

# CASE LAW & LEGAL CONSIDERATIONS

JAN SELL & TED WHITMER

# **FRYE**

**FRYE v. UNITED STATES. 293 F. 1013**

**( D.C.. Cir 1923)**

# **DAUBERT**

**DAUBERT et ux., individually and as  
guardians and litem for DAUBERT, et al. v.  
MERRELL DOW PHARMACEUTICALS, INC.**

certiorari to the united states court of appeals for the ninth circuit

**No. 92-102. Argued March 30, 1993 -- Decided June 28, 1993**

# **JOINER**

**General Electric Co. v. Joiner**

**522 U.S. 136 (1997)**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT

No. 96-188. Argued October 14, 1997-Decided December 15, 1997

# **BOLTAR**

**Boltar, LLC . Commissioner 2011 WL  
1314445 (U.S. Tax Ct.) (4-4-11)**

**KUMHO**

**KUMHO TIRE CO., LTD., et al. v.  
CARMICHAEL et al.**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT

No. 97—1709. Argued December 7, 1998—Decided March 23, 1999

**KUMHO**

**KUMHO TIRE CO., LTD., et al. v.  
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No. 97—1709. Argued December 7, 1998—Decided March 23, 1999

## DEFERENCE... CHEVRON TEST

1. “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”
2. If a court is unable to arrive at a construction of a statute at Step One, Chevron Step Two directs that it “not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

## DEFERENCE... CHEVRON TEST, HOWEVER...

- “Ordinarily, the construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations.” *Connecticut State Medical Society v. Connecticut Board of Examiners in Podiatry*, 546 A.2d 830, 834 (Conn. 1988). see, e.g., *State ex rel. Celebrezze v. National Lime and Stone Company*, 627 N.E.2d 538 (Ohio 1994).

# **WOLD**

State, Dept. of Commerce, Community & Economic Development,  
Div. of Corporations, Business & Professional Licensing v. Wold

Alaska, 2012.

May 18, 2012

278 P.3d 266

Supreme Court of Alaska.

STATE of Alaska, DEPARTMENT OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT, DIVISION OF  
CORPORATIONS, BUSINESS & PROFESSIONAL LICENSING, and Board of Certified Real Estate Appraisers, Appellants and  
Cross-Appellees,

v.

Kim WOLD, Appellee and Cross-Appellant.

Nos. S-13901, S-13952.

May 18, 2012.

Rehearing Denied June 18, 2012.

## **NOTE – “SUBSTANTIAL EVIDENCE & DEFERENCE**

- **I. INTRODUCTION**

- In 2008, Alaska's Board of Certified Real Estate Appraisers imposed professional sanctions on an appraiser for violations of the Uniform Standards of Professional Appraisal Practice (USPAP). The Board relied in large part on the views of a distinguished expert in Alaskan real estate appraisal who performed a “desk review” of the appraiser's work. The expert concluded that the appraiser committed numerous violations of the USPAP. Though we review the Board's findings with great deference, we conclude that none of the Board's findings of USPAP violations were supported by substantial evidence in light of the whole record. We thus affirm the superior court's reversal of the Board's findings of USPAP violations, and reverse the single violation that the superior court affirmed.

- A. Facts

- Kim Wold has been certified in Alaska as a general real estate appraiser since 1991. Three of Wold's appraisals are the subject of this case:

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- (i) the appraisal of a residential property at 315 Copper Road in Ketchikan, (the “Copper Road” property), which Wold completed in 1997 and supplemented in 1998;

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- (ii) the appraisal of a partial interest in Entwit's Float, a marina facility in Ketchikan (the “marina” property), which Wold completed in 1998; and

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- (iii) the appraisal of a luxury residential property on Ellis Island in Ketchikan (the “Ellis Island” property), which Wold completed in 2002.

# SUBSTANTIAL EVIDENCE

## III. STANDARD OF REVIEW

As we stated in our first and only other opinion reviewing a decision of the Board of Certified Real Estate Appraisers, “[b]ecause the superior court sat as an intermediate court of appeal, we will independently review the merits of the [B]oard’s administrative determination. We review findings of fact in appeals of administrative decisions under the ‘substantial evidence’ test.”<sup>FN2</sup> “Substantial evidence is ‘in light of the record as a whole, ... such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ”<sup>FN3</sup> “In determining whether evidence is substantial, ... we must take into account whatever in the record fairly detracts from its weight.”

The substantial evidence test for administrative factual findings has its roots in Alaska’s Administrative Procedure Act (APA), which presents the “scope of review” for administrative adjudication as follows:

The [reviewing] court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by

- (1) the weight of the evidence; or
- (2) substantial evidence in the light of the whole record

- **The Board's decision raises two issues, which we address in turn. First, the Board stated that “Mr. Wold violated SR 1–1(b) when he used comparable sales that required unreasonably high adjustments.” The Board's reasoning in this statement depends on there having been better comparables than the ones used by Wold. But Ferrara's speculation that such comparables must have existed as a matter of logic or reason is not a sufficient basis for a reasonable mind to conclude that such comparables did exist as a matter of empirical fact.<sup>FN14</sup> To the extent that the Board's finding that Wold violated SR 1–1(b) in the Copper Road appraisal was based on Wold's use of inappropriate comparable sales, we reverse that finding for a lack of substantial evidence.**

## BRACKETING...

- Nor is it logical to conclude, as both the State and Ferrara suggest, that the absence of lower-priced comparables provides evidence that the Copper Road property might not have had a value as low as Wold's appraisal claimed. Ferrara testified that “[i]t'd be very unusual that this is the lowest-priced property in that town.” It is true that there can be only one lowest-priced property in any town, assuming all properties have different prices, and thus the lowest-priced property will by definition be unusual. But it is also true that every town will have a lowest-priced property, and a highest-priced one. Surely appraisers should not be exposed to a heightened risk of professional sanction under the USPAP simply because they happen to be appraising an atypical property.

## SHOW THE CORRECT COMPS OR ADJUSTMENTS...

- The substantial evidence standard reflects the prudence of deferring to a state professional board's special competence in recognizing violations of professional standards. But we will not uphold the imposition of reputationally and economically damaging professional sanctions based on evidence that would not permit a reasonable mind to reach the conclusion in question.<sup>FN15</sup> To the extent that the Board faulted Wold for his choice of comparables, the Board's violation finding was based on nothing more than speculation that such comparables existed. To the extent that the Board accepted the possible absence of better comparables and faulted Wold for failing to explain his approach, the Board's violation finding lacked an adequate analytical basis in the USPAP and failed to adequately address the explanations that Wold did provide. We thus affirm the superior court's reversal of the Board's finding that Wold violated SR 1-1(b) in the Copper Road appraisal.

- Again, Ferrara cites to no authority for the claim that Wold's investigation was inadequate under USPAP SR 1-1(c). The State presents no evidence in the record that undermines the extensively-supported claim by Wold's principal expert witness, Dr. John Kilpatrick, that “Ferrara's statement here appears nowhere in USPAP, in the peer-reviewed literature, or in appraisal literature.” Nor does the State contest the accuracy of evidence cited by Wold to show the diligence with which he investigated Dima's report.
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- Instead, the State focuses on a brief portion of Ferrara's testimony to suggest that in addition to whatever investigation Wold performed, he also “should have looked at houses that were below \$100,000 to see what kind of physical infirmities they had and make comparisons from that standpoint.” But Ferrara provided no support in his testimony for the notion that the USPAP requires such an investigation. Ferrara's conclusions also appear to rest at least in part on factual speculation, such as his unsupported statement that according to his thinking “it would be unlikely” for someone to repair the sagging floor. Wold testified that he believed the foundation would have to be repaired before the property could qualify for financing. Ferrara's speculation to the contrary does not provide substantial evidence that Wold's belief was incorrect, much less that Wold violated the USPAP by operating on the basis of his belief.

## AS TO THE MARINA...

- Because no reasonable mind could infer that Wold violated the USPAP solely on the basis of Ferrara's individual expectations, the Board lacked substantial evidence to find that Wold's explanation of his use of the cost approach violated SR 1-1(a) of the USPAP. We affirm the superior court's reversal of the Board's finding.

## THE LAST COUNT STANDING REVERSED BY THE SUPREME COURT...

- Wold's cross-appeal argues that his one-sentence explanation for not using the sales comparison approach was sufficient for the requirements of SR 2–2(a)(xi).
- Based on our review of the record as a whole, including the above testimony, we do not find substantial evidence in support of the conclusion that Wold violated USPAP 2–2(a)(xi) by not providing a more detailed explanation of why he did not employ the sales comparison approach in the Ellis Island appraisal. We thus reverse the superior court's affirmation of the Board's decision on this count.

## CONCLUSION...

- It is not enough to have the word of an expert, you must produce evidence!

# **WILLIAMS**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**Docket No. 41193**

**TIMOTHY WILLIAMS, an individual, )  
Petitioner-Appellant-Cross Respondent, )  
v. )  
IDAHO STATE BOARD OF REAL ESTATE )  
APPRAISERS, a department within the State )  
of Idaho, )  
Respondent-Cross Appellant. )**

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**Boise, August 2014 Term**

**2014 Opinion No. 116**

**Filed: October 29, 2014**

**Stephen W. Kenyon, Clerk**

1. Williams allegedly violated Idaho Code section 54-4107(1)(c) by accessing the Wells Fargo RETECHS system through the user names and passwords of his competitors.
2. Williams allegedly violated Idaho Code section 54-4107(1)(c) by certifying he had personally inspected twelve properties but had actually not conducted personal inspections of the properties.
3. Williams allegedly violated Idaho Code sections 54-4107(1)(c) and (e) and USPAP<sup>3</sup> (2001) Rules 1-1(c), 2-1(a), and 2-3 by certifying he had personally inspected four properties but had actually not conducted personal inspections of the properties.
4. Williams allegedly violated Idaho Code sections 54-4107(1)(c) and (e) and USPAP (2002) Rules 1-1(c), 2-1(a), and 2-3 by certifying he had personally inspected twenty properties but had actually not conducted personal inspections of the properties.
5. Williams allegedly violated Idaho Code sections 54-4107(1)(c) and (e) and USPAP (2003) Rules 1-1(c), 2-1(a), and 2-3 by certifying he had personally inspected one property but had actually not conducted a personal inspection of the property.
6. Williams allegedly violated Idaho Code sections 54-4107(1)(d) and 54-

# WILLIAMS

4109(3) by failing to make certain appraisal files and supporting data available to the Bureau for inspection and copying.

7. Williams allegedly violated Idaho Code sections 54-4107(1)(d) and 54-4109(3), and the USPAP (2002) Recordkeeping rule by failing to make certain appraisal files and supporting data available to the Bureau for inspection and copying.
8. Williams allegedly violated Idaho Code sections 54-4107(1)(d) and (e); IDAPA 24.18.01.700; and USPAP (2005) Rules 1-1(b), 1-2(e)(i), 1-3(a), 1-4(a), 1-4(e), 1-5(a), 2-1(a), and 2-1(b) when he signed a misleading appraisal report.

## ISSUES CONSIDERED ON APPEAL<sup>4</sup>

1. Whether the investigation into Williams' conduct was improperly initiated.
2. Whether Williams' due process rights were violated because the Board was biased and the statute under which he was disciplined was void for vagueness.
3. Whether there was sufficient evidence to support the Board's decision.
4. Whether the Board abused its discretion when it revoked Williams' license and imposed \$4,000 in fines.
5. Whether the Board had authority to recover the fees and costs it incurred in the investigation and prosecution of Williams.
6. Whether either party is entitled to attorney fees on appeal.

## STANDARD OF REVIEW

“The Board is an ‘agency’ under the Idaho Administrative Procedure Act.” *Williams*, 149 Idaho at 677, 239 P.3d at 782 (citing I.C. § 67-5201(2)). “A strong presumption of validity favors an agency’s actions.” *Cooper v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000). Judicial review of agency action is governed by the IDAPA. I.C. § 67-5270(1). When, as is the case here, an agency is required to issue an order,<sup>5</sup>

the court shall affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions, or decisions are:

- a. in violation of constitutional or statutory provisions;
- b. in excess of the statutory authority of the agency;
- c. made upon unlawful procedure;
- d. not supported by substantial evidence on the record as a whole; or
- e. arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3). Notwithstanding the provisions of Idaho Code section 67-5279(3), “agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.” I.C. 67-5279(4). Therefore, the party attacking an agency decision “must first illustrate that the [agency] erred in a manner specified in Idaho Code § 67-5279(3), and then that a substantial right of [the party] has been prejudiced.” *Price v. Payette Cnty. Bd. of Cnty. Comm’rs*, 131 Idaho 429, 958 P.2d 583, 586 (1998).

The Due Process Clause provides “two distinct guarantees: substantive due process and procedural due process.” *Nelson v. Hayden*, 138 Idaho 619, 622, 67 P.3d 98, 101 (Ct. App. 2003) (citing *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Williams’ claim regarding the Board’s alleged bias goes to procedural due process and his claim regarding statutory vagueness goes to substantive due process. We will address these claims in turn.

## CONCLUSIONS...

- Deference means the courts will “defer” to the interpretation of a board, unless...
- Even though there were mistakes by the board, the process was fair.

## USPAP AS A LEGAL DOCUMENT

- Interpretation v. Application
- USPAP may not be subject to deference

## MULTIPLE DEFINITIONS OF “APPRAISAL”

- USPAP – an opinion of value
- FIRREA – a written opinion
- State Law – any opinion as to the nature, value, quality or utility of an aspect of or interest in identified real estate (review?)
- Which definition do you use when the state definition is not the same as the USPAP definition?

## USPAP AS A LEGAL DOCUMENT

- Scope of work is...
  - ONLY APPLIES TO DEVELOPMENT
  - ONLY APPLIES TO DATA & ANALYSIS

## USPAP AS A LEGAL DOCUMENT

- STANDARD ONE IS DEVELOPMENT & STANDARD TWO IS REPORTING...
- SR 1-1(C) DOES NOT APPLY TO 1,000 TYPOS (IT IS A DEVELOPMENT RULE)

## USPAP AS A LEGAL DOCUMENT

- **CONDITION PRECEDENTS IN USPAP...**
  - **SR 1-1(A) ONLY APPLIES IF NECESSARY FOR CREDIBLE RESULTS**
  - **SR 1-4 ONLY APPLIES IF THE APPROACH IS NECESSARY FOR CREDIBLE RESULTS**

## USPAP AS A LEGAL DOCUMENT

- **CONDITION PRECEDENTS IN USPAP...**
  - **SR 1-3 & 1-5 ONLY APPLY IF THE APPRAISAL IS FOR MARKET VALUE**
  - **THE ETHICS RULE ONLY APPLIES IF ONE IS ACTING AS AN “APPRAISER” IN AN “ASSIGNMENT”**

## USPAP AS A LEGAL DOCUMENT

- **AN ASSIGNMENT MUST HAVE COMPENSATION...**
- **ASSIGNMENT:** 1) An agreement between an appraiser and a client to provide a valuation service; 2) the valuation service that is provided as a consequence of such an agreement.
- **CLIENT:** the party or parties who engage, by employment or contract, an appraiser in a specific assignment.

## "MINIMUM REPORT CANNOT BE DEFINED" ...

1. IT MUST BE CONSISTENT WITH THE INTENDED USE
2. IT MUST CONTAIN SUFFICIENT INFORMATION FOR THE INTENDED USERS TO UNDERSTAND IT PROPERLY
3. An Appraisal Report must include sufficient information to indicate that the appraiser complied with the requirements of STANDARD 1.
4. Is not misleading &
5. HAS THE MINIMUMS OF SR 2-2(A)

## "MINIMUM REPORT CANNOT BE DEFINED"...

1. 7 STATE RULES
2. 4 SUMMARY RULES
3. 1 CERTIFICATION TO BE INCLUDED

USPAP DOES NOT DEFINE, "STATE", "SUMMARY" OR "SUMMARIZE", & "EXPLAIN"

CREDIBILITY IS NOT A USPAP STANDARD FOR REPORTS (1), JUST DEVELOPMENT (13) & SCOPE (7).

THE STANDARD FOR DEVELOPMENT IS "DOES IT MEET THE INTENDED USE, DOES IT CONTAIN SUFFICIENT INFORMATION FOR INTENDED USERS TO UNDERSTAND IT PROPERLY, DOES IT SHOW COMPLIANCE WITH STANDARD ONE, AND DOES IT MEET THE MINIMUM REQUIREMENTS OF SR 2-2(A)

## MINIMUM REQUIREMENTS OF A REPORT

I. Consistent with the "Intended use" (see definition at time of assignment)

II. Not be misleading

III. Contain sufficient info for the intended users to understand it properly

IV. At a minimum...

Disclose

- 1 Assumptions
- 2 Extraordinary assumptions Look at tests in SR 1-2
- 3 Hypothetical conditions
- 4 Limiting conditions
- 5 (state) their use might have affected the assignment results

State

- 6 Identity of client
- 7 Identity of intended users
- 8 Intended use of report
  
- 9 real property interest appraised
- 10 substantiation of real property interest by title descriptions or other documents
- 11 type of value
- 12 definition of value
- 13 cite the source of value
  
- 14 If in terms of cash or other non-market financing & summarize terms if not cash
- 15 exposure time if developed in compliance with SR 1-2(c)
  
- 16 effective date of the appraisal
- 17 effective date of the report
  
- 18 use of the real estate existing as of the date of value
  
- 19 use of the real estate reflected in the appraisal

Include	20 signed certification in accordance with Standard 2-3				
	21 I certify to the best of my knowledge and belief:				
	22 statement of facts				
	23 limited by...				
	24 no interest				
	25 prior services				
	26 no bias				
	27 no predetermined				
	28 compensation				
	29 per USPAP				
	30 Inspection				
31 Significant assistance					
Summarize	32 Information to identify the real estate involved in the appraisal				
	33 physical property characteristics relevant to the assignment				
	34 Legal property characteristics relevant to the assignment				
	35 economic characteristics relevant to the assignment				
	36 scope of work used to develop the appraisal (research & analysis used and not used)				
	37 extent of significant professional assistance				
	38 information analyzed				
	39 appraisal methods & techniques employed				
	40 reasoning that supports the analysis, opinions & conclusions				
	41 provide sufficient info to understand the rationale for opinions & conclusions				
	42 must contain sufficient info to understand the reconciliation of data and approaches per SR 1-6				
	43 results of analyzing subject sales, etc per SR 1-5				
	44 If info is unattainable steps taken to obtain info is required				
	45 if info is irrelevant statement acknowledging the existence of the info & citing its lack of relevance is required				

Sufficient info	46 you are aware of, understand & correctly employ recognized methods and techniques...						
complied with	47 you did not commit a substantial error of omission or commission						
STD 1	48 you did not render appraisal services in a careless or negligent manner						
(detail depends	49 any personal property, trade fixtures or intangibles that are not real property but are included in the appraisal						
upon significance)	50 any known easements, restrictions, encumbrances, leases, reservations, covenants, etc.						
From comment	51 whether the subject property is a fractional interest, physical segment, or partial holding						
2-2(a)(viii)	52 determine scope of work necessary for credible results						
	53 effect on use and value of existing land use regulations						
	54 reasonably probable modifications of land use						
	55 economic supply & demand						
	56 physical adaptability of the real estate						
	57 market area trends						
	58 if applicable, the assemblage & refrain from valuing the whole by addition						
	59 Anticipated public or private improvements						
	60 When applicable, personal property, trade fixtures or intangibles						
Explain	61 exclusion of the 3 approaches						
Describe	62 Competency, if applicable						

# CONCLUSION

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