 6(a) contains a confidentiality restriction that provides as follows:

> During the course of [Huset's] employment with or other service to the Partnership Group[1], [Huset] has learned and will continue to learn confidential information of the Partnership Group. [Huset] acknowledges the time and expense incurred by the Partnership Group in connection with developing proprietary and confidential information in connection with the Partnership Group's business and operations. [Huset] agrees that [Huset] will not, whether during [Huset's] service as an employee or service provider of the Partnership Group or at any time thereafter, divulge, communicate, or use to the detriment of any member of the Partnership Group or any of its Affiliates or any other person, firm or entity, confidential information or trade secrets relating to any member of the Partnership Group or its Affiliates, including, without limitation, business strategies, operating plans, acquisition strategies (including the identities of (and any other information concerning) possible acquisition candidates), financial information, market analyses, acquisition terms and conditions, personnel information, know-how, customer lists and relationships, supplier lists and relationships, or other non-public proprietary

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[1] The agreement defines Partnership Group as "collectively, the Partnership and each of its Subsidiaries." It uses Partnership to refer to EIS Ultimate Holding, LP; but does not define "Subsidiaries."

> and confidential information relating to any member of the Partnership Group or its Affiliates. The foregoing confidentiality agreement shall not apply if [Huset] can show that the communication (i) is required in the course of performing [Huset's] duties as an employee or service provider of the Partnership Group, (ii) is made with the General Partner's written consent, (iii) relates to information that is or becomes generally known by the public other than as a result of a breach hereof, or (iv) is required by law or judicial or administrative process.

¶ 9 Section 6(a)(iv) of the agreement provides that Huset, for the duration of his employment at ESA and the following two years, shall not

> directly or indirectly engage in, or serve as a principal, partner, joint venturer, member, manager, trustee, agent, stockholder, equity holder, director, officer, or employee of, advisor to, or in any other capacity or in any other manner, own, control, manage, operate, or otherwise participate, invest, or have any interest in, or be connected with, any person, firm, or entity that engages in any activity which competes directly or indirectly with any business of the Partnership Group anywhere within the United States, or in any other country where the Partnership group conducts or actively proposes to conduct business at any time within the two-year period immediately preceding the termination of [Huset's] service as an employee . . . if in connection with any of the foregoing, [Huset] has been or would be required to (or does)

> employ, reveal, or otherwise utilize trade secrets used by the Partnership Group before Huset's termination.

¶ 10 In March 2023, Huset, along with his business partner, Jeff Wright, started Impact. Wright owned 65% of Impact; Huset owned the remaining 35% and was Impact's only other employee. Impact began as a trucking brokerage company; the trial court found that ESA is not a trucking broker and that Huset and Impact's work does not compete with the defendants' interests.[2] In May 2023, Huset left ESA to work full-time for Impact. Shortly after Huset's resignation from ESA, the defendants sent him three demand letters stating their intent to enforce the restrictive covenants. The third letter was also sent to Wright.[3]

II. Procedural History

¶ 11 The plaintiffs filed suit against the defendants in August 2023, two days after receiving the third demand letter. The complaint included a request that the trial court declare the restrictive

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[2] The terms "trucking brokerage" and "trucking broker" appear throughout the record but are not precisely defined. The trial court ultimately found that Impact's services do not compete with those provided by ESA.

[3] Wright was not a party to the underlying litigation and thus is not a party to this appeal.

covenants void under section 8-2-113(7), C.R.S. 2026, which states, "A worker who is a party to a covenant not to compete, or a subsequent employer that has hired or is considering hiring the worker, may seek a declaratory judgment from a court of competent jurisdiction or an arbitrator that the covenant not to compete is unenforceable." In addition to declaratory relief, the plaintiffs requested an award of damages, prejudgment interest, penalties, and their attorney fees and costs under section 8-2-113(8)(b). The plaintiffs also asserted a claim, and requested the same relief, under section 8-2-113(1.5)(a), which states, "It is unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place the person sees fit."

¶ 12 In September 2023, the defendants filed suit against the plaintiffs in the United States District Court for the District of Colorado. Contemporaneously, the defendants also filed a complaint against the plaintiffs with the American Arbitration Association (AAA), asserting claims for breach of the restrictive covenants along with various tort and statutory claims.

¶ 13 The defendants then filed a motion to dismiss the plaintiffs' complaint and to compel arbitration in the trial court. The court denied the motion on two grounds: first, that Impact had no arbitration agreement with the defendants; and second, because the factual allegations could plausibly support the conclusion that the state court was the appropriate forum for resolution of the enforceability of the noncompete clause.

¶ 14 The defendants did not pursue an interlocutory appeal of the order denying the motion to compel arbitration. They then answered the complaint, without asserting any counterclaims or affirmative defenses.

¶ 15 The defendants next filed their first motion for summary judgment, arguing that the plaintiffs' claims failed as a matter of law based on the undisputed facts. The trial court granted the motion in part and denied it in part. In denying the motion with respect to the plaintiffs' declaratory judgment claim, the court concluded that there were issues of material fact regarding the interpretation and application of the restrictive covenants that precluded summary judgment. However, the court also determined that the plaintiffs' second claim — that the defendants had

intimidated them and prevented them from doing business in violation of section 8-2-113(1.5) — was factually unsupported. Therefore, the court entered judgment in favor of the defendants on that claim. Finally, the court declined to re-address the arbitration issue on the grounds that it had already resolved the matter in its order on the defendants' motion to dismiss and the de facto motion to reconsider was untimely.

¶ 16 The case proceeded to a two-day bench trial, after which the court issued detailed findings of fact and conclusions of law. The court found that Huset was ESA's "best field manager" but was "not an administrator or business manager." While at ESA, Huset worked on soil remediation and demolition projects, and the court found that Huset's work at Impact did not compete with the work of ESA or EIS's other subsidiary entities.

¶ 17 The court also found that the defendants failed to prove they own any trade secrets and that the restrictive covenants were unreasonable and therefore void under section 8-2-113. The court rejected the plaintiffs' damage claims but awarded them their attorney fees and costs under section 8-2-113(8)(b) and assessed a $5,000 penalty against the defendants.

¶ 18 The defendants appeal the judgment.

III. Arbitration

¶ 19 The defendants first contend that the trial court erred by denying their motion to dismiss and to compel arbitration. They argue that Colorado law favors arbitration and that the existence and timely invocation of an enforceable arbitration provision deprives the court of subject matter jurisdiction, an issue that can be raised at any time.

¶ 20 The plaintiffs respond that the defendants did not preserve their arbitration claim. They also argue that, even if the claim was preserved, the defendants waived it through their failure to assert the defense and their related representations to the court. Under these circumstances, we agree with the plaintiffs that the defendants waived any right they had to compel arbitration.

A. Standard of Review and Applicable Law

¶ 21 We review de novo a trial court's decision on a motion to compel arbitration. *Martinez v. Mintz L. Firm, LLC*, 2016 CO 43, ¶ 17. We employ the same legal standards as the trial court. *Tolle v. Steeland, LLC*, 2023 COA 84, ¶ 14. "A 'motion to compel arbitration is a motion to dismiss for lack of subject matter

jurisdiction.'" *Id.* (quoting *Eychner v. Van Vleet*, 870 P.2d 486, 491 (Colo. App. 1993)). "When reviewing a motion to compel arbitration under C.R.C.P. 12(b)(1), we accept as true the material facts in the complaint." *Id.*

¶ 22 The party seeking to compel arbitration has the burden to establish that the matter is subject to arbitration. *Id.*

¶ 23 The parties dispute whether the defendants preserved their arbitration argument. Because it impacts our subject matter jurisdiction, we typically address the denial of a motion to arbitrate irrespective of whether it is preserved. *See Herr v. People*, 198 P.3d 108, 111 (Colo. 2008) (the challenge to a court's subject matter jurisdiction is not waivable and may be raised for the first time on appeal); *Tolle*, ¶ 14. Despite its quasi-jurisdictional treatment, "a contractual right to arbitrate may nevertheless be waived." *Bashor v. Bache Halsey Stuart Shields, Inc.*, 773 P.2d 578, 580 (Colo. App. 1988).

B. Waiver

¶ 24 Waiver is the intentional relinquishment of a known right. *In re Marriage of Kann*, 2017 COA 94, ¶ 55. Fundamentally, this means that the party must first know it has a right, and then

knowingly give up that right. A waiver may be express or implied. *Id.* Waiver of a contractual provision may be inferred "when a party engages in conduct which manifests an intent to relinquish the right or privilege, or acts inconsistently with its assertion." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984) (conduct implying an intent to waive must be "free from ambiguity and clearly manifest the intention not to assert the benefit").

¶ 25 The defendants filed a motion to compel arbitration, arguing that the agreement required the plaintiffs to arbitrate the enforceability of the restrictive covenants. The court denied the defendants' motion. It did so, in part, because it had not yet addressed the enforceability of portions of the arbitration provision, including the requirement that arbitration be in New York and decided in accordance with Delaware law. The court also rejected the defendants' argument that the arbitration provision should be deemed applicable to Impact based on the "alter ego" and "closely related" doctrines, both of which require factually intensive inquiries. *See Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶¶ 28-31 (describing alter ego factual considerations); *Magi XXI, Inc. v. Stato*

della Citta del Vaticano, 714 F.3d 714, 722-23 (2d Cir. 2013) (discussing the closely related doctrine).

¶ 26 But the court's order did not foreclose the possibility of revisiting the arbitration issue:

> Viewing all this in the light most favorable to the Plaintiff[s], as the Court must at this stage of the proceedings, the Court finds the factual allegations could plausibly support the conclusion that this Court in Colorado is the appropriate forum for resolution of this matter, and certainly as to resolution of the enforceability of the non-compete clause. . . . Plaintiffs have pleaded sufficient factual allegations and raised sufficient questions to prevail on the present motion.
>
> The Court makes no further determinations or conclusions regarding any matter presented by the parties at this time including the enforceability of the [a]greement or of any of the non-compete provisions. Neither does the Court determine the extent or status of whether Impact can be compelled to arbitrate in this matter under any theory. The limited question before the Court is whether to dismiss and compel arbitration. The Court answers that question in the negative as to Plaintiffs' claim for declaratory relief that the noncompete clause is void and unenforceable.

Thus, the court left open the possibility that the arbitrability of the plaintiffs' claims could be revisited later.

¶ 27 The defendants argue that the trial court erred by not dismissing and compelling arbitration because it applied C.R.C.P. 12(b)(5) standards to their motion rather than C.R.C.P. 12(b)(1) standards. *See Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741, 744 (Colo. App. 2009) ("C.R.C.P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction."). They also contend that the trial court failed to recognize that an arbitrator could have resolved the choice of law provisions, *see* § 8-2-113(6), and that Impact could have been forced to arbitrate its claims as well, *see Dill*, ¶¶ 28-31; *Magi XXI*, 714 F.3d at 722-23.

¶ 28 But even if we assume, without deciding, that one or more of these arguments have merit, we conclude that the defendants waived their right to arbitrate this dispute.

¶ 29 On October 7, 2024, the defendants' counsel sent a letter to the plaintiffs' counsel stating as follows:

> Due to the nature of the preliminary injunction in the federal case*, ESA no longer intends to bring any claims against* [*Huset*] *under the* [*agreement*]*. ESA also does not intend to enforce the arbitration-related provisions of the* [*agreement*]. As such, ESA requests that your clients dismiss the Weld County case. At the same time the Weld County lawsuit is

> dismissed, ESA will withdraw the pending AAA arbitration against [Huset].

(Emphasis added.) The plaintiffs rejected the offer.

¶ 30 The next week, the defendants filed a motion for summary judgment, arguing that the case should be dismissed as moot. In support of the motion, the defendants attached a copy of the October 7 letter and represented that "ESA no longer intends to enforce the restrictive covenants or the [agreement] that is the subject of the claim. Thus, there is no longer a live dispute regarding the [agreement] that would entitle [the] [p]laintiffs to a declaration under [sections] 13-51-102 [to -115, C.R.S. 2026,] or C.R.C.P. 57." Consistent with its prior representation that "ESA also does not intend to enforce the arbitration-related provisions of the [agreement]," the defendants filed a contemporaneous notice dismissing their pending arbitration action against the plaintiffs. These representations and actions plainly manifest the defendants' clear intent to relinquish any right they had to compel arbitration of the plaintiffs' claims. *See Donahue*, 690 P.2d at 247.

¶ 31 We reject the defendants' argument that their arbitration waiver was limited to the offensive use of arbitration and did not

encompass their right to enforce the arbitration provision as a defensive shield against the plaintiffs' claims. The representation that the defendants' counsel made to the plaintiffs' counsel and the court was that ESA did not intend to enforce the restrictive covenants, or any aspect of the agreement, which includes the agreement's arbitration provision. This unqualified waiver encompassed all aspects of the agreement's arbitration provision — whether offensive or defensive.

¶ 32 Based on the defendants' representations, and subsequent dismissal of the arbitration action, we conclude that they waived any right they had to compel arbitration of the plaintiffs' claims. We therefore do not address the defendants' substantive arguments that the court erred by failing to dismiss the case and compel arbitration.

IV. Mootness

¶ 33 On appeal, the defendants argue that the case became moot because the restrictive covenants' two-year term was set to expire four months after trial, and in fact, expired the month before the

court entered its findings of fact and conclusions of law.[4] Arguing that the court could no longer enter relief that would impact an existing controversy, the defendants contend that the enforceability of the restrictive covenants was moot and the trial court erred by ruling on a mooted claim. We disagree.

A. Applicable Law

¶ 34 The parties dispute whether the defendants preserved the specific mootness argument they make on appeal. We "generally do not address unpreserved civil issues." *Laleh v. Johnson*, 2016 COA 4, ¶ 8, *aff'd*, 2017 CO 93. Nonetheless, because it impacts our subject matter jurisdiction, we review for mootness even if the issue is not preserved. *See USAA v. Parker*, 200 P.3d 350, 356-57 (Colo. 2009).

¶ 35 "We review de novo the legal question of whether a case is moot." *Colo. Mining Ass'n v. Urbina*, 2013 COA 155, ¶ 23. Mootness occurs "when the relief sought, *if granted*, would have no

[4] Based on the evidence presented at trial, the court found that the trade secrets provision effectively had an indefinite term beyond the express two-year term. Neither party challenges this finding.

practical effect on an existing controversy." *Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 2018 COA 65, ¶ 38.

B. Analysis

¶ 36 In their motion for summary judgment, the defendants primarily argued to the trial court that the plaintiffs' claims were moot because the defendants no longer intended to enforce the restrictive covenants or the agreement. Therefore, their argument continued, any declaration that the restrictive covenants were void would have no practical effect and provide the plaintiffs no meaningful relief.

¶ 37 We reject this argument for two reasons. First, in addition to declaratory relief, the plaintiffs sought an award of damages, penalties, interest, and their attorney fees and costs. Despite agreeing that they would not attempt to enforce the restrictive covenants or agreement, the defendants did not agree to pay the plaintiffs anything. Thus, the trial court had the ability to award relief beyond what the defendants agreed to provide.

¶ 38 Second, the defendants' representations that they would not pursue enforcement of the restrictive covenants or agreement did not provide the plaintiffs any assurance that the defendants would

not renew their efforts to enforce the covenants at a later date. *See Portley-El v. Colo. Dep't of Call*, 2022 COA 86, ¶ 19 (noting that if a defendant's voluntary cessation of challenged conduct could deprive a court of the power to resolve the legality of the challenged conduct, it would leave the defendant free to renew the offending conduct at a later date). Indeed, the defendants' appellate arguments attempting to enforce the arbitration provision reflect the limited value of relying solely on a party's representation that it will not take certain legal positions in the future. The court's order on the merits could and did eliminate such uncertainty. *See id.* (noting a defendant generally cannot moot a case simply by voluntarily ceasing its offending conduct).

¶ 39 For similar reasons, the issues raised on appeal have not been rendered moot by the expiration of the restrictive covenants' two-year term. As in the trial court, the disposition of this appeal resolves the plaintiffs' economic claims.

¶ 40 In the motion for summary judgment, the defendants also noted that the federal district court had entered a preliminary injunction requiring ESA to post a $500,000 bond and enjoining the plaintiffs from (1) using any trade secrets they may have acquired

from the defendants; (2) making any bids to ESA's existing clients for any of the services that ESA provided; and (3) disseminating any trade secrets that they might have learned from ESA. But the preliminary injunction was not a final judgment on the merits of the plaintiffs' claims and was not binding on the trial court. *See Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 839 (Colo. App. 2007) ("[F]indings made by a trial court after a preliminary injunction hearing are not determinative of the ultimate merits of the case."); *see also People v. Barber*, 799 P.2d 936, 940 (Colo. 1990) ("Lower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts . . . ."). Thus, it did not render the plaintiffs' claims moot.

V. Trade Secrets

¶ 41 The defendants raise two issues regarding the trial court's resolution of the trade secret issues in this case. First, the defendants assert that the court erred as a matter of law by framing the controlling issue as whether the defendants proved that they have any trade secrets. Second, they argue that the court erred by broadly declaring that the "defendants have no trade secrets." We address and reject these issues in turn.

A. Standard of Review

¶ 42 The determination of whether information is a trade secret is a question of fact. *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306 (Colo. App. 1990). We review the court's resolution of factual issues for clear error. *Bertoia v. Galaxy Mgmt. Co.*, 2025 COA 55, ¶ 19. When the material facts are undisputed, we determine de novo whether the information is a trade secret. *Rumnock v. Anschutz*, 2016 CO 77, ¶ 12.

B. Applicable Law

¶ 43 Section 8-2-113 provides, in relevant part, as follows:

> (1.5)(a) It is unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place the person sees fit.
>
> (b) A person who violates this subsection (1.5) commits a class 2 misdemeanor, as defined in section 18-1.3-501[, C.R.S. 2026].
>
> (2)(a) Except as provided in subsections (2)(b), (2)(d), and (3) of this section, a covenant not to compete that restricts the right of an individual to receive compensation for performance of labor is void.
>
> (b) . . . [T]his subsection (2) does not apply to a covenant not to compete governing an individual who, at the time the covenant not to compete is entered into and at the time it is enforced, earns an amount of annualized cash

> compensation equivalent to or greater than the threshold amount for highly compensated workers, if the covenant not to compete is for the protection of trade secrets and is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.

¶ 44 The defendants argued that the restrictive covenants fell within the trade secrets exception of subsection (2)(b).

¶ 45 When evaluating the trade secrets exception in the context of a motion for a preliminary injunction, courts have stated that "the focus is *not* on whether any particular trade secret is at risk of disclosure, but whether the noncompete covenant is a 'contract for the protection of trade secrets.'" *DigitalGlobe, Inc. v. Paladino*, 269 F. Supp. 3d 1112, 1121 (D. Colo. 2017); *see also Gold Messenger, Inc. v. McGuay*, 937 P.2d 907, 910 (Colo. App. 1997) ("For a covenant not to compete to fit within the trade secret exception . . ., the purpose of the covenant must be the protection of trade secrets, and the covenant must be reasonably limited in scope to the protection of those trade secrets.").

C. The Standard for Proving Trade Secrets

¶ 46 Drawing from *DigitalGlobe* and *Gold Messenger*, the defendants argue that the restrictive covenants indisputably are

intended to protect trade secrets. In the defendants' estimation, that purported undisputed fact ends the inquiry. In other words, because the covenants were intended to protect trade secrets, it is irrelevant whether EIS or ESA actually had any trade secrets to protect.

¶ 47 The plaintiffs argue that *DigitalGlobe* and *Gold Messenger* are procedurally and factually distinguishable from the present dispute. They argue that the final determination of whether the trade secrets exception applies requires the court to assess "whether a restrictive covenant is justified at all. . . . The trial court must then examine the specific terms of the noncompetition clause to determine the reasonableness of their effect." *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 526 (Colo. App. 2011) (quoting *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. 1988)); *see also Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo. App. 1984) ("[T]here was almost no evidence favorable to employer regarding the above factors which are usually considered by a court in determining whether a 'trade secret' actually exists as the subject of a non-competition clause."); *Haggard v. Spine*, Civ. A. No. 09-cv-00721-CMA-KMT, 2009 WL 1655030, at *6 (D. Colo. June 12,

2009) (unpublished opinion) ("Implicit within the review of a covenant not to compete for the protection of trade secrets is the question of whether 'trade secrets' are really at issue?"). The trial court agreed with the plaintiffs, and so do we.

¶ 48 Both *DigitalGlobe* and *Gold Messenger* were decided in the context of a motion for preliminary injunction. In that context, the court does not resolve the merits of the parties' claims and defenses. Rather, the court evaluates — typically on an expedited basis — whether the plaintiff has demonstrated "a reasonable probability of success on the merits." *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). In contrast, the final determination of whether the trade secrets exception has been satisfied typically occurs after the parties have completed the necessary discovery and the court has received and evaluated the parties' evidence. The reasonable probability standard does not apply in such circumstances. Rather, the court decides — by a preponderance of the evidence — whether the trade secrets exception applies, including whether any bona fide trade secrets actually exist. *Porter*, 680 P.2d at 1342.

¶ 49 We perceive no error in the trial court's rejection of the defendants' contention that the mere existence of a restrictive covenant that purports to protect trade secrets is adequate to establish the trade secrets exception in section 8-2-113(2)(b). Rather, when deciding the merits of a trade secrets dispute under section 8-2-113(2)(b), the court must decide whether the employer actually has one or more bona fide trade secrets. Not only is this conclusion mandated by the terms of the statute and our existing case law, but it is also necessary to protect the broad policy prohibiting employers from unnecessarily curtailing an employee's right to pursue their lawful profession or trade, while simultaneously allowing employers to protect their bona fide trade secrets.

¶ 50 Relatedly, we reject the defendants' contention that the trial court created a "new legal standard" and therefore we should remand to allow them to present additional evidence. As demonstrated by the foregoing analysis, the trial court did not create a new legal standard. Rather, the trial court applied the existing legal standard for evaluating the merits of a trade-secrets-exception dispute under section 8-2-113(2)(b). The defendants

gambled that the trial court would apply a preliminary injunction standard rather than the standard that applies when deciding the merits of such a claim. The defendants have no right to a "do-over" simply because their gamble failed in view of the controlling law.

D. The Court's Trade Secrets Findings

¶ 51 In resolving the merits of the trade-secrets-exception issue, the trial court found that the "defendants did not prove [EIS] had any trade secrets to protect." The defendants do not argue that this finding was clearly erroneous.

¶ 52 At trial, the defendants identified ESA's trade secrets as

- proprietary software and documents;
- lists of prequalified vendors and firms;
- a customer list of people invited to ESA's annual holiday party; and
- techniques used to perform its work.

¶ 53 As to specific examples of the software and special techniques that ESA claimed were trade secrets, Kory Mitchell identified

- using a platform system to wrap a truck;
- using a 40,000-psi power washer system;
- using a plastic that is easier to unfold;

- bidding software in an Excel sheet, including its markup rate and a contact with the City and County of Denver; and
- ESA's overhead markup.

¶ 54 After a thorough analysis of the evidence concerning these purported trade secrets, the trial court found that the defendants failed to meet "their burden to establish that these items were bona fide trade secrets to which [Huset] allegedly had access." Accordingly, the court found that "the existence of trade secrets at ESA cannot serve as the basis for the exception to the general prohibition on noncompetition agreement[s]."

¶ 55 The defendants do not challenge any of the court's specific factual findings on the trade secrets issues. But they appear to object to the breadth of the court's finding that "ESA possesses no trade secrets." Read in the context of the court's entire findings of fact and conclusions of law, however, it is clear the court made this finding based on the evidence that was presented at trial. Thus, we see no basis for reversal. *See Loveland Essential Grp., LLC v. Grommon Farms, Inc.*, 251 P.3d 1109, 1117 (Colo. App. 2010) (there is no clear error if a finding has record support).

VI. Section 8-2-113(8) Applies to this Case

¶ 56 We turn now to the defendants' contention that the trial court erred by concluding that section 8-2-113(8) applies to their effort to enforce the restrictive covenants against the plaintiffs. We perceive no error.

A. Standard of Review and Applicable Law

¶ 57 We review questions of statutory interpretation de novo. *State v. 5 Star Feedlot Inc.*, 2019 COA 162M, ¶ 9, *aff'd*, 2021 CO 27. "When interpreting a statute, our primary task is to 'give effect to the intent of the General Assembly.'" *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 15 (quoting *People v. Dist. Ct.*, 713 P.2d 918, 921 (Colo. 1986)). "In doing so, we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." *UMB Bank, N.A. v. Landmark Towers Ass'n*, 2017 CO 107, ¶ 22. Because we must respect the legislature's choice of language, we don't add words to or subtract words from a statute, and we avoid interpretations that would render words or phrases superfluous. *People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22. Unless a statute

is ambiguous, we enforce it as written without resorting to other rules of statutory construction. *Denv. Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011).

¶ 58 Generally, in the absence of a contrary legislative intent, we presume that a statute operates prospectively, "meaning it operates on transactions occurring after its effective date." *Vaccaro v. Am. Fam. Ins. Grp.*, 2012 COA 9M, ¶ 18; *see* § 2-4-202, C.R.S. 2026 ("A statute is presumed to be prospective in its operation."); *see also* Colo. Const. art. 2, § 11 ("No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.").

¶ 59 But a statute is not rendered retrospective simply because it expands the available remedies for conduct that occurred prior to the amendment of the statute. *See In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002) ("[T]he application of a statute is not rendered retrospective 'merely because the facts upon which it operates occurred before the adoption of the statute.'" (quoting *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 445 (Colo. 2000))); *see also Davis v. State Bd. of Psych.*

Exam'rs, 791 P.2d 1198, 1201 (Colo. App. 1989) ("Under Colo. Const. art. II, § 11, Colo. Const. art. XV, § 12, and [section] 2-4-202 . . . , changes in substantive law are required to operate prospectively. By contrast, changes in procedural law are applicable to existing causes of action, unless a contrary intent is expressed in the statute." (citation omitted)).

¶ 60 As explained by a division of this court,

> Application of a statute to an existing claim for relief does not violate the prohibition against retrospective legislation when the statute effects a change that is not substantive, but only procedural or remedial in nature. Substantive statutes create, eliminate, or modify vested rights or liabilities, while procedural statutes relate only to remedies or modes of procedure to enforce such rights or liabilities.
>
> . . . .
>
> . . . "The abolition of an old remedy, or the substitution of a new one, neither constitutes the impairment of a vested right nor the imposition of a new duty, for there is no such thing as a vested right in remedies."

Abromeit v. Denv. Career Serv. Bd., 140 P.3d 44, 51 (Colo. App. 2005) (citations omitted).

B. Analysis

¶ 61 Subsection (8)(a) prohibits three distinct types of conduct: (1) entering into "any covenant that is void under this section"; (2) presenting such a covenant to a worker or prospective worker as a term of employment; or (3) attempting to enforce such a covenant. § 8-2-113(8)(a).[5]

¶ 62 The trial court determined that the first two prohibitions of subsection (8)(a) do not apply to the present dispute because the defendants did not enter into or present the agreement to Huset after August 10, 2022, the effective date of the statute's new provisions. *See* Ch. 441, sec. 2(2), 2022 Colo. Sess. Laws 3099 ("This act applies to covenants not to compete entered into or renewed on or after [August 10, 2022]."). But the trial court found

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[5] As enacted by the 2022 amendments, section 8-2-113(8)(a) originally prohibited an employer's "attempt to enforce any covenant *not to compete* that is void under this section." Ch. 441, sec. 1, § 8-2-113, 2022 Colo. Sess. Laws 3099 (emphasis added). The legislature deleted "not to compete" two years later, so the provision now prohibits enforcement of "any covenant that is void under this section." Ch. 316, sec. 5, § 8-2-113, 2024 Colo. Sess. Laws 2120. As explained more fully below, covenants not to compete like the one at issue in this case were void under the 2021 version of the statute and remained void under the 2022 and current versions of the statute.

that the defendants violated the third prohibition of subsection (8)(a), and therefore, the terms of subsection (8)(b) applied to the plaintiffs' claims.

¶ 63 As for the issue of good faith, the trial court noted that subsection (8)(b) provides a framework for assessing a penalty against an offending employer, but subsection (8)(c) grants the trial court discretion to reduce or decline to impose any penalty if the employer brought the action "in good faith" and "had reasonable grounds for believing that the employer's act or omission was not a violation of" section 8-2-113. Ultimately, the trial court found that the defendants had not acted in good faith.

¶ 64 We first address whether the trial court erred by determining that subsection (8)(b) applied to the defendants' attempts to enforce the restrictive covenants. Then, we address the defendants' contention that the court erred by finding that they failed to demonstrate good faith in attempting to enforce those covenants.

1. Section 8-2-113(8)(a), (b)

¶ 65 Huset signed the agreement in March 2022, with an effective date of March 4. The amendments to the statute were enacted in June 2022 and took effect on August 10, 2022. Huset brought the

underlying lawsuit in August 2023 to address the defendants' efforts to enforce the restrictive covenants after his May 2023 resignation from ESA.

¶ 66 The defendants argue that section 8-2-113(8)(a) cannot apply to its enforcement efforts because the restrictive covenants were entered into before the amendments took effect and "only the former version of the statute" should have applied to its enforcement efforts. More specifically, the defendants argue that statutes are generally intended to have prospective rather than retroactive application, and therefore section 8-2-113(8)(a) cannot be applied to a restrictive covenant that was executed before that subsection's enactment. In making these arguments, the defendants acknowledge that a statutory amendment changing available remedies may be applied to conduct that occurred before the amendment's adoption, citing *Vandiver v. MG Billing Ltd.*, 653 F. Supp. 3d 884, 891 (D. Colo. 2023). But the defendants assert that section 8-2-113 does not impact only an employee's available remedies.

¶ 67 Relatedly, the defendants argue that the 2022 amendments to the statute substantively changed the grounds for invalidating a

covenant not to compete under section 8-2-113(2)(b). They note that the pre-2022 exception did not contain the "highly compensated workers" or the "no broader than is reasonably necessary" language and expanded the universe of agreements that are void under section 8-2-113(2).

¶ 68 The defendants' retroactivity argument has some initial appeal. After all, H.B. 22-1317 states that the act adopting the amendments to section 8-2-113 "applies to covenants not to compete entered into or renewed on or after the applicable effective date of this act." 2022 Colo. Sess. Laws at 3099. And subsection (8)(a) prohibits conduct related to "any covenant that is void under this section." § 8-2-113(8)(a). Combined, these provisions provide some support for the defendants' argument that the subsection (8)(b) remedies should not be applied to covenants entered into before August 10, 2022. But the argument fails on closer examination.

¶ 69 First and foremost, the defendants' argument is premised on the notion that the restrictive covenants were not unenforceable or unlawful under the version of section 8-2-113(2)(b) in effect when the agreement was executed. We disagree with this premise. As

previously noted, under the 2021 version of the statute, "Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void . . . ." § 8-2-113(2), C.R.S. 2021. True, the 2021 version of the statute, like the current version, had an exception for "[a]ny contract for the protection of trade secrets." § 8-2-113(2)(b), C.R.S. 2021. But under pre-2022 case law, the trade secrets exception is not established unless "the purpose of the covenant" is for "the protection of trade secrets, and the covenant must be reasonably limited in scope to the protection of those trade secrets." *Gold Messenger*, 937 P.2d at 910.

¶ 70 Here, after a full trial, the court found that the defendants failed to prove that they had any trade secrets. Thus, the trial court concluded that the restrictive covenants were not for the purpose of protecting trade secrets and were not limited in scope. Given these findings, the restrictive covenants were void and unenforceable under the current and previous versions of section 8-2-113(2)(b). And this law was not obviated by the 2022 amendments. As stated in section 8-2-113(1),

> The general assembly intends to preserve existing state and federal case law in effect before August 10, 2022, that:
>
> (a) Defines what counts as a covenant not to compete that is prohibited by this section; and
>
> (b) Specifies the extent to which a covenant not to compete for the protection of trade secrets must be tailored in scope in order to be enforceable under this section.

¶ 71 This conclusion is not undermined by the additional language of the 2022 amendments that the defendants reference. The trial court's conclusion that the restrictive covenants were unenforceable and void was not dependent on the "highly compensated workers" or the "no broader than is reasonably necessary" language. Rather, the trial court's conclusion was premised on its finding that the defendants failed to prove that they own any trade secrets and the unreasonable breadth and scope of the restrictive covenants. This conclusion is equally grounded under the 2021 and subsequent versions of the statute. And likewise, the trial court did not rely on any statutory language from the 2022 amendments that "expanded" the types of agreements that are void under section 8-2-113(2).

¶ 72 As previously noted, the defendants conceded that an expanded remedy does not violate the presumption against

retroactive application of a statute even if it impacts the remedies for conduct invoking an underlying agreement that was entered into before the amendment. *Abromeit,* 140 P.3d at 51; *Vandiver*, 653 F. Supp. 3d at 891. Thus, because the amendment simply increases the available remedies for the attempted enforcement of an offending restrictive covenant, it does not accomplish a prohibited retroactive result.

¶ 73 Second, despite the language surrounding the act's effective date, the amendments to section 8-2-113 include provisions intended to have prospective impact on covenants entered into before the effective date of the amendments. *See Vaccaro*, ¶¶ 27, 38. Subsection (6) is illustrative:

> A covenant not to compete that applies to a worker who, at the time of termination of employment, primarily resided or worked in Colorado may not require the worker to adjudicate the enforceability of the covenant outside of Colorado. Notwithstanding any contractual provision to the contrary, Colorado law governs the enforceability of a covenant not to compete for a worker who, at the time of termination of employment, primarily resided and worked in Colorado.

§ 8-2-113(6). This choice of law provision, which the defendants concede is not limited by H.B. 22-1317's effective date, applies to all

covenants not to compete, regardless of when they were entered into, if the employee resides in Colorado "at the time of termination of employment."

¶ 74 The language of the third prohibition in subsection (8)(a) is similarly prospective in application. In contrast to the first two prohibitions, the third prohibition applies to future conduct: "enforce any covenant that is void under this section." § 8-2-113(8)(a). This language reflects the General Assembly's intent to apply the remedies of subsection (8)(b) to efforts to enforce a void covenant regardless of when the covenant was entered into. Indeed, because subsections (1)(a), (2), and (8)(a) prohibit entering into these types of restrictive covenants, there would be no purpose to the third prohibition unless it was intended to apply to covenants entered into before the amendments' effective date. In other words, there would be no need to separately prohibit the enforcement of such covenants because they would be otherwise unenforceable based on the first two prohibitions of subsection (8)(a). Thus, the prospective nature of the third prohibition is apparent, and we must enforce it because we are not at liberty to ignore the language

of the statute or render any of its language superfluous. *See Rein*, ¶ 22.

¶ 75 Therefore, the trial court did not err by concluding that subsection (8)(a) and (b) applies to the plaintiffs' claim.

2. Good Faith

¶ 76 We next consider whether the trial court erred by finding that the defendants had not acted in good faith, thereby preventing them from invoking subsection (8)(c) to avoid or minimize the penalty. In rejecting the defendants' good faith defense, the trial court found that the "defendants[']s acts consisted of attempting to enforce a nationwide restrictive covenant based on trade secrets that do [not] exist."

¶ 77 The defendants argue that the trial court erred by finding that they attempted to exclude the plaintiffs from operating in the trucking brokerage industry. The defendants also argue that the trial court erred by finding that they attempted to enforce a nationwide restrictive covenant based on nonexistent trade secrets. Specifically, pointing to their second motion for summary judgment, the defendants argue that they "did not attempt to enforce the agreement, at all."

a. Standard of Review

¶ 78 Whether the defendants acted in good faith is a factual determination based on the particular facts of the case. *See Univ. of Denv. v. Doe*, 2024 CO 27, ¶ 51. Thus, we review for clear error. *See Copper Mountain, Inc. v. Poma of Am., Inc.*, 890 P.2d 100, 108 (Colo. 1995).

b. Analysis

¶ 79 As to the challenged factual findings, the record reveals that the defendants overstate the court's finding regarding their efforts to preclude the plaintiffs from operating a trucking brokerage. The trial court actually found that:

> ESA was of two minds when it came to enforcing the noncompetition provision. It perceived that Huset's work with Impact did not violate the [a]greement, as evidenced by ESA hiring Huset to perform work as a trucking broker on its behalf. On the other hand, ESA vigorously defended against this action and aggressively pursued remedies for perceived violations of the [a]greement in the Federal Case and an Arbitration Action.

We perceive no error in these findings.

¶ 80 We likewise see no error in the trial court's finding that the defendants vigorously pursued enforcement of the restrictive

covenants. In the events leading up to this lawsuit, the defendants' counsel sent three separate demand letters challenging Huset's ability to work at Impact. When the plaintiffs filed a declaratory judgment action arguing that the restrictive covenants were unreasonable and unenforceable, the defendants vigorously contested the claim. And as the trial court found, the defendants initiated separate actions before the AAA and the federal court related to the restrictive covenants. That conduct was not erased by their later representations that they no longer intended to enforce the restrictive covenants and agreement.

¶ 81 While the defendants dispute the breadth of the court's statement that ESA has no trade secrets, they do not dispute the court's conclusion that they *failed to prove* that either EIS or ESA has any trade secrets. And the defendants do not dispute the court's finding that "ESA knew that it had no trade secrets, as evidenced by [Kory] Mitchell's testimony that it did not require essential employees with access to the purported trade secrets and confidential information to execute their own versions of the [a]greement." Yet, despite their inability to demonstrate the

existence of any trade secrets, the defendants aggressively pursued the plaintiffs in multiple forums.

¶ 82 The trial court did not clearly err by rejecting the defendants' good faith arguments.

VII. Judicial Notice

¶ 83 The defendants next contend that the trial court abused its discretion by denying their post-trial motion to take judicial notice of information they had not introduced at trial. The information the defendants asked the court to judicially notice was the transcript from the preliminary injunction hearing and their amended complaint from the federal court litigation.

A. Standard of Review

¶ 84 We review a trial court's decision whether to take judicial notice of related proceedings for an abuse of discretion. *See People v. Sena*, 2016 COA 161, ¶ 22; *see also Vento v. Colo. Nat'l Bank*, 985 P.2d 48, 52 (Colo. App. 1999) ("[A] court may take judicial notice of the contents of court records in a related proceeding.").

¶ 85 "After the evidence is closed, the decision whether to admit supplemental evidence is within the sound discretion of the trial court." *Hoagland v. Celebrity Homes, Inc.*, 572 P.2d 493, 494 (Colo.

App. 1977). Thus, we review the trial court's rejection of the defendants' judicial notice request for an abuse of discretion.

B. Analysis

¶ 86 CRE 201 governs judicial notice of adjudicative facts. Judicially noticed facts must "not [be] subject to reasonable dispute [because they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." CRE 201(b).

¶ 87 The amended complaint that the defendants asked the court to judicially notice was not filed until three months after the trial was completed in this case. The preliminary injunction hearing transcript contained only arguments of counsel. We fail to see how either allegations or arguments of counsel constitute adjudicative facts, much less adjudicative facts that are incapable of reasonable dispute. *See* CRE 201. Accordingly, the trial court did not err by denying the defendants' request that it take judicial notice of the tendered "evidence."

VIII. Appellate Attorney Fees and Costs

¶ 88 The plaintiffs request an award of their appellate attorney fees and costs. The plaintiffs were the prevailing parties below and were awarded their attorney fees and costs under section 8-2-113(8)(b). The plaintiffs are also the prevailing parties on appeal. Thus, they are entitled to recover their reasonable attorney fees and costs incurred on appeal. *See Duhon v. Nelson*, 126 P.3d 262, 269 (Colo. App. 2005) ("When a party, pursuant to a statute, has been appropriately awarded attorney fees for a stage of the proceeding prior to the appeal, that party will be entitled to reasonable attorney fees for defending the appeal.").[6]

¶ 89 Because the trial court is better suited to determine the plaintiffs' reasonable appellate attorney fees and costs, we exercise our discretion under C.A.R. 39.1 and remand the case for further proceedings on those issues. *See Deutsche Bank Tr. Co. Ams. v. Samora*, 2013 COA 81, ¶ 36.

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[6] Having reached this conclusion, we need not address the plaintiffs' argument that the defendants' appeal was frivolous or groundless under section 13-17-102, C.R.S. 2026.

IX. Disposition

¶ 90 We affirm the trial court's judgment and remand for the trial court to determine the plaintiffs' reasonable appellate attorney fees and costs.

JUDGE DUNN and JUDGE BERGER concur.