

BPI as the general contractor for a construction project in Prestonsburg, Kentucky. *Id.* at 1–2. The project required BPI to build a cell tower, a compound, and an access road. *Id.* Less than one year after completing construction, the road collapsed, allegedly because of the faulty workmanship of BPI and its subcontractors. *See id.* at 2. American Towers sued BPI, and BPI filed a cross-claim against Nationwide, claiming that its potential liability was covered under its insurance policy. *See R. 21* at 4. Nationwide responded by seeking a declaration that it was not obliged to insure BPI. *R. 27* at 15. After discovery, BPI and Nationwide filed cross-motions for summary judgment. *R. 137; R. 141.*

DISCUSSION

Summary judgment is appropriate where there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). When determining whether such a dispute exists, the Court must view the facts in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). If—viewed from that angle—the evidence is such that a reasonable finder of fact could return a verdict for the non-moving party, then the Court cannot grant summary judgment. *Cordell v. McKinney*, No. 13-4203, 2014 WL 3455556, at *4 (6th Cir. July 16, 2014).

Because federal jurisdiction is premised on the diversity of the parties, state law controls the interpretation of the insurance policy. *Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir. 1995). But which state’s law controls? The parties disagree on that point. To resolve the dispute, the Court must apply Kentucky’s choice of law rules. *Security Ins. Co. of Hartford v. Kevin Tucker & Assocs.*, 64 F.3d 1001, 1005 (6th Cir. 1995) (“In a diversity action, the district court is obligated to apply the choice of law

rules of the state in which it sits.”). As detailed below, those rules point to West Virginia’s substantive law.

I. West Virginia Law Applies To This Dispute.

Kentucky employs the “most significant relationship” test to resolve choice of law questions in a contract dispute. *State Farm Mut. Auto Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 878 (Ky. 2013); Restatement (Second) of Conflict of Laws § 188 (the “Restatement”). That test requires the Court to consider several factors: Where the contract was negotiated; where the contract was performed; the location of the contract’s subject matter; and the parties’ domiciles, residences, places of incorporation and places of business. *Hodgkiss-Warrick*, 413 S.W.3d at 879; Restatement §§ 188, 193.

Like most multi-factor balancing tests that provide no guidance about how to weigh each factor, this one is of little use without more specific instructions. Perhaps for that reason, Kentucky’s courts have explained that particular factors are more important in particular kinds of cases. When considering liability insurance contracts, the Supreme Court of Kentucky focuses primarily upon the parties’ expectations regarding the “principal location” of the insured risk. *Hodgkiss-Warrick*, 413 S.W.3d at 879. Absent a choice-of-law clause, Kentucky’s courts look to the residence of the named insured and the contract itself to determine what the parties’ expectations were. *See id.* (referring to “our general choice-of-law rule” and collecting cases applying the law of the named insured’s state of residence).

The named insured in the contract here was BPI. BPI is incorporated under the law of West Virginia, and BPI maintains its principal place of business in West Virginia. R. 146-1 ¶ 2. The policy was issued through a West Virginia insurance agency, R. 146-4 at 36, and the policy includes multiple West Virginia endorsements, *Id.* at 38–42, 44. The contract

insured BPI generally—wherever it operated—and it is undisputed that the contract did not refer to either the Prestonsburg project or Kentucky. The contract did not include a choice-of-law clause.

As the preceding paragraph demonstrates, Kentucky has precious little to do with the parties' dispute. True, the accident for which BPI now seeks coverage occurred in Kentucky, but that “fortuitous fact” matters less than BPI's residence and the contract's multiple connections with West Virginia. *See Hodgkiss-Warrick*, 413 S.W.3d at 879 (applying the law of the named insured's state of residence—to which the contract specifically referred—rather than Kentucky law, even though the accident occurred in Kentucky). West Virginia law therefore applies to this case.

Nationwide resists this conclusion, arguing that *Asher v. Unarco Material Handling, Inc.*, 737 F. Supp. 2d 662 (E.D. Ky. 2010), requires the application of Kentucky law. R. 137-1 at 6–13. In *Asher*, this Court applied Kentucky law, because no other state had a sufficiently weighty interest in the case. *See id.* at 674. But this case differs from *Asher* in a critical respect. *Asher* observed that the named insured was not a part of the case, and the result turned in large part on the named insured's absence. 737 F. Supp. 2d at 672–73 (“The named insured, Atlas, is no longer before this Court. *Therefore*, the location of the contract does not determine the choice of law question in this case.”) (emphasis added); *id.* at 674 (“[W]ithout Atlas, Illinois lacks a significant relationship to the transaction . . .”). Here, of course, the named insured is before the Court and insists that the law of its home state applies. So the analogy to *Asher* is unpersuasive.

To sum up, the residence of the named insured and the contract itself both point to the application of West Virginia law. Kentucky merely happens to be the location of the

accident. Under such circumstances, West Virginia law controls. *Hodgkiss-Warrick*, 413 S.W.3d at 879.

II. Key Questions In This Case Depend On Unsettled Questions Of West Virginia Law.

BPI's policy covered "property damage" caused by an "occurrence." R. 27-2 at 20 (explaining that the policy covers property damage only if the damage is "caused by an 'occurrence'"). Determining whether BPI's insurance claims arise from an "occurrence" requires the Court to traverse what has become familiar ground for West Virginia's courts. The turf is particularly well-trod in the construction field. Courts have repeatedly dealt with cases in which a client sued a contractor, claiming that the contractor breached the construction contract by doing its job poorly. The contractor then sought coverage from its insurer, requiring the court to determine whether the contractor's allegedly poor performance qualified as an "occurrence." *E.g., Erie Ins. Property & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28 (W. Va. 1999). Courts describe these claims as claims for "faulty workmanship." Until recently, damages arising from "faulty workmanship" were not caused by an "occurrence" under West Virginia law, so an insurer was not obliged to cover such claims. *Id.* at 34 ("[D]amages to a building sustained by any owner as the result of a breach of a construction contract due to a contractor's faulty workmanship are a business risk to be borne by the contractor and not by his commercial general liability insurer."); *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77, 83 (W. Va. 2001).¹

But in 2013—after American Towers filed this lawsuit—the Supreme Court of Appeals of West Virginia overruled its prior decisions and reversed course. Now, "faulty

¹The policies in *Pioneer* and *Corder* and the contract here all defined "occurrence" in nearly identical terms. Compare R. 27-2 at 33, with *Pioneer*, 526 S.E.2d at 31; *Corder*, 556 S.E.2d at 83.

workmanship” does qualify as an “occurrence,” so damages resulting from such claims are covered under BPI’s policy. *Cherrington v. Erie Ins. Property & Cas. Co.*, 745 S.E.2d 508, 521 (W. Va. 2013) (expressly overruling prior cases holding otherwise).

That brings the Court to the unsettled questions of West Virginia law at the heart of this case. At least a portion of BPI’s potential damages arise from what West Virginia law classifies as “faulty workmanship”: American Towers hired BPI to construct a road, and that road collapsed—possibly because BPI constructed it poorly. *See* R. 162 at 6–9. If *Cherrington* applies retroactively, then all of BPI’s potential damages attributable to “faulty workmanship” arise from an “occurrence” (*i.e.*, the faulty construction of the road).

But if *Cherrington* does not apply retroactively, then the Court must parse the damages arising from “faulty workmanship” from the damages arising from an “occurrence.” The damages relating to the replacement of the road do not arise from an “occurrence.” *Pioneer*, 526 S.E.2d at 33 (explaining that the contractor, not the insurer, must bear the costs of repairing or replacing its faulty work product). It is unclear, however, whether the road’s collapse nevertheless qualifies as an “occurrence,” so that the damage inflicted upon surrounding property may be covered under the policy: Pre-*Cherrington* cases point in opposite directions. *Compare Corder*, 556 S.E.2d at 84 (suggesting that an “occurrence” can never be “tied to the original acts” of faulty workmanship), *with Pioneer*, 526 S.E.2d at 33 (suggesting that some damages caused in large part by faulty workmanship may result from an “occurrence”).

The Court is aware of no case deciding whether *Cherrington* applies retroactively, and the question is best addressed—in the first instance—by the Supreme Court of Appeals of West Virginia. The answer may turn on delicate questions of policy. *See Findley v. State*

Farm Mut. Auto. Ins. Co., 576 S.E.2d 807, 823 (W. Va. 2002) (considering the need to “shield insurers from the imposition of augmented substantive liabilities” when determining whether to apply a decision retroactively). The decision may also implicate constitutional questions. *See Harleystville Mut. Ins. Co. v. South Carolina*, 736 S.E.2d 651, 658 (S.C. 2012) (holding unconstitutional a South Carolina law that retroactively defined “occurrence” to include claims of “faulty workmanship”). And if *Cherrington* does not apply retroactively, then the Court will require guidance on pre-*Cherrington* law regarding whether the collapse of the road qualifies as an “occurrence.” The Court will therefore certify two questions of law to the Supreme Court of Appeals of West Virginia, pursuant to West Virginia’s certification statute. *See* W. Va. Code § 51-1A-3.

The questions of law to be answered are: (1) does *Cherrington* apply retroactively? And, (2) if *Cherrington* does not apply retroactively, and the road collapsed because it was poorly constructed, then does the collapse of the road nevertheless qualify as an “occurrence”?

West Virginia’s certification statute helpfully lays out certain requirements for the certifying Court. *See* W. Va. Code § 51-1A-6. Accordingly, this order has stated the questions of law to be certified and recited the facts relevant to the questions of law. *See id.* The Court acknowledges that the receiving court may reformulate these questions. *See id.* The Court will include the names and addresses of counsel at the end of this opinion. Should the Supreme Court of Appeals require more context than the body of this order provides, the Court has attached its prior opinion as appendix A.

Accordingly, it is **ORDERED** that:

- (1) The questions recited above are **CERTIFIED** to the Supreme Court of Appeals of West Virginia.
- (2) The clerk of court **SHALL FORWARD** this order to the Supreme Court of Appeals of West Virginia. Upon request, the clerk of court shall also forward the record to the Supreme Court of Appeals of West Virginia.
- (3) The names and addresses of counsel for BPI are:
 - a. Lee A. Smith, Reynolds Law Offices, PSC, 112 W. Court Street, Suite 100, Prestonsburg, KY 41653.
 - b. W. Mitchell Hall, Jr., VanAntwerp, Monge, Jones & Edwards, 1544 Winchester Avenue, Suite 500, P.O. Box 1111, Ashland, KY 41105-1111.
 - c. William H. Wilhoit, 103 S. Hord Street, P.O. Box 35, Grayson, KY 41143-0035.
- (4) The names and addresses of counsel for Nationwide are:
 - a. Drew Byron Meadows, Golden & Walters PLLC, 771 Corporate Drive, Suite 905, Lexington, KY 40503.
 - b. J. Dale Golden, Golden & Walters PLLC, 771 Corporate Drive, Suite 905, Lexington, KY 40503.
 - c. Kellie Marie Collins, Golden & Walters PLLC, 771 Corporate Drive, Suite 905, Lexington, KY 40503.
- (5) The parties' cross-motions for summary judgment, R. 137; R. 141, are **DENIED WITHOUT PREJUDICE**. The parties **SHALL INFORM** the Court after the Supreme Court of Appeals of West Virginia acts on this certification order. The

Court will entertain renewed motions for summary judgment after that court either answers the certified questions or declines to do so.

This the 18th day of August, 2014.



Signed By:

Amul R. Thapar AT

United States District Judge

I certify that this is a true and correct
copy of the original filed by me.

ROBERT R. CARR, CLERK

By: Ara K. Theodor RKT

Date: 8/18/14

Inc., the companies executed a Master Contractor Agreement (the “agreement” or the “contract”), and BPI began building. *See* R. 138-2; R. 134 at 19–20.

After breaking ground on the project, BPI encountered what it regarded as a problem with American Towers’ plans. R. 134 at 74. BPI thought the road’s design was flawed. *Id.* The agreement imagined just such a scenario. If BPI recognized a problem, it was to stop work immediately, inform American Towers, and American Towers would then instruct BPI on how to proceed. Agreement § 1.4. BPI therefore stopped work on the road and told American Towers about the problem. R. 134 at 74. BPI also proposed a solution to the problem—a modification of the road’s shape—and American Towers approved. *Id.* at 74–75. BPI then resumed construction in accordance with its new plan.

Alas, the solution was no solution at all. Less than one year later, the road BPI constructed collapsed in a landslide, damaging surrounding property and leaving the tower compound inaccessible and useless. R. 132 at 40–43; R. 134 at 23. The result was a flurry of litigation. American Towers sued BPI, alleging that BPI breached the agreement. BPI sued its subcontractors, the subcontractors sued each other, and everybody sued the insurer. After discovery, there were nearly as many motions for summary judgment as parties. This order deals with American Towers’ and BPI’s cross-motions for summary judgment only. *See* R. 138; R. 139. For the reasons explained below, this matter must proceed to trial, and both parties’ motions for summary judgment are denied.

DISCUSSION

Summary judgment is appropriate where there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). When determining whether such a dispute exists, the Court must view the facts in the light most favorable to the non-moving party. *Scott v.*

Harris, 550 U.S. 372, 378 (2007). If—viewed from that angle—the evidence is such that a reasonable finder of fact could return a verdict for the non-moving party, then the Court cannot grant summary judgment. *Cordell v. McKinney*, No. 13-4203, 2014 WL 3455556, at *4 (6th Cir. July 16, 2014).

Because federal jurisdiction is premised on the diversity of the parties, the Court must apply Kentucky’s substantive law. *Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir. 1995). The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) breach of the contract; and (3) damages or loss caused by the breach. *Metro Louisville/Jefferson City Gov’t v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009).

I. BPI Is Not Entitled To Summary Judgment, Because The Contract Does Not Assign The Obligation To Consult A Design Engineer To American Towers Only.

BPI’s main argument is that the contract required American Towers—not BPI—to consult a design engineer after BPI reported problems with the original design of the road. R. 138-1 at 14–16. BPI traces American Towers’ supposedly sole responsibility for consulting a design engineer to the agreement’s division of labor. The contract contemplated that American Towers would provide BPI with “drawings, specifications,” and “instructions.” Agreement § 1.4. BPI, on the other hand, was responsible for “all construction means, methods, techniques, sequences and procedures” Agreement § 4.1.1. The contract provided that BPI would complete its tasks in a “workmanlike manner and with the highest degree of skill and care exercised by reputable contractors performing the same or similar services” *Id.* The idea, BPI says, is that American Towers was responsible for formulating the overall plan and design, and BPI was responsible for executing the plan precisely. Because consulting a design engineer is part of crafting the

design—not part of executing the design—the responsibility to do so belonged to American Towers.

BPI says that the critical portion of the agreement confirms its interpretation. After BPI informed American Towers that it thought the road was poorly designed, the agreement required American Towers to “issue written instructions” about how to proceed to BPI. Agreement § 1.4. BPI says that its obligation was merely to execute whatever plan American Towers gave it, so American Towers was obliged to consult a design engineer before telling BPI what to do. American Towers therefore must bear the consequences, BPI says, of its own failure.

This argument glosses over key facts that weigh against BPI. True, when BPI encountered a problem, the contract required only that BPI inform American Towers and wait for instructions. Agreement § 1.4. But BPI apparently did more than the contract required. BPI proposed a new plan to American Towers, which American Towers approved, and which BPI proceeded to implement. R. 134 at 74. Dr. Ihab Saad, an expert witness, submitted a report explaining that BPI’s vow to complete its work with “the highest degree of skill and care” exercised by similar contractors required it to consult a design engineer before proposing the new plan to American Towers. R. 139-7 at 54–56. Expert testimony is admissible to elucidate a specialized standard of care for the finder of fact. *Charter Foods Inc. v. Derek Eng’g of Ohio, Inc.*, Civil No. 09-06-ART, 2009 WL 4825150, at *5 (E.D. Ky. Dec. 11, 2009). Indeed, if the fact finder would not understand the standard absent such testimony, then an expert may be required. *Id.*; *Boland-Maloney Lumber Co. v. Burnett*, 302 S.W.3d 680, 686 (Ky. Ct. App. 2009). So, viewing the facts in the light most favorable to American Towers, a jury could find that BPI proposed the new plan to American Towers,

and—if the jury credits Saad’s testimony—that the contract required BPI to consult a design engineer before doing so.

BPI has one round left in the chamber. No matter, BPI says, that the contract may have required BPI to consult a design engineer before proposing its plan, because the contract required American Towers to “issue written instructions” after learning of the problem. And the word “instruction” requires American Towers to do something more than merely “accept” or “approve” BPI’s proposal. R. 145 at 13. To “instruct,” American Towers contends, means something very different from merely “accepting” or “approving.” *Id.*

Not necessarily. A competent speaker of English might commonly recognize the giving of approval as a form of instruction. For example, during the Cuban Missile Crisis, President Kennedy famously approved a plan to stop ships carrying offensive weapons from delivering their cargoes to Cuba. The President’s approval of the plan also functioned as an order to implement it and as an “instruction” to the Navy to affect its object. Thus, it would make sense to say both that President Kennedy approved the plan and that he ordered the so-called quarantine of Cuba. So too here. American Towers approved BPI’s plan, but by doing so it also instructed BPI on how to proceed. This common understanding even comports with the dictionary definition upon which BPI relies. *See* R. 153 at 11 (citing the Merriam-Webster online dictionary, which defines “instruction” to mean “a statement that describes how to do something: an order or command . . .”). Other more ordinary examples illustrate the point, too (Q: “Coach, when I tackle, should I try to put my helmet on the ball?” A: “Yes.” Q: “May I send you the first draft of this brief by Thursday?” A: “Yes.”).

Because it is possible to give an instruction by approving a proposed plan, BPI's argument fails. American Towers therefore did not necessarily breach the agreement by failing to consult a design engineer before accepting BPI's recommendation and instructing BPI to proceed in the manner it had proposed. And because the duty to consult a design engineer did not belong to American Towers as a matter of law, BPI is not entitled to summary judgment.

II. American Towers Is Entitled To Summary Judgment Regarding Breach.

American Towers' motion for summary judgment requires careful parsing of the deposition testimony proffered by each side. American Towers' plans required BPI to use particular so-called "fill" material for the construction of the road and to consult a geotechnical engineer during portions of the work. *See* R. 139-2 at 7, 27. According to the report of Fikret Atalay—an expert witness retained by American Towers—BPI did not comply with the fill requirements and never consulted an engineer. R. 139-5 at 17. For both reasons, American Towers says, it is entitled to summary judgment as to the element of breach.

American Towers is half-right: There is no genuine dispute regarding BPI's failure to consult an engineer, but Atalay's deposition testimony is not clear enough as to the content of the fill material to warrant summary judgment. BPI offers no real response regarding its failure to consult a design engineer. It merely cites a few conclusory lines from the deposition of its site supervisor, who opined that BPI satisfied the contractual standard of care. R. 145 at 3. But BPI's supervisor was not disclosed as an expert witness who might explain the standard of care, and unsupported testimony as to legal conclusions does not create a genuine issue of material fact. *L.F.P.IP, LLC v. Hustler Cincinnati, Inc.*, 533 F.

App'x 615, 620–21 (6th Cir. 2013). It is therefore undisputed at this stage that BPI breached the agreement by failing to consult a geotechnical engineer as required by the contract.

American Towers' other argument for summary judgment fails, because Atalay's deposition testimony is somewhat muddled. During his deposition, Atalay apparently admitted that he could not be sure of his conclusions regarding the fill material. R. 129-1 at 29 (“Q: So in terms of figuring out what exactly the composition of that fill material or the compaction of that fill material at the time that it was actually placed . . . you can't do? A: Right.”). American Towers attempts to rehabilitate Atalay's testimony, arguing that a full reading of the deposition suggests that he meant to say only that he could not perform one particular test. R. 154 at 6. Perhaps that is the best reading of the full deposition, but that is far from clear. At this stage, the Court cannot weigh the testimony or resolve ambiguities. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It can only take stock of whether a genuine issue of material fact exists for trial. *See id.* Atalay's answer suggesting that he could not determine the composition of the fill material requires the Court to submit this issue to the jury.¹

Nor is American Towers entitled to summary judgment regarding causation. The record at this stage reflects a classic battle of the experts. According to Atalay, the road collapsed because of BPI's “poor construction techniques” and failure to prepare the

¹American Towers gestures at one other argument regarding breach—that BPI was required to consult a design engineer before proposing its revisions to American Towers' original plan. *See* R. 154 at 9. But the deposition testimony American Towers points to is even more muddled than Atalay's. Saad apparently relied on a contractual provision that American Towers does not even cite, *see* R. 133 at 35–36, and he may have based his conclusion on what he believed to be a set of “best practices” that could be distinct from the contractual standard of care. *See id.* at 15–17 (apparently distinguishing “best practices” in the industry from the contractual standard of care). And at one other point in his deposition, he seemed to state that the contract left all design responsibilities to American Towers. *Id.* at 21. The Court therefore cannot say that the jury must accept American Towers' characterization of Saad's conclusions, so American Towers is not entitled to summary judgment. *See Dawahare v. Spencer*, 210 F.3d 666, 671 (6th Cir. 2000) (warning courts to be careful before awarding summary judgment based on expert testimony that the fact finder may not accept).

(2) BPI's motion for summary judgment, R. 138, is **DENIED**.

This the 4th day of August, 2014.



Signed By:

Amul R. Thapar AT

United States District Judge

construction site adequately. R. 139-5 at 4, 15–16. But BPI’s expert, Wayne Karem, opined that the damage had nothing to do with faulty construction. R. 145-2 at 16. Instead, Karem concluded that the road collapsed due to the “geological and soil conditions of the mountainous topography around Prestonsburg.” *Id.* The Court cannot resolve the experts’ fact-bound disagreement. *Anderson*, 477 U.S. at 249. That responsibility falls to the jury at trial. *Id.*²

CONCLUSION

American Towers is entitled to summary judgment regarding one particular form of breach: There is no genuine dispute of material fact regarding whether BPI consulted a geotechnical engineer, as required by the contract. BPI did not, and by failing to do so it breached the agreement. In every other respect, the parties’ motions for summary judgment are denied.

Accordingly, it is **ORDERED** that:

(1) American Towers’ motion for summary judgment, R. 139, is **GRANTED IN PART AND DENIED IN PART**. American Towers is entitled to summary judgment regarding breach, because BPI failed to consult a geotechnical engineer as required by the contract. In all other respects, American Towers’ motion is **DENIED**.

²This conclusion also suffices to dispose of American Towers’ claims regarding BPI’s failure to comply with the contract’s warranty and indemnification provisions. *See* R. 139 at 21–22. Because the Court cannot say whether BPI’s breach of the contract caused American Towers’ damages, American Towers is not entitled to summary judgment on those claims either.