

1 in the amount of \$30,000. Given these facts, along with the fact that the property was being
2 sold at a 116 auction, there was no realistic scenario in which the Property could sell in the
3 traditional market.

4 In order to answer the question posed in his expert assignment, Brunson considered
5 traditional sales, short sales, 107 foreclosure sales and 116 foreclosure sales. He ultimately
6 determined that 116 sales were unique and differed from the other types of sales due to the
7 unsettled law and risks to the buyer with no warranty deed. Brunson's analysis was comported
8 with methodology and valuation theory found in The Appraisal of Real Estate, 14th Edition and
9 Real Estate Damages, 3rd Edition. Based on his extensive analysis, Brunson concluded that the
10 116 sale price was reasonable.

11 A litigation report was prepared by Brunson for the purpose of providing the necessary
12 outline of his opinions anticipated for trial with respect to his assigned role. This litigation report
13 was supplemented by his considerable job file, as is allowed under the Nevada Rules of Civil
14 Procedure. R. Scott Dugan ("Dugan") was hired and paid by the banks to calculate the market
15 value of the property, ignoring the existence of the sale and to use those findings to dispute the
16 findings of Brunson. He complied and prepared a market analysis report that ignored the
17 foreclosure altogether.

18 **II. RELEVANT PROCEDURAL HISTORY**

19 On or about October 5, 2018, Brunson received a letter of investigation from the Division
20 claiming they had received a "complaint" filed against him and requesting copies of
21 Respondent's work file. Brunson prepared a response letter dated October 25, 2018 and
22 provided a copy of his extensive job file.

23 Based on the records provided by NRED and testimony during the proceedings, it was
24 determined that no actual complaint had ever been submitted against Brunson. Instead the
25 Division simply received a copy of two reports. One was the Brunson litigation report. The
26 other was an expert report authored by Dugan in the same case. NRED's investigator, Daniel
27 Walsh ("Walsh") testified that NRED never investigated, evaluated or verified the opinions of
28 Dugan before relying upon them in the Appraisal Case Analysis authored by Walsh. Walsh also

1 confirmed no peer review was done with respect to either report. NRED arbitrarily decided that
2 Dugan was right and Brunson was wrong, despite the fact that they were hired for different
3 assignments, and sent a complaint letter to Brunson.

4 The Division filed a Complaint and Notice of Hearing dated April 23, 2021 The Complaint
5 alleged multiple violations of the Litigation Report's failure to comply with USPAP. Brunson filed
6 a response disputing the claims raised by NRED.

7 A hearing was held over a period of four days before the Nevada Commission of
8 Appraisers of Real Estate ("Commission"). The Commission issued Findings of Fact and
9 Conclusions of Law and Order dated July 2, 2021 ("Findings"). See Exhibit 1. The Order set
10 forth that Brunson was assessed monetary penalties in the amount of \$22,183.91, which
11 included a fine of \$5,000 and \$17,183.91 in fees and costs. The language of the Findings
12 states that Brunson "shall pay the total fine to the Division" within one (1) year of the effective
13 date of this Order." This language is contrary to the hearing in which the Commission was clear
14 that Brunson would have a full year to pay both the fines and the fees and costs. The draft
15 Findings were never provided to Brunson's counsel prior to being submitted to the Commission.

16 **III. LEGAL ARGUMENT**

17 **A. NAC 645C.505(7) Permits a Rehearing to Be Granted Based on Irregularity**
18 **in the Proceedings and Error in the Law.**

19 NRS 645C.505(7) (Hearings; Procedures for rehearings) states as follows:

20 A rehearing may be granted by the Commission for any of the following
21 causes or grounds:

- 22 (a) Irregularity in the proceedings in the original hearing...
23 (d) Error in law occurring at the hearing and objected to by the applicant during the
24 earlier hearing.

25 In this case, a Petition for Rehearing is essential to address both irregularities in the
26 proceedings and multiple errors in the law. The failure to grant the Request for Rehearing and
27 remedy these mistakes will violate the due process rights of Brunson and perpetuate disregard
28 of the rights of appraisers to protect their license.

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1 **B. The Commission's Award of Fees and Costs Without Any Evidence Being**
2 **Presented to Support the Legality or Reasonableness of the Charges Constitutes**
3 **Irregularity in the Proceeding and an Error In the Law.**

4 The record of the proceedings will demonstrate that the Division presented no
5 evidence of any kind during the presentation of evidence supporting a legal basis for an award
6 of fees and costs associated with the investigation or the reasonableness of the fees in
7 relation to the violations found by the Commission.¹ NAC 645C.500 sets forth the order of
8 presentation of evidence with respect to administrative hearings. This order includes portions
9 of the statute which state as follows:

10 **NAC645C.500 (Hearings: Procedures; date of decision; default)**

11 ***

- 12 2. The Division may not submit any evidence to the Commission before the hearing except
for the formal complaint and answer.
- 13 3. The respondent may cross-examine witnesses in the order that the Division presents them.
- 14 4. Witnesses or counsel may be questioned by the members of the Commission at any time
during the proceeding.
- 15 5. Evidence which will be introduced must first be marked for identification.
- 16 6. When the Division has completed its presentation, the presiding officer shall request the
respondent to proceed with the introduction of evidence and calling of witnesses on his or her
behalf.
- 17 7. The Division may cross-examine witnesses in the order that the respondent presents them.
- 18 8. When the respondent has completed his or her presentation, the Division may call any
rebuttal witnesses.
- 19 9. When all testimony for the Division and respondent has been given and all evidence
submitted, the presiding officer may request the Division and the respondent to summarize
their presentations.
- 20 10. The presiding officer shall indicate for the record that the hearing is terminated, and that
the Commission will issue a decision after considering all the evidence. After presentation of
the case by the Division and the respondent and closing arguments by either party, if any, a
recess may be ordered.

21 The Division was provided with a full opportunity to present its case and make any
22 recommendations prior to the termination of the proceedings. Brunson provided their own
23 evidence and requested that the Commission dismiss the case in its totality based on the
24 failure of the Division to prove their case. Despite many opportunities, the Division failed to
25 provide any evidence or legal support for an award of fees and costs or the institution of fines
26 against Brunson. They were not addressed at all.

27 After the hearing was terminated, prosecutor Peter Keegan ("Keegan") stated that the

28 ¹ The transcripts of the proceedings have been ordered, but not yet produced by the court reporting firm
hired by the division.

1 Division had incurred \$17,183.91 in fees and costs. No evidence of these fees and costs had
2 been disclosed to Brunson prior to the hearing or during the hearing. Once Keegan voiced for
3 the first time that the Division would be seeking \$17,183.91 in fees and costs, Commission
4 attorney Ashesh Bhalla ("Bhalla") proceeded to question NRED employee Jaye Lindsey
5 ("Lindsey"), without reopening the proceedings and without swearing her in, whether the fees
6 and costs incurred were "reasonable" in the prosecution of the case. Lindsey testified, again
7 not under oath, that the fees and costs were reasonable. Counsel for Brunson tried to raise
8 an objection to these actions on several grounds, but was told by the Commission Chair that
9 the proceedings had been terminated and that she was not allowed to speak. Counsel for
10 Brunson tried again to be heard so she could object and try to alert the Panel that they were
11 improperly: i) allowing evidence to be admitted after termination of the hearing; ii) letting
12 Bhalla, the attorney for the Commission, step into a prosecutorial role by trying to present
13 evidence supporting the award of fees and costs; iii) letting Lindsey testify without swearing
14 her in or reopening the proceedings; iv) letting Lindsey testify regarding facts and evidence
15 never disclosed to Brunson; and (v) letting Lindsey testify as to the reasonableness of attorney
16 fees for which she had no personal knowledge. Instead of allowing Brunson's counsel to raise
17 these valid and appropriate objections, the Commission chair instructed counsel to stay quiet
18 or he would "mute" her. Brunson's counsel was also prohibited from cross-examining Lindsey
19 or offering any rebuttal evidence to contest that the fees and costs were allowable under
20 statute or reasonably related to the violations found to have been committed. The basis for
21 denying Brunson's counsel the right to speak or lodge objections was that the proceedings
22 had been terminated. Regardless of how the record is examined, the Commission erred in
23 allowing Keegan to request the fees and costs, allowing Bhalla to question Lindsey about the
24 fees and costs, denying Brunson's counsel the right to be heard at all on the issue, and
25 awarding those fees and costs based on "evidence" provided after the termination of the
26 disciplinary hearing.

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28 **C. The Fees and Costs Awarded Are Not "Reasonable" Under NRS 622.400(2).**

1 Even if the Division had requested fees and costs prior to the termination of the
2 proceedings, they would have been required to present evidence as to the reasonableness of
3 those fees and costs. Such evidence would have allowed the Commission to consider what
4 portion of the fees and costs should be applied to the limited number of violations found. As
5 stated above, Brunson's counsel made a clear record of the massive overreach by NRED with
6 respect to the prosecution of Brunson, starting with creating a complaint against Brunson by
7 assuming his opinions were wrong and Dugan's were right without any unbiased or peer
8 review of both, failing to properly interpret and apply applicable treatises, misquoting a USPAP
9 expert and the attorney general failing to question or consider any of these blatant issues
10 before blindly proceeding with prosecution.

11 As to the attorney fees and costs, the Division would only be entitled to recover fees
12 paid for in the prosecution of the case that reasonably related to the violations found against
13 Brunson. As discussed above, Brunson was found innocent of the bulk of the charges plead
14 against him. It would be unreasonable to award 100% of the fees and costs incurred in the
15 prosecution of the matter. In addition to the applicability of the attorney fees, those fees also
16 have to be reasonable. The primary method for determining the reasonableness of fees in
17 Nevada is set forth in *Brunzell v. Golden Gate National Bank*, 455 P.2d 31, 35 (Nev. 1969). In
18 *Brunzell* the Court stated:

19 [I]n determining the reasonable value of an attorney's services...such factors may be classified
20 under four general headings (1) the qualities of the advocate: his ability, his training, education,
21 experience, professional standing and skill; (2) the character of the work to be done: its difficulty,
22 its intricacy, its importance, time and skill required, the responsibility imposed and the
23 prominence and character of the parties where they affect the importance of the litigation; (3) the
24 work actually performed by the lawyer: the skill, time and attention given to the work; (4) the
25 result: whether the attorney was successful and what benefits were derived.....

26 ...good judgment would dictate that each of these factors must be given consideration by the trier
27 of fact and that no one element should predominate or be given undue weight.

28 *Id.* at 349-350.

In this case, the Division was represented by the Attorney General's office, not an outside law
firm. NRED presented no information as to how the fees were calculated, whether the fees
were actually incurred and paid by them to the Attorney General or demonstrated any of the

1 Brunzell factors. We don't know which attorneys billed the time. Did it include Keegan and
2 Bhalla? What was the rate charged? What are their salaries? Did the charges reasonably
3 relate to the violations found by the Commission? No evidence was presented to answer these
4 questions. While Lindsey was allowed to "testify", she had no basis to make a determination of
5 the reasonableness of the attorney fees and she provided no evidence to meet the *Brunzell*
6 factors.

7 **D. The Findings Do Not Reflect the Commission's Ruling with Respect to the**
8 **Time to Pay the Fees and Costs and Any Payment Should be Stayed.**

9 The record of the proceedings will demonstrate that the Commission intended for
10 Brunson to have a full year to pay the fees and costs and fines awarded. The Findings
11 instead provide 1 year for payment of the \$5,000 fine only. The Findings were drafted by the
12 Division's counsel, and were not provided to Brunson's counsel before they were submitted.
13 On July 2, 2021, knowing that the language in the Findings contained this error, a bill was
14 issued to Brunson in the amount of \$17,183.91 as being immediately due and payable. The
15 action of submitting proposed Findings to the Panel without first providing them to opposing
16 counsel for review represents an ex-parte communication with Commission and resulted in a
17 fundamental error which will be punitive to Brunson. We will be addressing this issue
18 separately with NRED and will take any necessary legal action to protect Brunson if the
19 Commission will not address the issue.

20 **E. The Findings of Fact and Conclusions Not Properly Reached by the Panel**
21 **Due to a Failure to Evaluate the Facts and Conclusions Precisely as**
22 **Worded in the Complaint.**

23 While Brunson appreciates the Commission volunteering their time, and understands
24 that overseeing cases like this can be difficult, the deliberations have to be done in a manner
25 that protect the due process rights of Brunson and comply with the statutory requirements. In
26 multiple instances, especially early in the deliberations, the Panel made factual findings that
27 were not based on the exact language in the Complaint.² In multiple cases, the Commission

28 ² The transcript is not yet available and the record will be supplemented accordingly with specific examples and cites to the record.

1 read the words of the Complaint and either ignored portions of the wording or inferred different
2 wording to reach the conclusion that the fact was proven by the Division. Near the end of the
3 deliberations, the Panel consulted with Bhalla, who advised them that they had to make
4 decisions on the exact wording of the Complaint. However, the Commission did not go back
5 and correct earlier findings following that instruction. The Commission also continued to
6 engage in the conduct. For example, with respect to Facts 23-29 and 31, the Commission
7 ignored the word "failed" in reaching a determination that the fact was proven. The Mirriam-
8 Webster dictionary defines transitive verb of "fail" to mean "to disappoint the expectations or
9 trust of", "to miss performing an expected service or function for", "to be deficient in", "to leave
10 undone" or "to be unsuccessful". In Facts 23-29 and 31, the Commission found the facts to
11 be proven despite clear evidence that the steps and information included was not required for
12 the litigation assignment. While certainly not intentional, the impact of ignoring portions of the
13 wording or inferring words that were not there in order to vote that a fact or violation was
14 proven violated Brunson's due process rights and resulted in findings and conclusions that
15 were never properly proven by the Division.

16 Another example of the Commission ignoring important parts of the Complaint was in
17 the Conclusions of Law. Each of the violations pled contained the following language:

18 The Respondent's actions constitute unprofessional conduct and/or
19 professional incompetence, pursuant to NRS 645C.470(2) and NAC
20 645C.405(1), (2) and/or (3). The Respondent's actions are grounds for
disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b). See Findings,
page 6, lines 1-4 and 17-20, page 7, lines 1-4, 10-13 and 20-23.

21 The Commission never once addressed this paragraph in any of the five violations found,
22 or answered which of the statutory sections they were using to determine a violation occurred.
23 In several cases, during the deliberations, language contradictory to the requirements for a
24 violation were made. *Brunzell* factors.

25 F. **The Findings and Conclusions are Not Properly Supported by NRED's**
26 **Investigation and Evidence Presented at the Hearing Which was Solely**
Based on a Competing Expert Opinion Which was Not Peer Reviewed

27 As discussed above, the NRED investigator relied almost exclusively on the opinions
28 and input of Dugan to determine that Brunson's report was wrong. Dugan was hired and paid

1 to submit an opinion to advocate for the other side of the litigation. His retention as an
2 adversarial expert made him a biased witness. .

3 In *State v. Wold*, 278 P.3d 266 (AK 2012), the Alaska Supreme Court reversed
4 findings of the Alaska Board of Certified Real Estate Appraisers ("Board") against an
5 Appraiser for USPAP violations in part because "Though the Board offers no further
6 explanation of its conclusions, nor citations to the record, the Board's conclusions echo those
7 of Alfred Ferrara, the State's hired reviewer and principal expert witness." See *Id.*, at 272. The
8 Court went on to further criticize that "the Board's violation finding lacked an adequate
9 analytical basis in the USPAP and failed to adequately address the explanations that Wold did
10 provide." See *Id.*, at 273. The Court ultimately concluded that "we will not uphold the
11 imposition of reputationally and economically damaging professional sanctions based on
12 evidence that would not permit a reasonable mind to reach the conclusion in question." See
13 *Id.*, at 273. This case exactly mirrors NRED's investigation in this case.

14 G. The Commission has committed an Error of Law by Taking Over a Function
15 of the Judiciary.

16 While experts reports are required to provide reasonable notice to the opposing side of
17 the scope and nature of their opinions, the report is not required to include all details relied
18 upon. The experts can rely on their job file and can be deposed by opposing counsel.
19 Judges, looking at the totality, determine whether an opinion is reliable. The Courts have long
20 held that that Judges are the "gatekeepers" of determining whether experts in a litigation
21 should be allowed to express their opinions to a jury and what portion of those opinions are
22 reliable. See *United States v. Ozuna*, 561 F.3d 728, 737 (7th Cir. 2009); *In re Salem*, 465 F.3d
23 767, 777 (7th Cir. 2006). Additionally, with respect to experts being able to conduct their
24 investigations and express opinions, "[t]he immunity of parties and witnesses from subsequent
25 damages liability for their testimony in judicial proceedings was well established." *1141
26 *Briscoe*, 460 U.S. at 330-31, 103 S.Ct. 1108⁴ (footnote omitted) (citing *Cutler v. Dixon* (1585)
27 76 Eng. Rep. 886; 4 Co. Rep. 14 b.; *Anfield v. Feverhill* (1614) 2 Bulst. 269; 1 Ro Rep. 61;
28 *Henderson v. Broomhead* (1859) 157 Eng. Rep. 964, 968; 4 H & N. 569). Quoting a 19th

1 century court, the United States Supreme Court reasoned that "the claims of the individual
2 must yield to the dictates of public policy, which requires that the paths which lead to the
3 ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332–33, 103
4 S.Ct. 1108 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). The Court further explained
5 that "[a] witness's apprehension of subsequent damages liability might induce two forms of
6 self-censorship." *Id.* at 333, 103 S.Ct. 1108. First, a witness may be reluctant to present
7 testimony due to fear of subsequent damages liability. *Id.* Second, even if a witness makes it
8 to the stand, he may color his testimony as a consequence of the same fear. *Id.*

9 If the Committee allows these sanctions to stand, there will be a flood-gate which will
10 undoubtedly result in dueling complaints by opposing experts, each hoping they will be
11 believed over the other one, in order to get the Commission to knock out their competition
12 before the race actually starts. This type of interference in the judiciary was never
13 contemplated by the legislature and has opened a Pandora's box that the Commission should
14 take the opportunity to close.

15 **IV. CONCLUSION**

16 Brunson respectfully requests that the Committee grant a Rehearing of this matter or to
17 vacate the sanctions imposed. .

18 Dated this 16th day of June, 20121.

19 LIPSON NEILSON P.C.

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