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American Semiconductor v. Sage Silicon Respondent's Brief 1 Dckt. 43011

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IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN SEMICONDUCTOR, INC.,)
an Idaho Corporation,)
)
Plaintiff/Appellant,)
)
vs.)
)
SAGE SILICON SOLUTIONS, LLC., an)
Idaho Corporation; ZILOG, INC., a)
Delaware Corporation; DAVID ROBERTS,)
GYLE YEARSLEY, WILLIAM TIFFANY)
and Defendants DOES I - X,)
)
Defendants/Respondents.)
)

RELATED COUNTER ACTIONS)
_____)

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SAGE DEFENDANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Thomas J. Neville, District Judge, presiding

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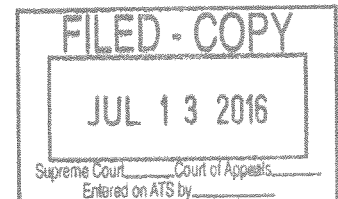


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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case originally involved twelve separate causes of action by ASI against David Roberts, Gyle Yearsley, William Tiffany and Sage Silicon Solutions, LLC (collectively referred to hereinafter as the “Sage Defendants”). The case arose from the employment of the individual Sage Defendants by ASI as microcontroller design engineers. Roberts, Yearsley and Tiffany believed that they had ASI’s express permission to moonlight while employed with ASI. As a result, the individual Sage Defendants contracted to do work for Zilog, Inc. through the Sage entity while they were employed by ASI. The individual Sage Defendants worked on a microcontroller that Zilog was developing. When ASI found out, it fired the individual Sage Defendants and then sued the Sage Defendants and Zilog. By the time the matter was submitted to the jury the causes of action had been reduced to three: breach of contract; breach of fiduciary duty; and intentional interference with economic expectancy. The jury only awarded damages against the Sage Defendants on the intentional interference claim.

ASI asked for more than \$1.2 million in damages from the jury and only received an award of \$195,175. To increase the damage award, ASI has appealed various discretionary decisions by the Trial Court. ASI challenges the Trial Court’s decision on a motion to compel the disclosure of a software license agreement between Zilog and a company called Synopsys. This was first argued at a hearing on January 10, 2014. It was then raised a second time at a hearing on May 3, 2014. The

request was denied both times as an improper attempt by ASI to obtain access to software licensed by Zilog so that ASI could avoid the cost of obtaining the software to open design files that Zilog produced during discovery. The same issue was then raised by ASI after discovery closed in its Motion in Limine No. 11. The motion in limine was argued on January 8, 2015 and the Trial Court denied the motion because it was an attempt to revisit the motion to compel.

ASI also challenges the Trial Court's decision that neither ASI nor the Sage Defendants were a prevailing party in the litigation. The Trial Court considered the entirety of the litigation and determined that ASI did not prevail because only three of the original twelve causes of action filed by ASI against the Sage Defendants went to the jury and the jury only awarded 19% of the total damages ASI requested. The Trial Court also awarded the Sage Defendants attorney fees for ASI's frivolous conduct in pursuit of a trade secret claim that ASI voluntarily dropped after failing to comply with two orders to compel disclosure of the alleged trade secret.

B. COURSE OF PROCEEDING

ASI filed a motion to compel in late 2013 against Zilog seeking to obtain various software license agreements. The software is also known as "design tools" which are used for designing microcontrollers. At the time, ASI was seeking the disclosure of multiple different license agreements, but is now only arguing that the Synopsys license agreement should have been produced. ASI's request that Zilog be compelled to disclose the Synopsys license agreement was argued before the Trial Court at two separate hearings. The issue was first argued on January 10,

2014 and then argued a second time on May 2, 2014. The motion to compel the disclosure of license agreements was denied because the Trial Court determined that ASI was actually attempting to gain access to Zilog's software to avoid the cost of acquiring the software to permit it to review design files which had been produced as part of discovery. Tr. p. 201-02.

ASI never filed a motion to reconsider the decision denying the motion to compel. Instead ASI filed Plaintiff's Motion in Limine No. 11 Re: Undisclosed License just before trial. The motion sought to preclude any of the Defendants from mentioning or making argument in any way related to the license agreements the Trial Court earlier ordered did not have to be disclosed. R. p. 1255-56. The motion was argued at the hearing held on December 9, 2014. However, a decision was not rendered until after the trial commenced. Tr. p. 1307, L. 7 - p. 1308, L. 16.

Claims against the Sage Defendants for breach of contract, breach of fiduciary duty, and intentional interference with an economic expectancy were submitted to the jury. The Sage Defendants also had counterclaims against ASI for unjust enrichment and intentional interference with contract. The jury only awarded damages against the Sage Defendants on the intentional interference claim. The jury also found that ASI had intentionally interfered with the Sage Defendants' contract with Zilog but did not award any damages. R. p. 1632-36.

Post trial motions were filed for costs, attorney fees, and sanctions. The Trial Court determined that on the claims between ASI and the Sage Defendants neither party prevailed. R. p. 2130-31. However, the Sage Defendants were awarded attorney fees based on ASI's conduct in

pursuing a trade secret claim that was voluntarily dismissed after ASI failed to comply with two motions to compel. R. p. 2133. An amended judgment was entered on February 25, 2015. R. 2135-2137. ASI then appealed.

C. STATEMENT OF FACTS

David Roberts, Gyle Yearsley, William Tiffany, Russell Lloyd and Evelyn Perryman were members of a design team at Zilog for a number of years until they were laid off due to a downturn in the economy and closing of one of Zilog's facilities in Boise in late 2008. Roberts, Yearsley, Tiffany and Lloyd all had degrees in electrical engineering. For the first time in their lives, Roberts and Lloyd found themselves out of work, on unemployment benefits and facing foreclosure. Yearsley and Tiffany were able to find some supplemental work for a few months but soon joined the ranks of the unemployed. They were familiar with the fact that businesses in the semiconductor industry often contracted work to independent contractors. The "team" remained in contact and hoped they would find contract work as independent contractors so they could get back into the field in which they were trained and educated.

David Roberts made contact with American Semiconductor, Inc. (ASI) in early 2009. ASI was a foundry which built semiconductor wafers designed by others. Tr. p. 1234, L. 3-17. Its founder, Douglas Hackler, had developed a new flexible wafer concept (FlexFet) which it hoped to market. Tr. p. 1341, L. 1-7. ASI convinced Roberts to work up applications for government funded projects on behalf of ASI which, if chosen by the sponsoring government agency, could be the

source of revenue for ASI and the source of some work for Roberts and his team of engineers. Tr. p. 773, L. 14 - p. 774, L. 18. Of course, ASI did not pay Roberts and the others to work up these applications, despite the hours of work required to produce an eye-catching proposal. Tr. p. 773, L. 14 - p. 774, L. 18; p. 878, L. 16-19. Instead ASI allowed Roberts and his team to use its facilities and put intellectual property (IP) developed by Roberts and his team on some test chips using the new FlexFet technology. Tr. p. 1694, L. 20 - p. 1695, L. 25.

After several months of working on these proposals, one was picked by the government. In anticipation of beginning work as part-time employees on this proposal, ASI required Roberts, Yearsley, Tiffany and Lloyd to sign an Employment Confidentiality Agreement (ECA) even before they received firm offers of employment. Tr. p. 896, L. 7 - p. 900, L. 25. The possibility of part-time employment was problematic for Roberts, Yearsley, Tiffany and Lloyd because acceptance of any employment would terminate their unemployment compensation benefits. Tr. p. 1400, L. 19 - p. 1401, L. 8. ASI eventually offered Roberts, Yearsley, Tiffany and Lloyd part-time employment, confirmed by letter, at approximately \$39/hour, which was two-thirds of what degreed engineers with their experience were making in Boise. Plaintiff's Exs. 81, 87 and 88. In this context Roberts, Yearsley, Tiffany, Lloyd and Perryman were concerned by the wording in the ECA and whether they were precluded from moonlighting because they needed to supplement what ASI was offering to pay with contract work. They were assured verbally and in writing that they could do outside work. Tr. p. 797, L. 2-17; Plaintiff's Ex. 82.

Just before the team was to go to work for ASI, David Roberts and senior management at ASI were successful in landing a large contract from SAIC for production of a microcontroller. Tr. p. 1194, L. 7-20. ASI was able to land this contract by misrepresenting that it had the engineering talent to do the work when, in fact, it did not yet employ Roberts and his “team.” Plaintiff’s Ex. 82. Roberts specifically accompanied the ASI management on a trip to meet with SAIC in Maryland to show SAIC that it had the engineering capability. Landing this contract was great news because ASI changed the offers of part-time employment to full-time employment even though their salary was still based on an hourly rate of approximately \$39/hour, well below the prevailing wages for computer design engineers. Plaintiff’s Exs. 90, 91, and 92. The assurances that the individual Sage Defendants could moonlight was not withdrawn.

Just before starting work there was also some discussion between Roberts and Wilson at ASI about cross licensing some of the team’s IP. Plaintiff’s Ex. 83. Wilson made it clear that the “group” needed a business entity before they could discuss cross-licensing. Plaintiff’s Ex. 83. Roberts advised him that they were close to getting it formed and, in fact, in January 2010, Sage Silicon Solutions, LLC was officially formed by filing its organization papers with the Idaho Secretary of State. Roberts, Yearsley, Tiffany, Lloyd and Perryman were all members. Plaintiff’s Ex. 22. The Sage Defendants presented Doug Hackler with a memorandum of understanding that identified Sage Silicon Solutions as a separate entity. Doug Hackler refused to look at it, which ASI argued at trial was proof that the Sage Defendants violated their fiduciary duty to ASI by forming Sage Silicon

Solutions, LLC. Tr. p. 1816, L. 6-15; Tr. p. 1904, L. 17 - p. 1906, L. 5; Defendants' Ex. 1-N. The Sage Defendants did not try to keep the existence of the Sage entity a secret from ASI. It never crossed their minds that forming a business entity could be a problem for their new employer.

From January 2010 until September 2011, Roberts, Yearsley, Tiffany and Lloyd worked with ASI full-time. Evelyn Perryman only worked part time, as a layout engineer, working when she was needed by ASI. In February 2011, Zilog contacted Roberts and asked if he and his team would be interested in performing some work for Zilog which was going to bring a microcontroller to market. The team had actually worked on the predecessor to this microcontroller while working at Zilog and they understood they would primarily be performing testing and verification work on the Zilog design. Plaintiff's Ex. 34. In 2009, before going to work for ASI, Roberts had informed Zilog about ASI's FlexFet technology in hopes of getting some work for ASI from Zilog, but Zilog informed him that it was not interested in that technology. Defendants' Ex. 1-A. Zilog and ASI were working in different technologies, were not competitors and Roberts never thereafter considered it practical to do the Zilog work through ASI. Tr. p. 868, L. 5-15.

From February 2011 to September 2011, Roberts, Yearsley, Tiffany, Lloyd and Perryman all performed work on the Zilog project while continuing to work full time for ASI. In September 2011, ASI became aware of the Zilog project and fired Roberts, Yearsley and Tiffany. Plaintiff's Exs. 97, 98 and 99. They were fired even though Doug Hackler did not consider Zilog to be a competitor of ASI. Tr. p. 868, L. 5- 15. Lloyd was not fired and continued to work for ASI. Tr. p. 859, L. 10-19.

Perryman had not worked for ASI for some time and was not ever notified that she was fired. ASI has affirmed that the work performed by Roberts, Yearsley and Tiffany for ASI before their firing met all of ASI's performance standards and was completed on time.

The termination letters were followed by lawyer letters dated September 27, 2011, from ASI's legal counsel in which they were advised that they violated the ECA and the employee handbook: "[b]y 'moonlighting' with Zilog and by performing work under the auspices of Sage Silicon Solutions, you have violated the Employee Confidentiality Agreement, the general duty to not compete, the obligation to provide ownership of all design materials to your employer, and have clearly violated the common law fiduciary duty that an employee in the state of Idaho owes to his employer." Roberts, Yearsley, Tiffany, Lloyd and Perryman were all ordered to cease and desist all work with Zilog, account for all income they had received from Zilog, cooperate in seeking an assignment of all design work provided to Zilog and cooperate fully with ASI's investigation. This lawsuit followed on December 2, 2011.

II. ISSUES PRESENTED ON APPEAL

ASI presents five issues on appeal. However, ASI also argues a sixth issue regarding whether the Trial Court erred in giving jury instruction number 28.

Issues one and two are related to the Synopsys license agreement. Synopsys provided a software design tool to Zilog that was used by the Sage Defendants on the Zilog project. These issues did not directly involve the Sage Defendants before trial or at trial. However, the relief that ASI is

requesting is directed solely at the Sage Defendants. ASI is requesting that the judgment entered against the Sage Defendants be vacated and that it be granted a new trial on damages only against the Sage Defendants. At the time the issues of the Synopsys license was being argued, ASI never associated this issue with damages against the Sage Defendants. It was always an issue directed solely at Zilog and the potential damages against Zilog. ASI cannot show that the Trial Court's ruling on the motion to compel or motion in limine regarding the Synopsys license agreement adversely affected its claims against the Sage Defendants.

Issue three regarding the dismissal of ASI's claim against Zilog does not pertain to the Sage Defendants and is not addressed in this Brief.

Issue four pertains to the Trial Court's determination of prevailing parties for purposes of awarding costs and fees. In ASI's argument on this issue, it also claims that the Trial Court erred in giving jury instruction number 28. When the entirety of the course of litigation is considered, the Trial Court correctly determined that there was no prevailing party.

The final issue involves attorney fees. As stated below, the Sage Defendants should be awarded attorney fees on appeal as ASI is merely asking this Court to second guess findings and decisions of the Trial Court.

III. ATTORNEY FEES ON APPEAL

As will be demonstrated below, ASI's arguments amount to nothing more than a request that the Trial Court's decisions be reconsidered because ASI was not satisfied with the findings

supporting those decisions. Attorney fees are appropriate on appeal pursuant to Idaho Code section 12-121 if an appeal “merely invites the Court to second guess the findings of the lower court.” *Bach v. Bagley*, 148 Idaho 784, 797, 229 P.3d 1146, 1159 (2010). Thus, the Sage Defendants should be awarded attorney fees.

Additionally, fees should be awarded based on the employment contracts between ASI and the individual Sage Defendants and Idaho Code section 12-120(3). Paragraph 6 of the employment contracts for David Roberts, William Tiffany, and Gyle Yearsley permit the prevailing party in any dispute to enforce the contracts to be awarded fees. Plaintiff’s Exs., 4, 13, and 14. Idaho Code section 12-120(3) similarly recognizes that the prevailing party in a commercial transaction, which includes employment contracts, is to be awarded fees. As will be demonstrated below, ASI should not prevail on this appeal and the Sage Defendants should be awarded attorney fees.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO COMPEL THE DISCLOSURE OF THE SYNOPSIS LICENSING AGREEMENT BECAUSE THE SYNOPSIS AGREEMENT IS NOT ADMISSIBLE AND ITS PRODUCTION WAS NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

1. Background

ASI argues that the Trial Court erred in precluding disclosure of the Synopsis license and then excluding evidence of the Synopsis license at trial. ASI obfuscates the issue regarding the Synopsis license by failing to give a full background of the motion practice regarding the Synopsis

license and ASI's position in relation to the license. When this issue was first raised at the January 10, 2014 hearing, ASI claimed that the Sage Defendants used the Synopsys software remotely and that ASI would not know whether or not that was permissible under the license until the license was produced. Tr. p. 102, L. 11-24. The Trial Court pointed out that ASI had not properly requested any software license agreements prior to filing the motion to compel. Tr. p. 112, L. 25 - p. 115, L. 7. However, the Trial Court determined that the real reason that ASI wanted the license agreement produced was as part of its request to have access to ASI's design tools so it could then use the software to access design files produced by Zilog. Tr. p. 101, L. 22 - p. 103, L. 10. The Trial Court denied the request for access to Zilog's design software at the hearing held on January 10, 2014.

ASI did subpoena Synopsys directly and demanded production of the license agreement with Zilog. R. p. 664-65. Synopsys refused to comply. R. p. 900-03. ASI's counsel acknowledged that Synopsys was not properly before the Trial Court on the motion to compel. Tr. p. 186, L. 1-8. Then ASI's counsel claimed that Synopsys did not object to the subpoena on confidentiality grounds but merely stated "we're not going to give it to you because we think you can get it from Zilog." Tr. p. 186, L. 9-11. However, Synopsys objected to the subpoena on several grounds including the following:

3. Synopsys objects to the Subpoena in its entirety on the ground that it seeks confidential information belonging to Synopsys and its customers subject to third party confidentiality agreements.

R. p. 900-03. Synopsys refused to produce the license agreement and was never properly brought

before the Trial Court to be compelled to produce the license agreement. Instead of providing Synopsys with notice of the motion to compel and providing an opportunity to be heard on the matter, ASI attempted to simply force Zilog to produce the license agreement in violation of the confidentiality provisions.

Zilog and Synopsys both refused to produce the license because it contains a confidentiality agreement that prohibits disclosure of the license agreement or its terms. R. p. 878. The issue of the license agreement was then raised again at a hearing on May 2, 2014, after a formal request had been made to Zilog for the license agreement. ASI argued in its memorandum that the license should be disclosed because it was relevant to the “nature and manner in which the Sage defendants provided certain design and related services at issue to Zilog.” R. p. 797-798. ASI’s only oral argument at the hearing as to why the Synopsys license agreement should be produced was that Zilog violated the license agreement in allowing the Sage Defendants to use the software remotely. Tr. p. 188, L. 13-21. Zilog’s counsel pointed out that whether or not Zilog breached licensing agreements in allowing the Sage Defendants to utilize the Synopsys software was a collateral issue that has no relevance to the issues in this case. Tr. p. 191, L. 19 - p. 192, L. 20. In reply, ASI argued that the Synopsys license agreement with Zilog was relevant because it goes to Zilog’s intent. Tr. p. 197, L. 23-24. ASI’s relevance argument was confusing. Tr. p. 197, L. 23 - p. 198, L. 8. The only relevance claimed by ASI at that time was that it showed Zilog’s intent to limit costs, which in turn, according to ASI, inexplicably showed that Zilog knew that the Sage Defendants were ASI employees.

In ruling on the motion to compel, the Trial Court acknowledged that the control of discovery is generally within the discretion of the Trial Court. Tr. p. 200, L. 11-15. The Trial Court then determined that ASI wanted to obtain copies of Zilog's software and that obtaining the Synopsys license agreement was the first step in that process.. Tr. p. 201, L. 14-22. ASI did not want to buy the software to review the design files produced by Zilog. Instead, ASI was trying to force Zilog to give ASI the software for free through the pretext of a discovery request and motion to compel. The Trial Court went on to hold that ASI was attempting to obtain the license agreements in order to prove or disprove "Zilog's claim that it cannot provide ASI with software for purposes of this litigation, which is an issue about whether ASI can review certain documents and not about the discoverability of documents." Tr. p. 202, L. 2-11. Thus, the Trial Court held that producing the Synopsys license agreement was not reasonably calculated to lead to the discovery of admissible evidence. Tr. p. 202, L. 2-11. The motion to compel was not denied on relevancy grounds as ASI now argues. It was denied because ASI was attempting to gain access to the software Zilog used to open and manipulate design files, which the Trial Court determined was not really about discovery of the license agreement but about the ability to access files.

ASI did not file a motion to reconsider the decision denying the motion to compel the Synopsys license agreement. Tr. p. 1283, L. 13-24. Discovery ended. ASI then filed a motion in limine on the eve of trial that raised the issue of the Synopsys license again. ASI filed a motion in limine asking that the Court prevent the Sage Defendants and Zilog from introducing any evidence

or making any arguments related to the Synopsys license. R. p. 1255-56. ASI did not want any of the Defendants to be able to use the fact that Zilog already had design tools, such as the Synopsys software, in arguments related to damages or to explain why Zilog would not have agreed to do the work performed by the Sage Defendants through ASI. Tr. p. 493, L. 14 - p. 494, L. 20. However, the Trial Court properly recognized that cost of the tools was never an issue raised in the motion to compel and that ASI had never made a discovery request about the cost of the Synopsys software. Tr. p. 495, L. 10 - p. 496, L. 10. ASI tried to waffle and argue that the motion to compel the license agreement did have to do with costs because the price of the tools would be in the license agreement. However, the Trial Court then stated:

THE COURT: That was more the focus of the issues last spring, as who can use this, where can they physically use it, do they have to go to the employer's site to use it, what state is it in, how many users, those kinds of things, it wasn't the cost of the tools that -- that was the focus of the motion, as I recall.

MR. ZARIAN: I think that's fair, Your Honor.

Tr. p. 499, L. 5-11. It is abundantly clear that the first time cost of the Synopsys software was raised by ASI was in the motion in limine. It was not an issue raised at all during the motion to compel. The matter was taken under advisement and a ruling was not issued until after trial commenced.

Before issuing a decision on the motion in limine the Trial Court conducted an in camera review of the most recent addendum to the Synopsys license agreement with Zilog.¹ The addendum

¹ Neither the Sage Defendants nor their counsel have ever had access to or reviewed the Synopsys license agreement. The Sage Defendants have the same information about the license agreement as ASI.

related back to the original license agreement that had been in place since 2004. Tr. p. 1283, L. 25 - p. 1285, L. 9. From that review the Trial Court determined that Zilog and the individual Sage Defendants were listed as proper users under the license agreement. Tr. p. 1284, L. 10-19. The Trial Court then determined that there was no basis for ASI's argument during the motion to compel that Zilog had breached the Synopsys license agreement. Tr. p. 1284, L. 20 - p. 1285, L. 5. The Trial Court also pointed out that the license agreement did not contain any provision that the cost for the license was increased by adding contractors, such as the Sage Defendants, to the list of users under the license agreement. Tr. p. 1285, L. 6-17. The Trial Court noted that the only information that ASI was now lacking in regard to the Synopsys software was the actual price, which the Trial Court stated "plaintiff knows how to find out the prices of tools, knows how to use the Internet, knows how to look up list prices." Tr. p. 1285, L. 18 - p. 1286, L. 17.

A rather strange exchange then took place between ASI's counsel and the Trial Court. ASI's counsel emphatically stated that the purpose of the motion in limine was not to reconsider the denial of the prior motion to compel but to enforce it. ASI's counsel stated:

And -- and I do just want to explain, Your Honor, we're actually seeking, to be clear, to enforce the Court's order from April. We're not looking to -- to overturn it or change it; we're actually looking to enforce the Court's discovery order from April.

Tr. p. 1294, L. 15-19. The only way to interpret this exchange is that ASI was arguing that it was trying to enforce the denial of its own motion to compel. ASI went on to explain that it was prejudiced because it had previously assumed that costs were incurred by Zilog before it could allow the Sage

Defendants to use the Synopsys tools. Tr. p. 1297, L. 15 - p. 1298, L. 4. Now, however, after reviewing the license agreement, the Trial Court concluded there were no additional or incremental costs associated with adding the Sage Defendants to the software license. Tr. p. 1285, L. 6-17. The Trial Court also pointed out that counsel for ASI's assumption was ill-founded because the list prices for the software would have been discovered with a little research by ASI. Tr. p. 1285, L. 18 - p. 1286, L. 17.

ASI concluded its oral argument by again stating that it was trying to enforce the denial of the motion to compel. Counsel for ASI stated:

So, all we're seeking, Your Honor, is to make sure that nothing new comes in that shouldn't have been, and that wasn't disclosed during discovery. We don't even know the date of the addendum, you know, that was submitted to the Court. There -- there's so much we don't know. And -- and we're just looking to keep out things that -- that weren't because the Court ordered the way it did. And we seek to enforce that at this point; nothing new should be coming in that wasn't disclosed.

Tr. p. 1306, L. 7-16. After arguing the motion in limine, ASI took the position that the Synopsys license agreement should not be admitted at trial, which contradicts the position it is taking on appeal.

The Trial Court was understandably perplexed by ASI's position on the motion in limine. The Trial Court denied the motion in limine on three separate grounds. First, that the total cost in the Synopsys license agreement was not relevant because it did not prove incremental increases in costs for contractors or consultants such as the Sage Defendants. Second, the Trial Court stated that there was no prejudice to ASI because ASI knew or was able to independently determine what it would cost to acquire the same tools and could calculate damages based on that information. Finally, the Trial

Court concluded by holding that there was also a confidentiality agreement that prevented disclosure of the Synopsys license. Tr. p. 1307, L. 7 - p. 1308, L. 16. The Trial Court reaffirmed that one of the considerations in denying the motion in limine was the confidentiality provisions of the license agreement which was the basis on which the Trial Court sustained the objection when the issue was later presented before the jury. Tr. p. 2358, L. 20 - p. 2359, L. 9. There was never an attempt at trial to have the Synopsys license admitted.

2. Standard of Review and Applicable Law

“The control of discovery is within the discretion of the trial court.” *McCann v. McCann*, 152 Idaho 809, 821, 275 P.3d 824, 836 (2012) (quoting *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659, 665 (2002)). Typically, a trial court’s decision to deny a motion to compel will not be disturbed unless there has been a clear abuse of discretion. *Villa Highlands, LLC v. W. Cmty. Ins. Co.*, 148 Idaho 598, 609, 226 P.3d 540, 551 (2010).

To determine whether there is an abuse of discretion this Court considers whether (1) the court correctly perceived the issue as one of discretion; (2) the court acted within the boundaries of such discretion and consistently with legal standards applicable to specific choices; and (3) the court reached its decision by an exercise of reason.

McCann, 152 Idaho at 821, 275 P.3d at 836 (quoting *Lee v. Nickerson*, 146 Idaho 5, 9, 189 P.3d 467, 471 (2008)).

Rule 26 of the Idaho Rules of Civil Procedure provides that “a document is discoverable if it is both relevant and not privileged.” *Ketterling v. Burger King Corp.*, 152 Idaho 555, 562, 272 P.3d

527, 534 (2012) (citing I.R.C.P. 26(b)(1)). If a particular document sought in discovery is not relevant it is not discoverable. *Id.* A trial court's denial of a motion to compel the disclosure of a document that is not relevant is reviewed for an abuse of discretion. *Id.*

3. Argument and Analysis

ASI argues that the Trial Court erred by precluding discovery of the Synopsys Agreement on relevance grounds. However, the motion to compel was denied on other grounds. The Trial Court ruled that ASI could not obtain the Synopsys license agreement because the real reason ASI brought the motion to compel was to get access to the software available to Zilog. Tr. p. 101, L. 22 - p. 103, L. 10; Tr. p. 202, L. 2-11. The Trial Court held:

The Court is not convinced, at this point, that the requests for software -- the software licensing agreements between Zilog and its vendors is reasonably calculated to lead to the discovery of admissible evidence. Rather, it seems, to the Court at least, to be pointed at proving or disproving Zilog's claim that it cannot provide ASI with software for purposes of this litigation, which is an issue about whether ASI can review certain documents and not about the discoverability of documents.

It seems to me that this portion of the motion to compel should be denied.

Tr. p. 202, L. 2-13. The motion to compel was not denied on relevancy grounds. The Trial Court recognized that this was a matter of discretion. Tr. p. 200, L. 11-15. The Trial Court acted within the bounds of its discretion in determining that ASI's pursuit of the Synopsys agreement was not reasonably calculated to lead to the discovery of relevant evidence because it was clear to the Trial Court that ASI was trying to get access to Zilog's license agreements to see if it could use software

licensed and paid for by Zilog to review documents ASI had obtained in discovery but did not have the software to access. This was a reasonable conclusion as that was the focus of ASI's arguments and ASI even couched its argument for the discovery of the licenses in those terms. Tr. p. 103, L. 3-10.

ASI never asked the Trial Court to reconsider the decision denying the motion to compel. Then ASI filed a motion in limine wherein ASI represented that it was seeking to enforce the decision on the motion to compel at trial. During argument on the motion in limine, ASI's counsel agreed that there was no argument that the Synopsys license was relevant on the issue of costs raised in support of the motion to compel. Tr. p. 499, L. 5-11. The Trial Court's decision should not be reversed on grounds that were never presented to the Trial Court.

ASI asserts that the Trial Court further erred by resorting to an unfair ex parte process in reviewing the Synopsys license agreement in camera. However, the license agreement was reviewed as part of the motion in limine and not as part of the motion to compel. Similarly, the argument that the Trial Court erred by relying on credibility findings had nothing to do with the motion to compel. The findings referenced by ASI were during the arguments on the motion in limine. The Trial Court properly exercised its discretion in denying the motion to compel. ASI has not made any showing that the decision was an abuse of discretion.

The Trial Court's discussions of relevancy of the Synopsys license all took place in the arguments regarding the motion in limine. The Trial Court did state that the total cost for the software in the license agreement was relevant. As stated above, the Trial Court found that ASI could determine the cost for the software independent of the license agreement. In its arguments that the Trial Court erred on the relevancy determination, ASI claims that "whether Zilog actually paid the requisite licensing fees for the design tools at or during the time that the Sage Defendants were working on the 6482 Project is a *disputed* and *highly relevant* factual issue." Opening Brief, p. 31. That is not the case. However, assuming this statement were true, it is doubtful the Synopsys license agreement provides information about whether or when Zilog paid any fees due under the license. The document in question is a license, not a payment history. Disclosure of the license would not likely provide the information that ASI claims it needed for trial. At best, the license only contains the fee for the Synopsys software license. ASI's argument is without merit.

Finally, a Trial Court has discretion to bar the disclosure of confidential contracts in discovery proceedings. *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). In *Jen-Rath* the Idaho Supreme Court upheld the trial court's determination that an agreement sought in discovery was confidential and should not be disclosed. *Id.* The Supreme Court held that lower courts have discretion to bar discovery of confidential contracts under I.R.C.P. 26(c). If a lower court can issue a protective order barring the disclosure of a confidential agreement, it is also permissible to deny a motion to compel or a motion in limine on the same grounds. The Trial Court in this case found that

the Synopsys license agreement was confidential and should not be produced to ASI. That was a reasoned exercise of its discretion as ASI is also a potential customer of Synopsys and would unfairly benefit from knowing what Synopsys was charging other customers. This is particularly true since ASI did not give Synopsys notice of the hearing regarding the disclosure of the license agreement or an opportunity to be heard after Synopsys objected to a subpoena seeking the license agreement.

B. THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY FROM VARIOUS WITNESSES REGARDING LICENSE AGREEMENTS AND THE TERMS OF THE LICENSES

This is the second issue identified in the “Issues Presented on Appeal” in the Opening Brief but it is addressed as part of the first issue in two paragraphs on pages 31 and 32 of the Opening Brief. ASI identifies instances in which ASI was prevented from eliciting certain information about the Synopsys license from witnesses. ASI does not offer specific arguments on each instance. Instead, ASI merely concludes that the Synopsys license was relevant so this testimony should have been admitted.

However, this testimony would have been inadmissible even if the Synopsys agreement had been admitted. The first identified testimony that was not admitted was from ASI’s expert. ASI asked its expert to testify that “insufficient supporting data has been provided to show that Zilog would not have incurred additional tool costs in contracting with Sage...” Tr. p. 2025, L. 1-3. The Trial Court had specifically reviewed the Synopsys license and informed ASI that the license agreement did not provide for any additional charges in adding the Sage Defendants to the Synopsys license. ASI

ignored this information and still sought an opinion from its expert which was inconsistent with the facts. Tr. p. 1285, L. 6-17.

ASI next cites to exchanges between the Trial Court and ASI's counsel regarding testimony that ASI sought to elicit during cross examination of Mr. Staab. In the first exchange the Trial Court specifically reserved ruling on the issue. Tr. p. 2055, L. 5-7. The second exchange occurred when Mr. Staab was asked how much Zilog actually paid for the tools used by the Sage Defendants. The Trial Court sustained an objection on the grounds that the amount paid was subject to a confidentiality agreement about which the Trial Court had already ruled as part of the motion in limine. Tr. p. 2358, L. 20 - p. 2359, L. 9. As part of the motion in limine, the Trial Court had ruled that the cost was part of a confidentiality agreement that was not discoverable and that ASI was fully capable of determining the cost for the software that was available on the market. Tr. p. 1285, L. 18 - p. 1286, L. 17. ASI has demonstrated no need for knowing how much Zilog actually paid for Synopsys tools. ASI's damage calculation was based on what ASI would have to pay for tools. What Zilog paid is not relevant to that issue and requiring Mr. Staab to testify on that issue would have been a breach of the license agreement with Synopsys.

The final piece of testimony that ASI claims should have been allowed was testimony from Lorelli Hackler regarding the differences in the \$124,000 charged by the Sage Defendants to do the work for Zilog and the amount ASI was claiming in its damage calculation of \$454,000 for the same work. The Trial Court sustained an objection because ASI's counsel had been cautioned to raise the

issue outside the presence of the jury before attempting to elicit such testimony and ASI's counsel agreed to do so. ASI failed to follow that protocol as agreed and thus the objection was sustained. Tr. p. 1220, L. 8 - p. 1221, L. 15.

C. ASI CANNOT SHOW THAT A SUBSTANTIAL RIGHT WAS AFFECTED BY ANY OF THE ALLEGED ERRORS.

In the event of an incorrect ruling on an evidentiary matter relief on appeal will only be granted if the error affects a substantial right of a party. *State v. Parker*, 157 Idaho 132, 139-40, 334 P.3d 806, 813-14 (2014), *reh'g denied* (Aug. 13, 2014). If the error does not affect a substantial right it is disregarded. *Id.* Similarly, if the an error did not affect the outcome of the trial there is no basis for a reversal. *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004). A substantial right is not affected if other evidence on the matter is presented. *Bailey v. Sanford*, 139 Idaho 744, 749-50, 86 P.3d 458, 463-64 (2004).

ASI argues that the Trial Court's ruling on the motion to compel and the testimony that was barred from being elicited affected a substantial right. ASI first argues that it was prevented from presenting evidence that Zilog did not have the proper licenses in place when the Sage Defendants worked for Zilog. ASI claims that this would have somehow demonstrated that the ASI damage calculation was not "too expensive." However, after the Trial Court reviewed the Synopsys license, the Trial Court found that the license provided that the Sage Defendants were authorized to use the Synopsys software without additional cost. Tr. p. 1283, L. 25 - p. 1285, L. 9. Thus, admission of the license agreement would not have proven what ASI claims.

ASI's second argument is that it was prevented from impeaching Mr. Staab and Mr. Reinstein. ASI wanted to impeach them with the Synopsys agreement. The failure to allow a witnesses to be impeached does not affect a substantial right of a party. *Navarro v. Yonkers*, 144 Idaho 882, 887, 173 P.3d 1141, 1146 (2007). Additionally, as stated above, the Synopsys license agreement contained an addendum that related back to 2004 and allowed Zilog's contractors to use the Synopsys software. Thus, there was no prejudice to a substantial right because the Synopsys license agreement did not support ASI's arguments or intended testimony.

ASI cannot show any substantial prejudice as a result of the Trial Court's decisions. ASI still presented a damages expert who claimed that ASI suffered damages in the amount of \$1,025,087. Plaintiff's Ex. 119; Tr. p. 2099, L. 11-25. Lorelli Hackler testified that she and Richard Chaney prepared a damage calculation or cost proposal for what ASI would have charged for the Zilog work done by the Sage Defendants. Tr. p. 1134, L. 5 - p. 1135, L. 21; Plaintiff's Ex. 101. She testified that the cost proposal included the costs for tools that ASI would have had to use to do the Zilog work. Tr. p. 1136, L. 1 - p. 1138, L. 13. She also testified that ASI was able to determine the cost to acquire the necessary design tools or software. Tr. p. 1140, L. 15 - p. 1142, L. 21. Lorelli Hackler also testified that when ASI did a job it used tools that it acquired and did not use tools provided by customers. Tr. p. 1180, L. 3-17. She testified that this was standard in the industry. Her testimony completely undermines ASI's arguments that the Synopsys license agreement was relevant to its own damage calculations.

If ASI uses its own tools when doing design work why would Zilog be any different? Zilog had to use tools it acquired because other engineers from other subsidiaries of Zilog's parent company were also working on the same project with the Sage Defendants. Tr. 1987, L. 18 - p. 1988, L. 13. In fact, before the events giving rise to this case transpired, ASI previously did some work for Zilog through a temporary employee. Tr. p. 1191, L. 25 - p. 1192, L. 24. That ASI employee did the work for Zilog using Zilog's tools at Zilog's facilities. Tr. p. 1191, L. 25 - p. 1192, L. 24. There is nothing in the record to show that the relationship between ASI and Zilog would have been any different had Zilog hired ASI instead of the Sage Defendants to do the work on the project in question. As such, Zilog's tool licenses and the costs for the tool licenses are not relevant to any issue in this case or to ASI's damages calculations.

Ultimately, the jury awarded ASI damages in the amount of \$195,175 against the Sage Defendants when the Sage Defendants were only paid \$124,181.75 by Zilog. Tr. p. 2485, L. 15- 20; Tr. p. 2828, L. 4-11; Defendants' Ex. 1-XXXX. ASI was able to pursue its case, make a claim for damages and ultimately received a verdict against the Sage Defendants. ASI's substantial rights were not affected. ASI just received a lower damages award than it wanted. ASI has not presented any evidence that the damages award may have been higher if the Trial Court had admitted the Synopsys license agreement.

ASI asks that the judgment against the Sage Defendants be vacated. Even assuming that ASI prevailed on all of its arguments, a new trial on damages would not be appropriate. The amount that

Zilog actually paid for the Synopsys tool is not relevant to ASI's damage calculations regarding the Sage Defendants. Whether Zilog breached its license agreement with Synopsys in allowing the Sage Defendants to use the Synopsys software is not relevant to ASI's damage claims against the Sage Defendants. The proper calculation of ASI's damages is based on its lost profits. It was made clear in *L & L Furniture Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 111, 813 P.2d 918, 922 (Ct. App. 1991) that “. . . the proper measure of damages for interruption of business . . . is reflected in Idaho pattern jury instruction (IDJI) 918, which states that, for damages to a business, the jury may award the lesser of

1) the value of net profits lost as a result of the defendant's wrongful conduct and the present cash value of the net profits reasonably certain to be lost in the future by reason of that conduct; or 2) the reasonable expenses incurred by the plaintiff because of the defendant's wrongful conduct.”

The Synopsys license agreement has no bearing on the net profits lost or the reasonable expenses incurred by ASI because of the conduct of the Sage Defendants. Introduction of the license agreement would not prove that ASI lost any more in profits than it already presented to a jury. The cost contained in the Synopsys license agreement is a cost for Zilog to do business, it is not a part of ASI's damage calculations. ASI has made no showing how the Synopsys license agreement is relevant to its calculations of lost profits or reasonable expenses incurred.

D. THE TRIAL COURT DID NOT ERR IN GIVING JURY INSTRUCTION NUMBER 28 REGARDING DOUBLE RECOVERY FOR THE SAME INJURY BECAUSE THE INSTRUCTION IS CONSISTENT WITH THE LAW.

ASI combines the prevailing party issue with the issue regarding error in giving jury instruction number 28. The issue regarding the jury instruction will be addressed first. On appeal, the reviewing court exercises free review over jury instructions. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 27, 105 P.3d 676, 687 (2005). The question is whether the instructions as a whole adequately and fairly state the law. *Id.* “Even when the jury instructions are factually or legally inaccurate, this Court will not reverse the district court unless the instructions mislead the jury or prejudice the complaining party.” *Id.* The Idaho Supreme Court has held “there can only be one award of damages for a single injury.” *Id.* at 31, 105 P.3d at 691.

During the jury instruction conference, ASI stated that it had a concern with instruction number 28. That instruction provided: “If you determine that a party is entitled to recover under two claims for the same injury, you should not award more than is required to adequately compensate the party for that one injury.” R. p. 1624. ASI argued that it was concerned that jurors would try to split damages between claims. Tr. p. 2662, L. 11-15. Counsel did not dispute that the jury instruction contained a correct statement of the law. Counsel also admitted that the three claims being submitted to the jury were seeking to recover for the same injury. Tr. p. 2662, L. 18 - p. 2663, L. 5. The Trial Court opted to leave the jury instruction as it was worded because it adequately stated the law and would be helpful to the jury. Tr. p. 2663, L. 22-25.

ASI argues that the jury was confused because the foreperson wrote in the damage amount under the first two claims and then crossed it out and placed her first initial and last name next to the crossed out amount. She then wrote in a zero. The amount of \$195,175 was written in under the claim for intentional interference claim against the Sage Defendants. R. p. 1633-34. ASI concludes that this proves that it was right about the instruction. However, ASI's concern was that the jury would split the damage award between claims. Tr. p. 2662, L. 11-15. There is no indication that the damage amount was split. It is equally plausible that the foreperson crossed out the first amount, put her initials, and wrote a zero because it was an error and not confusion about splitting damage amounts between claims. The jury only intended to award damages for the intentional interference claim. If ASI felt an error had occurred or wanted clarification of the verdict it could have asked the Court to have the jury clarify the verdict before the jury was dismissed. That did not happen. Jury instruction number 28 was a proper instruction and no prejudice resulted from it being given to the jury.

E. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THERE WAS NO PREVAILING PARTY BETWEEN ASI AND THE SAGE DEFENDANTS AS ASI ONLY PREVAILED ON ONE OF TWELVE ORIGINAL CLAIMS AND ASI ONLY RECOVERED 19% OF THE DAMAGES IT CLAIMED AT TRIAL.

Pursuant to Rule 54(e)(1) of the Idaho Rules of Civil Procedure, a Court may award attorney fees based on a determination of the prevailing parties as defined by Rule 54(d)(1)(B). That rule states:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the

action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54. Although the Court has broad discretion in determining who the prevailing party is, the Idaho Supreme Court has provided some guidance. The Supreme Court has stated:

In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed “in the action.” That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.

Nguyen v. Bui, 146 Idaho 187, 194, 191 P.3d 1107, 1114 (Ct. App. 2008). It is not an abuse of discretion to determine that there are no prevailing parties even when a plaintiff recovers a money judgment if the defendant also reduces his or her liability. *Adams v. Krueger*, 124 Idaho 74, 77, 856 P.2d 864, 867 (1993).

In this case the Trial Court determined that there was no prevailing party in the claims and counterclaims between ASI and the Sage Defendants. The Trial Court held:

Out of twelve causes of action which ASI pursued against the Sage Defendants, only three claims were submitted to the jury. ASI recovered damages on one of its three claims against the Sage Defendants, and recovered 19% of the total damages sought. Because ASI succeeded only one of its three claims against the Sage Defendants, recovering only 19% of its claimed damages, the Court, in a thoroughly considered decision and in a careful exercise of its discretion, finds there is no prevailing party in this matter between ASI and the Sage Defendants.

R. p. 2130-31. However, the Trial Court also awarded the Sage Defendants \$6,000 in attorney fees based on ASI’s conduct regarding a trade secret claim that ASI voluntarily dismissed after failing to

comply with two orders on motions to compel the disclosure of the trade secret ASI claimed had been wrongfully misappropriated but was never able to identify. R. p. 2133. When the entire case is considered, the Sage Defendants significantly decreased their total liability to ASI. ASI was not a prevailing party on its claims against the Sage Defendants.

ASI claims that the Trial Court erred because the jury found that the individual Sage Defendants breached their contracts and a fiduciary duty to ASI. However, no damages were awarded for either of those claims. As stated above, ASI argues that no damages were awarded because the jury was confused by jury instruction 28. There is no evidence to support that argument. The jury was polled about each question on the verdict form and there was no equivocation that each juror answered Question 3 on the Special Verdict form with a zero. Tr. p. 2826-37. ASI has not shown that the Trial Court abused its discretion in determining that there were no prevailing parties.

V. CONCLUSION

As the appeal pertains to the Sage Defendants, it should be denied in its entirety. The first two issues argued deal with the Trial Court's decision regarding the Synopsys license. The Trial Court properly exercised its discretion in denying the motion to compel. It then correctly perceived ASI's motion in limine as a disguised motion to reconsider the motion to compel, which would have been untimely if raised as a motion to reconsider. However, ASI's position at the time of the motion in limine was that the decision on the motion to compel should be upheld and the Synopsys license agreement should not be used or referenced at trial. The motion in limine was properly denied because

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the total cost in the Synopsys license agreement was not relevant, there was no prejudice to ASI because ASI knew or was able to independently determine what it would cost to acquire the same tools and could calculate damages based on that information and the information sought was subject to a confidentiality agreement that prevented disclosure of the Synopsys license. Tr. p. 1307, L. 7 - p. 1308, L. 16.

ASI cannot show any adverse affect on a substantial right resulting from the Trial Court's decisions. ASI still presented testimony on how much it would cost ASI to acquire the tools necessary to perform the Zilog job. ASI was still able to presents its entire case and was awarded monetary damages against the Sage Defendants. No unfair prejudice was suffered.

The Trial Court did not err in giving jury instruction number 28. The instruction is a correct statement of the law and was provided to prevent a double recovery for the same injury. ASI's argument that it confused the jury is pure speculation without any basis in fact. ASI never sought clarification of the verdict from the jury before the jury was dismissed.

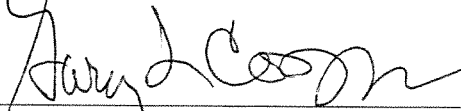
The determination of who prevailed at trial is discretionary with the Trial Court. It was determined that neither ASI nor the Sage Defendants prevailed. Only three of ASI's twelve causes of action were presented to the jury. The jury only awarded damages on one of those three claims. The damages awarded were only 19% of the total damages sought by ASI. Thus, the Sage Defendants significantly reduced their liability exposure through trial. As well, the Sage Defendants were awarded \$6,000 in attorney fees based on ASI's frivolous pursuit of the trade secret claim. There is

nothing that indicates that the Trial Court abused its discretion in reaching the conclusion that neither party prevailed.

Finally, all ASI has attempted to do is have the decisions and findings of the Trial Court second guessed on appeal. As such, an award of attorney fees on appeal is appropriate under Idaho Code section 12-121. Attorney fees should also be awarded pursuant to the terms of the employment agreements and Idaho Code section 12-120(3).

DATED this 12th day of July, 2016.

COOPER & LARSEN



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