

2001

## Utah v. Larry G. Bohne : Reply Brief

Utah Supreme Court

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**IN THE UTAH SUPREME COURT OF THE STATE OF UTAH**

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STATE OF UTAH,	)	
	:	
Plaintiff/Appellee,	)	
Respondent,	:	
	)	Case No. 20010116-SC
vs.	:	
	)	Court Appellant: 20000350-CA
LARRY G. BOHNE,	:	
	)	Argument Priority: (15)
Defendant/Appellant	:	
Petitioner.	)	

\*\*\*\*\*

**REPLY OF APPELLANT BOHNE**

Appellant BOHNE's reply to Appellee's Brief regarding an appeal from a Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Certificate of Probable Cause, filed August 3, 1998, by the Fifth Judicial District Court, Iron County, State of Utah, the Honorable Robert T. Braithwaite, presiding.

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UTAH SUPREME COURT

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STATE OF UTAH  
OFFICE OF THE ATTORNEY GENERAL



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**FILED**  
UTAH SUPREME COURT

MAR - 5 2002

PAT BARTHOLOMEW  
CLERK OF THE COURT

RAY HINTZE  
Chief Deputy Civil

KIRK TORGENSEN  
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October 29, 2001

Ms. Pat H. Bartholomew  
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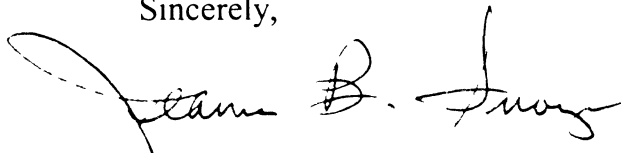
Re: *State v. Bohne*, 20010116-SC  
**Utah R. App. P. 24(i) Supplemental Authority Letter**

Dear Ms. Bartholomew:

Pursuant to rule 24(i), Utah Rules of Appellate Procedure, I am citing to *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (attached), in response to defendant's argument regarding the burden of proof under the analysis of the concurring opinion below. Defendant's argument is set forth under Point 2, Brief of Appellant Bohne, pages 21 to 23, filed with this Court on August 27, 2001. Oral argument in this case is set for March 14, 2002.

I appreciate your prompt distribution of this letter to the Court.

Sincerely,



JEANNE B. INOUE  
Assistant Attorney General

cc: J. Bryan Jackson, counsel for appellant

**C**

Supreme Court of Utah.

**STATE of Utah, Plaintiff and Appellant,**  
**v.**  
**Arnold J. SWENSON, Defendant and Appellee.**

**No. 910026.**

Sept. 28, 1992.

The state charged defendant with three counts of the sale of securities by an unregistered agent. The Third District Court, Salt Lake County, J. Dennis Frederick, J., dismissed and the state appealed. The Supreme Court, Howe, Associate C.J., held that once defendant produces evidence that he received no commission or remuneration, the burden shifts to the prosecutor to disprove the affirmative defense.

Reversed and remanded.

West Headnotes

**[1] Criminal Law** ⚔ **330**

110k330 Most Cited Cases

Prosecutor has burden to disprove affirmative defense once defendant has produced evidence of it.

**[2] Securities Regulation** ⚔ **327**

349Bk327 Most Cited Cases

Once defendant produces evidence that he received no commission or remuneration in selling securities, burden shifts to prosecutor to disprove affirmative defense in prosecution for sale of securities by unregistered agent. U.C.A.1953, 61-1-14.5.

\*1136 R. Paul Van Dam, David N. Sonnenreich, Salt Lake City, for plaintiff and appellant.

James N. Barber, Salt Lake City, for defendant and appellee.

\*1137 HOWE, Associate Chief Justice:

The State appeals from an order dismissing a criminal information against defendant Arnold J. Swenson which charged him with three counts of the sale of securities by an unregistered agent in violation of Utah Code Ann. §§ 61-1-3(1) and 61-1-21 (1989 & Supp.1990). A motion to dismiss was filed by defendant before the date set for trial. In his motion, he contended that the definition of the term "agent" in

section 61-1-3(1) is unconstitutionally vague in violation of both the Fourteenth Amendment to the United States Constitution and article I, section 7 of the Utah Constitution. The trial court granted the motion. The State appeals under Utah Rule of Criminal Procedure 26(3)(d), which grants the State the right to appeal an order holding a statute to be invalid. This court has jurisdiction of an appeal when a trial court order rules a statute unconstitutional on its face. Utah Code Ann. § 78-2-2(3)(g).

Section 61-1-3(1) provides, "It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this chapter." Defendant was charged with acting as an "agent," which is defined in section 61-1-13(2) as "any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities." However, that definition is qualified in the same section by a **three-pronged exception** which excludes a person who (1) represents an issuer, (2) receives no commission or other remuneration, and (3) effects a transaction in securities in any one of a large number of instances, including those set forth in section 61-1-14(2). Pertinent to the instant case are three instances provided in section 61-1-14(2)(a), (d), and (n), which respectively **exempt** securities sold in isolated transactions, in transactions involving an underwriter, or in transactions not involving a public offering.

The basis of the trial court's order of dismissal was that there are no provisions in the Utah Uniform Securities Act, §§ 61-1-1 to -30, or elsewhere in the statutes which define "isolated transaction," "underwriter," or "public offering." Nor could the court find definitions of those terms in Utah case law. The court stated that without adequate definitions of those terms, it could not properly instruct the jury as to their proper meaning. The court further noted that under section 61-1-14.5, the burden of proving the availability of an exemption from the registration requirement was on defendant. It was impossible, the court concluded, for defendant Swenson to sustain his burden of establishing that he was not acting as an agent when he effected the securities transactions at issue in this case. The court held that by employing those terms in section 61-1-14(2) without providing authoritative, readily available definitions of the terms, the legislature had failed to advise a reasonable person of the nature of the securities transactions

(Cite as: 838 P.2d 1136, \*1137)

which may not be effected without registration as an agent with sufficient clarity to meet the specificity requirements of due process under the United States and Utah Constitutions.

We need not and do not reach the vagueness issue which troubled the trial court. The State has conceded that Swenson meets prong one and prong three of the three-pronged test for exception from the definition of agent. The lack of definitions upon which the trial court based its order of dismissal concerned only prong three. The State contends that Swenson fails to meet only prong two of the exception test, that is, he received no commission or other remuneration. Defendant has not attacked or raised any issue regarding lack of definition or vagueness as to prong two. We therefore reverse the order of dismissal and remand the case for trial solely on the issue of whether Swenson received a commission or other remuneration. [FN1]

FN1 We note that in 1991 the legislature amended section 61-1-3 to include the following provision: "A term not defined in Section 61-1-13 shall have the meaning as established by division rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community." § 61-1-13(21) (current version at § 61-1-13(25) (Supp. 1992))

\*1138 [1][2] One other matter should be addressed. Section 61-1-14.5 provides:

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under Section 61-1-14 or an exception from a definition under Section 61-1-13 is upon the person claiming the exemption or exception.

Under a literal interpretation of that statute, defendant would appear to have the burden of proving that he received no commission or other remuneration, thereby meeting prong two of the exception. Such an interpretation, however, would raise constitutional concerns. Both the United States Constitution and the Utah Constitution require that the burden of proving all elements of a crime is on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368, 375 (1970); *State v. Starks*, 627 P.2d 88, 92 (Utah 1981).

In *Mullaney v. Wilbur*, 421 U.S. 684, 701, 95 S.Ct. 1881, 1890-91, 44 L.Ed.2d 508, 520-21 (1975), the

Court extended the holding in *Winship* to require the prosecution to disprove the nonavailability of defenses raised by a criminal defendant which served to negate an element of the charged offense. We have consistently followed that policy in this state. In *State v. Wood*, 648 P.2d 71, 82 n. 7 (Utah 1982), we observed that a long line of Utah cases imposes on the prosecution the burden to disprove the existence of affirmative defenses beyond a reasonable doubt, once the defendant has produced some evidence of the defense. See also *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985).

Like Utah, Michigan has adopted in substance the Uniform Securities Act. In *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976), the defendants, who had been convicted of selling unregistered securities in violation of the Michigan Act, appealed. They contended that the provision of the Act (similar to our section 61-1-14.5) which placed the burden of proving an exemption or exception upon the person claiming it required them to bear an unconstitutional burden of proving their innocence. The Michigan Supreme Court disagreed. In that case, the defendants maintained that they had sold commercial paper, which is an exempt security. See § 61-1-14(1)(i). The court observed that the defendants' claim of exemption was in the nature of an affirmative defense as a claim "that the accused is within an exception or proviso in the statute defining the crime." 396 Mich. at 711, 242 N.W.2d at 387 (quoting Edward W. Cleary, et al., *McCormick on Evidence* § 341, at 800 (2d ed. 1972)).

[T]he recent trend is to treat these so-called matters of defense as situations wherein the accused will usually have the first burden of producing evidence in order that the issue be raised and submitted to the jury, but at the close of the evidence the jury must be told that if they have a reasonable doubt of the element thus raised they must acquit.

396 Mich. at 711-12, 242 N.W.2d at 387 (quoting *McCormick* § 341, at 802). Thus, the Michigan court concluded that the provision of the Uniform Securities Act placing the burden of proving an exemption on the defendant

must be interpreted to mean that once the state establishes a prima facie case of statutory violation, the burden of going forward, i.e., of injecting some competent evidence of the exempt status of the securities, shifts to the defendant. However, once the defendant properly injects the issue, the state is obliged to establish the contrary.

beyond a reasonable doubt.

*Id.* at 713-14, 242 N.W.2d at 388 (citations omitted).

We agree with that interpretation. It accords with a fundamental rule of statutory construction that as between two possible interpretations of a statute, that interpretation will be favored which renders the statute constitutional. *Salter v. Nelson*, 85 Utah 460, 467, 39 P.2d 1061, 1064 (1935); *see also State v. Tebbs*, 786 P.2d 775, 779 (Utah Ct.App.1990). On remand, we direct that if defendant produces some evidence that he received no commission or other remuneration, thus properly raising the issue, the

burden of proof must be and remain \*1139 with the prosecution that defendant did in fact receive a commission or other remuneration. If this interpretation of section 61-1-14.5 is followed, there will be no violation of defendant's constitutional rights.

The case is remanded to the trial court for further proceedings consistent with this opinion.

HALL, C.J., and DURHAM, STEWART and ZIMMERMAN, JJ., concur.

END OF DOCUMENT

**IN THE UTAH SUPREME COURT OF THE STATE OF UTAH**

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STATE OF UTAH,	)	
	:	
Plaintiff/Appellee,	)	
Respondent,	:	
	)	Case No. 20010116-SC
vs.	:	
	)	Court Appellant: 20000350-CA
LARRY G. BOHNE,	:	
	)	Argument Priority: (15)
Defendant/Appellant	:	
Petitioner.	)	

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**REPLY OF APPELLANT BOHNE**

Appellant BOHNE's reply to Appellee's Brief regarding an appeal from a Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Certificate of Probable Cause, filed August 3, 1998, by the Fifth Judicial District Court, Iron County, State of Utah, the Honorable Robert T. Braithwaite, presiding.

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**IN THE SUPREME COURT FOR THE STATE OF UTAH**

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STATE OF UTAH,	)	<b>REPLY OF APPELLANT</b>
	:	<b>BOHNE</b>
Plaintiff/Appellee,	)	
Respondent,	:	
	)	Case No. 20010116-SC
vs.	:	
	)	Court Appellant: 20000350-CA
LARRY G. BOHNE	:	
	)	Argument Priority: (15)
Defendant/Appellant,	:	
Petitioner.	)	

\*\*\*\*\*

**I.**

**JURISDICTION**

Appellee agrees with Appellant that jurisdiction is appropriate before the Utah Supreme Court upon its grant of Writ of Certiorari.

**II.**

**STATEMENT OF FACTS**

The parties appear to be in agreement as to the facts which are generally comprised of the stipulated facts agreed to by the parties and submitted to the trial court together with testimony where each side testified as to their interpretation and understanding of the law and regulatory scheme.

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### **III.**

#### **RESPONSE TO AND CLARIFICATION OF ARGUMENTS**

##### **POINT NO. 1:**

##### **TO UNDERSTAND THE STATUTE CORRECTLY REQUIRES A COMPLETE READING OF THE ENTIRE PROVISION WITHOUT EXCLUDING PORTIONS OR OVER EMPHASIZING OR MISCHARACTERIZING CERTAIN WORDS.**

For more than five (5) years, the Appellant has tried to get clarification of the meaning and understanding of the application of the Construction Trades' Act upon manufactured housing by requesting a definitive interpretation of the statutory language articulated and codified by the Utah State Legislature. This was first attempted at an administrative hearing before the Board of Contractors. The Board decided against the Appellant and appeal was dismissed for his failure to timely file the appropriate filing fees. The present action takes the form of criminal charges filed against the Appellant for contracting without a license and the trial court and Court of Appeals have each ruled against the Appellant and have done so avoiding the very issues that Appellant has tried to have addressed for clarification and this avoidance now becomes the reason the Appellant continues to pursue the matter to the Supreme Court.

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No one seems to want to read the statute correctly or completely. It is embarrassing to have to put forth simple and commonly understood principles in understanding English composition in order to read a statute correctly. However, if Appellee can cite to Webster's Unabridged Dictionary to try to articulate what the statute means by defining "building", then perhaps the Court will not look unkindly upon Appellant's appeal to basic english sentence structure. Of course, part of the composition which seems to be not so well understood is that you must read an entire sentence from the first word to the last and not merely to the middle in order to understand its meaning. The statutory provisions in question on this appeal provide an interesting case study since the words used are not ambiguous and the sentence structure is not complex or confusing. Since the Construction Trades' Act attempts to regulate construction trades, one may start with its definitional language. Utah Code Annotated Section 58-55-102(8) (1953, as amended), offers a statutory or legislative definition for construction trades.

It reads:

(8) "construction trades" means any trade or occupation involving construction, alteration, remodeling, repairing, wrecking, or demolition, addition to, or improvement of any building, highway, road, rail road, dam, bridge, structure, excavation or other project, development or improvement to other than personal property (emphasis added).

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Perhaps the meaning of this sentence could be made more clear by removing that which does not apply and restating the last clause more clearly in a different way but stating the same thing.

Doing so produces:

(8) “construction trade” means any trade or occupation involving construction... of any building...on real property.<sup>1</sup>

Consequently, construction of a building that is detached from real property, hence that is personal property is expressly excluded from the definition of “construction trade.” Appellee attempts to distinguish not by citing to any statutory authority but by focusing on the word “building” found in the definition. While this does not change the meaning of the sentence, Appellee seems to imply that if it is a building that is constructed, it is subject to the Construction Trades’ Act whether or not it is real property or personal property. This is simply ignoring the last limiting clause set forth in the statutory language found within subsection (8). It could have been just as easy for the Legislature to state what the Appellee implies. That is, all buildings are subject to the construction trades whether real or personal property. Since it would have been easy and obvious for the Legislature to have made such

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<sup>1</sup>The Appellant does not believe it is too presumptuous to assume that the phrase “other than personal property” has the same meaning as “real property” since it has long been an accepted and commonly understood principle in law and common English usage that all property is either personal property or real property.

a simple statement and make the meaning clear, it strikes the Appellant as tortured for the Appellee to attempt to imply a meaning from language that is not actually used in the statute or to imply an intention where none is expressly stated. Hence, to simplify what has been understood from the statute's artful expression all construction, assembly or manufacturing of personal property is excluded from the construction trades.

Second, Appellee argues that Appellant does not qualify for exemption from licensing under Utah Code Annotated, Section 58-55-305(6) (1953, as amended). Once again, the need to reiterate the importance of reading the entire sentence seems to be an important and overlooked consideration to understanding the meaning of the statutory language. If one reads subsection (6) without reading the introductory provision of Section 305 it is easy to see how the Court of Appeals mistakenly reached its conclusion in arguing that the exemption was not intended for those who are in construction or build buildings. However, as Judge Thorne argued, provision 305 was not intended for a person who had no requirement to be licensed in the first place, such as sales people, but was intended as an exemption to those who were involved in construction trades, e.g. contractors or those in construction.

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///

That is precisely what the introductory language of Section 305 states and yet the introductory language of this very important provision was overlooked entirely in concluding that subsection (6) was not intended to include the Appellant.

Appellee attempts to contend or at least draw an inference to suggest that some type of fraud or irresponsibility will be perpetuated unless the Appellant is required to be licensed. Again, Appellee is not reading subsection (6) in its entirety. Perhaps it would be helpful to simplify the statute by excluding that which does not apply so as to reach a clearer understanding. The Appellant contends that the statute reads thus:

Section 305... Persons may engage in acts or practices included within the... construction trades... without being licensed under this chapter:

(6) a person engaged in the sale... of personal property that by its design or manufacture may be attached... to real property who has contracted with a person, firm or corporation licensed under this chapter to install... that property;

In short, while the exemption language allows for the construction, assembly or manufacturing of material involving personal property it always maintains that such items, whether assembled or unassembled, be installed or affixed by one who is licensed under the statute. That is to say that a contractor will always be involved in the construction of a home whether the contractor chooses to stick build the same from the ground up or chooses to purchase the material in an assembled fashion

from a manufacturer. There is no greater risk of fraud or irresponsibility acquiring assembled materials than if the contractor purchased the two by fours (2x4), drywall, paint, electrical wire and other accessories and assembled them himself on the property. The process is not compromised. The regulatory scheme is not compromised. The Appellant maintains that the Legislature understood the process and its interplay when articulating the language found in the statute.

Notwithstanding, while Appellee attempts to draw this Court's attention to what the statute should not be read to mean, little has been said about explaining or clarifying what exactly the language says or means. Again, the language is not complicated and the sentence structure is not complex or confusing. Every possible and conceivable argument has been made to the various interpreting authorities setting forth bizarre and contrived inferences arguing "sears exemptions" "motor vehicle tax regulations" and now defining the meaning of a "building." There has been more confusion and ambiguity created by the various responses through the proceedings than would be expected in understanding so simple a concept as personal property. Yet, in all the arguments, in their various forms, and in their various forums, not once has it been suggested by those in opposition to Appellant's position that the reviewing authority interpret that statute after the fashion of its plain meaning when read in its entirety.



This is all that Appellant has ever asked and this is why he has persisted or proceeded with such persistence and not given up because it seemed too much like giving in to something that was nothing but more confusion. In short, or simply put, the Appellant requests that this Court enforce the provisions of the law as stated or enforce it otherwise and explain in terms clear to understand why its plain meaning does not apply.

POINT NO. 2:

THE “CONSTRUCTION TRADES” DO NOT INCLUDE AND IN FACT  
EXPRESSLY EXCLUDES CONSTRUCTION OF PERSONAL PROPERTY

Given the direction of Appellee’s argument on “construction trades”, it seems imperative that a clear understanding be reached as to what the Legislature intended by the use of the term. Unlike the term “personal property” which is not defined in the pertinent statutes cited in the briefs of Appellant and Appellee, the term “construction trades” is statutorily defined and contains what Appellant believes to be a limitation intended by the Legislature for regulatory purposes. The definition is limited by its exclusion of personal property. As set forth in Appellee’s brief it is found at Utah Code Annotated § 58-55-102(8) (1953, as amended), and states:

(5) “construction trade” means any trade or occupation involving construction, alteration, remodeling, repairing, wrecking or demolition, addition to, or improvement of any building, highway, road, railroad, dam, bridge, structure,

excavation or other project, development or improvement  
to other than personal property. (emphasis added).

Perhaps as significant is the absence of a more limited or restrictive definition for “personal property” within this definitional section of the code. It is Appellant’s contention that if the Legislature intended to include modular construction within the regulatory scheme put forth by Appellee requiring that such manufacturers be licensed as building contractors that a first and essential step would have been to define or restrict the term “personal property” to mean something other than its general and accepted meaning or to include those types of construction of personal property within the regulatory scope of construction trades.

What is further remiss from Appellee’s brief is a citation to any judicial authority attempting to define the term “personal property” or “construction trades” to include activities similar to Appellant within the regulatory control of the Division of Professional licensing although Appellant does note that some administrative rulings of the Division have attempted to do so.

POINT NO. 3:

APPELLEE MISCONSTRUES APPELLANT’S CHALLENGE TO THE  
DIVISION’S INTERPRETATION OF THE STATUTE.

Appellee seems to infer from its argument that the Appellant is attempting to challenge the statutes in question. On the contrary, Appellant contends that these

statutes are clear and unambiguous and convey a plain meaning which is inconsistent with the interpretation put forth by the Division of Professional Licensing. The Appellant contends that a reasonable interpretation of the statutes must include the plain meaning of “personal property” which meaning extends to and includes forms of personal property other than those that could be characterized as “Sears exceptions” or vehicles licensed with the Department of Motor Vehicles. In short, the Appellant does not challenge the language of the various statutes as promulgated by the Legislature but the Division’s restrictive and somewhat tortured interpretation for regulation purposes.

POINT NO. 4:

APPELLEE FAILS TO DEMONSTRATE HOW THE STATUTORY USE OF THE TERM “PERSONAL PROPERTY” RENDERS THE STATUTES AMBIGUOUS OR LEADS TO AN UNREASONABLY CONFUSED, INOPERABLE OR BLATANT CONTRADICTION OF THEIR EXPRESS PURPOSE.

The Appellant and Appellee have set forth the well settled rules for statutory construction in Utah which seek to interpret statutes by utilizing the plain meaning of their words. See State v. Cox, 826 P.2d 656, 662 (Utah App. 1992). See also World Peace Movement v. Newspaper Agency Co., 879 P.2d 253, 259 (Utah 1994). As has been stated previously, the Utah Courts assume that each term in a statute

is used advisedly; thus the statutory words are read literally, unless such reading is unreasonably confused or inoperable. As noted in Appellee's brief, only if the language of a statute is ambiguous do the Utah Courts resort to other modes of construction. However, Appellee fails to demonstrate how the Legislature's use of the term "personal property" renders the meaning of the statute ambiguous. Appellee further contends that a corollary to the rule is that a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute. Appellant agrees. However, Appellant contends that Appellee has failed to demonstrate how an interpretation of the statute utilizing the plain meaning of "personal property" renders this statute confusing, inoperable or in blatant contradiction of its express purpose. To the contrary, the Appellant contends that the statutory language as promulgated is clear, decisive and definitive in expressing the Legislature's intent to regulate the construction trades through licensing and exempt certain similar activities that include a person engaged in the sale or merchandising of personal property that by its design or manufacture may be attached, installed or otherwise affixed to real property who has contracted with a person, firm or corporation licensed under this chapter to install, affix or attach that property.

Appellant believes that it is important to point out that this exemption is a qualified one. It requires that such personal property be installed, affixed, or attached by one who is licensed. In the instant case, as set forth in the stipulated facts, paragraph 3, the “[Appellant] transports and delivers the structure by “low-boy” and off loads it at the site. The Appellant does not do the site work, e.g. excavation, foundation, utilities, etc., nor does the Appellant actually install or attach the structure to the foundation. . . installation of the unit becomes the responsibility of the owner or a licensed contractor.” In other words, the rationale set forth by the trial court in its Certificate of Probable Cause and reiterated in Appellee’s brief that the “exception would swallow the rule” is not true. Since the statute requires that a licensed contractor be involved in the installation or attachment of such property to land, the Appellant is nothing more than a supplier of assembled materials to a contractor. The Appellant contends that the legislature had the foresight to see that requiring the licensing of a supplier of materials to a contractor would constitute an unnecessary redundancy in the regulatory scheme . Fabrication of quality materials and compliance with the appropriate building codes, the concern that did remain was insightfully addressed by the Legislature in Chapter 56 which was intended to regulate the manufactured housing industry. It assures that such construction meets with uniform and/or federal housing building requirements monitored through

inspections. The contractor and local building inspector require inspection certificates to insure that the item of personal property meets with the appropriate building code requirements. In the case of the Appellant, the product does not leave the yard until all inspections have been made. See paragraph 4, of Stipulated Facts.

The Appellant contends that the Legislature foresaw that a contractor would be involved in the process at the time of attachment and therefore considered it unnecessary to require the manufacturer of the unit to also be licensed as a contractor under Chapter 56. Consequently, Appellant is not asserting that Chapters 55 and 56 are mutually excluded as asserted by Appellee; rather, Appellant asserts that the two chapters work in conjunction with each other to insure that the one who installs or attaches personal property to real property is licensed as a contractor and the materials received, whether assembled or unassembled, meet with the requirements promulgated under the Uniform Building Standards Act. Such interpretation is plain, clear, and operable for regulatory purposes and adequately protects the general public from the health and safety issues associated with poor workmanship or poor quality materials.

Appellant contends that notwithstanding Appellee's assertion to the contrary, there is no independent public policy consideration to require licensing of contractors except to afford a reasonable expectation of good workmanship and standard quality

materials in the construction of a home. This is accomplished by the present statutory framework that interprets the language consistently with its plain meaning. It does not require the tortured interpretation put forth by Appellee to accomplish the public policy consideration.

POINT NO. 5:

APPELLEE ONLY CONFUSES THE ISSUE BY ATTEMPTING TO  
DISTINGUISH APPELLANT AS ONE WHO ACTUALLY CONSTRUCTS  
MODULAR HOMES OR BUILDS A BUILDING.

The Appellee attempts to draw distinction by asserting that Appellant is not only engaged in the sale or merchandising of modular homes but actually constructs modular homes. In short, he builds a building. Appellee concedes that he constructs modular homes which are buildings. He constructs modular homes just as a mobile home manufacturer or a manufactured home manufacturer constructs homes. Like a manufactured or mobile home, the Appellant's products are generally complete and unattached to real property. Notwithstanding, this is all addressed in the regulatory scheme provided through Chapter 56 which distinguishes between mobile homes, manufactured homes and modular construction only for the purpose of determining which building code requirements apply. In Utah Code Annotated § 58-56-3(12) (1953, as amended) the Appellants particular form of construction or

assembly is defined under the term “modular unit”. Which requires that Appellant’s product conform to the uniform building codes and not the HUD building code.

Moreover, as previously stated, the definition of “construction trade” in Chapter 55 expressly excludes construction of personal property. The attempt by Appellee to disqualify Appellant by classifying the activity as “construction” as opposed to “manufacturing, assembling, or designing” is a non sequitur that adds nothing to the rational or logical interpretation of the statute or the intended regulatory scheme of the construction trades or building code requirements.

Finally, if we look at the problem from the stand point of Appellee’s perspective and assume its interpretation is the correct one, then shouldn’t we also find regulatory language addressing the regulatory scheme that addresses the regulation and handling of certain types of personal property that Appellee believes to be regulated. No such regulation or scheme exists because the legislation never intended to include personal property under the Construction Trades’ Act. It makes no sense to interpret the statute in a way that goes beyond that contemplated through its regulatory language or scheme.

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POINT NO. 6:

THE INTERPRETATION OFFERED BY APPELLEE OF “PERSONAL  
PROPERTY” WOULD RESULT IN THE APPLICATION OF THE STATUTE IN A  
MANNER THAT WOULD RENDER IT UNREASONABLY CONFUSING,  
INOPERABLE AND IN BLATANT CONTRADICTION OF ITS EXPRESS  
PURPOSE.

While Appellant contends that the language of the Statute is plain and consistent with its ordinary use and meaning, the interpretation offered by Appellee is illogical, confusing, and inoperable and extends the regulatory authority of the Division blatantly beyond its express purpose. Appellee offers two (2) explanations as to why the term “personal property” as set forth in Section 305(6), Chapter 55, Title 58, Utah Code Annotated should be limited to exclude Appellant. On the one hand, Appellee contends that the personal property exemption was intended to cover only components such as Sears products which they refer to as part of the “Sears exception.” These would be products such as refrigerators, washing machines, garbage disposals, light fixtures, toilets, sinks, electrical wiring, outlet plugs, circuit breakers, sewer pipes, taps, faucets, etc. Effectively, any item of personal property that could be purchased at a Sears store (or Appellant assumes a similar merchandise store) would qualify under the exemption. This of course limits the

statutory meaning of the term “personal property” to a decision to be made by management of a Sears store. Since the Sears catalog has been known to change from year to year, a definition based upon a “Sears exception”, is always illusive of clear understanding its in scope and meaning. What is even more confusing, however, is that this rationale is inconsistent with Appellee’s second argument of limitation, that of licensing.

The second argument of Appellee is that Appellant should not be excluded from licensing under the personal property exemption because he is not licensed with the Department of Motor Vehicles. Appellee cites to Administrative Rule 156-55a-102(a) which defines personal property to mean “factory built housing and modular construction, as a structure which is titled by the Department of Motor Vehicle, State of Utah, and taxed as personal property.”<sup>2</sup> While at the time the Administrative Rule was enacted provision was made for the licensing of modular construction through the Department of Motor Vehicles, a subsequent change in the law exempted modular construction from licensing.<sup>3</sup> See Utah Code Annotated § 41-

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<sup>2</sup>If there is a factual issue of nonpayment of personal property taxes by Appellant it was not established at the hearing. Appellee presented no evidence and Appellant’s testimony was uncontroverted on cross examination that he paid personal property tax on his construction units. See Hearing Transcript, Volume II, page 146.

<sup>3</sup>Utah Code Annotated Section 41-1a-504(4), became law in 1992. Prior thereto, provision had been made for the licensing of modular construction as a motor vehicle. The new law exempts modular construction from licensing. However, Administrative

1a-504(4) (1953, as amended). Since the Administrative Rule was never changed to correspond with the change in the law, the Division now argues that the Rule has a meaning that is exactly the opposite of its previous intention and application which now effectively excludes all modular construction by implying that the same is not personal property. While this form of logic defies a general and accepted understanding of the term, it does nothing to explain why Appellee now believes it has the broadened regulatory authority to require that modular construction in the State of Utah only be done by licensed contractors. There is no express legislative regulatory authority or directive supporting such an interpretation and the application of such regulatory scheme would effectively exclude even what has been identified by Appellee as the “Sears exception”. In short, Appellee’s interpretation of “personal property” does nothing to clarify the meaning of the statute but in fact renders the terms ambiguous, confusing, inoperable and blatantly contrary to their express purpose.

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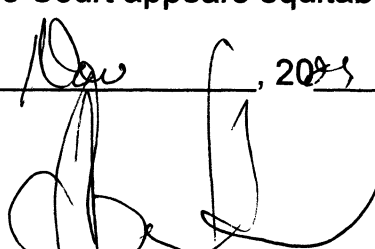
Rule 156-55a-102(8) which refers also to modular construction was never changed or amended to reflect this statutory change in the law and thus creates the implication that modular construction should now be excluded from the definition of personal property.

IV.

**CONCLUSION**

On the grounds and for the reasons set forth above, and also for those reasons set forth in Appellant's Brief, having replied to Appellees Brief, prays that relief be granted in reversing the trial court's decision, or remanded ordering that judgment be entered consistent with the plain meaning of the statute, together with such other and further relief as to this Court appears equitable and proper.

DATED this 20 day of Nov, 2013.

A handwritten signature in black ink, appearing to read 'J. Bryan Jackson', is written over a horizontal line.

J. BRYAN JACKSON,  
Attorney for Appellant Bohne

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I  
did mailed a true and correct photocopy of the REPLY OF APPELLANT BOHNE,  
by way of U.S. mail, postage fully prepaid, thereon, to the following:

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