

**In The Supreme Court
of the United States**

—◆—
**PETERS BROADCAST
ENGINEERING, INC.,**
Petitioners

v.

**PEM CONSULTING
GROUP, LLC, ET AL.,**
Respondents.

—◆—
**Petition For A Writ Of Certiorari
To The United States
Court of Appeals
For The Seventh Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI
with Appendix

—◆—
Leo P. Ross
ATTORNEY AT LAW
915 S. High St
Columbus, Ohio 43206
leoross1977@gmail.com
614-316-9144
Counsel for Petitioner

October, 2026

QUESTIONS PRESENTED

Petitioner's prime contract with Crown Castle required that any subcontractor be approved by Crown Castle before work began, and it made petitioner responsible for everyone it furnished to perform the work. Respondents were never approved. Yet petitioner gave respondents' crews access to Crown Castle's cell-tower sites, the crews worked there for weeks, and both sides' principals testified that respondents would receive 90 percent of Crown Castle's payments and petitioner 10 percent. Treating contract formation as "a question of law," the court of appeals held that no reasonable jury could find that the parties had a preliminary agreement containing all essential terms.

The questions presented are:

1. Whether Rule 56 and this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, *Reeves v. Sanderson Plumbing Products, Inc.*, and *Tolan v. Cotton* permit a court to grant summary judgment on contract formation when the evidence of the parties' conduct and course of performance supports competing reasonable inferences about whether they manifested assent to an interim arrangement.

2. Whether, consistent with the Seventh Amendment and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, a federal court in a diversity action

may treat a state-law characterization of contract formation as "a question of law" as license to resolve disputed evidence and competing reasonable inferences about the parties' assent.

PARTIES TO THE PROCEEDING

Petitioner Peters Broadcast Engineering, Inc. was the plaintiff in the district court and the appellant in the court of appeals.

Respondents PEM Consulting Group, LLC d/b/a Pyramid Consulting & Construction, LLC; Pyramid Consultants & Construction, LLC; and Philip E. Miller were defendants in the district court and appellees in the court of appeals.

Respondents Atlantic Casualty Insurance Company and Chesapeake Employers' Insurance Company, liability insurers of PEM, were defendants in the district court and appellees in the court of appeals.

No party has a stock ticker symbol.

RULE 29.6 STATEMENT

Peters Broadcast Engineering, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Peters Broadcast Engineering, Inc. v. PEM Consulting Group, LLC, No. 2:19-cv-4378 (S.D. Ohio) (filed Oct. 1, 2019).

Peters Broadcast Engineering, Inc. v. PEM Consulting Group, LLC, No. 1:21-cv-00219-HAB-SLC (N.D. Ind.) (opinion and order granting summary judgment entered Mar. 24, 2025; judgment entered Mar. 25, 2025).

Peters Broadcast Engineering, Inc. v. PEM Consulting Group, LLC, No. 25-1519 (7th Cir.) (opinion and judgment entered June 17, 2026; rehearing and rehearing en banc denied July 16, 2026).

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	iii
RULE 29.6 STATEMENT.....	iii
RELATED PROCEEDINGS	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND RULE INVOLVED.....	2
INTRODUCTION.....	3
STATEMENT OF THE CASE.....	5
A. The Crown Castle master agreement controlled who could work on Crown Castle sites.	5
B. PBE gives respondents' crews access to the sites, and both sides perform.	7

C.	The district court grants summary judgment.	10
D.	The court of appeals affirms.	12
REASONS FOR GRANTING THE PETITION		15
I.	The decision below conflicts with decisions of the First, Fourth, Fifth, Sixth, and Eighth Circuits.	15
A.	Conflict with the First Circuit.	16
B.	Conflict with the Fourth Circuit.	18
C.	Conflict with the Fifth Circuit	19
D.	Conflict with the Sixth Circuit.	21
E.	Conflict with the Eighth Circuit	22
F.	The decision below departs from the Seventh Circuit's own precedent.	23
G.	T h e c o n f l i c t i s outcome-determinative.	24
H.	The conflict concerns a federal question.	26
II.	The decision below conflicts with this Court's summary judgment precedents.	30

A.	Rule 56 forbids a court to choose among reasonable inferences.	30
B.	The record supports a reasonable inference that the parties agreed by conduct to an interim arrangement.. . . .	31
C.	The court of appeals resolved the competing inferences itself.	38
III.	The question is important and recurring.	42
IV.	This case is a suitable vehicle.	43
	CONCLUSION.	46
APPENDICES		

TABLE OF AUTHORITIES

Cases

Aaron v. Nat'l R.R. Passenger Corp., No. 26-32 (U.S. filed July 2, 2026) . . .	30, 46
Ahuja v. Lynco Ltd. Med. Research, 675 N.E.2d 704 (Ind. Ct. App. 1996). .	19, 33
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	i, 30, 38, 39
APS Capital Corp. v. Mesa Air Grp., Inc., 580 F.3d 265 (5th Cir. 2009)	20, 21, 25
Arnold Palmer Golf Co. v. Fuqua Indus., Inc., 541 F.2d 584 (6th Cir. 1976)	22, 26
Bourque v. FDIC, 42 F.3d 704 (1st Cir. 1994)	17, 18, 25
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)	i, 27, 43
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	31
Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979) . . .	3, 18, 25, 26
City of Indianapolis v. Twin Lakes Enters., Inc., 568 N.E.2d 1073 (Ind. Ct. App. 1991).	5

Conwell v. Gray Loon Outdoor Mktg. Grp., Inc., 906 N.E.2d 805 (Ind. 2009)	32
Dallis v. Don Cunningham & Assocs., 11 F.3d 713 (7th Cir. 1993)	33
Dick v. N.Y. Life Ins. Co., 359 U.S. 437 (1959)	29
East Coast Storage Equip. Co. v. ZF Transmissions Gray Court LLC, No. 24-1248 (4th Cir. Dec. 30, 2025) . .	19, 25
Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902)	28
Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996)	27
General GMC, Inc. v. Volvo White Truck Corp., 918 F.2d 306 (1st Cir. 1990) . .	16, 17, 25, 26
Grandoe Corp. v. Gander Mountain Co., 761 F.3d 876 (8th Cir. 2014)	23, 26
Herron v. S. Pac. Co., 283 U.S. 91 (1931)	27
Kelly v. Levandoski, 825 N.E.2d 850 (Ind. Ct. App. 2005)13, 21, 29	
Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959)	27

Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078 (Ind. 1993)	28
Mayer v. Gary Partners & Co., 29 F.3d 330 (7th Cir. 1994)	24
McCart v. Chief Exec. Officer in Charge, Indep. Fed. Credit Union, 652 N.E.2d 80 (Ind. Ct. App. 1995). . .	29, 32
Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058 (5th Cir. 1993)	20, 25, 26
Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978)	20, 25
Ocean Atlantic Dev. Corp. v. Aurora Christian Schs., Inc., 322 F.3d 983 (7th Cir. 2003)	24
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	28
Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951)	19
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	31
Retter v. Retter, 40 N.E.2d 385 (Ind. App. 1942).	32

Simler v. Conner, 372 U.S. 221 (1963) (per curiam)	27, 43
Simon v. William R. Simon Farms, Inc., 245 N.E.3d 1025 (Ind. Ct. App. 2024). . . .	29
Tolan v. Cotton, 572 U.S. 650 (2014) (per curiam)	passim
United States v. Williams, 504 U.S. 36 (1992)	45
Watkins Inc. v. Chilkoot Distrib., Inc., 655 F.3d 802 (8th Cir. 2011)	22, 26
Yee v. City of Escondido, 503 U.S. 519 (1992)	45
Constitutional Provision	
U.S. Const. amend. VII	1
Statutes and Rules	
28 U.S.C. § 1254(1).	2
28 U.S.C. § 1332	10
Fed. R. Civ. P. 56(a)	2, 5, 30

Fed. R. Civ. P. 56(c)(2)	37
Fed. R. Evid. 801(d)(2)(A)	37
Sup. Ct. R. 10	3, 15, 43
Sup. Ct. R. 13.1, 13.3	2
Other Authorities	
Restatement (Second) of Contracts (1981)	39

PETITION FOR WRIT OF CERTIORARI

Peters Broadcast Engineering, Inc. ("PBE") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is published as *Peters Broadcast Engineering, Inc. v. PEM Consulting Group, LLC*, No. 25-1519 (7th Cir. June 17, 2026).¹ The order denying rehearing and rehearing en banc (App. 20a) is unreported. The opinion and order of the district court granting summary judgment (App. 21a-44a) is unreported.

¹"App." refers to the appendix to this petition. "ECF" refers to the district court docket, No. 1:21-cv-219 (N.D. Ind.); "R." citations follow the court of appeals' record citations. "C.A. Br." and "C.A. Reply Br." refer to PBE's briefs in the court of appeals; "Oral Arg. Tr." to the transcript of the April 9, 2026 argument; and "Pet. for Reh'g" to PBE's June 30, 2026 petition for rehearing. "PBE Dep." and "Miller Dep." refer to the depositions of Robert M. Peters (ECF 142-2) and Philip Miller (ECF 129-5; ECF 142-1). "MSA" refers to the Crown Castle Construction Services Master Agreement (ECF 95-1).

JURISDICTION

The court of appeals entered its judgment on June 17, 2026. App. 1a. PBE timely petitioned for rehearing and rehearing en banc on June 30, 2026, and the court denied the petition on July 16, 2026. App. 20a. This petition is filed within 90 days of that order. Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56(a) provides in relevant part:

The court shall grant summary judgment if the movant shows that

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case presents a recurring question about the line between judge and jury in diversity cases: when state law describes contract formation as "a question of law," may a federal court use that label to resolve conflicting evidence about whether the parties, by their conduct, agreed to be bound? Decisions of the First, Fourth, Fifth, Sixth, and Eighth Circuits treat such disputes as questions for the factfinder. When formation turns on what the parties said and did over time, the question "[o]rdinarily" is "one of fact in genuine dispute so as to preclude summary judgment." *Charbonnages de France v. Smith*, 597 F.2d 406, 415 (4th Cir. 1979). The Seventh Circuit instead treated formation as "a question of law" and decided it against the nonmovant. That conflict is itself a reason to grant review. Sup. Ct. R. 10(a).

The record shows why the difference matters. For weeks in the summer of 2019, respondents' crews performed construction work on Crown Castle cell-tower sites under a master agreement that

Crown Castle had signed with PBE, not with respondents. That agreement required Crown Castle's approval of any subcontractor before work began-respondents were never approved-and made PBE responsible for everyone it furnished to do the work. The court of appeals itself recognized that PBE gave respondents "access to the sites." App. 14a. PBE paid workers' compensation for respondents' workers, bore taxes, insurance, and project expenses for the Crown Castle work, and supplied equipment. Respondents' principal testified that "the deal was" that he would fund the work and "get paid 90 percent of the invoice," and PBE's principal described the same split. From that evidence a reasonable jury could find that the parties agreed by their conduct to an interim arrangement: respondents would fund and staff the Crown Castle work, performed through PBE, for 90 percent of Crown Castle's payments, while the parties negotiated a written subcontract.

The court of appeals instead held that "[t]here is no evidence supporting Peters Broadcast's assertion that a contract existed." App. 10a. It treated formation as "a question of law," *id.*; acknowledged that both principals described the same 90/10 compensation term, App. 11a; and then declared that "[t]he conduct of the parties adds no clarity," *id.*, resolving each point of ambiguity against

PBE, App. 11a-12a. The district court, for its part, assumed that the parties' "emails, communications, and other actions showed the parties agreed to something," but held that "the record does not tell the Court what." App. 32a. When the evidence permits competing reasonable inferences about whether parties agreed, Rule 56 commits the choice to a jury. *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam). Indiana law does too. *City of Indianapolis v. Twin Lakes Enters., Inc.*, 568 N.E.2d 1073, 1079 (Ind. Ct. App. 1991). The Court should grant review or, as in *Tolan*, summarily vacate the judgment.

STATEMENT OF THE CASE

A. The Crown Castle master agreement controlled who could work on Crown Castle sites.

P B E i s a s m a l l telecommunications-engineering company in Fort Wayne, Indiana, owned and operated by Robert M. ("Mike") Peters. App. 2a, 22a. On May 21, 2019, PBE signed a Construction Services Master Agreement with Crown Castle USA Inc. (the "MSA"), under which Crown Castle would issue purchase orders for construction work on cell-tower sites in Indiana. App. 2a.

The MSA controlled who could perform that work. A list of the "Lower Tier Contractors" PBE expected to engage "shall be provided to and approved by Crown Castle prior to commencing Work." MSA § 7.A; *see* App. 2a. PBE could not "delegate any obligation under this Agreement" without Crown Castle's "prior written consent." MSA § 32. Everyone "furnished by Contractor to perform the Work," including "employees, non-employee workers, . . . and subcontractors," was "Contractor Personnel." *Id.* § 1. PBE was "separately and exclusively responsible for the acts and omissions of Contractor Personnel," had to "supervise and direct the Work," and kept "[a]ll persons employed by Contractor in the performance of the Work" under its "sole and exclusive direction and control." *Id.* § 24.A. Contractor Personnel had to carry "identification showing that they are working on behalf of Contractor," *id.* § 7.C; PBE had to call Crown Castle's network operations center "prior to entering and upon leaving any Site," *id.* § 9.B; and PBE answered for payroll taxes and any "improper worker classification," *id.* § 17.D.

As Peters testified, he "could not have a subcontractor on site - on a Crown Castle site without an approved agreement from Crown Castle," so

respondents' people "had to be with PBE for that." App. 25a (quoting PBE Dep. 68-69).

B. PBE gives respondents' crews access to the sites, and both sides perform.

In early May 2019, Chris Smith, a former PBE employee, introduced Peters to respondent Philip Miller, the owner-operator of respondent PEM Consulting Group, LLC (with Miller, "PEM"). App. 2a-3a. A May 5, 2019 email from Smith proposed that PBE retain ten percent of Crown Castle's payments, that PEM provide field crews and equipment, and that Smith's company oversee field operations. App. 3a-4a. Peters called the email "the first draft in discussions" and testified that "there was no agreement at that time. It was a proposal." App. 4a. As the district court recounted, Smith "was tapped by PBE as an independent contractor to assemble field crews to do the work for the Crown Agreement." App. 23a. Peters testified that Smith was then "a 1099 employee" of PBE, App. 25a (quoting PBE Dep. 47), and PBE's bookkeeper attested that PBE paid Smith for labor and had to issue him a Form 1099, ECF 142-4.

The parties never signed a written subcontract, but the work did not wait. "Despite the absence of any final written agreement, sometime in

May 2019, Smith and his company began work at Crown Castle sites." App. 4a. Peters "decided to give PEM access to the sites" in May, and by July PBE "had already given Mr. Miller and PEM access to the sites." App. 14a. "While the work progressed, PEM and Peters Broadcast continued to negotiate a written agreement," exchanging competing proposals. App. 5a, 27a. Miller described the terms on which the work proceeded:

Well the deal was that, you know, I was going to initially fund these contracts, right, you know to get the work going, and I was going to get paid 90 percent of the invoice and Mike was going to get paid 10 percent of it. And so that was the initial conversation at least. We never got to an agreement.

App. 26a (quoting Miller Dep. 61). Peters likewise testified: "My agreement was that we received 10 percent and didn't have to do anything." PBE Dep. 48; *see* App. 31a.

Both sides performed. PEM borrowed \$149,999.99, obtained trucks, and paid Smith's crews about \$36,000 between May and July. App. 4a. Miller testified that the crews completed one site per week. *Id.* PBE rented forklifts and dumpsters, paid for fuel, and supplied other site "expendables," PBE Dep.

48-49; paid workers' compensation for PEM's workers, *id.* at 70; and, as its bookkeeper attested, "had to pay the taxes, insurance as well as project expenses for Crown Castle work in the Ft. Wayne Market," ECF 142-4. Miller testified that the crew members were not W-2 employees: "No, they're 1099s. I don't do anything with W-2s." ECF 142-3 at 14 (quoting Miller Dep.).

In August, Peters wrote Miller that crew members had "not been compensated fully for the work they have performed that you agreed to be responsible for," and that "[n]ot having the signed agreements in place puts PBE in potential Tax Jeopardy, Insurance audits." R.126 at *207; *see* App. 5a-6a. He gave notice that PBE would pay the crews directly and "deduct all payments from the monies due your company," and PBE then paid crew members. R.126 at *207; App. 5a-6a. Crown Castle later explained that it had communicated with Miller because it understood him to be "a PBE Employee." ECF 142-7. And Miller told a Texas investigator that "[t]he arrangements in the agreement" were that "Peters gets 10% as the contractor for Crown Castle and Miller gets 90%." ECF 95-5 at 40-41. Crown Castle paid PBE about \$118,000 "for the work that it and PEM completed." App. 16a.

The relationship broke down over payment and PEM's failure to sign a compliant subcontract. On July 12, 2019, PBE sent PEM a check for \$46,365.50 with instructions not to deposit it until Crown Castle paid; when PEM deposited it in September, PBE charged it back. App. 5a-6a. PBE paid PEM \$6,000 in August, which PEM kept. App. 6a. In August, Miller contacted Crown Castle directly about payment. *Id.* Crown Castle terminated its agreement with PBE in late 2019, citing poor work at the sites. App. 7a.

C. The district court grants summary judgment.

PBE sued PEM and PEM's insurers in the Northern District of Indiana. It alleged that PEM "breached the parties' agreement by failing to provide construction services as orally agreed upon," App. 30a (quoting Am. Compl. 65), and asserted claims for fraud, fraudulent inducement, unjust enrichment, fraudulent and negligent misrepresentation, and tortious interference, together with a claim for a declaration of coverage against the insurers. App. 7a. The district court had jurisdiction under 28 U.S.C. § 1332. App. 2a n.1. PBE demanded a jury trial.

In opposing PEM's motion for summary judgment, PBE contended that "[i]n May/June 2019 PBE and the Miller Defendants, via Miller, orally

agreed to a temporary or interim agreement for cell tower funding and construction services by PEM pending execution of a formal subcontract by PEM in accordance with the Crown Agreement." App. 24a-25a (quoting ECF 140 at 14).

The district court granted summary judgment on every count. On the contract claim it relied on Peters's testimony that "there was no agreement at that time. It was a proposal," and Miller's that "we never got to an agreement." App. 31a. The court recognized that the parties "did not want to risk PBE's contract with Crown by not moving the Crown Project along," and it assumed that "the emails, communications, and other actions showed the parties agreed to something," but concluded that "the record does not tell the Court what." App. 32a. It acknowledged that, "[r]egardless of whether the parties saw eye to eye on the existence of an interim agreement, it is clear in the record that work began on the Crown Project and both PBE and the Miller Defendants were involved." App. 26a. It discounted the declaration of PBE's bookkeeper because she had not demonstrated "any basis of knowledge" for her statement that "a legally enforceable contract existed." App. 33a n.8. Although the court noted that the MSA "specified requirements for the engagement of" subcontractors, App. 23a, it did not consider what

those requirements implied about the footing on which PEM's crews worked.

D. The court of appeals affirms.

PBE argued on appeal that disputed facts precluded summary judgment on formation and that the parties' conduct established an interim implied agreement. C.A. Br. 26-31; C.A. Reply Br. 10-16. Its brief explained that PBE "had maintained full control over all site construction because Miller had never entered into an acceptable subcontractor relationship with PBE." C.A. Br. 19. At argument, counsel explained:

The only reason Miller was able to obtain access to the sites to bring people to work on the sites is because they were there under the authority of Peters Broadcasting. Had they been a subcontractor, they would have had independent authority to be at these sites. They never became a subcontractor. So the only reason they could go to these sites was because they were there as independent contractors under the control and active management and supervision of Mr. Peters.

Oral Arg. Tr. 8. Asked whether the arrangement was "an employer-employee agreement," counsel answered that this was "eventually what occurred," *id.* at 5, and that the workers "would have been 1099 employees," *id.* at 6.

The court of appeals affirmed. It stated that "[w]hether a set of facts establishes the existence of a contract is a question of law," App. 10a (citing *Kelly v. Levandoski*, 825 N.E.2d 850, 857 (Ind. Ct. App. 2005)), and that "[t]here is no evidence supporting Peters Broadcast's assertion that a contract existed," *id.* It recognized that preliminary agreements "can be enforceable" if the parties agree to all essential terms, App. 11a, and acknowledged that "[b]oth Mr. Miller and Mr. Peters testified that PEM would receive ninety percent of the value of each purchase order completed by PEM, while Peters Broadcast would receive ten percent," but said "that appears to be where common understanding ends," *id.* It reasoned that "[t]he conduct of the parties adds no clarity" because both PEM and PBE had paid crews and supplied equipment; that Miller believed he could accept or refuse each purchase order while Peters believed PEM had agreed to complete them all; that PBE had not explained Smith's role; and that, "[t]o add further confusion," counsel had "presented an entirely different theory of the

preliminary agreement: that it was an 'employer-employee' relationship." App. 11a-12a. It concluded that "no reasonable jury could find that PEM and Peters Broadcast had a preliminary agreement containing all essential terms." App. 12a. Although the opinion noted that the MSA "required that the subcontractors be approved by Crown Castle before work began," App. 2a, its analysis did not consider on what footing PEM's unapproved crews worked on Crown Castle's sites. The court affirmed judgment on PBE's other claims against PEM on other grounds, App. 12a-19a, and on the coverage claim "[b]ecause there are no claims against PEM and Mr. Miller for which the insurers could owe coverage," App. 19a.

PBE sought rehearing, explaining that whether PEM's workers were characterized as employees or independent contractors, they could be on Crown Castle's sites only through PBE and under its control, so "the status of Miller workers is a material issue of fact that should have been permitted to go to a jury." Pet. for Reh'g 7, 10-13. The court denied rehearing; no judge requested a vote on rehearing en banc. App. 20a.

REASONS FOR GRANTING THE PETITION

Review is warranted for two independent reasons. First, the decision below conflicts with decisions of the First, Fourth, Fifth, Sixth, and Eighth Circuits on an important question of federal procedure: whether a federal court may resolve conflicting evidence of contractual assent on summary judgment because state law calls contract formation "a question of law." Sup. Ct. R. 10(a). Second, the decision conflicts with this Court's summary-judgment precedents, most directly *Tolan*, by resolving competing reasonable inferences against the nonmovant. Sup. Ct. R. 10(a), (c). Either reason justifies review. Together they make this case a strong candidate for plenary review or, at a minimum, summary vacatur.

I. The decision below conflicts with decisions of the First, Fourth, Fifth, Sixth, and Eighth Circuits.

Each of the decisions discussed below applies the law of a different State, and none involves facts identical to these. What they share is a federal procedural approach to a recurring question: whether a federal court may resolve, on summary judgment, conflicting evidence about whether parties

manifested assent through their words and conduct. Those courts hold that, unless the evidence admits of only one reasonable conclusion, the question belongs to the factfinder, and they reverse or vacate summary judgments that resolve it. The Seventh Circuit, relying on a state-law description of formation as "a question of law," resolved the question itself.

A. *Conflict with the First Circuit.*

In *General GMC, Inc. v. Volvo White Truck Corp.*, 918 F.2d 306 (1st Cir. 1990), the parties kept doing business after their written franchise agreement expired. The district court granted summary judgment on the dealer's contract claim, reasoning in part that no contract existed. The First Circuit reversed: "The district court erred in dismissing this claim based on the alleged nonexistence of a contract without first exploring the possibility of an implied contract under applicable law. There is sufficient evidence on the record to show that an implied contract may have been developed through the parties' course of dealing." *Id.* at 309. The First Circuit has explained that determining mutual assent "may involve factual questions: What did the parties say (or do) to manifest their intent?," and that "[a]nswering these questions is the province of the factfinder and not the

court." *Bourque v. FDIC*, 42 F.3d 704, 708 (1st Cir. 1994). The court decides the question only when the parties' words and actions are "so clear themselves that reasonable people could not differ over their meaning." *Id.* (internal quotation marks omitted). *Bourque* affirmed summary judgment under that exception because the only evidence of assent was a letter whose "only reasonable interpretation" made any deal subject to further approval. *Id.* at 711-12.

The decision below conflicts with that approach. Under *General GMC*, a course of dealing like the one here is evidence from which an implied contract may be found; under *Bourque*, the court may resolve the question only if the parties' conduct admits of a single reasonable reading. This record does not: it consists not of one unambiguous writing, as in *Bourque*, but of weeks of conduct from which competing inferences can be drawn. The Seventh Circuit nonetheless held that "[t]here is no evidence supporting Peters Broadcast's assertion that a contract existed." App. 10a.

B. Conflict with the Fourth Circuit.

The Fourth Circuit holds that "disputes about whether a contract has or has not been formed as the result of words and conduct over a period of time are quintessentially disputes about 'states of mind,'" which "present interpretive issues traditionally understood to be for the trier of fact." *Charbonnages*, 597 F.2d at 414-15. "Ordinarily in such cases, the issue whether there has at any time been the requisite manifestation of mutual assent to a bargained exchange will be one of fact in genuine dispute so as to preclude summary judgment." *Id.* at 415. Summary judgment is inappropriate, the court explained, even "where there is no dispute as to the evidentiary facts but only as to the conclusions to be drawn therefrom." *Id.* at 414 (quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951)). Applying West Virginia law, the court reversed summary judgment. The Fourth Circuit continues to apply that rule. *East Coast Storage Equip. Co. v. ZF Transmissions Gray Court LLC*, No. 24-1248 (4th Cir. Dec. 30, 2025) (unpublished) (applying South Carolina law, quoting *Charbonnages*, and vacating summary judgment).

The decision below cannot be reconciled with that rule. PBE's claim is precisely a dispute about

"whether a contract has or has not been formed as the result of words and conduct over a period of time": weeks of performance on Crown Castle's sites under the 90/10 split both principals described. The Seventh Circuit drew the conclusions from that conduct itself, holding that "[t]he conduct of the parties adds no clarity." App. 11a. In the Fourth Circuit, those conclusions would have been for a jury.

C. Conflict with the Fifth Circuit.

The Fifth Circuit holds that, in diversity cases, "although the substantive issues are governed by state law pursuant to *Erie*, federal law governs the allocation of issues raised between judge and jury." *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1125 (5th Cir. 1978). Applying that rule in a Louisiana mineral-lease dispute, the court reversed a summary judgment because the controlling issue was one for the jury. *Id.* at 1121, 1128.

The Fifth Circuit applies the same approach to formation by conduct. In *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058 (5th Cir. 1993), applying Louisiana law, it reversed summary judgment on a claim arising from a preliminary letter of intent, holding that whether the parties were bound before

"a later, more comprehensive document" was executed "depends upon the intentions of the parties," and that "[t]he parties' intent is a question of fact." *Id.* at 1065. Looking to the parties' later dealings, the court found that "Sears' actions subsequent to the letter of intent indicate that it considered itself bound," *id.*, and concluded: "We are not prepared to deny the jury that opportunity." *Id.* at 1067. And in *APS Capital Corp. v. Mesa Air Group, Inc.*, 580 F.3d 265 (5th Cir. 2009), applying Texas law, the court distinguished "the legal question of indefiniteness" from "the fact question of intention," *id.* at 271; held that because the parties' intent was ambiguous, the case "was not properly resolved at summary judgment," *id.* at 272; and explained that "[i]f a fact-finder examining the full course of conduct and all the relevant extrinsic evidence finds an intent to be bound, then this contract should not fail for indefiniteness," *id.* at 274. APS Capital vacated a summary judgment that had enforced the contract. It thus left indefiniteness to the court but kept the antecedent question of intent, whichever way it cut, for the factfinder.

The Seventh Circuit did the opposite on each point. It took its allocation rule from Indiana law—"w]hether a set of facts establishes the existence

of a contract is a question of law," App. 10a (citing *Kelly*, 825 N.E.2d at 857)-and used that formulation to decide a contested factual issue itself, discounting the parties' later dealings as adding "no clarity." App. 11a. And it merged the two inquiries *APS Capital* keeps separate, treating the principals' disagreement about whether PEM had to accept future purchase orders-a question bearing on intent and scope-as proof that essential terms were legally missing. App. 11a-12a. In the Fifth Circuit, neither a state-law label nor a dispute about one term could have displaced the factfinder's determination of intent.

D. Conflict with the Sixth Circuit.

The Sixth Circuit holds that "the question whether the parties intended a contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve." *Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584, 588 (6th Cir. 1976). Applying Ohio law, it reversed a summary judgment because the district court "erred in determining that no contract existed as a matter of law." *Id.* at 590.

That is the error PBE asks this Court to correct. This is not one of "the clearest cases." Both

principals described the same 90/10 compensation term, App. 11a; work on Crown Castle's sites began and continued for weeks without a written agreement, App. 4a-5a; and the district court assumed that the parties' "emails, communications, and other actions showed the parties agreed to something," App. 32a. Under *Arnold Palmer*, the parties' intent to contract would have been tried.

E. Conflict with the Eighth Circuit.

The Eighth Circuit holds that, "[o]rdinarily, the existence of a contract is a question of fact to be determined by the jury." *Watkins Inc. v. Chilkoot Distrib., Inc.*, 655 F.3d 802, 805 (8th Cir. 2011). Applying Minnesota law, it reversed summary judgment because "reasonable minds could differ as to whether the parties intended to enter a new agreement." *Id.* It has likewise affirmed a jury's finding of an oral contract, holding that whether a party "ever assented" to a competing written agreement was "an underlying factual question" for the jury because "[t]his question of contract formation precedes any question about the legal effect of the contract's terms." *Grandoe Corp. v. Gander Mountain Co.*, 761 F.3d 876, 882, 885 (8th Cir. 2014).

The Seventh Circuit took the opposite course. It treated the existence of a contract as a question of law and held that "no reasonable jury could find" an agreement, App. 12a, even though both principals described the same 90/10 compensation term, App. 11a, and the parties performed under it for weeks. In the Eighth Circuit, that evidence would have created a jury question.

F. The decision below departs from the Seventh Circuit's own precedent.

The decision below also departs from the Seventh Circuit's own precedent. That court has held that in diversity cases it evaluates the evidence under "the federal reasonable-person standard across the board," at every stage from pretrial motions through appeal. *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994). And applying Illinois law, it has held that when the parties' preliminary offers "appear to include all terms essential to the deal and manifest the parties' mutual intent to be bound by those terms, or at the least are ambiguous in that respect, then whether or not a binding agreement exists is a question that must be resolved at trial." *Ocean Atlantic Dev. Corp. v. Aurora Christian Schs., Inc.*, 322 F.3d 983, 996 (7th Cir.

2003). The panel applied neither principle. Although it recited that "no reasonable jury could find" a preliminary agreement, App. 12a, it began from the premise that formation is "a question of law," App. 10a, and then decided for itself what the parties' conduct meant, App. 11a. Reciting the standard while drawing the inferences against the nonmovant is the error *Tolan* corrected. 572 U.S. at 657-60. The court of appeals declined to rehear the case en banc, App. 20a, and its published decision will now guide district courts throughout the circuit.

***G. T h e c o n f l i c t i s
outcome-determinative.***

The conflict can be summarized as follows:

Circuit	Treatment of disputed assent shown by words and conduct
First	A course of dealing may establish an implied contract; summary judgment reversed. What the parties said or did to manifest intent is for the factfinder unless reasonable people could not differ. <i>General GMC; Bourque</i> .

Fourth	Formation through words and conduct over time is ordinarily a fact question that precludes summary judgment, even when only the conclusions to be drawn are disputed. <i>Charbonnages; East Coast Storage</i> .
Fifth	Federal law governs the judge-jury allocation; intent to be bound is a fact question distinct from legal indefiniteness. <i>Nunez; Newport; APS Capital</i> .
Sixth	Intent to contract is "a factual one, not a legal one," except in the clearest cases. <i>Arnold Palmer</i> .
Eighth	Existence of a contract is "[o]rdinarily" a jury question; assent precedes legal effect. <i>Watkins; Grandoe</i> .
Seventh (below)	Existence of a contract is "a question of law"; the court resolved conflicting evidence of conduct itself. App. 10a-12a.

The difference decides cases. Under *General GMC*, *Charbonnages*, *Newport*, *Arnold Palmer*, or *Watkins*, a record in which one party's crews

performed for weeks on sites they could enter only through the other, under a compensation split both principals described, would go to a jury. In the Seventh Circuit it ends on summary judgment. Whether a diversity litigant receives a jury trial on contract formation should not depend on the circuit in which the case is filed.

H. The conflict concerns a federal question.

Respondents will say that these decisions apply different States' laws. That is no answer. In a diversity case, the allocation of decision-making between judge and jury is governed by federal law. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-38 (1958) ("strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts"); *Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam) (right to jury trial "is to be determined as a matter of federal law in diversity as well as other actions"); *Herron v. S. Pac. Co.*, 283 U.S. 91, 94-95 (1931). This Court has refused to let a state practice assigning a factual question to the judge displace the jury in federal court. *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 278-79 (1959). And it has reaffirmed that an "essential

characteristic" of the federal system is that it "assigns the decisions of disputed questions of fact to the jury." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (quoting *Byrd*, 356 U.S. at 537). A state-law label therefore cannot settle whether a federal court may resolve conflicting evidence of assent at summary judgment. PBE does not suggest that summary judgment itself offends the Seventh Amendment. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902)). The question is narrower: whether a state-law label may enlarge the class of disputed issues a federal court resolves on summary judgment.

Nor does Indiana law support the panel's approach. Indiana distinguishes between undisputed facts and conflicting evidence: "While the question of whether a certain or undisputed state of facts establishes a contract is one of law for the court, where the existence and not the validity or construction of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether a contract in fact exists." *Twin Lakes*, 568 N.E.2d at 1079. The Indiana Supreme Court has held that "the intention of the parties to

include a particular term in a contract is usually a factual question determined from all of the circumstances," so that whether there was "mutual assent to the limitation of liability" was "a question of fact precluding summary judgment." *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1087-88 (Ind. 1993). Indiana courts reverse summary judgment when "the acts and representations of the parties give rise to conflicting inferences" about the terms of an implied-in-fact agreement, because "[t]hese conflicting inferences are properly resolved by a trier of fact." *McCart v. Chief Exec. Officer in Charge, Indep. Fed. Credit Union*, 652 N.E.2d 80, 86 (Ind. Ct. App. 1995). *Kelly*, the case the panel cited, held that the evidence there created "genuine issues of material fact about whether an oral contract was created," so that summary judgment was properly denied and the case went to a jury. 825 N.E.2d at 855-58. And the Indiana Court of Appeals resolves formation "as a matter of law" when "the relevant facts as to the existence of a valid oral agreement were undisputed." *Simon v. William R. Simon Farms, Inc.*, 245 N.E.3d 1025, 1031 (Ind. Ct. App. 2024). The panel invoked *Kelly*'s statement of the rule, App. 10a, but not the factual predicate that *Twin Lakes* and *Simon* make explicit. A federal court that drops that

predicate is not applying state substantive law; it is reallocating a jury question to itself.

This Court has long recognized the importance of the federal-state allocation in diversity cases. It once reserved the related question whether a state or federal test of evidentiary sufficiency governs, noting that "the lower courts are not in agreement." *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 444-45 (1959). A pending petition presents that question under Rule 50, together with whether a court may decide sufficiency by reweighing or selectively considering the evidence. *Aaron v. Nat'l R.R. Passenger Corp.*, No. 26-32 (filed July 2, 2026). This case presents the Rule 56 counterpart: whether a State's characterization of a fact-bound issue as one of "law" may displace the federal jury on summary judgment. Because the summary-judgment inquiry "mirrors" the directed-verdict inquiry, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986), a decision in *Aaron* could bear on the question presented here.

II. The decision below conflicts with this Court's summary-judgment precedents.

A. *Rule 56 forbids a court to choose among reasonable inferences.*

Summary judgment is proper only where "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" *Id.* A movant may carry its burden by showing that the nonmovant lacks evidence on an element it must prove, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986), and PBE bears the burden of proving a contract. But once the nonmovant identifies evidence from which a reasonable jury could find that element, the court may not weigh it against the movant's. The court reviews the record as a whole, but it "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000) (Rule 50 standard, which "mirrors" Rule 56's, *id.* at 150).

In *Tolan*, this Court summarily vacated the judgment of a court of appeals that, while reciting these standards, credited the movant's version of the central facts. The Court reiterated that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," 572 U.S. at 656-57, and intervened because the decision "reflects a clear misapprehension of summary judgment standards in light of our precedents," *id.* at 659. The court of appeals had "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id.* at 660. The same thing happened here.

B. The record supports a reasonable inference that the parties agreed by conduct to an interim arrangement.

Under Indiana law, "[a]n implied contract, that is, one wherein an agreement is arrived at by the acts and conduct of the parties, is equally as binding as an express contract." *McCart*, 652 N.E.2d at 85 (quoting

Retter v. Retter, 40 N.E.2d 385, 386 (Ind. App. 1942)). Assent may be manifested "wholly or partly" by acts, Restatement (Second) of Contracts § 19(1) (1981), "even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined," *id.* § 22(2). "Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed." *Id.* § 34(2). Indiana requires only "reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required." *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 813 (Ind. 2009). And Indiana courts find implied contracts where a party never signed the written agreement but accepted the other's offer by its conduct. *Ahuja v. Lynco Ltd. Med. Research*, 675 N.E.2d 704, 709 (Ind. Ct. App. 1996); *see also Dallis v. Don Cunningham & Assocs.*, 11 F.3d 713, 716 (7th Cir. 1993) (affirming jury finding of implied-in-fact contract based on course of dealing).

PBE does not contend that the MSA itself is the contract between PBE and PEM, or that the MSA alone proves PEM's assent. The MSA is circumstantial evidence of the footing on which PEM's crews worked. Because PEM was never

approved as a subcontractor, MSA § 7.A; App. 2a, 25a, the undisputed fact that PBE gave the crews access to Crown Castle's sites, App. 14a, supports an inference that they worked as personnel PBE furnished and answered for, under an arrangement between PBE and PEM. PEM knew that a compliant written subcontract was still required: the parties exchanged proposals for one, App. 27a, and PBE warned Miller that his delay in signing an acceptable subcontract was jeopardizing the work and PBE's relationship with Crown Castle, App. 28a. PEM may argue that its crews simply worked in disregard of the MSA. That competing inference is for the jury. Viewed with the rest of the record, PBE's inference would permit a jury to find each term the panel found missing:

Term	Evidence a jury could credit
Parties and roles	PEM would fund the work and supply crews and equipment; PBE, the MSA holder, would provide site access and answer to Crown Castle; Smith, PBE's 1099 contractor, would run the crews. App. 3a-4a, 14a, 23a, 26a; PBE Dep. 68-69.

Work	The Crown Castle purchase orders the crews actually performed, about one site per week by Miller's account. App. 4a, 11a.
Price	90 percent of Crown Castle's payments to PEM, 10 percent to PBE, the term both principals described. App. 11a, 26a; PBE Dep. 48.
Control and status	Crews had site access only through PBE, which answered to Crown Castle for everyone it furnished; PBE paid workers' compensation, taxes, and insurance; Crown Castle understood Miller to be "a PBE Employee." MSA §§ 1, 7.A, 24.A; PBE Dep. 47, 68-70; ECF 142-4; ECF 142-7.

Funding and crew pay	PEM would "initially fund" the work; it paid the crews about \$36,000 and leased trucks. PBE covered site expenses and, when PEM fell short, paid crew members, giving notice that it would "deduct all payments from the monies due" PEM. App. 4a-6a, 26a; R.126 at *207.
Duration	Interim: the work proceeded while the parties negotiated a written subcontract. App. 5a, 27a; PBE Dep. 80-81.

That arrangement is definite enough to identify a breach and damages. PBE alleged that PEM breached "the parties' agreement by failing to provide construction services as orally agreed upon." App. 30a (quoting Am. Compl. 65). The evidence of breach concerns the work actually undertaken: Miller agreed that he would "initially fund" the work, App. 26a, yet crew members had not been "compensated fully for the work they have performed that you

agreed to be responsible for," and PBE paid them and covered equipment, fuel, and other site expenses itself. R.126 at *207; App. 5a-6a; PBE Dep. 48-49. Those obligations arise from the sites the crews actually worked, not from any promise about future purchase orders. Whether PEM also undertook to complete future orders-the point on which the principals disagreed, App. 11a-may bear on the scope of recoverable damages, but it does not defeat formation of an agreement covering the work both sides performed. Neither court below held that PBE lacked evidence of damages.

PEM's own statements reinforce the inference. Miller testified that "the deal was" that he would fund the work and receive 90 percent, App. 26a, and described the crews as "1099s," ECF 142-3 at 14. He told a Texas investigator that "[t]he arrangements in the agreement" were that "Peters gets 10% as the contractor for Crown Castle and Miller gets 90%." ECF 95-5 at 40-41. Miller's statements are admissible against PEM as those of a party opponent, Fed. R. Evid. 801(d)(2)(A), and what he told the investigator can be presented at trial through Miller himself or the investigator, see Fed. R. Civ. P. 56(c)(2). A jury could find that these statements describe crews working on PBE's Crown Castle

project under an agreed arrangement, not on PEM's own account.

The courts below relied on the principals' statements that there was no "agreement." App. 4a, 10a, 31a-33a. Those statements are ambiguous in context. Peters's testimony that "there was no agreement at that time" described Smith's May 5 email, which he called "the first draft in discussions" and "a proposal." App. 4a. His statement that "[w]e had no contract at that point" answered a question about PEM investing money *"without a signed written agreement."* PBE Dep. 37 (emphasis added); App. 25a. His statement that "[w]ithout his signed agreement, I could not use him as a subcontractor" also addressed the written subcontract. PBE Dep. 80-81; App. 25a-26a. And Miller's "we never got to an agreement" came in the same breath as his description of "the deal." App. 26a. Whether "agreement" meant the contemplated written subcontract or any interim arrangement at all was itself a factual question. On summary judgment it had to be resolved in PBE's favor. *Anderson*, 477 U.S. at 255.

C. The court of appeals resolved the competing inferences itself.

The panel gave four reasons for holding that no reasonable jury could find a preliminary agreement containing all essential terms. App. 11a-12a. Each reflects a choice among competing inferences, and none asks on what footing crews that Crown Castle had never approved, App. 2a, were working on its sites.

"The conduct of the parties adds no clarity." The panel reasoned that PBE's paying crews and supplying equipment was inconsistent with PEM's responsibility for those items. App. 11a. That both parties contributed resources does not make PBE's inference unreasonable; it shows that the evidence supports competing inferences. A jury could find that PBE's paying workers' compensation, bearing taxes and insurance, and supplying equipment is what one would expect if the crews were working through PBE under the MSA, and that PBE's paying crew members when PEM fell short-while giving notice that it would deduct those payments from "the monies due" PEM-reflects PEM's breach rather than the absence of any agreement. R.126 at *207. When the evidence supports

competing reasonable inferences, *Anderson* and *Tolan* forbid the court to choose between them.

The scope of PEM's obligation. The panel noted that Miller believed he could accept or refuse each purchase order, while Peters believed PEM had agreed to complete them all. App. 11a. That disagreement concerns future work. It does not touch the terms governing the sites the crews actually worked, terms the parties' performance could fix, see Restatement (Second) of Contracts § 34(2), and PBE's claim that PEM failed to fund the crews and the work on those sites arises from that performance. If PBE also seeks damages that depend on future purchase orders, the scope of PEM's commitment will matter to those damages; it does not defeat formation of an agreement covering the work both sides performed. A conflict between the principals' accounts of one term is a credibility question for the jury, not a ground for holding that no contract existed at all.

Smith's role. The panel faulted PBE for not explaining the role of Smith and his company. App. 11a. The record explains it. As the district court recounted, Smith "was tapped by PBE as an independent contractor to assemble field crews to do the work for the Crown Agreement," and his crews "began work on the Crown Project for PBE." App.

23a. Peters testified that Smith was then "a 1099 employee" of PBE, PBE Dep. 47; App. 25a, and PBE's bookkeeper attested that PBE paid Smith for labor and had to issue him a Form 1099, ECF 142-4. That evidence fits PBE's account: the field work was organized through PBE, with PEM funding the crews and supplying equipment.

Counsel's answer at argument. The panel treated counsel's answer to its "employer-employee" question as "an entirely different theory." App. 12a. Counsel did first say that the Miller group came on "basically, as his employees under his active supervision." Oral Arg. Tr. 5. But counsel went on to explain that the workers "would have been 1099 employees," *id.* at 6, on site "as independent contractors under the control and active management and supervision of Mr. Peters," *id.* at 8-as Miller himself described them, ECF 142-3 at 14. The terminology varied; the theory did not. Whatever the label, the crews were on Crown Castle's sites through PBE and under its control, as PBE had argued in its brief. C.A. Br. 19. An advocate's vocabulary at argument is not evidence, and that the workers' status could be described in more than one way shows that it was a disputed question of fact.

The panel's footnote. The panel observed that "[t]he record is unclear about what was happening at the work sites," noting the absence of evidence about how many sites were completed and how many crew members went unpaid. App. 6a n.12. Those gaps bear on the amount of damages, not on whether the parties agreed. A gap in the evidence, standing alone, would not create a triable issue, and PBE does not rely on one. It relies on affirmative evidence-site access, the compensation term both principals described, PEM's financing, PBE's payments, and weeks of performance-from which competing inferences can be drawn. On such a record the nonmovant is entitled to the reasonable inferences. *Tolan*, 572 U.S. at 657, 660.

The district court made the same choice. It recited that it "may not . . . choose between competing reasonable inferences." App. 29a (internal quotation marks and citation omitted). It then resolved against PBE the uncertainty it had itself identified. App. 32a. And it discounted the bookkeeper's declaration for lack of "any basis of knowledge" about whether "a legally enforceable contract existed," App. 33a n.8, without addressing the facts within her own knowledge: that PBE paid Smith for labor and had to issue him a Form 1099,

and that PBE "had to pay the taxes, insurance as well as project expenses for Crown Castle work." ECF 142-4. Those facts were part of PBE's summary-judgment submission, and they bear directly on the footing on which the crews worked.

III. The question is important and recurring.

Commercial parties routinely begin performance before the paperwork is complete, especially in construction and infrastructure work, where schedules are tight and prime contracts, like the MSA here, strictly limit who may work on a site and on what terms. When performance proceeds under such restrictions, the restrictions are significant evidence of the footing on which the parties dealt. A rule that such performance cannot even raise a jury question whenever the principals testify that they never finalized a written agreement would take from juries a class of disputes that has always been theirs. And it would reward the party that accepts the benefits of access and performance and then disclaims the arrangement that made them possible.

The problem reaches beyond contract law. Diversity litigants in different circuits now receive different answers to whether a state-law label can

remove a disputed fact question from the jury on summary judgment. That disparity in the administration of the Seventh Amendment is what *Byrd* and *Simler* sought to prevent.

PBE recognizes that this Court rarely grants review to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The error here is methodological: the court of appeals let a state-law label determine who decides conflicting evidence of assent, and it treated competing inferences from the parties' conduct as a failure of proof. That approach will govern diversity contract cases throughout the Seventh Circuit that turn on conduct rather than a signed writing. As in *Tolan*, the Court need not announce new law to correct it; it need only reaffirm that the settled standard means what it says. *See* 572 U.S. at 659-60.

IV. This case is a suitable vehicle.

The question is cleanly presented. PBE pressed it at every stage: in its summary-judgment opposition and statement of disputed facts, ECF 140, 141; App. 24a-25a; on appeal, C.A. Br. 19, 26-31; C.A. Reply Br. 2, 8-16; at argument, Oral Arg. Tr. 5-11; and on rehearing, Pet. for Reh'g 2-3, 7, 10-13. The key facts-the MSA's approval and control provisions,

PBE's grant of access, the 90/10 terms, and the crews' sustained performance-are undisputed or were found by the courts below.

PBE demanded a jury trial and has sought a jury determination of formation throughout. In the court of appeals it argued that PEM's position "forecloses a jury's ability to credit" Peters's testimony and asked that the case be "remanded back for trial by jury," C.A. Reply Br. 2; and invoked the rule that the drawing of inferences is among the "jury functions, not those of a judge," *id.* at 8-9; *see id.* at 10. On rehearing it argued that "the status of Miller workers is a material issue of fact that should have been permitted to go to a jury." Pet. for Reh'g 7; *see id.* at 2-3, 21, 23. The court of appeals, for its part, passed upon the allocation issue when it held that "[w]hether a set of facts establishes the existence of a contract is a question of law." App. 10a. This Court's rule against reviewing questions not raised below "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992). And having properly presented its claim to a jury determination of formation, PBE "can make any argument in support of that claim; parties are not limited to the precise

arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

The Court need not decide whether PBE and PEM in fact had a contract. It need decide only whether the evidence was sufficient to create a jury question, and whether a state-law label could take that question from the jury. Reversal would not require resolving any disputed fact or any open question of Indiana law; Indiana law itself sends conflicting evidence of formation to the factfinder. And the answer matters to the judgment: if the formation question goes to a jury, PBE's contract claim must be tried. The court of appeals rejected the fraudulent-inducement claim only because there was no contract, App. 12a n.16, and affirmed judgment for PEM's insurers only because no claim against PEM survived, App. 19a, so those claims would return for consideration on remand as well.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should summarily vacate the judgment of the court of appeals insofar as it affirmed summary judgment on PBE's contract claim and the claims that depend on it, and remand for further proceedings under the proper summary-judgment standard, as it did in *Tolan*. If the Court grants review in *Aaron v. National Railroad Passenger Corp.*, No. 26-32, it should hold this petition pending its decision in that case and then dispose of it accordingly.

Respectfully submitted,

s/Leo P. Ross

Leo P. Ross

ATTORNEY AT LAW

915 S. High St

Columbus, Ohio 43206

leoross1977@gmail.com

614-316-9144

Counsel for Petitioner

October 2026

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8,565 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2026.

s/Leo P. Ross

Leo P. Ross

ATTORNEY AT LAW

915 S. High St

Columbus, Ohio 43206

leoross1977@gmail.com

614-316-9144

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILINGS:

Appendix A -

Opinion of the United States Court
of Appeals for the Seventh Circuit,
No. 25-1519 (June 17, 2026) . . . A1 - A21

Appendix B -

Order of the United States Court of
Appeals for the Seventh Circuit
Denying Rehearing and Rehearing
En Banc (July 16, 2026) B1

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FILINGS:

Appendix C -

Opinion and Order of the United
States District Court for the
Northern District of Indiana, No.
1:21-cv-219-HAB (Mar. 24, 2025)
(ECF 165) C1 - C35

Appendix D -

Judgment in a Civil Action, No.
1:21-cv-219 (N.D. Ind. Mar. 25, 2025)
(ECF 166) D1 - D2

Appendix E -

Excerpts of Crown Castle
Construction Services Master
Agreement (§§ 1, 7, 9, 17, 24, 32)
(ECF 95-1) E1 - E18

Appendix F -

Excerpts of Transcript of Oral
Argument, No. 25-1519 (7th Cir.
Apr. 9, 2026), pp. 3-13 F1 - F11



In the
United States Court of Appeals
For the Seventh Circuit

No. 25-1519

PETERS BROADCAST ENGINEERING, INC.,
Plaintiff-Appellant,

v.

PEM CONSULTING GROUP, LLC, et al.,
Defendants-Appellees.

Appeal from the United States District Court for
the
Northern District of Indiana, Fort Wayne Division.
No. 1:21-cv-00219 — Holly A. Brady, Chief Judge.

ARGUED APRIL 9, 2026 — DECIDED JUNE 17,
2026

Before EASTERBROOK, RIPPLE, and LEE,
Circuit Judges.

RIPPLE, Circuit Judge. This case arises out of a business relationship between Peters Broadcast Engineering, Inc. (“Peters Broadcast”), a telecommunications company, and PEM Consulting Group, LLC d/b/a Pyramid Consulting & Construction, LLC (“PEM”), a company that worked with Peters Broadcast. The district court granted summary judgment for the defendants on all claims.

For the reasons set forth in the following opinion, we affirm the judgment of the district court.¹

I

BACKGROUND

A. Facts

Peters Broadcast is a small telecommunications engineering company in Indiana. The company is owned and operated by Robert Peters. On May 21, 2019, Peters Broadcast signed a Construction Master Services Agreement with Crown Castle USA, Inc. (“Crown Castle”). This agreement contemplated that, from time to time, Crown Castle would issue purchase orders to Peters Broadcast for construction work on cell tower sites in Indiana. The agreement did not guarantee, however, that Peters Broadcast would receive any specific number of purchase orders. The agreement also permitted Peters Broadcast to engage subcontractors to complete the work but required that the subcontractors be approved by Crown Castle before work began.

¹The district court had subject matter jurisdiction under 28 U.S.C. § 1332. Peters Broadcast is an Indiana corporation with its principal place of business in Indiana. Defendant PEM is a New Jersey LLC and is composed of members who are citizens of New Jersey, Illinois, and Michigan. Defendant Philip Miller is a citizen of New Jersey. Defendant Atlantic Casualty Insurance Company is incorporated in North Carolina and has its principal place of business there as well. Defendant Chesapeake Employers’ Insurance Company is incorporated in Maryland with its principal place of business in Maryland. We have jurisdiction to review the district court’s grant of summary judgment under 28 U.S.C. § 1291.

In early May, before Mr. Peters signed the Crown Castle agreement, he began discussions with Chris Smith, a former employee of his, about taking on the work as a subcontractor. Smith in turn introduced Mr. Peters to defendant Philip Miller. Mr. Miller is the owner-operator of defendant PEM. Mr. Peters testified that he wanted to subcontract work to PEM because “[he] did not have the resources or the cash reserve to bring in four or five crews and maintain them; nor did [he] want to, frankly.”² It was his hope that PEM could provide those resources.

The first communication in the record between Mr. Peters, Mr. Miller, and Smith is an email dated May 5, 2019. In the email, Smith proposed an agreement between Smith’s company (Frequency 1), Peters Broadcast, and PEM for the completion of work under the Crown Castle Master Services Agreement. Under a section of the email titled “PBE-Pyramid Initial Contract Agreement,” Smith wrote:

This is a base line agreement to get things moving between us [sic] Look things over and lets [sic] discuss any changes needed so we can all be on the same page and progress moving forward as soon as possible.

²R.142-2 at 23:16–23.

I would like to propose the following construction agreement between all parties involved[.]³

The email went on to explain that Peters Broadcast was the “Customer Contract holder,” that Mr. Miller and PEM would provide field crews and equipment and complete all sites, and that Smith and Frequency 1 would oversee all field crews and site processes, scheduling, field construction management, and customer relations.⁴ Smith also proposed a base structure in which Peters Broadcast would retain ten percent of all purchase orders from Crown Castle. It did not specify how the remaining ninety percent would be split between Frequency 1 and PEM. Mr. Peters testified that this email was “the first draft in discussions” and that “there was no agreement at that time. It was a proposal.”⁵ Miller similarly testified that the email did not reflect a final agreement.

Despite the absence of any final written agreement, sometime in May 2019, Smith and his company began work at Crown Castle sites. PEM obtained a loan in the amount of \$149,999.99 and

³R.129-4 at *1.

⁴Id. Although Frequency 1 is a party to the alleged contract, neither Smith nor Frequency 1 is a party in this litigation. Smith did not sit for a deposition and did not submit an affidavit.

⁵R.142-2 at 29:24, 41:01–02.

used it to pay Smith and his crews.⁶ PEM obtained trucks for Smith and his crews, which were leased by a separate company, Knudson, L.P. Between May and July, PEM paid Smith and his crews approximately \$36,000 for their work.⁷

Mr. Miller testified that the crews completed one site per week. Mr. Peters testified that “right out of the gate,” Peters Broadcast also had to cover expenses, supply crews with equipment and vehicles, and locate warehouse space for the projects.⁸

While the work progressed, PEM and Peters Broadcast continued to negotiate a written agreement. Counsel for Peters Broadcast contacted PEM to negotiate the written agreement for the first time on July 12, 2019. On the same day, Peters Broadcast sent a check to PEM in the amount \$46,365.50—apparently the first payment to PEM—but instructed it not to deposit the funds because Peters Broadcast had not yet received payment from Crown Castle. Mr. Miller and Mr. Peters then met in Fort Wayne, Indiana, on July 17,

⁶Peters Broadcast disputes whether PEM used this money to pay Smith and his crews, but it pointed to no evidence supporting its contention. R.141 at ¶ 8.

⁷PEM asserts, and Peters Broadcast admits, that Peters Broadcast received \$118,000. Peters Broadcast disputed whether this evidence was material but did not otherwise dispute that it received those payments. Id. at ¶¶ 14, 16.

⁸R.142-2 at 49:14–20. However, Mr. Peters also testified that he did not know how much he spent and had not produced the entire record of the expenses. Id. at 49:03–09, 49:21–22.

2019. Although the contents of this discussion are disputed, both Mr. Miller and Mr. Peters testified that they discussed Mr. Miller's ability to provide funding and equipment to complete Crown Castle sites.⁹ Peters Broadcast asserts, and Mr. Peters testified, that Mr. Miller talked about "how successful he was, how much money he had, that this would be an easy project for him, and he had the wherewithal and the knowledge to do this and the people and the equipment."¹⁰ Mr. Miller did not tell Mr. Peters that he was acquiring a loan to fund the project or that the trucks he provided belonged to Knudson.

Work continued, but apparently not to Peters Broadcast's satisfaction. Mr. Peters sent an email to Mr. Miller in early August, telling him that Peters Broadcast was compensating crew members, a task that he believed was PEM's responsibility. He wrote that he had "now in good faith extended financially beyond [his] obligations for the proposed 10%."¹¹ He also warned that the lack of payments was putting the Crown Castle project "in serious jeopardy."¹² Mr.

⁹Mr. Miller testified that he told Mr. Peters he would bring "some crews and equipment ... [and] initial funding to get the crews going." R.126 at 25:13–15.

¹⁰ R.142-2 at 22:07–11.

¹¹ R.126 at *207.

¹² Id. The record is unclear about what was happening at the work sites. There is no evidence showing how many sites were completed or how quickly. There is no evidence showing how

Miller testified that he was confused by this communication, because he was under the impression that he would decide which sites to do on a site-by-site basis, and had no continuing obligation to

outfit all sites with crews and equipment.¹³ Shortly after this email exchange, Peters Broadcast made a \$6,000 payment to PEM. PEM did not request this payment but also does not maintain that it returned the payment. As far as we can discern from the record, the funds were retained by PEM and Mr. Miller.

Believing that Peters Broadcast was being paid by Crown Castle but failing to remit payment to PEM, Mr. Miller contacted Crown Castle in August to obtain payment directly. As far as we are aware, PEM did not obtain any direct payments from Crown Castle. On September 5, PEM deposited the \$46,365.50 previously given to it by Peters Broadcast, but Peters Broadcast charged the amount back on September 10. In October, Mr. Miller emailed a paralegal at Crown Castle, explaining the situation and asking for help obtaining payment. On an unspecified date after this, PEM left the project. Mr. Peters testified that he did not know whether the trucks supplied by PEM continued to be used after they left.

many crew members were uncompensated or for how long.

¹³ R.126 at 85:08–23, 86:03–19.

Crown Castle terminated its agreement with Peters Broadcast sometime in late 2019. Crown Castle cited poor work product at the cell tower sites as the reason for the termination.

B. Proceedings in the District Court

Peters Broadcast filed its complaint in 2021. It named PEM, Mr. Miller, Atlantic Casualty Insurance (“Atlantic”), and Chesapeake Employers’ Insurance Company (“Chesapeake”) as defendants. The operative amended complaint contains multiple claims against Mr. Miller and PEM: breach of contract (Count I), fraud (Count III), fraudulent inducement to contract (Count IV), unjust enrichment (Count V), fraudulent misrepresentation (Count VI), negligent misrepresentation (Count VII), and tortious interference with business relations (Count VIII). Count II sought a declaratory judgment that Atlantic and Chesapeake are obligated to provide coverage for PEM and Mr. Miller.

The district court granted summary judgment on all counts. It determined that there was no contract between Peters Broadcast and PEM or Mr. Miller, noting Mr. Peters’s repeated statements that no contract existed. It also examined the parties’ dealings, noting that even though Mr. Peters maintained that he understood PEM to be responsible for equipment, he had also rented and supplied equipment. The court decided that, at most, there was an unenforceable “agreement to agree later.”¹⁴ The court further concluded that there was nothing in the record from which the terms could be

¹⁴ R.165 at 12.

identified. This ruling resolved both the breach of contract claim and the fraudulent inducement claim.

As to the fraud claims in Counts III and VI, the district court found that the evidence could not support reliance because the fraudulent statements were allegedly made in July, well after Mr. Miller and PEM were actively engaged in the project. The court also concluded that any statements about the source of funds or trucks were not material, because there was no evidence that those facts would have changed Mr. Peters's decision to do business with Mr. Miller. Finally, the court decided that the alleged injury connected to the fraud claims was not sufficiently distinct from the injury alleged from the breach of contract claim.

The court dismissed the unjust enrichment claim because there was no evidence that PEM obtained a benefit from Peters Broadcast. It reasoned that the first payment of \$46,365.50 was charged back by Peters Broadcast, so no benefit was conferred on PEM. The court then noted that neither PEM nor Mr. Miller requested the second payment of \$6,000.

Turning to the tortious interference claim, the district court held that it failed because Peters Broadcast had not demonstrated that PEM committed an illegal act (here, fraud) either in representations made to Peters Broadcast or to Crown Castle. It decided, in the alternative, that PEM had no duty to avoid speaking to Crown Castle, and that its communications with Crown Castle were not malicious or exclusively for the purpose of harming Peters Broadcast. The court concluded that

there was no evidence that PEM's contact with Crown Castle had resulted in any damages.

Finally, the court rejected the negligent misrepresentation claim, ruling that it is unavailable in this context under Indiana law. Having dismissed all claims against PEM and Mr. Miller, the court entered summary judgment for Atlantic and Chesapeake sua sponte.

II DISCUSSION

We review an order granting summary judgment de novo. *Mesco Mfg., LLC v. Motorists Mut. Ins. Co.*, 145 F.4th 705, 708 (7th Cir. 2025). Summary judgment is proper where the evidence shows there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Atlanta Gas Light Co., v. Navigators Ins. Co.*, 164 F.4th 1038, 1048 (7th Cir. 2026). The party opposing summary judgment may not rest on the allegations or denials in its pleadings; it must present evidence of specific facts that are genuinely at issue. *Celotex Corp.*, 477 U.S. at 321 n.3; *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008). The parties agree that Indiana law applies to this case. Therefore, “our role is to apply Indiana law as we predict the Indiana Supreme Court would today.” *Atlanta Gas Light Co.*, 164 F.4th at 1044 (quoting *Mesco Mfg., LLC*, 145 F.4th at 708).

A

To establish a claim for breach of contract, the plaintiff must establish the existence of a contract, a breach of that contract, and damages as a result of

that breach. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 614 (Ind. Ct. App. 2000). Whether a set of facts establishes the existence of a contract is a question of law. *Kelly v. Levandoski*, 825 N.E.2d 850, 857 (Ind. Ct. App. 2005).

“The party urging the validity of a contract bears the onus of proving its existence.” *OVRs Acquisition Corp. v. Cmty. Health Servs., Inc.*, 657 N.E.2d 117, 125 (Ind. Ct. App. 1995) (quoting *Ochoa v. Ford*, 641 N.E.2d 1042, 1044 (Ind. Ct. App. 1994)). For there to be an oral contract, the parties must agree to all terms of the contract. *Kelly*, 825 N.E.2d at 857. “If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed.” *Lash v. Kreigh*, 202 N.E.3d 1098, 1105 (Ind. Ct. App. 2023) (quoting *Troutwine Ests. Dev. Co., LLC v. ComSub Design & Eng'g, Inc.*, 854 N.E.2d 890, 897 (Ind. Ct. App. 2006)); see also *Simon v. William R. Simon Farms, Inc.*, 245 N.E.3d 1025, 1031 (Ind. Ct. App. 2024) (finding no oral contract where plaintiff admitted in testimony that no agreement was reached).

Peters Broadcast submits that the district court ignored the parties' disagreement about the existence of a contract. It attempts to shift the evidentiary burden to PEM by turning to the “sham contract” doctrine, arguing that where there is prima facie evidence of a contract, the party seeking summary judgment must show that each party unequivocally disavowed the contract. In Peters Broadcast's view, because PEM did not present evidence of disavowal, it is entitled to remand. But

this argument fails because Peters Broadcast has not made a prima facie showing that a contract existed.

There is no evidence supporting Peters Broadcast's assertion that a contract existed. It is undisputed that the parties never reached a written agreement. The record contains no communication between the parties prior to the May 5 email containing a draft written agreement. Peters Broadcast submits that there was a preliminary oral agreement that bound the parties. But there is no evidence in the record explaining when that agreement was made or what terms it contained. Preliminary agreements, made with the intention that they will later be memorialized in writing, can be enforceable, but the parties must agree to all essential terms. *Wolvos v. Meyer*, 668 N.E.2d 671, 674–75 (Ind. 1996); see also *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 160 N.E.3d 1103, 1109 (Ind. Ct. App. 2020). “Essential terms” include “the terms and conditions of the promises made, including by whom and to whom.” *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 813 (Ind. 2009). The absence of essential terms creates a lack of certainty; this undermines both a finding of mutual assent and the court's ability to identify and remedy a breach. See 1 CORBIN ON CONTRACTS § 2.9 (2026).

Both Mr. Miller and Mr. Peters testified that PEM would receive ninety percent of the value of each purchase order completed by PEM, while Peters Broadcast would receive ten percent. But that appears to be where common understanding ends. Mr. Miller testified that he had the option to accept

or refuse each purchase order at his discretion. Mr. Peters believed that Mr. Miller and PEM had agreed to complete all purchase orders from Crown Castle. The conduct of the parties adds no clarity; while PEM completed the work for some purchase orders, paid crew members, and provided some equipment, including trucks, Peters Broadcast also supplied equipment and paid crews. Additionally, Peters Broadcast has not explained what role, if any, Chris Smith and his company, Frequency 1, had in the alleged preliminary agreement. The May 5 email depicts Smith and Frequency 1 as responsible for all crews and construction management. To add further confusion, at oral argument, counsel for Peters Broadcast presented an entirely different theory of the preliminary agreement: that it was an “employer-employee” relationship.¹⁵

The obligations of each of the parties to the contract are essential terms. *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388, 399 (Ind. Ct. App. 2005). On this record, no reasonable jury could find that PEM and Peters Broadcast had a preliminary agreement containing all essential terms. Contracts exist so that parties can protect their rights. When parties engage in joint business but leave unanswered essential terms, a court should

¹⁵ The audio recording of the oral argument for this case may be found on the court’s website. Counsel’s description of the preliminary agreement begins at 5:46.

not supply those terms. Accordingly, the district court correctly dismissed Count I and Count IV.¹⁶

B

To establish fraud or fraudulent misrepresentation, Peters Broadcast must prove that (1) the defendants made a material statement of past or existing fact; (2) that was false; (3) the defendants knew or were reckless to the fact that it was false; (4) the defendants made the statements with the intent to deceive; (5) Peters Broadcast reasonably relied on the statement; and (6) Peters Broadcast suffered an injury proximately caused by the false statement. *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 335 (Ind. 2013), superseded by statute on other grounds, IND. CODE § 24-5-0.5-3 (2014); *Wise v. Hays*, 943 N.E.2d 835, 840 (Ind. Ct. App. 2011). Fraudulent misrepresentation additionally requires a showing that the defendant intended to induce the plaintiff to act. *Wise*, 943 N.E.2d at 840.

Peters Broadcast bases its fraud claims on two statements that Mr. Miller allegedly made to Mr. Peters at their first inperson meeting, which occurred in July. The first is Mr. Miller's alleged claim that he had sufficient resources of his own to fund the work

¹⁶ Because there is no contract, Count IV falls with Count I. "Fraudulent inducement occurs when a party is induced through fraudulent misrepresentations to enter into a contract." *America's Directories Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059, 1068 (Ind. Ct. App. 2005); see also *Judson Atkinson Candies, Inc. v. Kenray Assocs., Inc.*, 719 F.3d 635, 639 (7th Cir. 2013).

on the Crown Castle project.¹⁷ The second is Mr. Miller's alleged claim that he owned trucks that were out fitted and able to complete cell site work.¹⁸

It is undisputed that both claims, if they were made, were false. Mr. Miller obtained a loan to fund his work and used trucks paid for by Knudson. Mr. Miller and PEM submit, however, that Mr. Miller's alleged statements were not fraudulent because he had no duty to disclose the source of the money or the trucks. It is true that there is no actionable fraud where a party is silent about a matter it has no duty to disclose. *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370, 1374 (Ind. Ct. App. 1998). But Peters Broadcast's theory of the case is not that Mr. Miller was silent as to the source of funding and trucks, but rather that when he spoke, he was not truthful, and that the falsehood was material to Peters Broadcast's decision-making process. When a party "undertakes to disclose facts within his knowledge, he must disclose the whole truth without concealing material facts...." *Ind. Bank & Trust Co. of Martinsville v. Perry*, 467 N.E.2d 428, 431 (Ind. Ct. App. 1984).

Peters Broadcast's claims nevertheless fail for a different reason: There is no evidence that it relied on either of these statements. Reliance requires that the plaintiff take "some kind of action in response to the misstatement." *BSA Constr. LLC v. Johnson*, 54

¹⁷ R.95 at ¶¶ 35, 36; R.142-2 at 22:15 ("He assured me it was all his money.").

¹⁸ R.95 at ¶ 26; R.142-2 at 24:01–02 ("And he assured me that he had trailers, trucks.").

N.E.3d 1026, 1032 (Ind. Ct. App. 2016). It is undisputed that PEM and Mr. Miller had already started working on the Crown Castle sites when these statements were made in July. Further, Mr. Peters testified that in May, prior to the meeting, he was relying on Smith's representations when he decided to give PEM access to the sites, not Mr. Miller's.¹⁹ Indeed, Peters Broadcast could not have relied on these statements to its detriment because it had already given Mr. Miller and PEM access to the sites when they were made.

Even if Peters Broadcast relied on the statements by remaining in the business relationship, the record does not contain any evidence about how many additional sites PEM worked on after these representations were made. We know only generally what occurred between the parties after this meeting. Since there is no evidence in the record from which the jury could find reliance, summary judgment on Counts III and VI was proper.

C

To prove its unjust enrichment claim, Peters Broadcast must establish: (1) that it conferred a benefit upon PEM at the express or implied request of PEM; (2) that allowing PEM to retain the benefit without restitution would be unjust; and (3) that it expected payment. *Woodruff v. Ind. Fam. & Soc. Servs. Admin.*, 964 N.E.2d 784, 791 (Ind. 2012); see also *Zoeller v. E. Chic. Second Century, Inc.*, 904 N.E.2d 213, 220 (Ind. 2009). Indiana courts understand unjust enrichment "as a doctrine to

¹⁹ R.142-2 at 23:08–12.

‘promote justice and equity.’” *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728, 736 (7th Cir. 2011) (quoting *Wright v. Pennamped*, 657 N.E.2d 1223, 1229 (Ind. Ct. App. 1995)).

Peters Broadcast made a payment of \$46,365.50 to PEM but charged it back when PEM cashed the check. Mr. Peters testified that he believed the charge-back recouped his losses. In light of the charge-back, there was no benefit conferred and no repayment expected.

Peters Broadcast also contends that PEM received a “benefit” when Peters Broadcast paid for equipment and crews. A “benefit” can be conferred where “one is saved from expense or loss,” *Coppolillo v. Cort*, 947 N.E.2d 994, 999 (Ind. Ct. App. 2011) (citation modified), and this would have reduced PEM’s losses. However, there is no evidence that PEM requested that Peters Broadcast pay crews or supply equipment. Peters Broadcast has also presented no evidence that PEM impliedly requested that they pay those expenses. Peters Broadcast’s payment of expenses, on its own, does not establish an implied request. See *Ritzert Co., Inc. v. United Fid. Bank, FSB*, 935 N.E.2d 756, 763 (Ind. Ct. App. 2010).

Finally, there was a payment of \$6,000 from Peters Broadcast to PEM in August. Unlike the other payment, there is no evidence that this sum was charged back or that PEM returned it to Peters Broadcast. However, there is also no evidence that PEM requested this payment. Indeed, the uncontroverted evidence shows that PEM incurred approximately \$36,000 in expenses related to the

Crown Castle project, and that Peters Broadcast was paid approximately \$118,000 by Crown Castle for the work that it and PEM completed. Considering PEM's expenses and Peters Broadcast's gains, there is nothing unjust about PEM retaining the \$6,000. *Lady Di's*, 654 F.3d at 736 ("There is simply nothing inequitable or unjust about the plaintiff paying for services it ordered and received."); *SelectSun GmbH v. Porter, Inc.*, 928 F.3d 550, 556 (7th Cir. 2019) ("Porter received no benefit, much less unjust enrichment, by receiving partial payment for the yacht it manufactured and then delivered"). Summary judgment on the unjust enrichment claim was proper.

D

Indiana recognizes the tort of negligent misrepresentation, adopting the definition found in the Restatement (Second) of Torts § 552(1). *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 747 (Ind. 2010). The Restatement provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information

RESTATEMENT (SECOND) OF TORTS § 552(1) (A.L.I. 1977) (emphasis added).

Indiana courts originally limited this tort to employee-employer disputes. *Troth v. Warfield*, 495

F.Supp.3d 729, 743 (N.D. Ind. 2020) (citing *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983)). It has expanded recently, but only to situations in which the relationship between the parties can be characterized as “advisory.” *Jeffrey v. Methodist Hosps.*, 956 N.E.2d 151, 157 (Ind. Ct. App. 2011). A relationship is advisory when one party has “superior knowledge and expertise,” is in the business of giving advice or supplying information, and is compensated for providing the information. *Id.* at 157. Indiana courts have recognized brokers, attorneys, and surveyors as some professions that fit this description. *Id.* at 156 n.7.

Peters Broadcast argues that Mr. Miller made his statements to PEM to “provide guidance” to Peters Broadcast in their business transactions. This stretches the concept of “guidance” beyond what Indiana courts envision. Indiana courts have extended this tort only to situations in which the defendant’s primary purpose in speaking is to provide advice, such as in the case of attorneys or brokers. *Id.* at 156 n.7. But Mr. Miller was not retained by Peters Broadcast to give advice on completing the project. He made his statements in the context of a contract negotiation. While it may be foreseeable that the other party in the negotiation will rely on the statements, that does not mean that the statements were provided as “advice.” Cf. *Tri-Pro. Realty, Inc. v. Hillenburg*, 669 N.E.2d 1064, 1069 (Ind. Ct. App. 1996) (observing that a seller who falsely claimed to own property at the time of sale did not provide a “professional opinion”). Accordingly, the district court did not err by granting summary judgment on Peters

Broadcast's negligent misrepresentation claim in Count VII.

E

The only remaining claim against PEM and Mr. Miller is Count VIII, a claim for tortious interference with business relations, which is premised on Mr. Miller's communications with Crown Castle. The elements of such a claim are: "(1) the existence of a valid [business] relationship; (2) the defendant's knowledge of the existence of that relationship; (3) the defendant's intentional interference with the relationship; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful interference with the relationship." *McCollough v. Noblesville Schs.*, 63 N.E.3d 334, 344 (Ind. Ct. App. 2016). Only the fourth and fifth elements are disputed, and the fourth element is dispositive.

A "lack of justification" requires that the defendant's action was "malicious and exclusively directed to the injury and damage of another." *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (quoting *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994)). "[T]he existence of a legitimate reason for the defendant's actions provides the necessary justification to avoid liability." *Id.*

Peters Broadcast argues that Mr. Miller lacked justification because Mr. Miller was not actually a subcontractor of Peters Broadcast when he contacted Crown Castle requesting help to obtain payment from Peters Broadcast. But PEM had a "legitimate reason" to contact Crown Castle: It had not been paid for

work that it had completed on Crown Castle sites.²⁰ Peters Broadcast admits that, after the charge-back, it paid only \$6,000 to PEM and does not dispute that PEM incurred \$36,000 in expenses. On this record, a jury could not conclude that Mr. Miller contacted Crown Castle exclusively to injure Peters Broadcast.

F

Only Count II—a request for declaratory relief against Atlantic and Chesapeake, PEM’s insurers—remains. Because there are no claims against PEM and Mr. Miller for which the insurers could owe coverage or indemnification, there was no error in granting summary judgment sua sponte in the insurance companies’ favor.

Conclusion

The judgment of the district court is affirmed.

AFFIRMED

²⁰ R.142-9 at *3.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
July 16, 2026
Before
FRANK H. EASTERBROOK, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge
JOHN Z. LEE, Circuit Judge

No. 25-1519

PETERS BROADCAST ENGINEERING,
INC.,
Plaintiff-Appellant,
v.
PEM CONSULTING GROUP, LLC et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Indiana, Fort Wayne Division.
No. 1:21-cv-00219
Holly A. Brady,
Chief Judge.

O R D E R

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on June 30, 2026. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

PETERS BROADCAST ENGINEERING,
Plaintiff

v. CAUSE NO.: 1:21-CV-219-HAB

PEM CONSULTING GROUP, LLC, et al.,
Defendants

OPINION AND ORDER

This case is a primer in how not to conduct business. After a contract to construct communications towers in Indiana went south, Plaintiff, Peters Broadcast Engineering (“PBE”), sued Defendants PEM Consulting Group, LLC (“PEM”), Pyramid Consultants and Construction, LLC (“Pyramid”), Phillip E. Miller (“Miller”), and their general liability insurance carriers, Atlantic Casualty Insurance Company (“Atlantic”) and Chesapeake Insurance (“Chesapeake”). As to PEM, Pyramid and Miller (collectively, the “Miller Defendants”), PBE asserts state law claims for breach of contract, actual fraud, fraud in the inducement, unjust enrichment, fraudulent misrepresentation, negligent misrepresentation and tortious interference with business relations. It also seeks to pierce the corporate veil and hold Miller personally liable for the torts alleged. With respect to Atlantic and Chesapeake (together, the “Insurers”), Plaintiff

asserts a third-party claim for breach of contract and requests declaratory relief.¹ Presently before the Court is the Miller Defendants' motion for summary judgment on the state law claims. (ECF No. 128). The motion is fully briefed (ECF Nos. 128, 140, 141, 151, and 152) and ripe for consideration. For the following reasons, the Miller Defendants' Motion will be GRANTED.

DISCUSSION

A. Factual Background²

PBE is a small telecommunications engineering company located in Fort Wayne, Indiana. PBE's sole shareholder, CEO, and Founder is Robert M. Peters ("Peters"). PEM is a New Jersey limited liability company. Pyramid is an LLC that operates on PEM's behalf. Miller is the CEO and managing member of PEM and Pyramid. (Am. Compl., ECF No. 95, ¶¶ 3-6). On May 21, 2019, PBE entered into a Construction Master Services Agreement with Crown Castle USA, Inc. ("Crown") to perform certain communications tower construction services for Crown in Indiana. (ECF No. 129, ex. 1, hereafter the

¹The Insurers have separately moved to dismiss the Amended Complaint against them. (ECF Nos. 125, 127).

²Factual recitations are taken from the parties' respective Statements of Material Facts ("Pltf SMF" or "Dfdt SMF") and their responses to those filings ("Pltf Resp. to SMF" or "Dfdt Resp. to SMF"). At times, where relevant, the Court cites to specific deposition testimony relied upon in the parties' respective SMFs. Where facts are both disputed and material the Court references them expressly herein.

“Crown Agreement”). PBE had previously done work for Crown on a different project and so Crown was familiar with PBE. (ECF No. 142 6, Decl. of Joshua Donahue at ¶¶4, 5, “Donahue Decl. ¶__”). As part of the Crown Agreement, PBE received an initial offer to assist in the construction of 33 cell sites in Indiana. (Am. Compl. ¶9, the “Crown Project”). The Crown Project involved enhancement/upgrade work on cell tower sites in Indiana, as well as the opportunity for construction of numerous other tower sites as part of the 5G rollout. (Pltf SMF ¶23, ECF No. 141).

The Crown Agreement provided that Crown would issue purchase orders to PBE for the Crown Project, but it did not guarantee quantity or value of work to be performed by PBE. (Dfdr Resp.to SMF ¶23, ECF No. 152). Specifically, paragraph 2A of the Crown Agreement provides:

This agreement is entered into with no guaranteed quantity or value of Work to be awarded to the Contractor. Crown [] shall have no obligation to Contractor unless and until a Purchase Order or Project Appendix is issued by Crown [] to Contractor.

(Crown Agreement, ¶2A). Likewise, PBE was not the exclusive contractor for the Crown Project and Crown reserved the right to hire other contractors for the Crown Project. See Crown Agreement ¶ 2(C) (“[t]his Agreement is not exclusive and Crown [] may, in its sole discretion, choose to obtain from other contractors or itself perform the same or similar

services as those provided by the Contractor.”) (Id. ¶2C).

Other provisions of the Crown Agreement detailed the terms of the parties’ agreement including provisions regarding standards specifications and drawings, and subcontracting. (Pltf SMF ¶ 22). Section 7 of the Crown Agreement authorized PBE to engage subcontractors, but specified requirements for the engagement of those subcontractors.

Chris Smith (“Smith”), a former employee of PBE and owner of a company called Frequency 1, was tapped by PBE as an independent contractor to assemble field crews to do the work for the Crown Agreement. Smith’s crews began work on the Crown Project for PBE sometime in May 2019. (Pltf SMF ¶ 34).

Smith knew Miller and was familiar with his companies. In May 2019, Smith facilitated email communications between PBE and the Miller Defendants regarding PBE’s cell construction contract with Crown. (Id. ¶ 32). Peters, testifying on behalf of PBE, recalled learning from Smith about the Miller Defendants:

Q: ...And do you know if Chris Smith reached out to Phil Miller or whether it was Mr. Miller who reached out to Chris Smith?

A: I have no way of knowing that.

...

Q: ...You say [Miller] had no prior experience, but what do you know about his company?

A: I don’t know anything except what Chris Smith told me, and he told me about all these wonderful things they’d done and how much

money he had that apparently he did not have...

Q: And so it was Chris Smith that told you this information about –

A: Initially to get the conversation going, yes. (PBE Dep., ECF No. 129-3 at 25, 79-80).³ When asked what the purpose of bringing the Miller Defendants into the mix was, Peters testified:

A: I did not have the resources or the cash reserves to bring in four or five crews and maintain them; nor did I want to, frankly. I was wanting to do more of my engineering work. Nor did I want to dedicate that much energy to it. They came with what I thought was an opportunity; and because of the contract that I was offered that I could stand-by, and even on a small percentage, it would be profitable.

(Id. at 24).

On May 5, 2019, Smith emailed Peters and Miller a “PBE-Pyramid Initial Contract” that described the roles of each party. (PBE Dep. at 28-30). In this email, PBE was referred to as the contract holder with Crown, Miller was to provide “the field crews and equipment for the construction and completion of all sites assigned,” and Frequency 1 was designated as the project and construction manager. (Id.). Peters referred to the May 5, 2019, email from Smith to PBE and Miller as a “first draft” and an “initial proposal.” (Id. at 29, 41).

³Page references are to the deposition page rather than the ECF page.

Nevertheless, PBE asserts in its filings that the parties entered into an interim oral agreement whereby the Miller Defendants began conducting subcontracting work even without an appropriate subcontracting agreement in place. (ECF No. 140 at 14: “In May/June 2019 PBE and the Miller Defendants, via Miller, orally agreed to a temporary or interim agreement for cell tower funding and construction services by PEM pending execution of a formal subcontract by PEM in accordance with the Crown Agreement.”). That representation, however, appears contrary to Peters’ testimony of his understanding:

Q: Okay. So your – PBE’s position was that you guys were okay with having PEM invest money into the project without a signed written agreement between your 2 companies?

A: No, we weren’t okay with that. My counsel could explain that. There were numerous correspondence to try to get this in place, but I’d already invested a lot of money and time up to that point. I guess I looked at – We had no contract at that point.

(PBE Dep. at 37).

Peters testified that Smith was working as a 1099 employee on the Crown Project and that Peters never communicated to Crown that the Miller Defendants were subcontracting on the Crown Project since no agreement had been reached:

Q. Okay. Did you disclose to Crown Castle when work started in May of 2019 that Chris Smith was working with you as a subcontractor?

A. He was a 1099 employee at that point as I recall...

Q. And did you ever disclose to Crown Castle in May of 2019 that Pyramid or PEM Consulting Group was working as a sub on this project?

A. No. As far as – I didn't have any agreement with PEM, so I could not do that.

(PBE Dep. at 47).

Q:... It's your contention that PEM was not a sub of PBE on this project?

A: I'm not contending anything. What I'm saying is that I could not have a subcontractor on site – on a Crown Castle site without an approved agreement from Crown Castle. So, no, they weren't a sub.

Q: But work was –

A: I technically couldn't do that, have them on premise. They had to be with PBE for that.

(PBE Dep. at 68-69).

Q: So he wasn't an employee of PBE and your contention is that he was not a sub of PBE. So is it your contention that there was no contractual relationship whatsoever between PBE and PEM?

A: Without his signed agreement, I could not use him as a subcontractor, and not only did it have to be signed, but it had to be approved by Crown Castle. We made that very clear. And it just drug on and on; and he said we'll get this straightened out, but it never got straightened out.

(Id. at 80-81).

Miller likewise testified that no agreement had been reached:

A: Well the deal was that, you know, I was going to initially fund these contracts, right, you know to get the work going, and I was going to get paid 90 percent of the invoice and Mike was going to get paid 10 percent of it. And so that was the initial conversation at least. We never got to an agreement.

(PEM Dep., ECF No. 129-5, at 61). Thus, it appears that the principal players agree that no formalized agreement was ever reached between the parties in May and June 2019.

Regardless of whether the parties saw eye to eye on the existence of an interim agreement, it is clear in the record that work began on the Crown Project and both PBE and the Miller Defendants were involved. Along with the work being conducted, Miller, on PEM's behalf, borrowed money from, Thomas Ross ("Ross"), a member of PEM, in the amount of \$149,999.99 and used that source of payment to finance Chris Smith and his crews. (Dfdt SMF ¶ 8, ECF No. 128-2 and ECF No. 130-1).⁴ PEM

⁴PBE disputes that PEM borrowed this money noting that no loan agreement between PEM and Ross was signed. PBE believes Miller borrowed the money from Ross in his individual capacity. (Pltf Resp. to Dfdt SMF ¶ 8). However, bank statements from PEM show incoming wire transfers totaling \$149,999.99 from Ross deposited in the PEM corporate account. Those transfers occurred on May 14, 28, and 31, 2019.

also supplied trucks to Smith's crews.⁵ Those trucks were being leased by a separate company, Knudson, L.P ("Knudson"), based in Texas.⁶

From May through July 2019, work on the Crown Project continued and PEM paid Smith and his crews over \$36,000. (ECF No. 130). In July 2019, PEM requested funding from PBE. On July 12, 2019, PBE sent a check to PEM in the amount of \$46,365.50 but instructed PEM not to deposit the funds until PBE received payment from Crown. (Dfdt SMF ¶ 6; Pltf SMF ¶ 51). The payment was memorialized in an email dated July 12, 2019, from Peters. (ECF No. 129-7, Ex. 7).

Around this same time, PEM and PBE submitted competing written proposals to each other for a signed subcontractor arrangement. On July 17, 2019, during further negotiations for a formal

⁵PBE also claims it had to pay for trucks for the project or that the trucks supplied by PEM were inadequate to do the work that was contemplated. The Court need not delve into this issue because, as discussed below, there was no meeting of the minds on the issue of who would supply trucks, how many, or what capabilities the trucks had.

⁶PBE includes a number of allegations in its SMF that purport to show a problematic business relationship between the Miller Defendants, Knudson and Knudson's owner, Patricia Joiner ("Joiner"). PBE includes these factual recitations presumably to show that while engaged in the Crown Project, the Miller Defendants had obligations to Knudson and Joiner and that the assets used in the Crown Project were fraudulently obtained or unauthorized by Knudson to be used on the Crown Project. None of these facts are relevant or material to the allegations in the Amended Complaint.

subcontractor agreement, Miller met with PBE in Fort Wayne, Indiana. PBE represents little about the substance of this meeting and much about what did not occur. According to PBE, Miller did not disclose that: (1) the funds and equipment/trucks being used were supplied by Knudson; (2) the Knudson trucks were unauthorized for use on non-Knudson contracts; (3) Miller was under criminal investigation in Texas for alleged misfeasance in its dealings with Knudson; and (4) Miller needed immediate cash to repay Knudson. (Pltf SMF ¶¶s 42-47).

The Miller Defendants dispute some of these facts about the meeting but mostly claim that they are immaterial to the claims asserted. They clarify, for instance, that the funds being used to pay Smith belonged to PEM (borrowed from Ross), not Knudson, and that Miller was unaware in July 2019 that he was under criminal investigation as he was not contacted by investigators until the fall of 2019. (Dfdt's Resp. to Pltf SMF ¶¶s 42-47). Specifically, the Miller Defendants point to Miller's deposition wherein he was specifically asked about the source of funding to pay Smith's crews:

Q: You were a conduit. But to the extent that you needed to pay crews, when you come in in June 2019, was PEM paying for those crews or was Knudson?

A: No, it was the money I borrowed, so it was PEM. It was all of that money that got that project going. Knudson was not paying for the work in – those crews in Indiana. It was PEM.

(PEM Dep., ECF No. 129-5 at 47). As for the remaining alleged non-disclosures, the Miller Defendants argue that the source of the trucks being supplied was immaterial information they were under no obligation to disclose and there was no injury to PBE since the trucks remained on-site until PBE's contract with Crown ceased.

Following this meeting, PBE sent another proposed subcontractor agreement to the Miller Defendants. (Pltf SMF ¶ 53). As of August 1, 2019, the Miller Defendants had not signed the new subcontractor proposal from PBE. (Id. at ¶¶s 53-54). PBE advised Miller that his delay in entering into an acceptable subcontractor agreement was jeopardizing work at the sites and PBE's relationship with Crown. (Pltf SMF ¶ 58). Throughout this time, PBE maintained full control over the funds issued to it from Crown (Pltf SMF ¶ 55).

At some point the Miller Defendants became frustrated believing that PBE had received funds from Crown for completed purchase orders and it was not remitting funds to PEM. So on August 24, 2019, Miller contacted Crown and had a conversation with Crown about not receiving payments. (Dfdt SMF, ¶ 19). The Miller Defendants also say they inquired from Crown whether they could place a lien with Crown on the Crown Project for payment. They claim that Crown advised against placing a lien especially if the Miller Defendants desired a business relationship with Crown in the future.⁷ Although

⁷PEM seemingly acknowledges and does not dispute that it did desire future work with Crown. However, Joshua Donahue

Peters acknowledges that he was not privy to any conversation between Miller and Crown, (PBE Dep. at 63-64: “I wasn’t privy to the actual conversations with Crown.”), PBE states that the Miller Defendants represented themselves as subcontractors of PBE to Crown even though they knew no formal written subcontracting agreement had been signed.

After the contact with Crown, PEM withdrew financing from Smith’s crews to cut its losses. PEM deposited the check it had received from PBE in July into PEM’s bank account on September 5, 2019. Five days later the funds were charged back by PBE. (Dfdd SMF ¶ 7). At the time PEM left the Crown Project, the trucks that were supplied by Knudson, L.P. were still being used by Smith and his crews. (Peters Dep. at 77, acknowledging that the trucks and equipment remained until Crown suspended PBE from the Crown Agreement).

Crown eventually suspended its agreement with PBE. According to Donahue, Crown suspended the contract “due to substandard performance by PBE on awarded [purchase orders].” (Donahue Decl. ¶ 10).

B. Applicable Standard

Summary judgment is warranted if there are no genuine issues of material fact and the moving

(“Donahue”), the Site Operations Manager for Crown, does not recall any conversation from Miller about becoming a direct contractor, despite it being common in the industry. (Donahue Decl. ¶¶9-10).

party is entitled to judgment as a matter of law. A factual issue is material only if resolving the factual issue might change the outcome of the case under the governing law. See *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). A factual issue is genuine only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. See *Anderson*, 477 U.S. at 248. In deciding a motion for summary judgment, the court “may not ‘assess the credibility of witnesses, choose between competing reasonable inferences, or balance the relative weight of conflicting evidence.’” *Bassett v. I.C. Sys., Inc.*, 715 F. Supp. 2d 803, 808 (N.D. Ill. 2010) (quoting *Stokes v. Bd. of Educ. of the City of Chi.*, 599 F.3d 617, 619 (7th Cir. 2010)). Instead, it must view all the evidence in the record in the light most favorable to the non moving party and resolve all factual disputes in favor of the non-moving party. See *Anderson*, 477 U.S. at 255.

C. Analysis

As discussed, the Miller Defendants move for summary judgment on all claims against them. They contend that no disputed material facts exist to warrant a trial on any of the state law claims brought against them. Each claim is addressed seriatim.

a. Breach of Contract Claim (Count I)

PBE’s Amended Complaint alleges that the Miller Defendants “have breached the parties’ agreement by failing to provide construction services as orally agreed upon in June of 2019.” (Am. Compl. ¶ 65). The essential elements of a breach of contract action are the existence of a contract, the defendant’s breach thereof, and damages. *Rogier v. Am. Testing*

and Eng'g Corp., 734 N.E.2d 606, 614 (Ind. Ct. App. 2000).

For an oral contract to exist, parties have to agree to all terms of the contract. If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed. A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract. Whether a set of facts establishes a contract is a question of law.

Kelly v. Levandoski, 825 N.E.2d 850, 857 (Ind. Ct. App. 2005) (internal citations omitted).

The Miller Defendants argue that they are entitled to summary judgment on PBE's breach of contract claim because there was no contract; and, even if there was, PBE has no contractual damages. The Miller Defendants point to the undisputed record where both principals of PBE and PEM agree that no agreement was ever reached. They argue that the testimony of both Peters and Miller demonstrates that there was no mutual assent or a meeting of the minds between the parties. See Bennett v. Broderick, 858 N.E.2d 1044, 1048 (Ind. Ct. App. 2006). At most, the Miller Defendants suggest that the record supports the Court finding that the parties entered into an "agreement to agree in the future," which they argue is not a contract. Mays v. Trump Indiana, Inc., 255 F.3d 351, 357–58 (7th Cir. 2001) (an agreement to agree is not a binding contract under Indiana law). For its part, PBE argues, without much

evidentiary support, that a contract existed, the Miller Defendants breached it and caused them damage.

Based on the summary judgment record before it, this Court need not dig deep into the facts to conclude that the parties failed to reach an agreement, oral or otherwise, that was sufficiently definite in its terms to be enforceable. The Miller Defendants correctly recite that contracts must demonstrate an intent to be bound and definiteness of terms to be enforceable under Indiana law. *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 309 (Ind. 2012) (citing *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 813 (Ind. 2009); Restatement (Second) of Contracts § 33 (recognizing that in order to give effect to a contract, its terms must be “reasonably certain”)). And here, there is simply no evidence that the parties were on the same page as to the scope or details of their arrangement.

In fact, the exact opposite appears true. For instance, both Peters and Miller testified that the discussions in May 2019 did not result in a contract. According to them, the parties were having “initial conversations” and exchanging draft emails. While the draft emails mentioned PEM receiving 90% of invoiced amounts and PBE retaining 10% of those amounts, there is no evidence that the parties ever reached a final agreement on such terms. Peters testified that “there was no agreement at that time. It was a proposal.” (PBE Dep. at 40-41). Likewise, Miller testified “we never got to an agreement.” (PEM Dep. at 61).

Nor do the parties' dealings with one another indicate that any final agreement had been obtained. Peters testified that he "assumed" PEM was investing money in the project in May and June 2019, but he believed the agreement was that he would receive 10% without having to do anything. (Peters Dep. at 48). Yet, Peters testified he rented fork trucks, dumpsters, fuel for trucks and paid some employees. (Id. at 49). At the same time, he represents that the Miller Defendants were supposed to supply the equipment and pay the employees.

What is clear is that the parties were engaged in conversations but could not reach an agreement. They also did not want to risk PBE's contract with Crown by not moving the Crown Project along. What this suggests is that the parties agreed to continue working towards a finalized agreement, but never reached that agreement. And such an arrangement, that is, an agreement to agree later is not enforceable. *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996) ("The law is well established that a mere agreement to agree at some future time is not enforceable.").

That said, PBE seemingly argues that the parties had reached an agreement in May and June and the only thing left to do was reduce it to writing. PBE is correct that parties may agree to a contract which obligates them to execute a subsequent final written agreement, but nowhere is this evident in the present record:

It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent final

agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called “contract to make a contract” is not a contract at all.

Wolvos, 668 N.E.2d at 674–75 (Ind. 1996) (quoting 1 Arthur Linton Corbin and Joseph M. Perillo, Corbin on Contracts § 2.8 at 133–34 (rev. ed. 1993)).

Here, even if the emails, communications, and other actions showed the parties agreed to something, the record does not tell the Court what. PBE wants the Court to find a contract existed but proffers no evidence from which the agreed upon terms could be gleaned. Both Peters and Miller – the two people that matter – agreed that they never reached an agreement and that the email from Smith was only an “initial proposal.”⁸ Following that email,

⁸Peters points to declarations from Dianna McFadden, a former PBE employee, and an individual named Mike Taylor as additional proof of the existence of a contract. McFadden’s Declaration states that “PBE and Phillip Miller, the owner of PEM Consulting & Construction had entered into an agreement for cell site construction work in Ft. Wayne.” (ECF No. 142-4, ¶ 4). Taylor’s Declaration is loaded with hearsay and states, “Mr. Smith informed me that PEM Consulting Group, owner, Phillip

it is clear that in May, the Miller Defendants borrowed money to pay to Smith's crews who were already working on the Crown Project, but there is no evidence as to the specifics of any payment obligation to those crews. Additionally, Peters testified he was renting trucks and other equipment and paying employees, albeit, he did so believing that it was not his responsibility. But that is merely further indication that the parties were not in agreement on even the most basic terms. Indeed, it is this absence of agreement that caused all the downline drama in July. PEM believed PBE was withholding monies received from Crown for purchase orders and not reimbursing PEM; PBE believed PEM wasn't timely paying Smith's crews. None of this was good for business. But without definite and certain terms and the parties manifesting an intent to be bound, the Court cannot possibly conclude an enforceable contract was created, what the terms were, who breached it, and whether there were damages. For this reason, the Miller Defendants are entitled to summary judgment on PBE's claim for breach of contract.

Miller, had entered into an agreement with PBE to provide financing, equipment and vehicles for six construction crews to work on Crown Castle sites in Ft. Wayne, Indiana." (ECF No. 142-5, ¶ 3). Both declarations suffer from the same flaw, that is, the declarant has not demonstrated any basis of knowledge for their statement that a legally enforceable contract existed. Neither was involved in the negotiations and neither has any first-hand knowledge about the parties' exchange of information during that negotiating process.

b. Fraud (Count III) and Fraudulent Misrepresentations (Count VI)⁹

Next, PBE asserts that “on July 17, 2019[,] and in email and telephone calls from July 12, 2019 to July 17, 2019, [the Miller Defendants] made material misrepresentations to PBE concerning the source of funds and equipment to complete thirty-three Crown Castle sites in Indiana,” knowing those representations were false. (Am. Compl. ¶¶s 77, 78). PBE further contends that it relied on the representations to its detriment and that reliance led to loss of money paid to the Miller Defendants and to loss of its contract with Crown.

PBE’s claim for fraud hinges on its belief that the Miller Defendants in July 2019 failed to disclose

⁹Aside from claims of actual fraud and fraudulent misrepresentation, PBE asserted a claim for fraud in the inducement (Count IV). “Fraudulent inducement occurs when a party is induced through fraudulent misrepresentations to enter into a contract.” *Reitenour v. M/I Homes of Ind., L.P.*, 239 N.E.3d 56, No. 23A CT-3090, 2024 WL 3085306, at *2 (Ind. Ct. App. June 21, 2024) (quoting *Am.’s Directories, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059, 1068 (Ind. Ct. App. 2005)). The elements of fraudulent inducement are no different from the elements of any action for fraud, which are: “(1) a material misrepresentation of past or existing facts; (2) made with knowledge or reckless ignorance of falsity; (3) which caused the claimant to rely upon the misrepresentation to the claimant’s detriment.” *Siegel v. Williams*, 818 N.E.2d 510, 515 (Ind. Ct. App. 2004) (citing *Jackson v. Blanchard*, 601 N.E.2d 411, 418 (Ind. Ct. App. 1992)). Because the Court finds that the parties did not reach an enforceable agreement, the Miller Defendants’ motion for summary judgement on the claim for fraudulent inducement is GRANTED.

they were using funds and equipment supplied by Knudson rather than their own equipment and funds. To support its claim for fraud, PBE asserts that in July 2019 Miller “lied to Peters about having sufficient resources of his own to fund the Crown Project” and cites Peter’s testimony:

A. The initial meeting was at IHOP. He told me about himself and what he had to offer.

Q. And what did he tell you?

A. He was just telling me how successful he was, how much money he had, that this would be an easy project for him, and he had the wherewithal and the knowledge to do this and the people and the equipment. It could be a good fit was my thoughts at the time.

Q: Did you ever ask Mr. Miller during those meetings what the source of his funds – where his funding was coming from?

A. He assured me it was all his money. He drove in in a brand new Audi. I remember that. He was kind of flashy. He said he worked with government stuff and was very successful; and he had the funds to do all this, because I was cautious about the outlay of funds it took to do –not cautious. I was not cautious enough. I was concerned of sometimes it takes 30 to 90 days to get cash flow on some of these things depending on the customer; and I wanted to make sure he could weather that storm, so to speak, just before things started to happen. And I wanted to make sure that the people that he was going to provide were competent and experienced,

because when you go to a cell site –I don't know if you want to get into too much – you have to know what you're doing when you get there or you're going to fail. You can't just go by the drawings.

Q: Did you do anything else to vet Mr. Miller or his company for this project?

A: I was pretty much relying on Chris Smith, his recommendations; and he said he worked with him. I should have done more.

(PBE Dep. at 22-23).

The Miller Defendants acknowledge that they provided trucks to Smith that had been leased by Knudson, but essentially assert that they were under no obligation to disclose this information. Even if their failure to disclose that Knudson leased the trucks was actionable, they argue that PBE cannot show that PBE suffered any injury from their failure to disclose as all trucks remained on the job sites through the summer of 2019. With respect to the funding of the project, the Miller Defendants deny that the source of funds was provided by Knudson. They point to Miller's testimony that he took a loan from his friend Ross to fund the project and the bank records showing the wire transfers from Ross to PEM in May 2019.

As an initial matter, the Court does not see any practical difference between PBE's claims for actual fraud and its claim of fraudulent misrepresentation. The elements of common law fraud require PBE to establish that the Miller Defendants made: (1) a material misrepresentation of

past or existing fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage of which PBE complains. *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 249 (Ind. 1992). Similarly, to prevail on a fraudulent misrepresentation cause of action, PBE must prove: (1) the Miller Defendants made false statements of past or existing material facts; (2) they made such statements knowing them to be false or recklessly without knowledge as to their truth or falsity; (3) they made the statements to induce PBE to act upon them; (4) PBE justifiably relied and acted upon the statements; and (5) PBE suffered injury. See *Wise v. Hays*, 943 N.E.2d 835, 840 (Ind. Ct. App. 2011).

“[F]raud is not limited only to affirmative representations; the failure to disclose all material facts can also constitute actionable fraud.” *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 335 (Ind. 2013) (quoting *Lawson v. Hale*, 902 N.E.2d 267, 275 (Ind. Ct. App. 2009), superseded by statute on other grounds). But, in the absence of a duty to disclose, “mere silence is not actionable fraud.” *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370, 1374 (Ind. Ct. App. 1998). A duty to speak arises in two primary ways: through a fiduciary relationship or through a buyer-seller relationship where one party “enjoy[s] a position of superiority over the other.” *Strong v. Jackson*, 777 N.E.2d 1141, 1147 (Ind. Ct. App. 2002). Simply possessing “at least some knowledge not possessed by the other” does not immediately create

a position of superiority. *Am. Heritage Banco, Inc. v. Cranston*, 928 N.E.2d 239, 247 (Ind. Ct. App. 2010).

Here, the evidence in the record fails to show that the Miller Defendants engaged in actionable fraud. First, the conversation relied upon by PBE occurred well after work on the Crown Project began in May 2019 and so nothing that Miller said in July 2019 could have been relied upon by PBE two months earlier. Smith's crews were onsite in May 2019 and PEM had already secured financing through Ross by the time the July 17, 2019, conversation occurred. Prior to that conversation, as this Court has already noted, no agreement had been reached and the party's appeared to be operating on the "hope" that a final arrangement would be reached.

Second, there is nothing in Peters' testimony that shows Miller made an affirmative misrepresentation of a material fact. At the time that conversation occurred, Miller had obtained funding for the project, and it clearly had provided trucks for use by Smith's crews. Likewise, Miller had paid the crews in May and June. Nowhere does Peters represent that if he had known the source of the funding or that trucks were leased from Knudson, he would not have done business with the Miller Defendants or that he would have terminated the Miller Defendants ability to continue doing work on the Crown Project.

Third, to the extent that PBE asserts that the Miller Defendants did not follow through on alleged representations it did make, (i.e., it did not pay crews, the trucks provided were not properly equipped, and it provided an insufficient number of

trained crews), that is simply a repackaging of its breach of contract claim. (See ECF No. 85: “Plaintiff’s fraud allegations are more akin to a breach of contract claim.”). Indeed, a claimant who brings both a breach of contract and a fraud claim must prove that (1) the breaching party committed the separate and independent tort of fraud; and (2) the fraud resulted in injury distinct from that resulting from the breach. *Tobin v. Ruman*, 819 N.E.2d 78, 86 (Ind. Ct. App. 2004). While “[b]reaches of contract will almost invariably be regarded by the complaining party as oppressive, if not outright fraudulent,” the claimant must nonetheless prove the independent tort. *Id.* (quoting *Epperly v. Johnson*, 734 N.E.2d 1066, 1073 (Ind. Ct. App. 2000)). Here, when reduced to its simplest form, PBE’s claim is not that the Miller Defendants defrauded them. It is that they did not live up to the obligations PBE anticipated when the Miller Defendants began working on the Crown Project. This is not actionable fraud and PBE has not made any cogent argument to establish that the Miller Defendants’ actions constitute the separate and independent tort of fraud.

Finally, the Court fails to view either the alleged misrepresentations or omissions to be anything more than tangential facts that are not material to the parties’ arrangement. Whether the trucks were leased or owned by PEM is of little consequence since the trucks were provided. Whether the funds were loaned to PEM or obtained from outside sources is irrelevant when the funds are in their possession. None of this rises to the level of fraud, which requires an intent to mislead and

deceive – neither of which has been shown by the record. Accordingly, the Court GRANTS the Miller Defendants’ Motion for Summary judgment on all the fraud related counts.

c. Unjust Enrichment (Count V)

“Also referred to as quantum meruit or quasi-contract, unjust enrichment requires a party who has been unjustly enriched at another’s expense to make restitution to the aggrieved party.” *Reed v. Reid*, 980 N.E.2d 277, 296 (Ind. 2012). Under Indiana law, unjust enrichment claims have three elements: “(1) a benefit conferred upon another at the express or implied request of this other party; (2) allowing the other party to retain the benefit without restitution would be unjust; and (3) the plaintiff expected payment.” *Woodruff v. Ind. Fam. & Soc. Servs. Admin.*, 964 N.E.2d 784, 791 (Ind. 2012). “Put another way, ‘a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust. One who labors without an expectation of payment cannot recover in quasi-contract.’” *Id.*

PBE asserts that genuine issues of material facts exist showing that the Miller Defendants were unjustly enriched by their actions. PBE devotes only two paragraphs of its 29-page response brief to this claim. It contends that the evidence shows that it paid various items that should have been the Miller Defendants’ responsibility. Likewise, it notes that it

paid \$46,365.00 to the Miller Defendants on July 12, 2019. But it charged back that amount.¹⁰

The problem with all this is that PBE points to know benefit conferred upon the Miller Defendants at their express or implied request outside of perhaps the \$46,395.00 payment that it charged back. So the record contains no evidence that the Miller Defendants received monies or other benefits from PBE that they requested and from which an unjust enrichment claim would flow. The Miller Defendants' Motion for Summary Judgment on the unjust enrichment claim is GRANTED.

d. Tortious Interference with Business Relations (Count VIII)

PBE argues that the Miller Defendants tortiously interfered with PBE's business relationship with Crown when it contacted Crown on August 24, 2019, seeking payment. Generally, the elements of tortious interference with a business relationship are: "(1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from [the] defendant's wrongful interference with the relationship." *McCollough v. Noblesville Schs.*, 63 N.E.3d 334, 344 (Ind. Ct. App. 2016), trans. denied. To be tortious, the wrongful

¹⁰ The Miller Defendants refer to a payment of \$6,000 allegedly received by PEM from PBE but Peters denied knowing anything about this payment and there is no evidence in the record that the Miller Defendants requested it.

conduct had to involve “some independent illegal act[.]” *Brazauskas v. Fort Wayne-S.Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003); *Watson Rural Water Co., Inc. v. Ind. Cities Water Corp.*, 540 N.E.2d 131, 139 (Ind.Ct.App.1989) (“In the State of Indiana, an element necessary to prove this cause of action is that a defendant acted illegally in achieving his end.”),

PBE devotes even less paper to defending this claim. For its part, the Miller Defendants take issue with three prongs of the elements above – justification, damages, and illegal act. The Miller Defendants argue that they were justified in going to Crown to request payment when it believed that PBE was receiving payments from Crown and not paying PBE. They point out that there is no evidence that they represented themselves as a subcontractor to Crown but did seek payment for services it rendered. As far as the Court can tell, the parties provide no evidence from anyone at Crown showing that the Miller Defendants misrepresented their role in the Crown Project. In fact, even Peters had no information that the Miller Defendants claimed to Crown they were subcontracting on the Crown Project. (PBE Dep. at 63-64: “I wasn’t privy to the actual communications with Crown.”). As for damages, the Miller Defendants point to the statement from Crown project manager Donaldson who submitted a declaration that states that PBE was removed from the Crown Project for “substandard performance” on the awarded purchase orders not because of any action by the Miller Defendants. (Donahue Decl. ¶ 10). Finally, the Miller

Defendants argue that there is no proof that they engaged in any illegal conduct.

Taking these arguments in reverse order, PBE correctly argues that if the Miller Defendants committed fraud, that would satisfy the “illegal conduct” requirement. See *Reginald Martin Agency, Inc. v. Conseco Medical Ins. Co.*, 478 F.Supp.2d 1076, 1089 (S.D.Ind. 2007) (“CMIC must have acted illegally-and fraud is a sufficient illegal act-in its interference with Plaintiffs’ business relationships.”). But the Court sees no genuine issue of fact that the Miller Defendants committed fraud. It is unclear whether PBE is trying to tie in its fraud claims in its earlier counts or whether it contends that the Miller Defendants committed new fraud by misrepresenting its status to Crown. Either way, however, the claim fails because PBE fails to demonstrate a genuine issue of fact that the Miller Defendants committed fraud at all.

If that were not enough, the Miller Defendants were under no duty not to speak with Crown. To be unjustified, the Miller Defendants’ actions must “be malicious and exclusively directed to the injury and damage of another.” *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000). The Miller Defendants’ actions simply do not fit this definition. Nor is there a genuine issue of fact as to damages. True, PBE lost the Crown contract. True, it lost the contract at some point after the Miller Defendants contacted Crown. Although PBE wants the Court to imply that the reason for PBE’s suspension by Crown was because it engaged a subcontractor outside its contract with Crown, even

a generous reading of the record simply does not support this conclusion. What the Court is missing is any genuine issue of fact tying those two truths to the

Miller Defendants' contact with Crown.

For all these reasons, the Defendants are entitled to summary judgment on PBE's claim for tortious interference with business relations.

e. Negligent Misrepresentation (Count VII)

PBE also brings a claim for negligent misrepresentation. Indiana has adopted the definition of "negligent misrepresentation" contained in the Restatement (Second) of Torts § 552(1), which provides that:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

U.S. Bank N.A. v. Integrity Lane Title Corp., 929 N.E.2d 742, 747 (Ind. 2010). Historically, Indiana courts recognized the tort of negligent misrepresentation narrowly, in the limited context of an employer-employee relationship. See Perfect Barrier, LLC v. WoodSmart Solution, Inc., 2008 WL

4449560 (N.D. Ind. Sept. 26, 2008) (citing *Eby v. York Division, Borg-Warner*, 455 N.E.2d 623, 629-30 (Ind. Ct. App. 1983)) (stating that Indiana courts have declined to recognize the tort of negligent misrepresentation beyond the context of an employer-employee relationship.). However, the tort recently has been expanded to include those whose profession includes the giving of opinions. See *Troth v. Warfield*, 495 F. Supp. 3d 729, 743 (N.D. Ind. Oct. 20, 2020).

The Miller Defendants move for summary judgment on this claim contending that Indiana law has not extended claims for negligent misrepresentation to claims like the one raised here. This Court agrees. In *Troth*, District Judge Jon DeGuilio, this Court's respected colleague, thoroughly discussed the state of Indiana law involving claims of negligent misrepresentation. The Court includes the relevant discussion and incorporates it here:

For decades, the tort was limited to the employer-employee relationship, *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983); *Trytko*, 28 F.3d at 721 (observing "Indiana courts have declined to extend [negligent misrepresentation] beyond the employment context"), but it has recently been expanded to include those whose profession includes the giving of opinions. See *Integrity*, 929 N.E.2d at 747; *Jeffrey v. Methodist Hosps.*, 956

N.E.2d 151, 156 n.7 (Ind. Ct. App. 2011). The class of professionals who could be subject to a negligent misrepresentation claim includes, but is not limited to, “brokers, attorneys, abstractors, and surveyors.” Jeffrey, 956 N.E.2d at 156 n.7 (declining to limit the class of professionals to brokers, attorneys, abstractors, and surveyors).

The Indiana Supreme Court’s most recent statement on this area of the law was in *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010). There the Court attempted to quell some of the chaos surrounding this cause of action. Relying on a number of factors outlined in the Restatement (Third) of Economic Torts and Related Wrongs § 9, cmt. f (Council Draft No. 2, 2007), the Court determined the tort of negligent misrepresentation could be extended to create a duty for title insurers to communicate the state of a title accurately. See *Integrity*, 929 N.E.2d at 748-49. The factors relevant to the Court’s decision included that title commitments are normally relied upon by insureds; that there was an advisory relationship between the defendant and the plaintiff, that the defendant had superior knowledge and was in the

business of providing such knowledge, and that the information was provided in response to a specific request and designed to guide the plaintiff in making a decision. *Id.*

Since the Integrity decision, there has been limited discussion from the Indiana courts concerning the impact of the Integrity decision; however, the Indiana Court of Appeals has signaled further growth. *Jeffrey*, 956 N.E.2d at 157. In *Jeffrey*, the court found Indiana law did not foreclose a claim of negligent misrepresentation against a hospital. In *Jeffrey*, the plaintiffs sought to adopt a child, but would only do so if the child had no signs of significant health issues. *Id.* at 153. The plaintiffs relied on the hospital's social worker and nurse for information about the child's health. *Id.* It was later discovered the child had medical complications that were known by the hospital, but undisclosed to plaintiffs, at the time of the adoption. *Id.* at 154. Relying on the factors outlined in *Integrity*, the court could not say "that an action for negligent misrepresentation was, as a matter of law, unavailable to the [plaintiffs]" against the hospital. *Id.* at 156-57 (citing *Integrity*, 929 N.E.2d at 750).

Despite Indiana's development in this area of law, some federal courts applying Indiana law have been tentative to push this expansion past those claims traditionally recognized. Compare *Origin Healthcare Solutions LLC*, 2014 WL 6750042 (declining to expand negligent misrepresentation to a sales representative), and *Samaron Corp. v. United of Omaha Life Ins. Co.*, 2014 WL 4906314, at *13 (N.D. Ind. Sept. 29, 2014) (declining to expand negligent misrepresentation to an insurer because it is not the court's role "to expand upon the availability of tort remedies that Indiana has made clear are to be very limited in scope"), with *Technicolor USA, Inc. v. Nat'l Union Fire Ins. Co.*, 2019 WL 2106681, at *4 (S.D. Ind. May 14, 2019) (finding Indiana law did not definitively foreclose plaintiff's claim of negligent misrepresentation against insurer for purposes of assessing fraudulent joinder, but withholding judgment as to whether Indiana law would recognize the claim under the circumstances presented), and *Harrison Mfg., LLC v. Bienias*, 2013 WL 6486668, at *6 (S.D. Ind. Dec. 10, 2013) (applying Indiana negligent misrepresentation to a professional broker).

Troth, 495 F. Supp. 3d at 743–44.

Although Indiana has shown some expansion in this cause of action, the facts of PBE's claim simply are not comparable to the types of claims for which the doctrine has been expanded. As Troth explained, the class of individuals for whom Indiana intends this cause of action to apply involve individuals who engage in advisory roles or provide opinion-based advice. That sort of relationship has not been alleged here and PBE has not made any cogent argument that examines Indiana law on this cause of action. Accordingly, the Court declines to extend the tort of negligent misrepresentation to include the situation here and the Miller Defendants' motion for summary judgment is GRANTED on Count VII.

f. Individual Liability Against Miller

PBE also attempts to pierce the corporate veil and hold Miller personally liable for all the above torts and for the breach of contract. Because the Court has granted summary judgment on all claims against the Miller Defendants, it is likewise GRANTED as to the individual claims against Miller.

g. Insurer Liability for Breach of Contract

PBE's amended complaint asserted claims for breach of contract against the general liability insurers for PEM. It sought declaratory relief finding that the Insurers owed coverage and indemnification obligations for the claims PBE brought against their insureds. (Am. Compl. ¶¶s 70, 71). Both Insurers have filed dispositive motions seeking to dismiss PBE's claims. (ECF No. 125, Chesapeake's Motion to Dismiss or Alternatively, Motion for Summary

Judgment; ECF No. 127, Atlantic's Motion for Judgment on the Pleadings).¹¹ Because this Court has granted summary judgment in favor of the Miller Defendants, there are no claims remaining for which the Insurers could owe a coverage or indemnification duty under their insurance contracts with PEM. Accordingly, the Court DENIES their motions as MOOT but sua sponte GRANTS summary judgment in their favor on Count II of the Amended Complaint.

CONCLUSION

Based on the above, the Court GRANTS the Miller Defendants' Motion for Summary Judgment (ECF No. 128). The Court DENIES as MOOT the Insurer's Motions at ECF Nos. 125 and 127. The Court sua sponte GRANTS summary judgment in favor of the Insurers on Count II of the Amended Complaint. The Clerk is DIRECTED to enter judgment in favor of all Defendants and against PBE.

SO ORDERED on March 24, 2025.

s/ Holly A. Brady

CHIEF JUDGE HOLLY A. BRADY

¹¹ This Court referred Chesapeake's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and alternatively, for summary judgment to the Magistrate Judge for a Report and Recommendation ("R & R"). (ECF No. 162). The Magistrate Judge entered her R & R on February 28, 2025, (ECF No. 173) and PBE filed its objection to the R & R within the objection period in Fed. R. Civ. P. 72. The R & R recommends dismissal for lack of personal jurisdiction. However, because the Court concludes that no claims survive for which coverage would flow even if personal jurisdiction existed, Chesapeake's Motion to Dismiss, or in the alternative, for summary judgment is rendered moot.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
for the
Northern District of Indiana

PETERS BROADCAST ENGINEERING,
Plaintiff

v. CAUSE NO.: 1:21-CV-219-HAB

PEM CONSULTING GROUP, LLC, et al.,
Defendants

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

 the plaintiff
recover from the defendant the amount of
dollars \$ which includes prejudgment interest rate
of % along with costs.

 the plaintiff recover nothing, the action is
dismissed on the merits, and the defendant
recover costs from the plaintiff

X Other: Judgment is ENTERED in favor for
Defendants PEM Consulting Group, LLC, Pyramid
Consultants & Construction, LLC, Phillip E Miller,
Atlantic Casualty Insurance Company, Chesapeake
Insurance, and against Plaintiff Peters Broadcast
Engineering, Inc.

the action that was (check one)

__tried to a jury with a Judge_____presiding, and
the jury has rendered a verdict.

__tried by Judge_____without a jury and the
above decision was reached.

X decided by Chief Judge Holly A Brady on
Defendant Miller's Motion for Summary Judgment.

DATE: 3/25/2025
CHANDA J. BERTA, CLERK OF COURT

by s/ S. Jarrell
Signature of Clerk or Deputy Clerk

Excerpts of Crown Castle Construction Services
Master Agreement (§§ 1, 7, 9, 17, 24, 32) (ECF
95-1)

1. DEFINITIONS

As used in this Agreement, the following capitalized terms have the respective meanings ascribed to them below:

"Accident" means any incident involving injury to any person requiring immediate attention by a medical professional or any incident involving damage to property.

"Affiliate" means Crown Castle's subsidiaries, parents, direct and indirect affiliates whenever created or any joint venture in which it participates and shall be collectively referred to as the "Affiliates" and individually as an "Affiliate."

"Agreement" means this Construction Services Master Agreement, together with the following Exhibits attached hereto and incorporated by reference herein:

Exhibit A Contractor Invoicing
Requirements
Exhibit B-1 C o n t r a c t o r
Conditional Release and Waiver of Lien

Exhibit B-2 C o n t r a c t o r
Unconditional Release and
Waiver of Lien
Exhibit C I n s u r a n c e
Requirements

"Change" means any addition or alternative to, or deductions or deviations from, or substitution in the Work to be performed pursuant to the Contract Documents which may arise by direction of Crown Castle or Customer or for reasons beyond Contractor's reasonable control.

"Change Order" means a written directive issued by Crown Castle and executed by the parties, pursuant to which Contractor shall implement a Change, as provided in Section B. of this Agreement.

"Confidential Information" means information, including, but not limited to, information regarding: (i) Crown Castle, Affiliate, or Customer assets, liabilities, operations, financial conditions, employees, plans, prospects, management, investors, products, Customers, Contract Documents, strategies and techniques; (ii) the technical characteristics or operations of Crown Castle, Affiliate, or Customer products; (iii) Crown Castle, Affiliate, or Customer products system designs, system planning or technical data; (iv) Crown Castle CCISites, JDE, and OTG

information, systems and databases; (v) the identity and confidential information of Crown Castle or Affiliate's suppliers, landowners, subcontractors, and Customers, including the nature and extent of Crown Castle and Affiliate's business relationships with such parties; and (vi) trade secrets; whether disclosed in writing, orally, visually, in tangible or intangible form, including electronic mail or by other electronic communication.

"Contract Documents" means this Agreement, together with any Project Appendices, Exhibits, attachments, drawings, specifications, instructions, reports, studies Purchase Orders, NTP's, Scopes of Work, communications or other documents issued by Crown Castle or Customer or incorporated by reference in connection with a Project or Work.

"Contractor Personnel" means any person(s) furnished by Contractor to perform the Work under the Contract Documents including, but not limited to, Contractor's and Lower Tier Contractor's employees, non-employee workers, seconded employees, consultants, representatives, agents, and subcontractors.

"Customer" means a telecommunications provider or a telecommunications provider

vendor for whom Crown Castle is providing materials, work, or services.

"Elevated Work" means any work over six feet (6') above ground level, including but not limited to any means of elevating personnel, equipment, or materials above the ground, and any tower climbing (macro, rooftop, fiber, and small cell) and tower antenna installation or removal, equipment installation or removal, and maintenance activities on towers, small cell sites, fiber, rooftops or other structures.

"Final Acceptance" of a particular Project or Work shall be deemed to have occurred when: Contractor has performed all of the Work required by the applicable Contract Documents; a Certificate of Occupancy or similar document shall have been issued by the appropriate governmental body, if required; Crown Castle shall have inspected the Work and determined the same to have been completed (including all punch list items, if any) in accordance with the applicable Contract Documents and Customer requirements; Contractor shall have completed transmittal of all documentation required for closeout, as set forth in the relevant Purchase Order or Contract Documents; and Crown Castle shall have issued its certificate of final acceptance. Final Acceptance shall occur and be determined by Crown Castle on a Site-by-Site basis.

"Intellectual Property Rights" means all patents (including all reissues, divisions, continuations, and extensions thereof) and patent applications, trade names, trademarks, service marks, logos, trade dress, copyrights, trade secrets, mask works, rights in technology, know-how, rights in content (including performance and synchronization rights), or other intellectual property rights that are in each case protected under the laws of any governmental authority having jurisdiction.

"Lower Tier Contractor" means any service provider, person, company, materialmen, or entity with which Contractor or any subcontractor shall have entered into an agreement to provide Work, services or materials in connection with any Project, and their respective subcontractors.

"Notice to Proceed" or "NTP" means the written notification prepared for a Site identified in a Purchase Order, which is provided to Contractor authorizing Contractor to, among other things, order materials, begin Work, and solicit quotations for such Site from Lower Tier Contractors.

"Project" means Work to be performed by Contractor, or some other form of Work awarded by Crown Castle to Contractor, as described in the Contract Documents.

"Project Appendix" means a supplement to this Agreement, which may describe, including but not limited to, the specific Work on a Project, which may be performed by Contractor, as more fully described in Section 2. of this Agreement.

"Purchase Order" means a written instrument issued by Crown Castle or an Affiliate pursuant to this Agreement, which authorizes Contractor to proceed with Work.

"Site" means each physical location where the Work will be performed.

"Work" means the tasks, services, materials, and equipment collectively, which Contractor is engaged by Crown Castle, Customer or landowners to perform or provide, pursuant to and as described in the Contract Documents.

7. SUBCONTRACTING

- A. A list of Lower Tier Contractors, which Contractor expects to engage on any particular Project, shall be provided to and approved by Crown Castle prior to commencing Work, and such approval will not be unreasonably withheld. Any professional engineering services required for any Project must be performed by a professional engineering firm registered and in good standing in the appropriate state as required by law.

Contractor represents to Crown Castle that its Lower Tier Contractors shall perform its services and Work in accordance with the terms of the Contract Documents and all applicable laws. Contractor also represents that its Lower Tier Contractors shall comply with the terms of this Agreement. Furthermore, any regulatory compliance consultation work shall be performed by Crown Castle approved vendors only, the list of such vendors, which may be updated from time to time. All subcontracts and orders for the purchase or rental of supplies, materials or equipment shall require that the Lower Tier Contractor be bound by and subject to all terms and conditions of this Agreement. Each subcontract or order shall contain a provision permitting assignment to Customer, Crown Castle, or Affiliates. Crown Castle reserves the right to reject or require Contractor to terminate its relationship with any such Lower Tier Contractor in connection with this Agreement or any particular Project or Projects at any time. Crown Castle further reserves the right to require Contractor to terminate any particular work then in progress by any Lower Tier Contractor for failure to meet the requirements of the Contract Documents. Contractor's engaging of any Lower Tier Contractor to perform any portion of the Work shall not relieve Contractor of its obligations to Crown Castle pursuant to the Contract Documents.

Contractor shall have a competent person, satisfactory to Crown Castle, at the Site at all times during progress of the Work with the authority to act for Contractor. Crown Castle, in its reasonable sole discretion, and upon written notice to Contractor, may require Contractor to immediately remove any Contractor Personnel from a Project and replace such Contractor Personnel with a competent substitute within two (2) business days of the receipt of the notification.

- B. Contractor shall ensure that its representatives and Lower Tier Contractors will avoid the use of landowner or customer lines to place calls, to do testing or for any other purpose if at all possible. If such use cannot be avoided, Contractor's representatives and Lower Tier Contractors will use a calling card or other means, which prevent charges to landowner or customer accounts.
- C. Contractor Personnel, who may have contact with the public while performing Work, shall carry and display upon request identification showing that they are working on behalf of Contractor. Contractor Personnel shall be responsible for securing permission to enter upon private property when entry is necessary to Contractor's performance of the Work. All of Contractor and Lower Tier Contractor's owned, leased or rented vehicles shall be

marked with identification, including company name and telephone number.

- D. Contractor will determine whether each Contractor Personnel who performs Customer Work has performed Work as an employee or temporary worker for such Customer, or any Customer affiliate, in the six (6) months preceding the individual's proposed commencement of Customer Work. Contractor will provide Crown Castle with written notice of any individuals who meet the foregoing criteria. Customer may require that Contractor provide another individual to perform the Work.
- E. Contractor shall not use any person or other entity as a subcontractor on the Project at any time where such person or other entity is on the OSHA Severe Violator Enforcement Policy list, and any such use shall be a material breach of this Agreement.

9. INSPECTION OF WORK SITE; EXISTING UTILITIES AND SERVICES

- A. At all times, Crown Castle, Customer, and their respective agents, employees and representatives shall have access to the Site wherever Work is being performed, and Contractor shall provide proper facilities for such access and for inspection.

- B. Contractor shall call Crown Castle's NOC at 1-800-788-7011 (tower), 1-978-264-6000 (fiber), or 1-866-553-4237 (fiber) prior to entering and upon leaving any Site.
- C. Contractor shall have sole responsibility to familiarize itself with the nature and location of the Work. Contractor's failure to familiarize itself with applicable conditions shall not relieve Contractor of responsibility for properly estimating either the difficulties, time for or the cost of performing the Work. Prior to the submission of any proposal for Work to be performed under this Agreement, Contractor shall make or shall be deemed to have made a careful examination of the proposed Site and shall have satisfied itself as to the intent, nature and character of the Project including, but not limited to: location and characteristics of the facilities required as they relate to the proposed Work; local conditions as they may affect delivery and availability of materials and supplies; the availability of local labor and any Work rules relative to the performance of the Work; all laws, codes and right of way and easement agreements which affect the Work in any way; the type and quantity of facilities needed preliminary to and during the execution of the Work; and all other matters that may in any way affect the cost and time required for completion of the Work. Any difficulties which may be encountered in the execution of the Work and which result from

failure of Contractor to make the necessary examination and investigation of the proposed Site or as a result of its failure to seek clarification of the Contract Documents will not excuse any failure or omission on the part of Contractor to fulfill the requirements of the Contract Documents and shall not be accepted as the basis for any claim whatsoever for extra compensation or extension of the time required for completion of the Work.

- D. Without limiting the generality of the foregoing, Contractor represents and warrants that it is aware of the possible existence of aerial or underground power lines, telephone lines, water lines, sewer lines, cable television facilities, pipelines, structures and other public and private improvements within the Work area or adjacent thereto which may or may not be shown on the drawings. The fact that any aerial or underground facility is not shown on the drawings shall not relieve Contractor of its responsibility to ascertain the existence, position and ownership of such structures that may be subject to damage by reason of its operations. Contractor shall take every precaution to preserve and protect any such facilities, structures, and improvements from injury or damage during its Work operations. Prior to commencing Work on any Project, Contractor shall contact all affected utilities and facility owners to arrange for the locating and marking of their installations and

facilities as may be necessary or appropriate in connection with the performance of the Work. Contractor shall have the further responsibility of coordinating the Work with that of the utility and other facility owners in such a manner as to avoid any interference with the operation of such utilities and facilities. In any event, the responsibility for determining the actual on-site location of utility lines and services shall rest exclusively with Contractor. In the event that Contractor should damage any utility or facility owner's property or installations, Contractor will immediately contact the affected utility or facility owner and make it aware of the incident in order to minimize any down time and/or loss of revenue the utility or facility owner may have experienced due to such damage. Contractor shall be solely responsible to the utility or facility owner for all such claims, costs and/or loss of revenue.

- E. Crown Castle inspectors, employees or agents shall have no authority to direct or advise Contractor or Lower Tier Contractor concerning the manner by which the Work is to be performed. Crown Castle is not liable or responsible for reviewing, auditing, or approving Contractor or Lower Tier Contractor plans, methods, or compliance.

17. LAWS, PERMITS AND TAXES

- A. At its expense, Contractor shall comply with, and shall ensure that its Lower Tier Contractors shall comply with, all federal, state and local laws, ordinances, rules, regulations, standards, and orders required for the performance of the Work. Before starting Work on each Project, Contractor shall ascertain whether the specifications, drawings or other Contract Documents are at variance with any such laws, ordinances, rules, regulations, standards, and orders and shall promptly notify Crown Castle of any such variance. Contractor responsibility to ensure that all of its Work and that of its Lower Tier Contractors comply with said laws, ordinances, rules, regulations and orders.
- B. Contractor shall secure all licenses, permits, certifications, approvals, authorizations, and inspections, pay all related charges and fees and give all notices necessary for the due and lawful prosecution of the Work.
- C. Unless otherwise agreed in writing, Contractor shall be responsible for the administration and payment of: (i) all taxes, fees and contributions on or measured by the net income, or assets of Contractor, and (ii) all sales and use type taxes pertaining to tools, office supplies and similar items used by

Contractor in carrying on the Contractor trade or business.

- D. Contractor and its Lower Tier Contractors shall pay all taxes measured by wages, salaries or other remuneration of their employees required by the Federal Insurance Contributory Act as amended, any other applicable federal laws, or the applicable laws of the state and/or locality in which the Work is performed. Contractor hereby agrees to indemnify and hold Crown Castle, Affiliates, Customer, and landowner harmless from any liability arising out of or related to taxes, liens, duties, assessments, deductions and benefits, in addition to any penalty, interest or other charge that may be levied as a result of Contractor's or any Lower Tier Contractor's late payment, insufficient payment, failure to pay any such taxes, or improper worker classification.
- E. Contractor and its Lower Tier Contractors shall file such returns, reports or forms necessary for the payment of taxes.
- F. Upon written request, Contractor shall submit to Crown Castle written confirmation of any filings or payments of all taxes, including government furnished receipts and detailed documentation by the federal government or any applicable states. Crown Castle reserves the right to contest, or cause Contractor to contest, any such tax, fee or assessment, and

Contractor shall use its best efforts in cooperating with Crown Castle in any such contest. Crown Castle reserves the right to contest, or cause Contractor to contest, any such tax, fee or assessment, and Contractor shall use its best efforts in cooperating with Crown Castle in any such contest.

- G. If provided by Contractor, Contractor shall pay all royalties and license fees in connection with materials installed and labor performed in conjunction with the Work.
- H. Contractor must conduct business with Crown Castle in an ethical manner. Contractor shall not directly or indirectly, make, offer, cause to be made, accept, request, suggest, direct or otherwise induce any bribe, payment, loan, commission, hospitality, gift of money, kick-back, inducement or anything of value or other advantage (individually or collectively "Bribery") to any official, employee, agent or instrumentality of any government, including legislative, administrative or judicial positions, or any public international organization or any other person, company or legal entity to gain any advantage for Crown Castle or Customer, or violate any economic or trade sanctions, in connection with any transaction relating to this Agreement that could result in a violation of any laws relating to Bribery, including without limitation the Foreign Corrupt Practices Act.

- I. None of the Work shall be performed or provided and no information related to this Agreement shall be collected, stored, handled or accessed by Contractor or its Lower Tier Subcontractors at any location outside of the United States without the prior written approval of Crown Castle.

24. RELATIONSHIP OF PARTIES

- A. Contractor's relationship with Crown Castle pursuant to this Agreement is that of independent contractor. All persons employed by Contractor in the performance of the Work shall be under the sole and exclusive direction and control of Contractor and shall not be considered for any purpose to be the employees or agents of Crown Castle or Customer. Contractor shall be separately and exclusively responsible for the acts and omissions of Contractor Personnel and those of its Lower Tier Contractors. Contractor shall supervise and direct the Work, using the highest skill and attention, and shall be responsible for all construction means, methods, techniques, sequences, safety, and procedures and for coordinating all Work. Contractor shall be responsible for all withholding from its employees wages as required by law, and for making all contributions in respect thereof required of employers. Nothing in this Agreement shall create any contractual obligation or other liability of Customer to

Contractor or any Lower Tier Contractor or its employees. Contractor agrees to bind every Lower Tier Contractor to terms consistent with the terms of this Agreement applicable to the Work to be performed by each such Lower Tier Contractor.

- B. The parties acknowledge that Crown Castle has entered into this Agreement on behalf of itself and certain of its Affiliates for convenience in order to establish uniform terms and conditions for Work awarded by any of such Crown Castle Affiliates to Contractor. The foregoing notwithstanding, Contractor hereby agrees that any claim Contractor may have arising out of or relating to this Agreement or any Work performed by Contractor shall be made only against the particular Crown Castle entity which issued the applicable Purchase Order. Contractor further agrees that it shall have no claim against any other Crown Castle entity or Affiliate based only on the manner in which this Agreement was executed by Crown Castle.
- C. Contractor further agrees to not divert or solicit directly or indirectly from Crown Castle to itself or any third parties, or solicit from any Customer or potential Customer on behalf of itself or any third parties, business opportunities that Crown Castle presents to Contractor in which Crown Castle proposes to

subcontract all or a portion thereof, to Contractor.

32. ASSIGNMENT

Contractor shall not assign any right or interest under this Agreement or, subject to the provisions of Section 7. of this Agreement, delegate any obligation under this Agreement or any other Contract Document without the prior written consent of Crown Castle. Contractor shall be responsible to Crown Castle for all Work performed by Contractor's Lower Tier Contractors. Crown Castle may assign this Agreement or any related agreements to Affiliates.

**Excerpts of Transcript of Oral Argument, No.
25-1519 (7th Cir. Apr. 9, 2026), pp. 3-13**

Page 3

1 deal with at all. It didn't dismiss or overrule
2 the motion for summary judgment in relation to
3 that claim. It merely ignored that claim.
4 So number one, the dismissal of the
5 case did not address every claim raised by the
6 plaintiff. The fraudulent inducement claim was
7 not dealt with at all. On that ground alone, the
8 district court should be reversed.
9 Secondly, the district court, instead
10 of according the inferences arising from the facts
11 alleged by the plaintiff, made decisions deciding
12 which of the facts the district court decided to
13 approve.
14 The third issue is the district court
15 focused entirely in its opinion on whether or not
16 there was a contract between the parties which
17 gave the defendants the status of a subcontractor.
18 What the district court ignored was that the
19 claim, the gravamen of the amended complaint,
20 was
21 that there was detrimental reliance on behalf of
22 Peters Broadcast Engineering, which gave rise to
23 an amended -- an implied contract, I should say,
24 that was breached.
25 Peters Broadcast Engineering relied to

Page 4

1 its detriment and altered its position based upon
2 fraudulent and negligent representations made to
3 it by the defendants. Specifically, Your Honor,
4 Peters Broadcast Engineering is a 40-year-old

5 small radio-broadcast-engineering company based
in
6 Fort Wayne, Indiana.
7 In 2019, by virtue of its reputation
8 within the industry, Crown Castle approached
9 Peters in connection with its requirement to
10 construct cell sites at 33 locations in Indiana
11 and for Peters Broadcasting to be a lead
12 contractor on that construction. Those -- the
13 opportunity presented to Mr. Peters and Peters
14 Broadcast Engineering was such that, not only
did
15 they have the opportunity to work on these 33
16 sites, because this opportunity was extended in
17 connection with the 5G rollout, there was an
18 opportunity for Peters Broadcast Engineering to
19 work on cell sites indefinitely, practically, all
20 over the United States. At first, however, they
21 were asked by Crown Castle to work on 33 sites.
22 THE COURT: Mr. Squire, you -- you
23 mentioned that there was a -- it seemed like there
24 was some sort of agreement between Peters

Page 5

1 Broadcasting and the Miller Group before the
2 written subcontractor agreement was finalized; is
3 that correct? That's your argument?
4 MR. SQUIRE: Your Honor, that is
5 correct.
6 THE COURT: So --
7 MR. SQUIRE: Because the subcontractor
8 agreement was never consummated.
9 THE COURT: So, what were -- and I was
10 trying to figure this out from the record. What

11 were the precise terms of that agreement?
12 MR. SQUIRE: Your Honor, the terms of
13 the agreement were, because of representations
14 made by the Miller defendants concerning their
15 capabilities, Mr. Peters, in advance of any
16 subcontractor agreement being entered into,
17 permitted the Miller Group to come on, basically,
18 as his employees under his active supervision.
19 Had a subcontract --
20 THE COURT: So are you saying that the
21 agreement was an employer-employee agreement?
22 MR. SQUIRE: That's eventually what
23 occurred. That's what occurred because of the
24 inability to formulate a subcontractor agreement.
Page 6

1 Mr. Peters had a responsibility under
2 the agreement he reached with Crown Castle to
3 begin work on those 33 sites in May of 2019. But
4 for the fact that he was approached by Miller and
5 told, "I can come in here and perform this work.
6 You pay me 90 percent of what you receive from
7 Crown" --
8 THE COURT: So hold on -- hold on for a
9 second.
10 MR. SQUIRE: Yes.
11 THE COURT: I guess this is the first
12 time I'm hearing this concept of an
13 employer-employee agreement. Typically, when
14 you have an employee-employer arrangement, you
15 have --
16 you know, you have W-2s. You have tax forms
17 that

16 are -- that are, you know, completed. Were any
17 of
18 those formalities abided by?

19 MR. SQUIRE: These would have been 1099
20 employees --

21 THE COURT: Okay.

22 MR. SQUIRE: -- Your Honor.

23 THE COURT: Okay.

24 MR. SQUIRE: So the reason I'm saying
-- this was an interim arrangement because at
all

Page 7

1 times there was an effort being made to enter
into

2 a subcontractor agreement. The subcontractor
3 agreement was never achieved because Miller
4 refused to enter into the type of agreement that
5 the Master Services Agreement required.

6 So in order to commence work on the
7 sites, Mr. Peters permitted Miller to start
8 working with his crew with the expectation that
9 during this interim period, Miller -- that Peters
10 could fulfill his responsibilities under the
11 Master Services Agreement. But he could not
let

12 Miller assume the status of a subcontractor,
13 because there was no subcontractor agreement
that

14 complied with the Master terms.

15 THE COURT: So -- so what were the
16 terms of that employer-employee agreement?

17 MR. SQUIRE: That he would --

18 THE COURT: So how --

19 MR. SQUIRE: That he would bring -- I'm
20 sorry, Your Honor.

21 THE COURT: For example, how much did
22 -- did, you know, Peters Broadcasting promise to
23 pay Miller? What was Miller exactly -- what
24 was
25 the scope of the Miller Group's work? I'm -- I'm
Page 8

1 thinking, for -- you know, you need, kind of,
2 precise terms.

3 MR. SQUIRE: What I'm saying, Your
4 Honor, is that Peters retained his position as the
5 controller of work on these sites. The only
6 reason Miller was able to obtain access to the
7 sites to bring people to work on the sites is
8 because they were there under the authority of
9 Peters Broadcasting. Had they been a
10 subcontractor, they would have had independent
11 authority to be at these sites. They never
became

12 a subcontractor. So the only reason they could
13 go
14 to these sites was because they were there as
15 independent contractors under the control and
16 active management and supervision of Mr.
Peters.

17 Mr. Peters also brought on another
18 individual by the name of Mike Taylor. He
wasn't

19 under the umbrella of the Miller defendants.
He

20 was separate. So Mike Taylor and all of the
Miller folks were working on cell sites under the

21 active control and management of Peters
Broadcast

22 Engineering, because there was no
subcontractor

23 agreement. So that meant Mr. Peters was in a
24 position --

Page 9

1 THE COURT: Was there an agreement
2 between the parties in the event that the
3 subcontractor agreement would not be finalized,
4 that Miller -- that -- that Peters Broadcasting
5 would compensate Miller for a certain amount
for
6 the work that the Miller people were doing?

7 MR. SQUIRE: He compensated them for
8 the work they were doing. And this is where --

9 THE COURT: And -- and that's -- I'm
10 asking what were the terms of that
compensation?

11 MR. SQUIRE: The terms of that
12 compensation was what they worked out orally,
Your

13 Honor.

14 THE COURT: And what was that?

15 MR. SQUIRE: He paid them \$46,000 for
16 the work they did on the first five sites. That's
17 what he paid them. That was based upon his
18 assessment of the quality of what had been done
in

19 order to meet the requirements of Miller,
pending

20 the consummation of a subcontractor
agreement.

21 Mr. Peters was under a requirement to
22 work on these sites. He had five sites he had to
23 start working on. He got the Master Services
24 Agreement in May of 2019. He had a duty to
start

Page 10

1 working at that point. He would have had to go
2 out, hire crews, hire individuals to start
3 working, which he was in the process of doing
when

4 he was approached by Chris Smith and Mr.
Miller.

5 They told him, "We can do this. You can take a
6 passive role. Give us 90 percent of the money.
7 We'll enter into a subcontractor agreement."

That

8 didn't occur. So Mr. Peters retained active
9 control over the sites in order to satisfy his
10 duty to Crown Castle, and brought them on as
11 independent contractors.

12 What was learned after he did that was
13 that -- contrary to representations that were
made

14 to him concerning the qualifications of the
crews,

15 concerning the source of their resources, and
16 concerning what could be done with the money
they

17 were paid, it was learned that the Miller
18 defendants were under criminal investigation in
19 Texas, that they had obtained money from a
third

20 party by the name of Ms. Joyner to the extent of

21 \$700,000, and that all of the equipment and so
22 forth that was brought to the sites, contrary to
23 what Miller represented to Mr. Peters, actually
24 belonged to this third party.

Page 11

1 THE COURT: Mr. Squire, I -- I guess
2 I'm a bit confused. Because the -- you're saying
3 that the Peters Broadcasting maintained control
4 over these sites as they needed to do under their
5 agreement with Crown Castle. And in the end,
6 Crown Castle terminates the agreement or does

--

7 you know, refuses to provide Peters
Broadcasting
8 with any more sites because of the faulty
9 workmanship on the sites.

10 MR. SQUIRE: Correct.

11 THE COURT: And, yet, Peters
12 Broadcasting was the one managing the sites
and
13 overseeing and supervising. And so to some
14 extent, wasn't it Peters Broadcasting's fault that
15 the work on the sites didn't meet Crown Castle
16 specifications?

17 MR. SQUIRE: It was his fault, Your
18 Honor, because he relied upon the fraudulent
and
19 negligent misrepresentations of Miller
concerning
20 what their capabilities were. He said he had
21 employees that knew, and he knew from his
previous

22 experience with Chris Smith, who brought
Miller

23 into Mr. Peters' confidence, who operated a
24 company called Frequency 1. Smith
represented to

Page 12

1 Mr. Peters that he knew Miller, that Miller's
2 people were competent. So at that point, instead
3 of going out and hiring his own crews, he said,
4 "I'll let these guys go in and work." Turns out,
5 they brought in employees who had no
experience in

6 telecommunications. They were people brought
out
7 of an oil field.

8 Contrary to the representations made to
9 Mr. Peters, the equipment didn't belong to them.
10 And contrary to the representations made to
11 Mr. Peters, Mr. Peters would not have been
12 entitled to any money. Because all of the money
13 earned by Miller was obligated to a third party
by

14 the name of Ms. Joyner, who had given Miller
15 \$700,000. And Miller was obligated to turn over
16 100 percent of whatever revenue he earned from
17 working on cell sites to Ms. Joyner, because he
18 had, in January of 2019, entered into an
agreement

19 with her to that effect. That was never
disclosed

20 to Mr. Peters.

21 So what we're saying, Judge, is that
22 Mr. Peters relied to his detriment, justifiably,

23 on representations made by Mr. Miller that
were
24 fraudulent. He never disclosed to Mr. Peters
that

Page 13

1 the trucks, the money, came from a third party
2 that he was obligated to pay 100 percent of the
3 revenue to, nor that he had people working on
4 these crews that had no competence, whatsoever.

5 This is an industry that -- the reason
6 Mr. Peters got this awarded contract was
because

7 of his status and reputation within the industry.
8 Crown Castle just doesn't go around and accord
9 these opportunities to anyone. It takes someone
10 who has a track record in the industry, who has
11 proven their ability to do this type of work, and
12 Mr. Peters had worked 40 years to establish
that
13 reputation.

14 He relied to his detriment on the
15 fraudulent representations made by Mr. Miller
and

16 Mr. Smith and let those people come in. They
17 never would agree to enter into a subcontracting
18 agreement of the nature that Crown Castle
19 required, and then, without any authority,
having

20 failed to perform as they represented,
21 circumvented Mr. Peters, went to Crown Castle,
and

22 tried to get themselves established as a direct
23 contractor to the detriment of Mr. Peters, again,

24 without his authority or --

F-11