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**SC Court of Appeals**

**BRIEF OF APPELLANT**  
**THE STATE OF SOUTH CAROLINA**  
In The Court of Appeals

APPEAL FROM RICHLAD COUNTY

SCWCC No. 1212926

Workers Compensation Appellate Panel

Commissioner Mike Campbell

Appellate Case No. 2019-00079

Richard Sells

Appellant, Pro-Se

v.

S.C. Department of Mental Health,  
State Accident Fund, Carrier Defendant

Employer

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....9

Statement of Issues on Appeal.....7

Statement of the Case.....

Standard of Review.....8

Facts .....4

Arguments.....4

Conclusion.....3

TABLE OF AUTHORITIES

CASES

Evans v. Gunter, 29 S.C. 525, 529, 366 S.E. 2d 44, 46 (Ct. App 1988).....1

Rule 60(b) SCRC Hagy v Pruitt, Supra.....1

Bryan V Bryan, 220 S.C. 164, 66 S.E. 2d 609 (1951).....1

Potter v. Spartanburg Sch. Dist.7, 395 S.C. 17, 23-34, 716 S.E.2d 123, 126-27 (CT App, 2011).1

Tiller v. Nat’l Health Care Ctr. of Sumter 334 S.C. 333, 339-40, 513 S.E. 2d 843, 846 (1999)....1

Ballenger v. S Worsted Corp.. 209 S.C. 463, 467, 40 S.E. 2d 681, 682-83 (1946).....1

Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003).....1

Hazel-Atlas Glass Co. v. Hartford-Empire Co. supra.....1

Dixon v. Comm’n of Internal Revenue 2003 WL 1216290 (9<sup>th</sup> Cir. 2003).....1

STATUTES

S.C. Civil Procedure 408 (2<sup>nd</sup> ed. 1985).....2

S.C. Code Ann. 42-1-160 (2007) and S.C., Ann, 42-13-60 (2007).....2

S.C. Regulation 67-801 (C) .....2

S.C. Regulation 67-803 (b) (c).....2

S.C. Code Ann§ 42-17-90 (A) (2015).....2

OTHER AUTHORITIES

R.P. 30 Lines 13-2-.....2

L.R.P. 30 Lines 21 and R.P. 31, Line 5.....2

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See Tr. p. 26, L. 14-25, Tr. p. 27, L. 1-25, Tr. p. 28, L. 1-25, Tr. p. 29. L. 1-4).....2

\*The authorities cited are fictitious and intended to show the form of citation only.

## STATEMENT OF ISSUES ON APPEAL

ON SEPTEMBER 4, 2012, APPELLANT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT TO HIS LEFT HIP, LEFT LEG, NECK, LOWER BACK, AND CERVICAL SPINE WHEN HE TRIED TO STOP A RESISTING, INVOLUNTARILY MENTAL PATIENT FROM UNLAWFULLY ESCAPING THE MENTAL INSTITUTION WHERE APPELLANT WORKED AS AN EMPLOYEE FOR THE SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH, PURSUANT TO FORM (50) DATED FEBRUARY 22, 2017, APPELLANT ALLEGED THAT HE WAS ENTITLED TO COMPENSATION AND MEDICAL CARE FOR INJURIES HE RECEIVED TO HIS LEFT HIP, LEFT KNEE, NECK LOWER BACK AND CERVICAL SPINE SUSTAINED IN AN ADMITTED ACCIDENT ON SEPTEMBER 4, 2012 UNDER THE S.C. CODE ANN. 42-1-160 (2007) AND S.C. ANN. 42-13-60 (2007). BEFORE THE PRESIDING COMMISSIONER, SUSAN S.BARDEN, A HEARING WAS HELD ON APPELLANTS' FORM (50) PLEADINGS.

IN HER ORDER DATED JUNE 28, 2017, COMMISSIONER BARDEN AWARDED BOTH A PERMANENT AWARD TO APPELLANT LOWER EXTREMITY AND FUTURE TREATMENT TO APPELANTS' LEFT KNEE AS PRESCRIBED BY DR. COLEMAN FOWBLE, SEE ORDER OF COMMISSIONER BARDEN. AFTER RECEIVING COMMISSIONER BARDEN'S ORDER, APPELLANT AND MR. RAMIES SHALABI, DEFENDANTS' ATTORNEY ENTERED INTO A CLINCHER SETTLEMENT AGREEMENT, APPELANT MADE IT ABUNDANTLY CLEAR TO MR. SHALABI THAT ONLY APPELLANTS' LEFT KNEE NOT HIS LEFT HIP, WAS NEGOTIABLE AS APPELLANTS' LEFT KNEE HAS REACHED MAXIMUM MEDICAL IMPROVEMENT AND HAD A RATING ASSIGNED TO IT; WHEREAS COMMISSIONER BARDEN HAD AWARDED A PERMANENT AWARD TO APPELANTS' LEFT LOWER EXTREMITY AND FUTURE MEDICAL TREATMENT TO APPELLANTS' LEFT KNEE AS PRESCRIBED BY DR. FOWBLE. HOWEVER, APPELANT HAD NOT REACHED MAXIMUM IMPROVEMENT AND APPELLANT WAS STILL BEING MEDICALLY TREATED FOR THE INJURY TO HIS LEFT HIP. APPELLANT AGREED TO SETTLE AND CLINCH THE LEFT KNEE AND MR. SHALABI ACCEPTED.

MR. SHALABI REQUESTED AN INFORMAL CONFERENCE AND COMMISSIONER BARDEN HELD A TELEPHONIC CLINCHER CONFERENCE, THEREBY GIVING APPROVAL TO THE CLINCHER SETTLEMENT DATED AUGUST 10, 2017. SEE ATTACHED SETTLEMENT AGREEMENT AND RELEASE.

IN RESPECT TO THE ATTACHED SETTLEMENT AGREEMENT, APPELLANT NEVER SAW AND READ PARAGRAPH FIVE (5), SIX (6), SEVEN (7), EIGHT (8), AND TEN (10) AND IF HE DID HE WOULD HAVE OUTRIGHT REJECTED THOSE TERMS BECAUSE APPELLANT HAVE AGREED TO NOT SETTLE IN SUCH A MANNER. AT THE TELEPHONIC CONFERENCE, APPELLANT DID NOT SEE AND READ PARAGRAPH EIGHT IN PARTICULAR, WHICH READS AS FOLLOWS:

THAT EMPLOYEE APPEARED PRO-SE AT THE CLINCHER CONFERENCE. THE HEARING COMMISSIONER EXPLAINED THE RIGHT OF REPRESENTATION TO EMPLOYEE AND FURTHER EXPLAINED THE PURPOSE OF THE HEARING, THE TERMS OF THE CLINCHER, AND THE FINALITY OF THE AGREEMENT. EMPLOYEE HAS INFORMED OF HIS RIGHTS TO PROCEED WITH A HEARING AND THE ISSUES OF THE CLAIM AND THAT HE WOULD BE GIVEN A CHANCE TO RETAIN AN ATTORNEY FOR THAT HEARING IF SO DESIRED. AFTER THIS EXPLANATION OF RIGHTS, EMPLOYEE ELECTED TO PROCEED WITHOUT AN ATTORNEY STATING THAT HE UNDERSTOOD HIS RIGHTS, EMPLOYEE EXECUTES THIS AGREEMENT VOLUNTARILY UNDER HIS OWN FREE WILL AND ACKNOWLEDGES THAT THIS AGREEMENT CONSTITUTES HIS UNDERSTANDING OF THE SETTLEMENT AND THAT THERE ARE NO OTHER OUTSTANDING ISSUES TO BE REVOLVED.

APPELLANT ASSERTS THAT THIS STATEMENT AGREEMENT WAS MAILED TO APPELLANT FOR HIS SIGNATURE BEFORE APPELLANT AND MR. SHALABI APPEARED AT THE INFORMAL TELEPHONIC CLINCHER CONFERENCE BEFORE COMMISSIONER BARDEN, APPELLANT SIGNED THE ATTACHED AGREEMENT ON JULY 19, 2017, AND COMMISSIONER BARDEN APPROVED IT ON AUGUST 10, 2017. **SEE** ATTACHED ORDER APPROVING SETTLEMENT AGREEMENT. THERE IS NO TRANSCRIPT OF THE PROCEEDING THAT EXISTS BECAUSE THE CLINCHER CONFERENCE WAS NOT RECORDED. APPELLANT DO NOT KNOW THE DATE OF THE CLINCHER CONFERENCE. APPELLANT ALLEGES THAT THE SECOND PAGE OF THE ATTACHED SETTLEMENT AGREEMENT AND RELEASE WAS FRAUDULENTLY PLACED THERE FOR FRAUDULENT PURPOSES. THE SECOND PAGE OF THE SETTLEMENT AGREEMENT WAS NOT THE TERMS. THE SETTLEMENT APPELLANT AGREED TO; BUT SINCE THIS AGREEMENT HAS APPELLANT'S SIGNATURE, HE ALLEGES THAT DEFENDANTS COMMITTED FRAUD IN PROCURING IT.

~~APPELLANT CONTENDS THAT SINCE HE WAS NOT REPRESENTED BY AN ATTORNEY, S.C. REGULATIN 67-801 (c) MANDATED THAT THE PARTIES IN THIS CASE MUST APPEAR IN PERSONS, NOT BY TELEPHONIC CONFERENCE, BEFORE~~

THE COMMISSIONER ASSIGNED TO APPELLANTS' CLAIM AT AN INFORMAL CONFERENCE FOR APPROVAL OF THE SETTLEMENT.

IN THE INSTANT CASE, A COPY OF THE ALLEGED AGREEMENT WAS MAILED TO APPELLANT WHO SIGNED AN AGREEMENT AND MAILED IT BACK TO MR. SHALABI BEFORE THEY MADE A TELEPHONIC APPEARANCE BEFORE THE COMMISSIONER, THE INTENT OF S.C. **REGULATION 67-801 (c)** IS TO PROTECT AN APPELLANT LIKE APPELLANT FROM HAVING HIS CLAIM DISMISSED BASED ON FRAUD AS HEREIN ALLEGES. **SEE ALSO REGULATION 67-803 (b) (c)**. A HEARING WAS HELD IN THIS MATTER ON APRIL 30, 2018 BEFORE THE HONORABLE MIKE CAMPBELL PRESIDING. THE APPELLANT APPEARED PRO-SE. PRIOR TO THE HEARING, APPELLANT MOVED TO HAVE CERTAIN WITNESSES ATTEND THE APRIL 30, 2018 HEARING. HOWEVER, COMMISSIONER CAMPBELL DENIED HIS REQUEST. **SEE ATTACHED MOTION ORDER OF COMMISSIONER MIKE CAMPBELL.**

APPELLANT CONTENDS THAT THE WITNESSES WHO APPELLANT WANTED TO APPEAR AT HIS HEARING WAS DENIED ON THE BASIS OF DEFENDANT'S COUNSEL REQUEST FOR THEY WOULD NOT ADD ANYTHING TO THE HEARING. **SEE ORDER OF COMMISSIONER ATTACHED.** THIS DENIAL WAS IN VIOLATION OF APPELLANT'S DUE PROCESS TO PRESENT EVIDENCE AT THE HEARING AND HAVE TESTIMONY FROM WITNESSES. WHEN APPELLANT WAS CONDUCTING DIRECT EXAMINATION OF MR. SHALBI AT THE HEARING, APPELLANT MADE THE FOLLOWING STATEMENT IN DIRECT REGARD TO THE FRAUDMENT NATURE OF THE CLINCHER AGREEMENT THAT WAS SENT VIA U.S. MAIL TO HIM:

**"AND I JUST FEEL LIKE THE—THE CLINCHER PAPER THAT WAS SENT HAS SOME—IS SOME—YOU KNOW, IS FALSE IN IT. SO, THAT'S WHY I FILED AND LOOK AT WITH THE POLICY THAT I COULD GO BACK AND MAKE AN ARGUMENT ABOUT IT. THAT'S IN THE STATE POLICY. (R.P. 30, LINES 13-20).**

DEFENDANTS' ATTORNEY, MS. HILTON, OBJECTED TO APPELLANTS' STATEMENT AND COMMISSIONER CAMPBELL SUSTAINED HER OBJECTION ON THE PRINCIPLE. **(R.P. 30, LINES 21 AND R.P. 31, LINE 5).**

COMMISSIONER CAMPBELL SUSTAINING MS. HILTONS OBJECTION TO APPELLANTS' STATEMENTS RESULTED IN A DEPRIVATION OF HIS DUE PROCESS RIGHT TO PRESENT THE ISSUE OF FRAUD AGAINST APPELLANTS' PROCEDURAL DUE PROCESS TO PRESENT EVIDENCE AT THE HEARING.

**WHEN MS. HILTON OBJECTED TO APPELLANTS' COMMENTS RELATING TO DEFENDANTS' FRAUDULENT MISCONDUCT ASSOCIATED WITH APPELLANT ALLEGED READING, SIGNING AND RECEIPT OF THE ALLEGED FRAUDULENT SETTLEMENT AGREEMENT AND RELEASE, SHE WAS INFORMING THE COMMISSIONER THAT RES JUDICATA BARRED APPELLANT FROM RELITIGATING ANY ISSUE CONNECTED TO A PRIOR HEARING OF THE CASE.**

APPELLANT ASSERTS THAT THE SETTLEMENT AGREEMENT AND RELEASE HE RECEIVED IN THE U.S. MAIL DID NOT CONTAIN THE SECOND PAGE OF THE SETTLEMENT AGREEMENT AND RELEASE AS IT DOES NOW. THEREFORE, APPELLANT WAS NOT GIVEN ANY OPPORTUNITY TO READ IT BECAUSE AS THE SETTLEMENT AGREEMENT WAS PROCURED BY DEFENDANTS FRAUD AND FRAUDULENT ACTIONS. EVEN THOUGH, MS. HILTON REPRESENTED THE DEFENDANTS AT THE APRIL 30, 2018 AND HER SIGNATURE APPEARING ON THE SETTLEMENT AGREEMENT AND RELEASE, MS. HILTON WAS NOT THE DEFENDANTS' ATTORNEY AT THE CLINCHER CONFERENCE; THEREFORE, SHE COULD NOT TELL THE COMMISSIONER WHAT SHE BELIEVE "THE CLINCHER WAS EXPLAINED TO HIM AND HE HAD EVERY OPPORTUNITY TO READ IT BEFORE SIGNING IT AND HE SIGNED IT. "THE HEARING COMMISSIONER SHOULD NOT ALLOWED MS. HILTON'S STATEMENT TO ENTER THE RECORD AT THE HEARING MR. SHALBI REPRESENTED THE DEFENDANTS AT THE TELEPHONIC CLINCHER CONFERENCE.

APPELLANT ALLEGES THAT COMMISSIONER CAMPBELL SUSTAINING OF MS. HILTON'S OBJECTION TO APPELLANTS' STATEMENT RELATING TO FRAUD RESULTED IN A DEPRIVATION OF APPELLANTS' DUE PROCESS RIGHT TO A FULL AND MEANINGFUL OPPORTUNITY TO BE HEARD ON HIS CLAIM THAT DEFENDANTS COMMITTED FRAUD IN THE PROCUREMENT OF APPELLANTS SIGNATURE ON A FRAUDULENT SETTLEMENT AGREEMENT, MOREOVER, HE WAS DEPRIVED OF THE RIGHT TO INTRODUCE EVIDENCE ON HIS CLAIM OF FRAUD, AND THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES TO ESTABLISH FACTS ALLEGING THAT THE CLINCHER SETTLEMENT AGREEMENT AND RELEASE BE SIGNED WAS PROCURED BY FRAUD AND DEFENDANTS' FRAUDULENT ACTIONS.

APPELLANT ASK THAT THIS CASE BE REVERSED AND REMANDED ALLOWING APPELLANT THE OPPORTUNITY FOR A FULL AND MEANINGFUL OPPORTUNITY OF THE ISSUE OF FRAUD.

## **STATEMENT OF THE CASE**

On August 10, 2017, a clincher agreement was signed by appellant and defendants on belief that such agreement was true and fair settlement of all claims. This appeal follows:

## STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the stand of review for decisions by the South Carolina Workers' Compensation Commission. See: *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23-24, 716 S.E.2d 123, 126-127 (Ct App, 2011) (explaining the Commission may consider lay and medical evidence and disregard medical evidence if the record contains other competent evidence, and reiterating the appellate court does not balance objective against subjective findings of medical witnesses, or weigh the testimony of one witness against that of another, in reviewing the Commission's findings); see also *Tiller v. Nat'l HealthCare Ctr. Of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999) (explaining the Commission has discretion to weigh and consider all evidence, both lay and expert, when determining causation); *Ballenger v. S. Worsted Corp.* 209 S.C. 463, 467, 40 S.E. 2d 681, 682-83 (1946) (finding despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award). See: "S.C. Code Ann § 42-17-90 (A) (2015). 'A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award.' *Gattis v. Murrells Inlet VFW No. 10420*, 353, S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App 2003). 'Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter.' *Id* at 109, 576, S.E.2d at 195 (citation omitted). 'The determination of whether a claimant experiences a change of condition is a question for the fact finder.' *Id.* at 107, 576 S.E.2d at 194." Finally, both commissioners relied on exclusively on objective evidence, in S.C. Code Ann § 42-17-90 (A) (2015). There is no requirement in the Act that a claimant prove the change of condition by objective evidence.

## FACTS

The following are events which led up to Defendants actions which allowed them to secure Appellant's signature on the Clincher Settlement.

1. On about July 28, 2017, the Appellant took receipt of the attached letter in respect of an informal Clincher Conference, which was never held (see page 1 of 1 of above date). Nor was Appellant contacted in respect of cancellation.
2. Mr. Will Hawthorne claims representative has throughout this legal process delayed the Appellant from reaching a final settlement (see attachments dated **March 1, 2013 – September 19, 2016. Note: July 20<sup>th</sup> – July 28<sup>th</sup>, 2017** where Mr. Hawthorne requested my signature also on a Clincher Settlement document dated **June 8, 2017**. As a result of the above signature was procured on three blank clincher forms but were later signed by Attorney Paige P. Hilton who was not at time privy to commission's bargains telephonic clincher conversation. The court should also note Mr. Shalabi later denied he mailed me a clincher form (See Tr. p. 26, L. 14-25, Tr. p. 27, L. 1-25, Tr. p. 28, L. 1-25, Tr. p. 29, L. 1-4).
3. See Application dated **February 22, 2017** where Appellant requested a hearing for repetitive trauma which was never addressed although he paid the \$25 filing fee.
4. See Gmail document form which was forwarded to Appellant from Mr. Will Hawthorne stating, "**We did receive the signed paperwork. The check will be printed and mailed to you.**"
5. See Appellant transcripts for all matter stated above.

THERE IS NO STATURE OF LIMITATIONS WHEN A PARTY SEEKS TO SET ASIDE A JUDGEMENT DUE TO FRAUD UPON THE COURT. RULE 60(b), SCRPC; SEE HAGY V. PRUITT, SUPRA (COURT HAS THE INHERENT AUTHORITY TO SET ASIDE A JUDGEMENT ON THE GROUND OF EXTRINSIC FRAUD IN SPITE OF ANY FACIALLY APPLICABLE STATURE OF LIMITATIONS). IN ORDER TO SECURE EQUITABLE RELIEF ON THE BASIS OF FRAUD, THE FRAUD MUST BE EXTRINSIC. BRYAN V. BRYAN , 220 S.C. 164, 66 S.E. 2d 609 (1951). (EXTRINSIC FRAUD IS NECESSARY IN ORDER TO SECURE EQUITABLE RELIEF VACATING A PRIOR JUDGMENT).

## ARGUMENTS

DID COMMISSIONER MIKE CAMPBELL, AS A MATTER OF LAW DEPRIVE APPELLANT, AT THE APRIL 30, 2018 WORKERS' COMPENSATION HEARING, OF HIS DUE PROCESS TO A FULL AND MEANINGFUL OPPORTUNITY TO BE HEARD ON THE CLAIM THAT DEFENDANTS, COMMITTED FRAUD IN PROCURING APPELLANT SIGNATURE ON A FRAUDULENT SETTLEMENT AGREEMENT, IN DEPRIVING APPELLANT OF HIS DUE PROCESS RIGHT TO INTRODUCE EVIDENCE?

OUR COURT HAS NOT PREVIOUSLY DEFINED FRAUD UPON THE COURT IN CONNECTION WITH SETTING ASIDE A FINAL JUDGEMENT. IN EVANS v. GUNTER, 294 S.C. 525, 529, 366 S.E. 2d 44, 46 (Ct. App. 1988), THE COURT OF APPEALS NOTED ONE COMMENTATOR DESCRIBED "FRAUD UPON THE COURT" AS "THAT SPECIES OF FRAUD WHICH DOES, OR ATTEMPTS TO, SUBVERT THE INTEGRITY OF THE COURT ITSELF, OR IS A FRAUD PERPETRATED BY OFFICERS OF THE COURT SO THAT THE JUDICIAL MACHINERY CANNOT PERFORM IN THE USUAL MANNER ITS IMPARTIAL TASK OF ADJUDGING CASES THAT ARE PRESENTED FOR ADJUDICATION". (CITING H. LIGHTSEY, J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE, 408 (2<sup>nd</sup> ed, 1985). THERE ARE ISSUES OF GREAT MOMENT TO THE PUBLIC IN A FRAUD ACTION. FURTHERMORE, TAMPERING WITH THE ADMINISTRATION OF JUSTICE IN THE MANNER INDISPUTABLY SHOWN HERE INVOLVES FAR MORE THAN AN INJURY TO A SINGLE LITIGANT. IT IS A WRONG AGAINST THE INSTITUTIONS SET UP TO PROTECT AND SAFEGUARD THE PUBLIC, INSTITUTIONS IN WHICH FRAUD CANNOT COMPLACENTLY BE TOLERATED CONSISTENTLY WITH THE GOOD ORDER OF SOCIETY. SURELY IT CANNOT BE THAT PRESERVATION OF THE INTEGRITY OF THE JUDICIAL PROCESS MUST ALWAYS WAIT UPON THE DILIGENCE OF LITIGANTS. THE PUBLIC WELFARE DEMANDS THAT THE AGENCIES OF PUBLIC JUSTICE BE NOT SO IMPORTANT THAT THEY MUST ALWAYS BE MUTE AND HELPLESS VICTIMS OF DECEPTION AND FRAUD.

THE SUBORNATION OF PERJURY BY AN ATTORNEY AND/OR THE INTENTIONAL CONCEALMENT OF DOCUMENTS BY AN ATTORNEY ARE ACTIONS WHICH CONSTITUTE EXTRINSIC FRAUD. CONTRARY TO PERJURY BY A WITNESS OR A PARTY'S FAILURE TO DISCLOSE REQUESTED MATERIALS, CONDUCT, WHICH CONSTITUTES INTRINSIC FRAUD, WHERE AN ATTORNEY—AN OFFICER OF THE COURT—SUBORNS PERJURY OR INTENTIONALLY CONCEALS DOCUMENTS, HE OR SHE EFFECTIVELY PRECLUDES THE OPPOSING PARTY FROM HAVING HIS DAY IN COURT. THESE ACTIONS BY AN ATTORNEY CONSTITUTE EXTRINSIC FRAUD.

## CONCLUSION

The Appellant in conclusion would once again ask this court to recognize because fraud upon the court is an affront to the administration of justice, a litigant who had been defrauded need not establish prejudice. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra; *Dixon v. Comm'n of Internal Revenue*, 2003 WL 1216290 (9<sup>th</sup> Cir. 2003) ("The perpetrator of this fraud [upon the commission] should not be allowed to dispute the effectiveness of the fraud after the fact"). This panel should not accept "This switch and bait" ploy. Therefore, Appellant seeks reversal of the single commissioner's ruling.

s/ *Richard Sells*

Richard Sells, Pro se

Appellant

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Dated: 7/19 2019

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