**IN THE SUPREME COURT OF OHIO**

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| **PIERRE INVESTMENTS, INC,** | * | **On Appeal from the Lucas County** |
| | * | **Court of Appeals, Sixth District** |
| **APPELLANT,** | * | **Court of Appeals Case No. CL 21 1229** |
| **v.** | * | |
| **CLS CAPITAL GROUP, INC, ET AL ,** | * | |
| **APPELLEES.** | * | |

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# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, PIERRE INVESTMENTS, INC

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## EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellants here fully performed under the loan agreement, met all conditions listed in the loan agreement, provided seventy five thousand dollars in loan commitment fee to guarantee its performance and to initiate preparation of the loan closing documentation sought to be performed by Mockensturms, paid ten thousand dollars in earnest money to secure the land-purchase agreement, provided the Appellees CLS with all requested and agreed documentation pertaining its business registration and status, and expected to get the approved and guaranteed loan funded in 30-60 days. Appellees CLS promised and held out that they were the money source and could fund the ten million dollars loan that was needed to finance the intended real estate development and construction project of Appellants. Later in discovery it revealed that CLS was a defunct corporation, that neither CLS nor Comprehensive Lending Services Capital Group, LLC (as added defendant) had ten million to lend and to fund the intended project, that neither corporation ever lend or brokered loans before, that neither corporation ever obtained any lender insurance policies, and that neither corporation ever worked with any third-party lenders to fund any of their approved loans. As part of the conditions, which were fully performed by Appellants, Appellants paid seventy five thousand dollars commitment fee and paid ten thousand dollars earnest money deposit with the land-purchase contract.

Appellants had been deceived in the past when trying to fund other projects, and therefore took all necessary and available to them safety measures to assure legitimacy of the lender and its "approved and guaranteed" loan. Appellants had employed a Texas attorney to assist with their due diligence, who then performed background checks on Uballe, verified Mockensturms with the State Bar, verified CLS's corporate status with Secretary of State where the corporation

was registered and doing business, verified CLS's relationship with its Mockensturm attorneys, and verified its relationship with the bank. Appellees CLS and their attorneys, Mockensturms, represented and made Appellants believe that CLS had a multi-million-dollar reserve fund to perform on the ten million dollar loan that it's committee had approved and guaranteed to Appellants. As appeared in discovery, CLS was a defunct corporation, and possessed no assets or cash on hand to perform on any such loan. In fact, CLS had not been a going concern since 2012, when the corporation was canceled by SEC due to financial frauds, yet Uballe held himself out as a director, president, or otherwise an employee of CLS when dealing with Appellants and their attorney, which also was represented and confirmed by Mockensturms.

Appellees CLS assured Appellants that the requested commitment fee was to guarantee and protect CLS against project termination by Appellants prior to funding, and that a part of this commitment fee will be paid to their attorneys, Mockensturms, for preparation of the loan closing documentation, who also promised they had an escrow account to process the receipt of this commitment fee. Later in discovery Mockensturms testified they never served CLS as clients, never prepared any loan closing documents for CLS, knew about Uballe's insolvency and inability to fund the loan, never held an escrow account for CLS, have never been retained by CLS before or for preparation of the closing documentation for the intended loan.

This court should accept this appeal to correct the trial court and appellate court's ruling that no fraud occurred by CLS and Mockensturms, that no breach of contract by occurred by CLS, and that at the very least no return of unjust receipt of the commitment fee and the applicable by law attorney fees needed to be awarded to Appellants.

## STATEMENT OF THE CASE AND FACTS

Appellants, a Texas Corporation and its owner, President/CEO, Ken Gazian, sought funding of ten million dollars for a real estate development and construction from Appellees CLS. Appellants checked CLS's website and reached out via email, and CLS responded via email and telephone. Thru discovery it was determined that Uballe, Redell Napper, and Helen Odum are official employees/directors of a defunct CLS. The Loan Commitment was approved by CLS committee of these employees/directors, and was signed by Uballe, which made Appellants believed that it was a bona-fide and binding agreement. Appellants paid a seventy five thousand dollar loan commitment fee to CLS, where "a portion not to exceed twenty percent" agreed to be returned to Appellants if the loan was not realized by CLS and if Mockensturms were engaged to prepare the loan closing documentation (the process referred by Mockensturms as "underwriting"). Appellants also paid ten thousand dollars in earnest money to secure a purchase of real property in Texas requested by CLS for the intended development and construction project, as one of the conditions of the Loan Agreement. Appellants were informed by Appellee Mockensturm that CLS were their clients, that CLS was a lender (the actual money source), that they prepared all previous loans for CLS, and that the closing of the loan will also be prepared by them, for which they agreed to approved attorney Musgrove to list their law firm, Mockensturm Ltd, on the Loan Agreement.

The funding for the ten million dollar real estate project never materialized. Appellee CLS never returned the commitment fee or any or its portion, and threatened to use this obtained fee to counter sue Appellants if Appellants intend to obtain the fees through litigation. As result of these frauds that took place in this loan transaction, Appellants suffered damages from the loss

on the commitment fee, loss of the earnest money deposit, the loss of the project, and the loss of a lucrative real estate opportunity.

Sometime prior to filing a complaint in Ohio Court, Appellants requested from Appellee Mockensturm confirmation of their representations made to Appellant and their attorney regarding CLS and its loan transactions. Appellants specifically requested a copy of their client/attorney relationship with CLS and a copy of at least one loan agreement that was performed by CLS and prepared by Appellee Mockensturm. Appellee Mockensturm confirm availability of these requested documents, but requested time to get permission from their CLS clients to release them, but these documents were never provided. Instead, Appellee Mockensturm provided a copy of IOLTA Escrow Agreement for $25,000 to prove that Appellees CLS were their clients and that Appellees CLS closed on previous loans. In depositions, Appellee Mockensturms testified that Appellees CLS were never their clients and that they never prepared any loan closing documentation for Appellees CLS. Later discovery proved that the presented to attorney Musgrove and then to Court IOLTA Escrow Agreement was a fabricated and non-existing document typed on a form of a canceled bank with a fake QR code.

On October 28, 2019, Appellants filed a complaint alleging breach of contract, fraud, unjust enrichment, promissory estoppel, deceptive trade practices and legal malpractice against Appellees CLS and Appellees Mockensturm.

On June 9, 2020 CLS's defense counsel Anthony Calamunci created and filed an Assignment Agreement for CLS to "assign" its Loan Commitment to Comprehensive Lending Services Capital Group, LLC. On June 16, 2020, Pierre sought leave to amend his complaint adding Comprehensive Lending Services Capital Group, LLC as a new defendant of Appellees CLS. The amended complaint alleged all previously made claims for fraud/misrepresentation,

breach of contract, promissory estoppel and deceptive trade practices. Appellees CLS filed a counterclaim for breach of contract.

On September 10, 2020, the trial court entered a partial judgment on the pleadings in favor of Appellee Mockensturm on the legal malpractice claims.

On December 22, 2020, Appellee CLS filed a Motion for Summary Judgment.

On December 30, 2020, Appellee Mockensturm filed a Motion for Summary Judgment.

On March 23, 2021, the trial court entered judgment for all remaining claims against the Mockensturm Appellees and dismissed all fraud claims. It also entered judgment in favor of the CLS Appellees save the breach of contract claim and counterclaim.

A few weeks prior to scheduled trial Appellants' counsel withdrew due to threats with reporting Rule 11 made by Mockensturm defendants. Appellants were unable to secure a new counsel or pursue as Pro Se litigants, and sought for voluntary dismissal, but could not avid trial due to pending CLS' counterclaim.

On September 20, 2021, the CLS Appellees and the Appellants had a two-day bench trial on the remaining breach of contract claim and counterclaim.

On October 28, 2021, the trial court entered a verdict on behalf of Comprehensive Lending Services Capital Group, LLC for the Appellants' breach of contract claim and dismissed the CLS Appellees counterclaim for want of merits. A notice of appeal was timely filed and the transcripts and record of the trial court were filed with the Sixth District Court of Appeals.

Appellants raised two issues with the Sixth District Court of Appeals:

1. After hearing facts, evidence, and testimonies that revealed a defunct status and financial incapacity of CLS, and revealed the facts and evidences of

misrepresentations made by Mockensturms and their involvement in the loan, the trial court improperly dismissed these parties and fraud claims on summary judgment.

2. In spite of evidence to the contrary, the trial court found in favor of the Appellee CLS that it was not liable for the money that it took from Appellants for the performance of their obligations under the loan agreement and that Appellee Mockensturms were not liable for their materially false representations.

The Sixth District Court of Appeals affirmed the trial court's decision on December 2, 2022. This timely jurisdictional appeal follows.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

## PROPOSITION OF LAW I

## THE TRIAL AND APPELLATE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR THE APPELLEES

### I. STANDARD

Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. *Civ.R. 56(C); State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn., 69 Ohio St.3d 217, 219, 1994- Ohio 92, 631 N.E.2d 150 (1994).* Material facts are those facts "'that might affect the outcome of the suit under the governing law.'" *Turner v. Turner, 67 Ohio St.3d 337, 340, 1993- Ohio 176, 617 N.E.2d 1123 (1993), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986).* "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'" (*Bracketing in original.) Id., quoting Anderson at 251-252.*

"The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact." *Carnes v. Siferd, 3d Dist. Allen No. 1-10-88, 2011-Ohio-4467, ¶ 13, citing Dresher v. Burt, 75 Ohio St.3d 280, 292, 1996- Ohio 107, 662 N.E.2d 264 (1996).* "In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument." Id., citing Dresher at 292. "The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings." Id., citing Dresher at 292 and Civ.R. 56(E).To prevail under Civ.R. 56, the party moving for summary judgment must show the following:

> (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.
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> *Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 1996-Ohio 336, 671 N.E.2d 241 (1996).*

A court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 358-359, 1992- Ohio 95, 604 N.E.2d 138 (1992).* A trial court does not have the liberty to choose among reasonable inferences in the context of summary judgment, and all competing inferences and questions of credibility must be resolved in the nonmoving party's favor. *Perez v. Scripps-Howard Broad. Co., 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988).*

## I. MATERIAL ISSUES OF FACT REMAIN

### a. *Mockensturm Appellees*

Appellant argued that Mockensturm told him:

1. CLS was their client, a lender and not a third-party broker capable of making the ten million dollar loan;
2. They had worked for CLS in the past, CLS had been a client for years and that they had underwritten many multi-million-dollar loans;
3. CLS had financial capacity to perform the loan, and that they would facilitate it by preparing closing documents, and that their representations and representation by CLS were true and honest.
4. They would ask their CLS clients' permission to release copies of requested by attorney Musgrove documents to prove their relationship with CLS and representations that they successfully closed on at least one CLS loan, where CLS was a lender and where the loan amount was at least one million.

Appellees Mockensturm claimed that they had made no false representations that Appellants should have justifiably relied upon. Appellees Mockensturm claimed that they owed no duty to be honest and truthful to Appellants and their attorney, even when attorney Musgrove asked them to be honest to assure his client is not again trapped in fraudulent transaction. They further argued that they had no affirmative duty to disclose information to the Appellants.

The trial court relied upon an Eighth District case which in affirming summary judgment that, "affidavits based on opinion, statements made without personal knowledge and legal conclusions." Youssef v Pair. This case was inapposite of the case below. The opinions in the Youssef case were helpful and determinative in deciding the case.

The trial court also failed to make any decision as it related to a number of issues:

- CLS was a legitimate entity who performed "numerous lending transactions with Mockensturms"
- Mockenstrums had performed all "underwriting" documentation for CLS's loans and that performing the Appellants' loan would not be their "first Rodeo"
- CLS had been clients of Mockensturms for years
- CLS was financially sound and could close the transaction for Appellants
- Mockensturms will be retained for Appellants loan transaction, as for all previous loans performed by CLS
- Mockensturms will be able to provide documents to prove they represented CLS and that they prepared closing documents on CLS's previous loans, as soon as they obtain permission to release these documents from their CLS clients.

The appellate court found that none of those issues were genuine issues of material fact that would effect the outcome of the motion for summary judgment. It affirmed the trial courts dismissal of the claims against the Mockensturm defendants.

b. *CLS Appellees*

CLS and Uballe made several statements in the negotiation stage to induce Appellant into signing the loan commitment and obtaining the seventy five thousand dollar payment. These include

1. CLS having a board of directors and a committee that reviewed and approved the loan
2. CLS is the money source, like a bank, but without FDIC insurance, and therefore required an insurance policy from MFG that approves 99.9% of all CLS's loans

3. CLS having hundreds of millions of dollars on hand to fund the ten million real estate project in Texas
4. CLS had hired Mockensturms in the past to prepare loan closing documentation
5. Holding out Helen Odom as a “secretary” of CLS
6. Having approved and guaranteed the loan of ten million
7. Having closed many loans with CLS and Mockensturms
8. CLS was a lender and not merely a broker

All of these statements induced Appellant to pay seventy-five thousand dollars to CLS. This money, partially or whole, was never repaid, the loan was never approved by CLS or could ever been funded by any “third-party” lender. The appellate court failed to pierce the corporate veil as it did not find that the transaction between the two parties was not more than an arm’s length transaction, the fact and evidences of which show frauds.

## PROPOSITION OF LAW II

### THE TRIAL COURTS VERDICT FOR THE BREACH OF CONTRACT CLAIM WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE

### I. STANDARD

Under the civil standard, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co., 54 Ohio St.2d at the syllabus*;

Appellate courts applying the civil-manifest-weight-of-the-evidence standard should presume that the trial court's factual findings are correct because it had the opportunity "'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these

observations in weighing the credibility of the proffered testimony.'" *Seasons Coal Co., Inc. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273.*

A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not' *Id. at 81."*

## II, **ANALYSIS**

The trial court in this case dismissed the breach of contract claim as CLS was a non-entity and had no merits. This decision was affirmed by the court of appeals in its decision. CLS, which had not been an entity since 2012, advertised on the internet and was represented by Mockensturms as a lender. CLS Appellees held themselves out to Appellants as being able to fund a ten million dollar project. CLS Appellees accepted seventy five thousand dollars from Appellants as “protection” against Appellants’ project termination and assurance to pay Mockensturms for preparation of the closing documents for already approved by CLS loan. CLS Appellees confirmed to Appellants that they received all agreed and requested documents from Appellants that were needed for preparation of the closing and funding of the approved loan. Their false intents to fund the project, where CLS Appellees had no financial ability or means to fund, caused Appellants to lose the commitment fee, the earnest money deposit, the loss of the project, and the loss of opportunity. Then, in the legal process, CLS Appellees “assigned” the contract to another company, Comprehensive Lending Services Capital Group, LLC, without any intent to perform on the loan contract or return the money to Appellants but to deceive the Court, to file a counterclaim, and to secure unjust attorney fees. Comprehensive Lending Services Capital Group, LLC was owned by CLS Appellees and also had no financial capability or means

to fund the loan. It seems unconscionable that this defunct non-entity can advertise on the internet, close multi-million dollar loans with Mockensturms, accept "commitment" money for a loan they knew they could not fund or ever funded, and then get rid of their responsibilities through a mean of filing a false "assignment agreement" with Court, and without any intent to fulfill any contract obligations under CLS' Loan Commitment.

Under this courts jurisprudence regarding a manifest weight claim, it should reverse the decision of the trial court and the appellate court. There was competent, credible evidence that Appelles CLS and Appelles Mockensturm committed fraud and that Appellees CLS breached the contract. CLS Appellees obtained seventy five thousand dollars knowing that they could never fulfill the funding request by Appellant and prove any representations made by Mockensturms.

## CONCLUSION

For the reasons discussed above, this case involves a matter of public and great general interest and a substantial constitutional question.

The Plaintiff-Appellant request that this court grant jurisdiction and allow this case so the important issues presented in this case will be reviewed on merits.

Respectfully submitted,

S/ **Eric J Allen**

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the Appellees counsel by regular mail and electronic mail the same day it was filed.

**S/ Eric Allen**

_____

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Attorney for Appellant