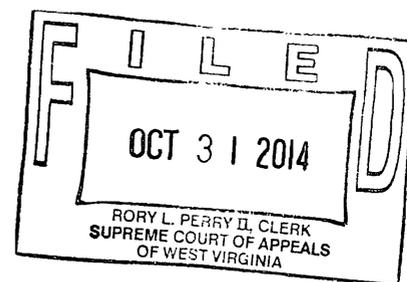


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 14-0799**



**BPI, INC.,
PETITIONER**

VS.

**NATIONWIDE MUTUAL INSURANCE
COMPANY,
RESPONDENT**

**(On Certification of Questions from the United States District Court,
Eastern District of Kentucky, Civil Action No. 7:12-cv-00139-ART)**

BRIEF FOR PETITIONER

Respectfully submitted,

VanAntwerp, Monge, Jones,
Edwards & McCann, LLP

A handwritten signature in cursive script, appearing to read "Leigh G. Latherow".

Leigh G. Latherow
WV Bar No. 12116
1544 Winchester Avenue, 5th Floor
P.O. Box 1111
Ashland, Kentucky 41105-1111
Office: (606) 329-2929; Fax: (606) 329-0490
llatherow@vmje.com
Counsel for Petitioner BPI, Inc.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS CERTIFIED.....	1
STATEMENT OF THE CASE	2 – 6
A. <u>The Parties and CGL Policy for Big Branch Project.</u>	3-5
B. <u>The 2011 Policy and the Failure of the Access Road</u>	5
C. <u>Underlying Litigation and Certification of Questions.</u>	5-6
SUMMARY OF ARGUMENT.....	7
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
ARGUMENT.....	9 – 16
I. <u>The 2011 Nationwide Policy Covers Claims of Poor Workmanship.</u>	9 – 13
A. <u>The holding in Cherrington was applied to the existing policy and should be applied here.</u>	9 - 10
B. <u>Cherrington’s holdings should be applied to cases pending when the decision was issued.</u>	10 - 13
II. <u>Even if Cherrington does not apply “retroactively,” the road collapse in this case qualifies as an “occurrence.”</u>	13 - 16
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Bradley v. Appalachian Power Co.</i> , 163 W.Va. 332, 256 S.E.2d 879 (1979)	11 - 12
<i>Caperton v. A.T. Massey Coal Co.</i> , 255 W.Va. 128, 156, 690 S.E.2d 322, 350 (2009)	7, 11, 13
<i>Cherrington v. Erie Ins. Property & Cas. Co.</i> , 231 W.Va. 470, 745 S.E.2d 508 (2013)	<i>passim</i>
<i>Columbia Cas. Co. v. Westfield Ins. Co.</i> , 217 W.Va. 250, 617 S.E.2d 797 (2005)	10
<i>Corder v. William W. Smith Excavating Co.</i> , 556 S.E.2d 77 (2001).....	12 – 14
<i>Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.</i> , 206 W.Va. 506, 526 S.E.2d 28 (1999)	9, 14 – 16
<i>Simpson-Littman Construction v. Erie Insurance Property & Casualty Ins. Co.</i> , 2010 WL 3702601 (S.D.W.Va. Sept. 13, 2010).....	7, 14, 16
<i>Tackett v. American Motorists Insurance Co.</i> , 213 W.Va. 524, 584 S.E.2d 158 (2003)	10

QUESTIONS CERTIFIED

The following questions were certified to this Court by the United States District Court for the Eastern District of Kentucky pursuant to W. Va. Code § 51-A-3:

1. Does *Cherrington v. Erie Ins. Property & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013), apply to a CGL insurance policy in effect at the time *Cherrington* was issued or only to CGL policies issued after June 18, 2013, the date *Cherrington* was decided?

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” under a Commercial General Liability Insurance Policy?

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Kentucky has certified two questions of West Virginia law to this Court, as set forth above. The dispute centers upon a Commercial General Liability (“CGL”) Insurance Policy (“Policy”) issued in 2011 to Petitioner BPI, Inc. (“BPI”) by Respondent Nationwide Mutual Insurance Company (“Nationwide”). Specifically, BPI asserts that the Policy provides coverage for claims of faulty workmanship made against BPI on a construction project; Nationwide has denied coverage under the Policy.

This Court held in *Cherrington v. Erie Ins. Property & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013), that defective workmanship causing bodily injury or property damage is an “occurrence” under a CGL insurance policy. This changed the law in West Virginia with regard to interpretation of CGL policies. The *Cherrington* Court applied this principle to the 2004 policy under review in that case. BPI seeks application of the *Cherrington* decision to the 2011 Policy under review in this case.

Nationwide argues that *Cherrington* should not be applied to the 2011 Policy. Nationwide, however, has not offered any distinctions between the Court’s retroactive application of the holding in *Cherrington* to the 2004 policy under review in *Cherrington* and retroactive application to the 2011 Policy under review in this case. *Cherrington* did not restrict its application to future policies, but applied the rule of law to a policy issued nine years earlier. In further support of *Cherrington*’s application in this case, this action was pending at the time *Cherrington* was decided, which requires application of its holdings to this case.

A determination that *Cherrington* applies to the 2011 Policy in this case relieves the Court from having to consider any further issues. If *Cherrington* is not applicable, however, then the second question presented is whether a road collapse caused by poor construction by the insured’s subcontractor qualifies as an “occurrence” under a CGL policy.

A. The Parties and CGL Policy for Big Branch Project.

Petitioner BPI, Inc. (“BPI”) is a West Virginia contractor whose work includes the construction of cell towers for cellular telephone providers at sites in West Virginia and surrounding states, including Kentucky. In February 2008, BPI entered into a Master Contractor Agreement (“MCA”) with its customer American Towers, LLC (“ATC”), for construction and equipment installation of cell tower sites. (MCA at JA 0401-0414). In 2010, ATC issued a purchase order for BPI to provide construction and installation services under the MCA as the general contractor on a project near Prestonsburg, Kentucky, known as the “Big Branch Project.” BPI’s scope of work for the Big Branch Project included construction of a 300-foot cell tower and cell tower compound, with an access road up the mountain to the tower, using plans engineered and provided by ATC.

For years before the loss involved in this action, BPI, which is located in Winfield, West Virginia, purchased its insurance coverage from Nationwide (JA 0356). BPI purchased its insurance through Partners Insurance Agency, a Nationwide agent located in Hurricane, West Virginia. Documents produced by Nationwide’s underwriting department reveal that Nationwide was familiar with BPI’s operations. Nationwide conducted field audits of BPI to recommend changes to coverage and premiums. Partners Insurance Agency frequently communicated with Nationwide about BPI’s projects and insurance needs. When BPI had questions or needed additional coverage, it called Partners Insurance who, in turn, communicated with Nationwide’s underwriting department. (JA 0357).

In 2010, when the purchase order for the Big Branch Project was issued, BPI had in place a CGL insurance policy from Nationwide for all of BPI’s operations at all locations. (JA 0419-0506). The “Locations and Descriptions of Hazards” section of the policy included “contractors – sub contracted work – in connection with construction, re-construction, erection or repair not

buildings” and insured BPI for “All locations at which ongoing operations are being performed for the additional person(s) or organization(s).” (JA 0430, 0432-0434, 0463). The policy included West Virginia endorsements. (JA 0437).

The MCA with ATC required BPI to maintain general liability insurance coverage for projects governed by the MCA. It required BPI to purchase coverage that included “products/completed operations, contractual liability, broad form property damage and independent contractor’s coverage,” with minimum limits of \$1,000,000 per occurrence. The property damage coverage was to include damage for “explosion, collapse, and underground damage.” (JA 0409). BPI was required to obtain a certificate of insurance naming ATC as an additional insured under BPI’s policy.

BPI complied with the insurance obligations under the MCA. Pursuant to its customary practice, BPI provided the MCA to Partners Insurance Agency. Partners reviewed the contract and furnished BPI with a Nationwide policy providing the required coverage. BPI relied upon Partners to ensure that BPI received a policy that would provide full coverage to BPI. (JA 0358). Documents produced by Nationwide confirm that, in fact, Partners contacted Nationwide’s underwriting department to request that ATC be added as an additional insured under the policy. (JA 0399, 0396). Nationwide did issue an endorsement adding ATC as an additional insured. (JA 0495).

BPI was the general contractor for the Big Branch Project. BPI and its subcontractors performed the work and completed the project in approximately August 2010. BPI’s subcontractor, McVey Land Development, LLC (“McVey”), did all of the excavation and construction work for the cell tower compound and the access road. The project was completed in approximately August 2010. (JA 0358).

B. The 2011 Policy and the Failure of the Access Road.

Nationwide renewed the 2010 Policy in 2011 (the “Policy”) through Partners Insurance Agency. (JA 0507-0647). There were no material changes in the Policy. Like the previous policy, it included West Virginia endorsements, it listed the Locations and Descriptions of Hazards section of the policy to include “contractors – sub contracted work – in connection with construction, re-construction, erection or repair not buildings,” and it covered BPI for all of its locations. (JA 0543, 0545-0548, 0551).

In April and May 2011, a section of the access road failed at the Big Branch Project causing fill material and debris to slide down the hill onto adjacent property occupied by the Rising Son Ministries church. ATC hired an engineering company and a contractor to evaluate the access road failure, to repair the road, and to repair damages to the church property.

C. Underlying Litigation and Certification of Questions.

ATC filed suit in the United States District Court Eastern District of Kentucky in December 2012, seeking over \$800,000.00 in damages that it claims relate to the access road failures. ATC claimed breach of contract/warranty against BPI and asserted a direct claim against Nationwide for coverage based on ATC’s status as an additional insured under the Policy. (JA 0019-0036, ATC Amended Complaint).

BPI answered ATC’s Complaint, denying responsibility for the access road failures and related damages. BPI cross-claimed against Nationwide, asserting that, to the extent that damages are awarded against BPI, then Nationwide must provide coverage for such losses. (JA 0037-0041, BPI Answer and Cross-Claim). BPI also sued its subcontractors, who cross-claimed against one another.

Nationwide filed its Counterclaim Seeking Declaratory Relief against BPI, alleging that it does not have coverage obligations under the policy. (JA 0042-0057, Nationwide Answer and

Counterclaim). In its Counterclaim, Nationwide alleged that the damages claimed against BPI do not constitute “property damage” arising from an “occurrence” within the meaning of the Policy. It also argued that several exclusions in the Policy apply to deny BPI coverage.

A number of cross-motions for summary judgment were filed in this case while pending before the Eastern District of Kentucky, including BPI and Nationwide’s cross-motions for summary judgment on the issue of coverage under the Policy. In its August 18, 2014 Memorandum Opinion and Certification Order, the district court found that West Virginia law should govern the coverage issue between BPI and Nationwide. The Court did not answer the salient question of whether *Cherrington* should be applied to coverage disputes pending when *Cherrington* was decided. The district court concluded that the issue would better be determined by this Court. (JA 0001-0018, Opinion at pp. 6-7). Resolution of that question in favor of BPI ends the inquiry. If, however, the Court finds that *Cherrington* is only applicable to policies issued after June 18, 2013, then the second question posed by the district court remains to be resolved: whether the road’s collapse nonetheless qualifies as an “occurrence” under previous West Virginia law.

SUMMARY OF ARGUMENT

The rule that “defective workmanship constitutes an ‘occurrence’ under a policy of CGL insurance” announced in *Cherrington v. Erie Inx. Property and Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013), was applied retroactively in that case. That is, the policy at issue in the case had an effective date of January 1, 2004 through January 1, 2005 – nine years before *Cherrington* was decided. The Court adopted a new definition of occurrence for CGL policies so that faulty workmanship constitutes an occurrence even though there was contrary case law when the policy was issued in 2004. Nothing in *Cherrington* suggests that application of the newly pronounced rule to the 2004 policy was an anomaly or that the rule would only be applicable to *new policies written after* June 18, 2013. The 2004 policy was not a new policy – it was written *before Cherrington* was issued and at a time when the law *excluded* coverage for the damages at issue in the case. Furthermore, the coverage dispute in the present case between BPI and Nationwide was pending when *Cherrington* was decided. This Court should apply its well-established principle that “[t]he Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that ‘[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.’” *Caperton v. A.T. Massey Coal Co.*, 255 W.Va. 128, 156, 690 S.E.2d 322, 350 (2009) (citing decisions).

Even if the Court finds that *Cherrington* cannot be applied to the 2011 Policy at issue in this case, the Court should nonetheless find that ATC’s damages arise from an “occurrence” under previous West Virginia law as demonstrated by *Simpson-Littman Construction v. Erie Insurance Property & Casualty Ins. Co.*, 2010 WL 3702601 (S.D.W.Va. Sept. 13, 2010) (copy attached at JA 0790-0814).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner does not believe that Oral Arguments will provide any additional information relevant to the Court's decision and that all matters can be adequately addressed through written submissions. However, if the Court finds that Oral Arguments would be helpful, the Petitioner has no objection.

ARGUMENT

I. The 2011 Nationwide Policy Covers Claims of Poor Workmanship.

A. The holding in *Cherrington* was applied to the existing policy and should be applied here.

There is no dispute that the rule set forth in *Cherrington* was applied retroactively to the CGL insurance policy under review in that case. *Cherrington* was decided on June 13, 2013 and the holding was applied to a 2004 policy. When that 2004 policy was issued, poor workmanship was not an occurrence under CGL insurance policies under West Virginia law. West Virginia law expressly stated that “CGL policies of insurance do not provide protection for poor workmanship; instead these policies protect an insured from liability due to personal injury or property damage to others caused by the insured’s negligence.” *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 512, 526 S.E.2d 28, 33 (1999). *Cherrington* changed that legal principle. That law changed in 2013 when *Cherrington* was decided. The *Cherrington* Court applied the changed law to the CGL policy at issue in that case, *i.e.*, the change was retroactively applied to the 2004 GCL policy written and issued under the previous law.

The issue of retroactive application was a non-issue in *Cherrington*. The *Cherrington* Court applied the 2013 change to the 2004 policy. The defendant insurance company was required to provide coverage under the 2004 policy for an “occurrence” based upon faulty workmanship *even though* faulty workmanship was not covered when the policy was written and issued. In *Cherrington*, the Court did not implement the change on a prospective basis only – that is, only to newly issued policies going *forward*. Rather, the Court applied the change in the law to the existing 2004 policy under review in that case.

Nationwide ignores *Cherrington*’s retroactive application. If Nationwide’s argument is correct, *Cherrington* would not apply to any policy issued before June 13, 2013, including the

policy under review in *Cherrington*. This Court in *Cherrington*, however, applied the holding to the 2004 policy under review. The same should be true in this case.

Cherrington is not an anomaly with regard to retroactive application of a newly established principle or definitional interpretation in insurance policy coverage disputes. For example, in *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W.Va. 250, 617 S.E.2d 797 (2005), the United States Court of Appeals for the Fourth Circuit certified a question to this Court of whether jail inmate suicides were “accidents” that constituted “occurrences” under a liability insurance policy issued to the Randolph County Commission. This Court held that the issue should be decided from the perspective of the insured, the Commission, in which case the deaths by suicide were not deliberate, intentional, expected, desired or foreseen by the Commission. Hence – for purposes of that policy – the Court found the suicide to be covered as an “occurrence.” The Court did not limit application of the principle prospectively, but applied the rule to the insurance policy under review. *See also Tackett v. American Motorists Insurance Co.*, 213 W.Va. 524, 584 S.E.2d 158 (2003) (holding that claims of “great embarrassment, consternation, mental pain and anguish, and emotional upset” as a result of employee’s alleged sexual misconduct fell within policy’s personal injury coverage provisions and applying that principle to the policy under review).

Therefore, just as these Courts applied the case holding to the existing policy under review, so should the Court apply the *Cherrington* holding to the 2011 Policy at issue in this case.

B. *Cherrington’s* holdings should be applied to cases pending when the decision was issued.

Even if *Cherrington* did not compel application of its holding to the 2011 Nationwide Policy, West Virginia recognizes the presumption that judicial decisions are to be given retroactive effect. “The Supreme Court of Appeals of West Virginia, like all courts in the

country, adheres to the common law principle that, “[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.” *Caperton v. A.T. Massey Coal Co.*, 225 W.Va. 322, 156, 690 S.E.2d 322, 350 (2009) (citing decisions).

In the district court, Nationwide cited to *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), which identified six factors that may be used to determine when a common law decision will not be given retroactive effect, which is the exception to the general rule. Those factors are:

First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. **Second**, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. **Third**, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. **Fourth**, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. **Fifth**, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. **Finally**, we will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Id. at 349.

The *Bradley* factors do not support Nationwide’s position that *Cherrington* should not be given retroactive application. First, the nature of the substantive issue overruled was not a traditionally settled area of the law. Nationwide would have the Court believe that the definition of “occurrence” in the context of construction defect cases was clear cut and had been established for over a decade by the opinion of *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77 (2001). But an opinion from 2001 interpreting the definition of “occurrence” in a factually specific situation can hardly be said to have created “a traditionally settled area of law.”

Corder held that “[p]oor workmanship, standing alone, cannot constitute an “occurrence” under the standard policy definition of this term” *Corder* did not elaborate on what was meant by “standing alone,” and, in failing to do so, left open the question of under what circumstances poor workmanship, combined with some other activity or cause, could constitute an occurrence. *Corder* also did not involve defective work performed by a subcontractor and, therefore, the holding did not settle the area of law addressed by *Cherrington* and presented in the current case. The *Cherrington* Court’s intent was to provide certainty to an unsettled and uncertain area of the law: “We do not think that a holding of this Court that must be altered every time the same issue comes before us is a solid pronouncement of the law upon which future litigants may reasonably rely to guide their future conduct.” *Cherrington*, 231 W.Va. at 483.

The third *Bradley* factor does not support only prospective application of *Cherrington* because *Cherrington* was a common law decision, overruling and, to a greater extent, clarifying previous common law decisions that the Court believed to be flawed and requiring clarification. The fourth factor does not support Nationwide’s position because *Cherrington* did not represent a change in statutory or constitutional law. The fifth and sixth factors do not support Nationwide’s position because *Cherrington*’s holding that faulty workmanship performed by a subcontractor constitutes an occurrence under a CGL policy does not represent a radical departure from previous law in West Virginia or throughout the country. As discussed above, pre-*Cherrington* decisions, including *Corder*, did not squarely address the issue that *Cherrington* addressed. Moreover, the rule that faulty workmanship of a subcontractor constitutes an occurrence under a CGL policy appears to be gaining widespread national acceptance. *Cherrington*, 231 W.Va. at 479 (“However, a majority of other states have reached the opposite conclusion [that faulty workmanship may constitute an occurrence], announcing their contrary view either in judicial decisions or through legislative amendments”).

Thus, it is clear from *Cherrington's* retroactive application of the principle regarding faulty workmanship constituting an occurrence to the policy under review in *Cherrington* that the rule should be applied in this case. Even if the retroactive application were not clear from *Cherrington's* application in that case, however, Nationwide cannot establish a basis to depart from the general rule of applying judicial decisions to "all other parties in pending cases." *Caperton*, 255 W.Va. at 156, 690 S.W.2d at 520. This case was pending when *Cherrington* was decided, and thus application of the rule announced in *Cherrington* should be applied to the 2011 Policy under review here.

II. Even if *Cherrington* does not apply "retroactively," the road collapse in this case qualifies as an "occurrence."

Even if *Cherrington* does not apply, ATC's damages still arise from an "occurrence" under previous West Virginia law. Nationwide cites *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77 (2001), in support of its argument that faulty workmanship by a subcontractor is not an occurrence under the policy. Reliance upon *Corder* is misplaced. *Corder* involved a property owner's claim against a contractor for loss of use relating to delays caused by the failure of a sewer line that was improperly installed by the contractor. The contractor's insurer claimed that the loss was not covered because it arose from faulty workmanship that did not constitute an occurrence. The court held that "[p]oor workmanship, standing alone, cannot constitute an 'occurrence' under the standard policy definition of this term as an 'accident including continuous or repeated exposure to substantially the same general harmful conditions.'" *Id.* at 83. The court held that the key to determining the existence of an occurrence "is whether a separate act or event or happening occurred at some point in time that led to the failure of the pipe or whether the pipe's alleged failure is tied to the original acts of repair performed by Smith Excavating." *Id.* at 84. Because there was indication that other

events caused the sewer line failures, the court declined to hold that the claims did not arise from an occurrence.

In this case, ATC's claims arise from failure of the access road and a landslide of debris, outside the control of BPI, that damaged adjoining property. ATC's claimed damages arise from physical damage to the access road and surrounding properties. ATC alleges that the road failures resulted from work that was performed by BPI's subcontractor. *Corder* did not involve claims of defective workmanship of the subcontractor, nor did it involve the failure of a road and subsequent slide of materials that damaged the project and adjacent properties.

This case is more similar to the pre-*Cherrington* decision of *Simpson-Littman Construction v. Erie Insurance Property & Casualty Ins. Co.*, 2010 WL 3702601 (S.D.W.Va. Sept. 13, 2010). That case involved a homeowner's claims relating to settlement and cracking of foundations in a home constructed by the insured contractor. The homeowner claimed that the contractor's subcontractor had not properly compacted the soil and fill material under the house's foundation, thus causing the fill and foundation to sink over time. The insurer argued that these allegations of faulty workmanship did not arise from an occurrence under its CGL policy. The court, however, citing *Corder*, held that the defective work performed by the subcontractor was an occurrence under the policy, since neither the subcontractor's failure to properly compact the soil, nor the sinking of the material, were intended, anticipated, or expected from the perspective of the insured. *Id.* at *10. Therefore, even under pre-*Cherrington* law, ATC's claimed damages constitute an occurrence, since the allegedly defective work of BPI's subcontractor, and the failure of the road were not intended, anticipated, or expected from BPI's perspective.

Finally, even if the Court determines that *Cherrington* should not be applied to the 2011 Nationwide Policy and that the road collapse was not an "occurrence" under previous West Virginia law pursuant to *Simpson-Littman*, any damages caused to the surrounding property, *i.e.*

to third-parties, is covered as an occurrence as set forth in *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999). Thus, any damages to the neighboring property owned by a third-party (Rising Son Ministries) that were the result of poor workmanship in constructing the road leading to road collapse are covered under the CGL Policy. The distinction for coverage for third-parties is well-recognized under West Virginia law and explained in *Pioneer*: “We summarize by stating that CGL policies of insurance do not provide protection for poor workmanship; instead, these policies protect an insured from liability due to personal injury or property damage to others caused by the insured’s negligence.” 206 W.Va. at 512, 526 S.E.2d at 512. The *Pioneer* Court provided the following instructive example distinguishing between covered and uncovered damages as to third-parties:

When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case. The happenstance and extent of the latter liability is entirely unpredictable – the neighbor could suffer from a scratched arm or a fatal blow to the skull from the peeling stonework. Whether the liability of the businessman is predicated upon warranty theory or, preferably and more accurately, upon tort concepts, injury to persons and damage to other property constitute the risks intended to be covered under the CGL.

Pioneer, 206 W.Va. at 511, 526 S.E.2d at 34. Thus, even though the home owner could not recover damages under the CGL policy against the craftsman for the faulty workmanship and poor results, if the ***same faulty workmanship and poor results*** caused damage to a third-party, coverage exists as to that third-party.

Here, then, even if *Cherrington* does not apply and there is no coverage as to the claim between BPI and ATC based upon alleged faulty workmanship in construction of the road, a road failure resulting from poor workmanship of a subcontractor qualifies as an occurrence under *Simpson-Littman*. Further, there is coverage with regard to the damage to the Rising Son

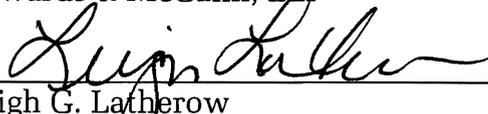
Ministries' property under *Pioneer Home Improvement*. Rising Son Ministries is a third party and the damage to its property constitutes a risk intended to be covered under the CGL.

CONCLUSION

Based on the foregoing, BPI requests this Court to find the ruling announced on June 13, 2013, in *Cherrington* is applicable in this case so that the road collapse alleged to be caused by faulty workmanship constitutes an occurrence under the 2011 Nationwide Policy. If *Cherrington* is not applicable, damages caused by the alleged faulty workmanship of BPI's subcontractor constitutes an occurrence under previous West Virginia law. Finally, any damages caused to the third-party neighboring property owner are a covered event under that policy.

Respectfully submitted,

VanAntwerp, Monge, Jones,
Edwards & McCann, LLP



Leigh G. Latherow

WV Bar No. 12116

P.O. Box 1111

Ashland, Kentucky 41105-1111

Office: (606) 329-2929; Fax: (606) 329-0490

llatherow@vmje.com

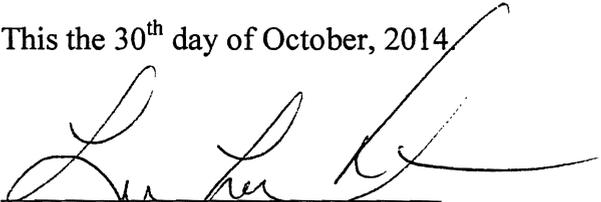
Counsel for Petitioner BPI, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Petitioner was placed in the United States mail, postage prepaid, addressed to the following:

J. Dale Golden
Drew Byron Meadows
Kellie M. Collins
Golden & Walters, PLLC
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
COUNSEL FOR NATIONWIDE
MUTUAL INSURANCE COMPANY

This the 30th day of October, 2014.



Leigh Gross Latherow
COUNSEL FOR BPI, INC.