

2000

# Kurt N. Holbrook and Tracy H. Bigelow v. West N. Holbrook : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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KURT N. HOLBROOK, an individual,  
and TRACY H. BIGELOW, an  
individual,

Plaintiffs and Appellees,

vs.

WEST N. HOLBROOK, an individual,  
Trustee of the B.G. Holbrook Family  
Trust,

Defendant and Appellant.

Case No. 20000931-CA

Priority No. 15

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**BRIEF OF APPELLEES**

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APPEAL FROM THE ORDER ON ORDER TO SHOW CAUSE  
FINDING APPELLANT IN CONTEMPT

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Third Judicial District Court, Salt Lake County, State of Utah  
The Honorable Tyrone E. Medley, Third District Court Judge

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(j).

## **DETERMINATIVE STATUTES AND RULES**

### Utah Rule of Appellate Procedure 4 (a):

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of the entry of the judgment or order appealed from.

### Utah Rule of Appellate Procedure 4 (e):

The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

### Utah Rule of Civil Procedure 65A(b)(2):

The order shall expire by its terms within such time after entry, not to exceed 10 days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

## **STATEMENT OF THE CASE**

Appellees Kurt N. Holbrook and Tracy H. Bigelow (collectively, the “Plaintiffs”) hereby supplement the Statement of Facts provided by Defendant-Appellant West N. Holbrook (“Defendant”) as follows:

### **Statement of Relevant Facts**

1. On November 24, 1994, the B.G. Holbrook Family Trust (the “Trust”) was established. The Trust beneficiaries included Brigham G. Holbrook (“B.G.”) and Plaintiffs. R. at 4, 15.
2. On December 27, 1999, B.G. designated Defendant as the Trust’s sole trustee. R. at 6, 57.
3. On or about January 25, 2000 Plaintiffs filed a Complaint with the district court, in their capacities as beneficiaries of the Trust, alleging, among other things, that Defendant had violated his fiduciary duty of loyalty as Trustee of the Trust. Plaintiffs asked for damages and requested injunctive relief removing Defendant as Trustee. R. at 3-13.
4. At the same time, Plaintiffs filed an application for a temporary restraining order to enjoin Defendant from acting as Trustee. R. at 123-124.
5. At a hearing on January 27, 2000, counsel for Defendant told the court that a restraining order was unnecessary, since counsel would be supervising Defendant’s actions as Trustee in the future. The court agreed and denied the application. R. at 144, 151-53; 174.
6. On March 27, 2000, Plaintiffs learned that Defendant had made multiple distributions from the Trust totaling more than \$200,000 and repeatedly failed to disclose disbursements from the Trust accounts to all beneficiaries. R. at 173-83.
7. After contacting counsel for Defendant regarding Defendant’s acts in breach of his fiduciary duties, counsel for Defendant resigned on the same day. R. at 163-164.

8. Fearing continued wasting of Trust assets, Plaintiffs immediately filed an application for temporary restraining order and preliminary injunction. R. at 169-333.

9. On March 30, 2000, the district court entered a Temporary Restraining Order requiring, among other things, that Defendant cease acting as Trustee of the Trust and that all Trust assets be frozen. R. at 334.

10. During the March 30, 2000 hearing, at the Defendant's request, this Court extended the TRO until April 25, 2000. Video Transcript at 10:10:36 to 10:11:10.

11. On April 19, 2000, pursuant to a stipulated order for expedited discovery, Defendant produced, through his counsel, information concerning the Trust accounts held at Fidelity Investments. Included in the information was a statement for Fidelity account number X29-137200. The statement indicated a balance as of March 31, 2000 of \$440,700.73. R. at 489-93.

12. On April 25, 2000 the district court extended the TRO again, until May 2, 2000 when the ruling on Plaintiff's Application for Preliminary Injunction was scheduled to issue. R. at 414-17.

13. On May 2, 2000 the district court ruled in favor of Plaintiffs' Application for Preliminary Injunction and removed Defendant as Trustee of the Trust. R. at 418.

14. On June 23, 2000 Plaintiffs learned that the balance of Fidelity account number X29-137200 was less than one thousand dollars. On that day, Plaintiffs issued a subpoena of Fidelity account records for the Trust. R. at 446-47.

15. On or about August 11, 2000 Plaintiffs' brought an Order to Show Cause against Defendant for violating this Court's March 30, 2000 Temporary Restraining Order, May 2, 2000 ruling and June 19, 2000 Order. R. at 733-912.



16. The motion for order to show cause was heard on September 8, 2000. R. at 1120.

17. At the conclusion of the September 8, 2000 hearing, this Court found that Defendant initiated over 100 separate transactions, trades or transfers in or from the B. G. Holbrook Family Trust account from March 30, 2000 to on or about May 31, 2000. R. at 1120.

18. The court also found that each of the over 100 trades was a separate and distinct act of contempt to be punished separately and ordered the Defendant to serve 365 consecutive days in the Salt Lake County jail. R. at 1120.

### **SUMMARY OF ARGUMENTS**

This case nearly defies description. Defendant-Appellant West N. Holbrook (“Defendant”), the appointed trustee of the B.G. Holbrook Family Trust (“Trust”), not only breached his fiduciary duty to the Trust by wasting Trust assets, he squandered over \$500,000 held in Trust in flagrant violation of a temporary restraining order freezing Trust assets and forbidding him from acting as Trustee. After finding that Defendant had committed more than 150 different violations of the TRO and repeatedly lied to the court, the district court found Defendant in contempt for at least 13 violations of the TRO and sentenced Defendant to one year in jail by consecutive 30-day sentences. Amazingly, Defendant is appealing his contempt sentence. He first disputes the procedure of the TRO hearing, despite the fact that he has never appealed the TRO and the time for appeal is long past due. He further argues that there was insufficient evidence that HE committed the contempt violations, despite the clear transactional record and his later admissions. Finally, he argues that the district court was unable to order consecutive

sentences for his contempt violations, although such is plainly in accord with Utah law. Defendant's latest crack at circumventing the law, like his other attempts, should be rejected.

## **ARGUMENT**

### **I. THE TEMPORARY RESTRAINING ORDER WAS NOT APPEALED AND IS NOT SUBJECT TO REVIEW BY THIS COURT**

In his appeal, Defendant seeks to challenge the trial court's Temporary Restraining Order, which was issued following a hearing on March 30, 2000. Defendant asserts that because his former counsel withdrew shortly before the hearing, the trial court committed plain error in issuing the Order instead of delaying proceedings for twenty days pursuant to Utah Code Ann. § 78-51-36 and Utah Code of Judicial Administration Rule 4-506. It is true that Defendant had the right to contest the court's Order for any number of reasons. However, Defendant has never appealed that Order, has never asked for an extension of time to appeal that Order, and cannot appeal that Order now.

Rule 4(a) of the Utah Rules of Appellate Procedure requires that appeals from a final judgment and order "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Rule 4(e) permits the trial court, "upon a showing of excusable neglect or good cause, [to] extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule." Thus, the Rules provided Defendant with two 30-day periods in which to protest the court's March 30, 2000 Order. However, Defendant never appealed the court's Order, let alone within the time periods allotted in

the Rules. The only appeal made by Defendant—the instant appeal from the order finding Defendant in contempt—was filed in November 2000, well beyond the permissible period.

Even if the issue were timely and relevant to the Order appealed, Defendant’s failure to raise the issue previously is fatal to his claim. This court has frequently stated: “Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.” Tebbs Family Partnership v. Rex, 2001 WL 312387, No. 990681-CA (Utah Ct. App. March 15, 2001) (quoting Hart v. Salt Lake County Comm’n, 945 P.2d 125, 129 (Utah Ct. App. 1997)).

Because the trial court’s Order of March 30, 2000 was not appealed, timely or otherwise, and was not raised in the trial court, it is not properly before this court, and thus Defendant’s first argument must be disregarded.

However, even if Defendant’s contention were timely and properly noticed, the trial court was permitted under UCJA 4-506 to deviate from the 20-day delay. That Rule declares: “No further proceedings shall be held in the case until 20 days have elapsed . . . *unless otherwise ordered by the court.*” In this case, the trial court ordered the hearing to proceed in view of the exigent circumstances of the case. Counsel for Defendant had avoided a prior TRO on the understanding that counsel would supervise Defendant in his administration of the trust funds. Upon discovering that Defendant was carelessly depleting the trust fund of tens of thousands of dollars in margin trading, counsel withdrew. Defendant was making such trades almost daily. If the court had further

delayed the TRO hearing, substantial additional harm would have occurred to the trust. In those extreme circumstances, the trial court was justified in temporarily restraining Defendant's administration of trust funds. In fact, the Utah Supreme Court in Sperry v. Smith, 694 P.2d 581 (Utah 1984), which Defendant cites, declared that "in certain instances, trial courts have the inherent power to waive compliance with their own rules," so long as "some reason [is] suggested . . . why there should have been a waiver." Id. at 582. The trial court clearly saw such a reason, and such has been reiterated here. Finally, this court has previously excused "a technical violation of Rule 4-506(1)" where such was insufficient to show excusable neglect or an irregularity in the proceedings. Rex, 2001 WL 312387 at \*3. This appellate allowance of waiving delay is especially important in the context of temporary restraining orders, which by their nature require immediate action. Were it otherwise, TRO defendants could avoid restraint and do substantial harm by simply allowing or effecting their attorneys' withdrawal.

Thus, this court should reject Defendant's first argument as not timely appealed, not properly noticed, not a proper subject on appeal, waived as not previously raised, and substantively meritless.

## **II. THE TEMPORARY RESTRAINING ORDER REMAINED IN FULL FORCE AND EFFECT UNTIL MAY 2, 2000**

The Utah Rules of Civil Procedure are clear: a Temporary Restraining Order may be extended for longer than 10 days if the party against whom the order is directed consents to such an extension. Rule 65A specifically provides as follows:

The order shall expire by its terms within such time after entry, not to exceed 10 days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

Utah R. Civ. P. Rule 65A(b)(2) (emphasis added).

In their moving papers and proposed order, Plaintiffs requested only that the TRO remain in place for 10 days or upon a hearing for Preliminary Injunction whichever was sooner. The district court extended the period of the Temporary Restraining Order, *at the request of Defendant*, during the TRO hearing on March 30, 2000. Both B.G. Holbrook and the Defendant requested that the date for the Preliminary Injunction hearing be postponed to a date well beyond the expiration of the 10 days. After some discussion with counsel for B. G. Holbrook regarding an extension, the following exchange took place between Judge Medley and Defendant.

Judge Medley: “Mr. Holbrook, are you understanding this discussion?”

Defendant: “Yeah, I would appreciate it if you could push it [the hearing for Preliminary Injunction] back a little bit so I have time enough by, I could get new counsel.”

Judge Medley: “You understand though the further I push it back that this temporary order will remain in place until that [Preliminary Injunction] hearing is conducted and a decision is rendered. *That’s the other side of the equation.*”

Vidco Transcript at 10:10:36 to 10:11:10.<sup>1</sup> Notwithstanding the above exchange, Defendant requested and received a postponed hearing date for the Preliminary Injunction and voluntarily consented to extend the TRO.

Contrary to the assertion of Defendant in his Brief, the TRO was extended, pursuant to Rule 65A of the Utah Rules of Civil Procedure. Although the extension is not noted in the written Temporary Restraining Order, Rule 65A only requires that any basis for the extension be entered of record. The basis for extension of the TRO—namely, Defendant’s expressed request—is entered of record.<sup>2</sup> Moreover, the understanding of the Court and parties was further evidenced at the conclusion of the April 25, 2000 Preliminary Injunction Hearing when this Court again extended the TRO until May 2, 2000, the date a ruling on the Application for Preliminary Injunction was scheduled to issue.<sup>3</sup> Accordingly, the TRO was in full force and effect until May 2, 2000, based on the request and consent of the Defendant and in compliance with Rule 65A.

### **III. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUFFICIENT TO JUSTIFY THE SENTENCE IMPOSED**

The Fidelity documents that evidence the more than 100 transactions initiated by Defendant during his administration as trustee and subsequent to his removal therefrom,

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<sup>1</sup> Plaintiffs currently possess only a video transcript of the hearing and necessarily cite to the times indicated on the video.

<sup>2</sup> While a written transcript of the video is not currently before the court, Defendant does not dispute its existence or verity. Moreover, any error in presenting the transcript in the record on appeal is largely the result of Defendant’s delay of eight months from the date of filing its notice of appeal until his appellate brief was filed.

<sup>3</sup> At the conclusion of the April 25, 2000 Preliminary Injunction hearing, Judge Medley stated, “That [Temporary Restraining] Order presently in place will remain in place until I’ve ruled, which will be the second of May at 1:30.” Video Transcript of April 25, 2000 Preliminary Injunction Hearing at 2:25:44 to 2:25:53.

were entered in evidence as part of Plaintiffs' Exhibit 1 during the Order to Show Cause hearing. Defendant stipulated as to the admissibility of the Fidelity documents for all purposes and Defendant was questioned extensively regarding the transactions evidenced in the Fidelity documents. Ultimately, this Court found that each of the over 100 transactions evidenced in the Fidelity documents constituted separate and distinct acts of contempt to be separately punished. As a result, there is no need to speculate, as Defendant does in his Brief, regarding when these transactions occurred and whether such transactions occurred during the time the TRO was in place. The evidence entered in this Court speaks for itself. The Fidelity documents identify the date and nature of each transaction initiated by Defendant. Accordingly, by referring to the Fidelity documents, one can quickly determine that Defendant initiated 154 transactions between March 31, 2000 and May 2, 2000. In short, Defendant's argument that there is insufficient factual evidence to determine which of the over 100 transactions occurred during the time the TRO was in place is without merit.

In addition, even if the trial court had considered only the transactions that took place between March 31<sup>st</sup> and April 9<sup>th</sup>, during which Defendant concedes the written TRO was in place, a documented 52 trades took place. Each trade constituted a separate act of contempt. The trial court's contempt ruling required only 13 trades for the one-year contempt sentence it issued, and there were more than enough for its determination. It is important to reiterate that the parties stipulated to the authenticity and relevance of the Fidelity documents. The Fidelity documents clearly show the number of trades that

occurred on each day involving the trust fund accounts. In this instance, the stipulated Record speaks for itself.

Despite the clarity of the Fidelity documents, Defendant conjures up the novel contention that the “settlement dates” carefully noted on the documents do not clarify when the trades actually took place. Appellant’s Brief at 23-25. The argument is specious; trades are generally “settled” within a few hours of being “made,” and Defendant’s attempt to distinguish between the two is disingenuous and wholly unavailing. This is especially true in light of the fact that 54 trades took place during the initial TRO period and 157 trades within the extended time. Thus, quibbling over the precise “settlement date” is rendered meaningless.

Defendant also attempts to argue that the evidence was insufficient to show that he made the trades that depleted over hundreds of thousands of dollars from Trust accounts. Thus, although Defendant admitted that he alone controlled the accounts where trading took place, and that only he was authorized to initiate trades, he now contends that it was not proven that he actually made the trades himself.

Defendant was clearly the author of the trades in violation of the court’s order. Defendant was the sole trustee of the B.G. Holbrook Family Trust. Defendant was the only one authorized to make trades on the account. Defendant admitted at the contempt hearing that trades had been made on the account in violation of the TRO. R. at 1120 (Tr. 67-67). Moreover, Defendant took full responsibility for the transactions, but argued that such transactions should be considered as a “course of conduct” instead of separate



and distinct violations of the Court's TRO. Even in his Brief on appeal, Defendant states that "what *he did* involved a course of conduct, not separate acts." App. Brief at 27 (emphasis added). By both Defendant's statements and the plain evidence at hearing, Defendant was identified as the perpetrator of the trades for the account he controlled. This court does not require an impassioned confession to affirm the obvious.

#### **IV. THE TRIAL COURT HAD THE DISCRETION TO TREAT SEPARATE ACTS OF VIOLATION AS SEPARATE INSTANCES OF CONTEMPT TO BE PUNISHED SEPARATELY**

Defendant asserts that each of the 157 transactions he initiated in the Fidelity Trust account in violation of this Court's March 30, 2000 Order, should be considered as a single act of contempt or "course of conduct" for the purpose of determining an appropriate penalty under U.C.A. §78-32-10 (2000). In short, the Defendant argues that he has committed only one act of contempt and should be subject to a maximum penalty of a \$1000 fine and 30 days in jail. As is described more fully below, neither Utah law nor the law cited by Defendant supports such a conclusion.

It is within this Court's discretion to consider each of the 154 acts enumerated in the Plaintiffs' moving papers and set forth at the September 8, 2000 hearing as separate incidents of contempt. In fact, the case cited by Defendant, Department of Registration v. Stone, 587 P.2d 137 (Utah 1978), supports this conclusion. Specifically, the Stone court

held that “a sentencing judge has discretion to treat separate acts of violation as separate instances of contempt to be separately punished.” Stone, 587 P.2d at 138.<sup>4</sup>

The Stone court went on to hold that the particular Defendant in that case could not be sentenced for each of the 120 separate violations of the Court’s order, because the Motion for Order to Show Cause and supporting documents failed to individually set forth the 120 violations, charging instead, a “course of conduct.” Stone, 587 P.2d at 139. The court stated that the “dimensions of the punishment” must be within the “reasonable contemplation of the accused” in the moving papers. Id. It was the failure of the Plaintiffs to separately charge the 120 violations that caused the Court to rule that the Defendant could not be sentenced separately for each violation. Id.

In the instant case, the Plaintiffs clearly enumerated 291 instances of contempt and 154 instances of contempt specifically involving the B.G. Holbrook Family Trust account at Fidelity Investments. These instances were individually set forth in the Memorandum in Support and the hearing and documented by the account statements from Fidelity Investments that were attached to Plaintiffs’ moving papers and entered in evidence at the hearing. The charges were clearly within Defendant’s “reasonable contemplation.” Id. Accordingly, pursuant to the decision in Stone, this Court “has discretion to treat [the

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<sup>4</sup> In making its ruling, the Stone court refers to seven cases from five jurisdictions which hold that a sentencing judge has discretion to treat separate acts of violation as separate instances of contempt to be separately punished. The high court then specifically cites Ex Parte Genecov, 186 S.W.2d 225 (Texas 1945) (upholding separate punishment for 36 separate acts of discharging a pollutant into a river, as 36 separate acts of contempt). Texas courts have repeatedly ruled consistently with Genecov. No other Utah cases address this specific issue.

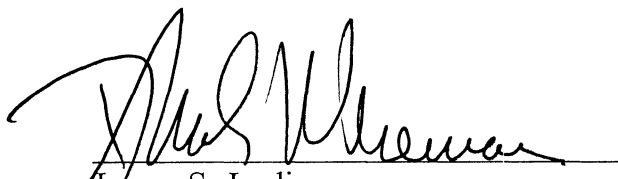
154] separate acts of violation as separate instances of contempt to be separately punished.” Id.

### CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court deny Defendant’s Appeal of the District Court’s Order of October 2, 2000.

DATED this 2<sup>nd</sup> day of Nov. ~~October~~, 2001.

RAY, QUINNEY & NEBEKER



James S. Jardine  
D. Zachary Wiseman

Attorneys for Plaintiffs and Appellees

617359/ma

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEES was mailed, postage prepaid, on this 2<sup>nd</sup> day of November, 2001 to the following:

James A. McIntyre  
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360 East 450 South, #3  
Salt Lake City, UT 84107

A handwritten signature in cursive script, reading "Kathy Long", is written over a horizontal line.

617359