THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Supreme Court Case No. 2020-000445

Appellate Case No. 2016-001140

Case No. 2011-CP-10-00387

PCS Nitrogen, Inc. .....Petitioner,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, and Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America) .....Respondents.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW 2

III. COUNTER-STATEMENT OF THE CASE 3

A. The Insurance Policies 3

B. The History of Columbia Nitrogen Corporation (Old CNC) 4

C. PCS's Acquisition of Certain Assets of Old CNC 4

D. Old CNC Assigned "Benefits," Not "Policies," to New CNC, and the Parties Knew that Insurer Consent Was Needed to Transfer Policies, Which Was Not Obtained Here 5

E. The Underlying Environmental Litigation 6

F. The Insurance Coverage Case and Contentions of the Parties Below 8

G. The Trial Court's Summary Judgment Order 9

H. Court of Appeals' Ruling Affirming Summary Judgment 10

IV. STANDARD OF REVIEW 11

V. ARGUMENT 12

A. The Trial Court's Holding on Novation Was Not Appealed and Is Law of the Case, Which Alone Justifies Denial of Certiorari 12

B. The Decision of the Court of Appeals Is in Full Accord with this Court's Precedent and Involves No Novel Question of Law 13

1. Insurance Policies Cannot Be Transferred Without Insurer Consent 15

2. PCS's Effort to Misread Dictum in *Narruhn* to Reach a Different Result Should Be Rejected 16

3. A Chose in Action Accrues Only After a Tort Claimant Obtains a Judgment of Liability Against the Insured 19

4. PCS's Reliance on Out-of-State Authority Is Misplaced 22

5. PCS's *De Facto* Merger Theory Is Legally Untenable 24

VI. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989) 13

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014) 15

Atlantic Coast Bldrs. & Cont., LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) 13

Brown v. American Ry. Exp. Co., 128 S.C. 428, 123 S.E. 97 (1924) 24

Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) 13

Fluor Corp. v. Super. Ct., 354 P.3d 302 (Cal. 2015) 23

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 151 A.3d 576 (N.J. 2017) 23

Greenwood Cotton Mill v. Pace, 172 S.C. 531, 174 S.E. 473 (1934) 12

Hack v. Metz, 173 S.C 413, 176 S.E. 314 (1934) 16

Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008) 11

Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1970) 22

Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981) 15

Ligon v. Metropolitan Life Ins. Co., 219 S.C. 143, 64 S.E.2d 258 (1951) 16, 19

Mason v. Finley, 129 S.C. 367, 124 S.E. 780 (1924) 15

McDonald v. South Carolina Farm Bur. Ins. Co., 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999) 13

Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013) 17, 18, 20, 22

Park v. Safeco Ins. Co., 251 S.C. 410, 162 S.E.2d 709 (1968) 19, 20, 21

PCS Nitrogen, Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013) 8

Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) 14

Ross Dev. Corp. v. PCS Nitrogen, Inc., 526 F. App'x 299 (4th Cir. 2013) 9

Silverman v. Dew, 182 S.C. 457, 189 S.E. 756 (1937) 15, 19

Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 746 S.E.2d 35 (2013) 24

Wise v. Poston, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984) 15

Rules

Rule 242(b), SCACR 12

I. INTRODUCTION

Petitioner PCS Nitrogen, Inc. ("PCS") filed this suit against several insurance companies that issued liability insurance policies to another company, Columbia Nitrogen Corporation ("Old CNC"). PCS has no corporate relationship with Old CNC. PCS claimed that its purchase of certain assets and assumption of certain liabilities of Old CNC in 1986 entitled it to Old CNC's insurance rights, as if "insurance runs with the property." But this Court directly rejected that proposition 83 years ago. Undeterred, PCS relied on a limited "Assignment of Insurance Benefits" executed at the time of the corporate asset purchase, saying it resulted in transfer of insurance *policies* to it without consent of the insurers. But PCS overlooks the fact that the parties clearly understood that the assignment would not have that effect, and the fact that this Court rejected that argument in the very case PCS relies upon. The trial court correctly rejected PCS's arguments and went on to hold that any attempt to transfer a contractual relationship is not an "assignment" but a "novation," which requires the consent of all parties, which was not obtained—and PCS did not appeal that issue, making it the law of the case.

PCS argued below, as it argues here, that the rule it espoused is the "overwhelming nationwide consensus," but that, too, is incorrect. Indeed, the overwhelming consensus of decisions is that insurance policies may *not* be transferred to a third party without insurer consent, at any time. Instead, cases hold that an insured may assign only a right to receive the insurer's payment, once that payment obligation has accrued, because the right to receive an accrued payment is a "chose in action"—in other words, *property* (and not merely a contract right) that the insured *owns* and that is therefore *transferable*—which is precisely South Carolina law. Moreover, PCS omits a key fact distinguishing this case from *all* of the cases it relies upon, namely, that here PCS was *adverse* to Old CNC in the underlying environmental litigation, suing Old CNC's parent company and helping to establish Old CNC's environmental liability. PCS

ended up responsible for that liability because it was held to have contractually assumed it, but in the meantime *it helped prove, as an adverse party, liability that it now seeks to recover from Old CNC's insurers*. PCS even seeks to recover from the insurers its attorneys' fees in doing so. In other words, PCS was the insured's adversary for *liability* purposes, but now claims to be the insured for *insurance* purposes, a contradiction that demonstrates the infirmity of PCS's position, because it cannot be both the insured's adversary and the insured. While PCS glibly proclaims that an insurer's risk cannot be affected after its policy expires, PCS's own conduct proves otherwise, as it seeks "insured" status for liability it vigorously sought to prove itself. Clearly this is an "increase in risk" that none of the insurers bargained for.

The unanimous Court of Appeals decision properly rejected all of PCS's arguments and held that insurance policies may not be transferred without insurer consent and that Old CNC did not assign a "chose in action" to recover insurance payments at the time of the 1986 corporate transaction, because as of then the key condition to the insurers' payment—that the insured have been held liable in a judgment covered by the policies—had not occurred, as indeed no suits had even been filed. The Court of Appeals applied settled South Carolina law, so there is no "novel question of law" or departure from this Court's precedent to justify review.

Finally, the last-ditch argument that PCS might be the successor to the insured entity here on a "*de facto* merger" theory is unavailing. This argument is *the exact opposite* of what PCS argued, for years, to the federal courts in the underlying environmental litigation. The courts below gave no credence to PCS's argument, and neither should this Court.

The Court should deny the Petition.

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the unanimous decision of the Court of Appeals correctly apply South Carolina law in holding that a court cannot unilaterally rewrite contracts to permit a stranger to

insert itself into a contractual relationship with liability insurers, and that only an assignment of a "chose in action" may be permitted without insurer consent, which did not occur here because the insured had no "chose in action" to recover insurance money at the time of the assignment?

2. Is the "*de facto* merger" theory rejected by the trial court, whose ruling was left undisturbed by the Court of Appeals, facially inapplicable here because, as a matter of law, equity does not step in to recast a corporate transaction as a *de facto* merger where the asset purchaser has *contractually assumed* corporate liabilities, and because, as a matter of fact, the factors necessary to support that theory undisputedly were not satisfied here?

III. COUNTER-STATEMENT OF THE CASE

A. The Insurance Policies

Respondents issued several primary and excess liability insurance policies to Columbia Nitrogen Corporation ("Old CNC"), covering the period 1966 to 1985. App. 218-328; 736-53; 948-63; 975-1016, 1030-49, 1055-1131; 1146-48; 1458-1504, 1510-1599; 1611-49; 1666-1963. In quoting policy language, the trial court referred to the language in the Continental policies, but noted that the policies of the remaining Respondents contain similar language. App. 149 n.1.

Continental issued two primary general liability insurance policies to "Columbia Nitrogen Corporation:" Policy No. CCP 9682195, for the policy period January 1, 1973 to January 1, 1974, and Policy No. CCP 9883159, for the policy period January 1, 1974 to February 1, 1975 (the "Continental Policies"). App. 218-328; 335 ¶ 17; 355 ¶ 17. The "named insured" was defined in the Continental Policies as "Columbia Nitrogen Corporation and Nipro, Inc. and any owned, controlled or affiliated company now or hereafter acquired." App. 234 & 273. Subject to all of their terms and conditions, the Continental Policies stated that Continental would "pay *on behalf of the insured* all sums which *the insured* shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance

applies, caused by an occurrence." App. 249 & 277 (emphasis added). The Continental Policies stated, "Assignment of interest under this policy shall not bind [Continental] until its consent is endorsed hereon." App. 255; 375 ¶ 9; 384 ¶ 10.[1]

B. The History of Columbia Nitrogen Corporation (Old CNC)

The corporate history of Old CNC is undisputed. In simplest terms, Columbia Nitrogen Corporation was incorporated in 1962, and it dissolved in 1986. It did not merge with any other corporation. Old CNC was incorporated as "Columbia Nitrogen Corporation" in Delaware on October 1, 1962. App. 375 ¶ 10; 384 ¶ 11. Old CNC acquired a site located in the Neck area of Charleston, South Carolina, on June 30, 1966 (the "Charleston Site"). App. 334 ¶ 1; 376 ¶ 12; 385 ¶ 13. The Charleston Site was used for phosphate fertilizer production. App. 396 ¶ 14. Old CNC ceased production at the Charleston Site in 1972. App. 436 ¶ 12. Old CNC sold the Charleston Site to a third party in 1985. App. 376 ¶ 12; 385 ¶ 13.

C. PCS's Acquisition of Certain Assets of Old CNC

On or around October 31, 1986, Old CNC entered into a transaction under which it sold certain assets (*not* including the Charleston Site, which it had already sold off in 1985) to a new entity called "CNC Corp." App. 376 ¶¶ 16-17; 385-86 ¶¶ 17-18; 395 ¶ 11. CNC Corp. was incorporated on September 26, 1986. App. 376 ¶ 16; 385 ¶ 17. CNC Corp. obtained only certain assets and assumed certain liabilities relating to the "Acquired Business," which was defined as "a business that produces and sells ammonia and nitrogen-based products," App. 436-37 n.1.[2]

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[1] The policies issued by all other Respondents contained substantially similar language. App. 753; 960; 979; 1014; 1046; 1072; 1113; 1119; 1164; 1218; 1263; 1332-33; 1362; 1429-30; 1495; 1546; 1579; 1626; 1649; 1684; 1738; 1783; 1803; 1849-50; 1879; 1944-46.

[2] In its Petition PCS asserts that "all" of the assets of Old CNC were sold to the new entity. Pet. at 3. This is incorrect. App. 436-37 n.1 (showing only "Purchased Assets" sold, not "Retained Assets"); App. 397 ¶ 11 (PCS admission that CNC Corp. "received a transfer of certain assets").

Old CNC filed a certificate of dissolution on November 19, 1986. App. 376 ¶ 15; 385 ¶ 16. Following the dissolution of Old CNC, CNC Corp. changed its name to "Columbia Nitrogen Corporation" ("New CNC"). App. 376 ¶ 16; 385 ¶ 17.

New CNC merged with a corporation called "Fertilizer Industries, Inc." on or about November 29, 1989. Fertilizer Industries, Inc. changed its name to "Arcadian Corporation" on or about November 30, 1989. Arcadian Corporation merged with PCS in March 1997. App. 377 ¶¶ 21-22; 387 ¶¶ 22-23.

PCS is therefore the successor-by-merger to "*New* CNC," a corporation that was created on September 26, 1986, after all Respondents' policies had expired. New CNC is not the same corporation as Old CNC, which was incorporated in 1962 and was dissolved in 1986. New CNC similarly did not merge with Old CNC, but simply acquired certain of its assets and assumed certain of its liabilities.

D. Old CNC Assigned "Benefits," Not "Policies," to New CNC, and the Parties Knew that Insurer Consent Was Needed to Transfer Policies, Which Was Not Obtained Here

In connection with the 1986 transaction, Old CNC executed an "Assignment of Insurance Benefits" ("Assignment"). App. 2398. Old CNC stated that it "does hereby transfer and assign to [New CNC] . . . all of [Old CNC's] rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned.*" *Id.* (emphasis added). The trial court held that the clear terms of this Assignment, and the conduct of the parties at the time, showed "the parties' understanding that assignment of the Policies in full would require consent of the insurers," which was neither sought nor obtained. App. 157-58.

Indeed, Old CNC's and New CNC's contemporaneous statements showed that they understood that assignment of insurance policies from one to the other was impossible without

the consent of the insurers. A checklist of tasks to accomplish to close the sale noted that, at the closing, Old CNC was to provide "Assignment of insurance policies *with the consent of the insurance companies endorsed thereon.*" App. 2510 (emphasis added). This shows that the parties understood that insurer consent was needed for assignment of "policies." This is confirmed by a December 6, 1986, letter, summarizing events surrounding the November 1, 1986, closing, which notes that, in fact, most of Old CNC's then-current policies were cancelled, with new policies being issued to New CNC ("the purchaser of Columbia Nitrogen Corporation"), rather than old policies being assigned to it. App. 2524-28. Only those policies that could not be cancelled for a refund of premium were assigned:

> Most all of those policies were cancelled at closing, November 1, 1986, and pre-payments were refunded to Nipro, Inc. and distributed by Nipro, Inc. to the companies according to the original share of premium. In these cases, new separate policies were issued to Nipro, Inc., Synres and to the purchaser of CNC [New CNC]. In the cases indicated [below], the prepaid premium was not subject to refund by terms of the policy and so, *the benefits of such prepaid policies were assigned* to Nipro, Inc. and to [New CNC]."

App. 2524 (emphasis added). The letter lists "Liability Insurance" policies that were assigned, App. 2525-26, and the list does not include any of the policies at issue here. Indeed, the only liability policy that was assigned instead of being canceled (a second level excess policy) was assigned *with the consent of the insurer.* App. 2526 ("the underwriter did agree to assign coverage to Nipro, Synres and the purchaser of Columbia Nitrogen Corporation [New CNC]. Such endorsement was received 10/14/86. . . ."). These facts, which were not disputed by PCS, show that New CNC understood it needed insurer consent for assignment of policies, and that it actually obtained such consent from one of the then-current insurers of Old CNC. Yet no consent was sought or obtained for assignment of any of the policies at issue here.

E. The Underlying Environmental Litigation

On September 26, 2005, the owner of the Charleston Site, Ashley II of Charleston, LLC

("Ashley II"), filed suit against PCS in federal court, alleging that PCS was liable for environmental remediation at the Charleston Site. App. 462-504. Ashley II alleged that PCS was responsible for environmental liability at the Charleston Site because the terms of the 1986 transaction required it to assume Old CNC's liabilities. App. 470. PCS denied it was liable but it filed a third-party complaint against Old CNC's parent company, DSM Chemicals North America, Inc. (formerly called "Nipro, Inc.," which was also an insured under Respondents' policies), seeking contribution. App. 395-433, at 421-25. Among other things, PCS alleged that DSM Chemicals "should be held responsible for any and all contamination caused by their alter ego Old Columbia Nitrogen [*i.e.,* Old CNC]." App. 422. PCS made allegations directly adverse to Old CNC, alleging, for example, that "[d]iscovery recently taken in this case has revealed that [Old CNC's] *activities at the Charleston Site substantially contributed to the contamination of the Charleston Site* property and thus rendered [Old CNC] a 'covered person' within the meaning of Section 107(a)(2) of CERCLA." App. 416 ¶ 37 (emphasis added).

Throughout the *Ashley II* litigation, PCS adamantly and consistently denied that it was the corporate successor to Old CNC or that it had assumed Old CNC's liabilities with respect to the Charleston Site. For example, in the federal district court, PCS disputed at trial that it had assumed the environmental liability arising out of the Charleston Site, saying the "Acquired Business" was limited to an ammonia- and nitrogen-based fertilizer plant located in Augusta, Georgia, and denying that it was liable for Old CNC's other liabilities under any theory of successorship to corporate liability. App. 444-55.

PCS similarly argued on appeal in the underlying matter that it was not the corporate successor to Old CNC under any theory, including *de facto* merger. App. 505-75, at 529-51 ("PCS Is Not a Successor to CNC"). Ultimately, PCS was *not* held to be the corporate successor.

Instead, PCS was found only to have assumed certain of Old CNC's liabilities *by contract*, including environmental liability associated with the Charleston Site. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 174-76 (4th Cir. 2013) (App. 703-18, at 709-11). The Fourth Circuit observed, "[W]e must affirm the judgment of the district court holding that in the Agreement New CNC assumed Old CNC's CERCLA liabilities for the site and that PCS is therefore a PRP as a successor to Old CNC's CERCLA liability for the site." *Id.* at 176.

PCS was held liable for 30 percent of the clean-up costs for the Charleston Site—based on Old CNC's activities, which it helped to prove—subject to paying more, if other responsible parties failed to pay their allocated shares. App. 576-702, at 694, 701.

F. The Insurance Coverage Case and Contentions of the Parties Below

On January 18, 2011, PCS filed this suit in the Court of Common Pleas, Charleston County, against certain insurers who had issued primary liability insurance policies to Old CNC, alleging that it "has been held to be the successor" to Old CNC and seeking defense and indemnity costs with respect to the *Ashley II* suit. App. 178. The case was stayed pending PCS's appeal of the *Ashley II* judgment to the Fourth Circuit. After that appeal concluded, PCS filed a Third Amended Complaint, on March 24, 2015, among other things adding several excess insurers as defendants. App. 331.

Continental (joined by all insurers) moved for summary judgment on July 24, 2015, on the ground that, based on the undisputed facts recounted above, PCS was not the "insured" under the insurers' policies and was not entitled to claim rights under them. App. 188.[3] Continental

[3] Continental and certain other insurers simultaneously filed another motion for summary judgment based on the "pollution exclusion" contained in their policies. App. 756-800. As the insurers demonstrated, even if PCS could claim rights to coverage under policies issued to a different company, it is clear that the pollution exclusion bars coverage—an issue *PCS has already litigated and lost* under South Carolina law, in seeking coverage with respect to the very same Charleston Site under policies issued to another company, Ross Development Corporation,

argued that PCS was not the corporate successor to Old CNC (as confirmed by the Fourth Circuit) and that PCS had not received an assignment of Old CNC's insurance rights, as any assignment would require the insurers' consent, which was neither sought nor obtained. Continental showed that South Carolina law upheld provisions in insurance policies restricting assignment of policies without consent, and that the exception permitting assignment of a right to a current money payment did not apply because Old CNC had not made a claim to the insurers or been held liable in an underlying suit, such that the insurers had no payment obligation to Old CNC that could be assigned. Continental demonstrated that what PCS really sought was not "assignment" of insurance rights but "novation"—to substitute itself as a completely new party, for all purposes, to the insurance contracts, which South Carolina law clearly prohibits without the *mutual consent* of all parties, which was not obtained. Finally, Continental demonstrated that even if PCS were permitted to claim—contrary to its position in the federal courts—that it was successor to Old CNC under an equitable "*de facto* merger" theory, that theory did not apply because New CNC had different management, directors and shareholders from Old CNC, and because it had contractually assumed Old CNC's liabilities, making improper any resort to equity to recast the corporate transaction.

G. The Trial Court's Summary Judgment Order

Following extensive oral argument held on February 2, 2016, the trial court entered an order on March 23, 2016, granting the insurers' motions for summary judgment based on

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with a pollution exclusion identical to the one found in most of the policies here. *Ross Dev. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013); App. 773-77. Here, the trial court deemed the pollution exclusion motion moot after finding PCS had no rights to coverage under Old CNC's policies. App. 172-73. The pollution exclusion provides an additional basis for summary judgment for many of the insurers. As noted in the trial court's ruling on the pollution exclusion motion, summary judgment was warranted as to Providence Washington, in any event, as it moved for summary judgment on the basis of the pollution exclusion, and PCS failed to oppose that motion. App. 173 n.1.

corporate succession. App. 147-71. Notably, the trial court specifically held that PCS "seeks to step into Old CNC's shoes for all purposes as the insured, including as to a duty to defend. This is not an assignment of a chose in action for money payment, but an assignment of a contractual relationship—an attempt at a novation, to which the insurers did not agree—that is clearly precluded by the contracts and South Carolina law." App. 166-67. PCS moved for reconsideration on April 7, 2016, which the trial court denied on May 5, 2016.

H. Court of Appeals' Ruling Affirming Summary Judgment

In the Court of Appeals, PCS made the same arguments it made to the trial court. Respondents pointed out, however, that PCS made no argument that the trial court erred in ruling that PCS's claims of "assignment of a contractual relationship" amounted to an improper attempt at novation. App. 106. Respondents argued that this unappealed holding was therefore "law of the case," justifying affirmance on that ground alone. *Id.* PCS made no reply to this argument.

PCS also argued to the Court of Appeals, presumably to show the merit of its position, that under its theory "a driver with a perfect driving record" could assign his or her insurance policy "to his neighbor who has multiple drunk driving convictions" at any time after the policy period is over, as doing so "cannot create any additional risk to the insurer after the policy period has run." App. 44. Yet, as Respondents countered, PCS's example of how its theory would work just proved its own fallacy: "The (new) unsympathetic defendant will be what the jury considers when it renders its verdict, not the paragon the insurer actually insured. . . ." App. 94. Consequently, even in PCS's own example, "assignment to a stranger *dramatically* increases the risk of a judgment of liability, and therefore dramatically increases the risk of the insurer's indemnity obligation (not to mention the costs of defense)." *Id.*

In a thorough, unanimous opinion, the Court of Appeals affirmed the trial court, applying prior South Carolina cases. In particular, the court noted that the law enforces contractual

prohibitions on "transfer of a contractual relationship" but an "assignment after loss" is permitted because it "is the transfer of a right to a money claim" that "can be freely assigned or sold like any other chose in action or piece of property." App. 10 (quoting 3 Couch on Insurance § 35:8 (3d ed. 2018) and 17 Williston on Contracts § 49:126 (4th ed. 2018)). The court ruled that, in the context of third-party liability insurance policies (at issue here), as distinct from first-party insurance for the insured's own loss, there is no "money claim" due from the insurer that the insured can transfer—no payment obligation of the insurer that can be assigned—unless and until the insured is held liable in an underlying tort suit judgment. App. 10-11. As there was no judgment (indeed no claim asserted) against the insured here (Old CNC) at the time of the 1986 corporate transaction, there was no payment owed by the insurers for Old CNC to assign.[4] As the court said, "[I]f PCS wanted to ensure its rights to enforce potential claims under the policies, it should have obtained insurer consent as it did for the liability policy not at issue in this case." App. 11. The court further declined to address PCS's "*de facto* merger" theory "because the cases PCS cites do not address the question of insurance coverage." App. 11 n.7.

IV. STANDARD OF REVIEW

The Court "will grant certiorari to the Court of Appeals 'only where special reasons justify the exercise of that power.' " *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008) (citation omitted). Reasons for granting certiorari include "novel questions of law," "a

[4] PCS repeatedly mischaracterizes the opinion of the Court of Appeals as holding that a chose in action under a liability insurance policy may be assigned when a tort suit is "filed" against the insured. Pet. at 2, 6-8. The opinion itself shows that the Court of Appeals concluded that the insurers had no transferable payment obligation "*until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured*," App. 11 (emphasis original; quoting contract). The court noted that no "judgment" could have been entered against Old CNC as of 1986, and therefore "no vested claims existed" when the assignment took place, because by then no suits had even been filed. *Id.* The court did not suggest that mere filing of a tort suit against the insured would itself have been sufficient to assign a right to the insurer's money payment.

dissent in the decision of the Court of Appeals," and "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b), SCACR.

V. ARGUMENT

A. The Trial Court's Holding on Novation Was Not Appealed and Is Law of the Case, Which Alone Justifies Denial of Certiorari

The trial court here granted summary judgment to the Respondents in part on the ground that the parties to the 1986 Assignment had not even attempted to assign "policies," but even if they had, any such assignment was ineffective absent the consent of the insurers, because assignment without consent is possible only with respect to a chose in action—of money already due under the policies—and there simply was no chose in action to assign here. App. 158-63. The trial court went on to rule that what PCS really was attempting was "novation"—to substitute itself as a party to a contract made between two other parties—but it could not do so without consent of all parties to the contract:

> [PCS] seeks to step into Old CNC's shoes for all purposes as the insured, including as to a duty to defend. This is not an assignment of a chose in action for money payment, but an assignment of a contractual relationship—an attempt at a novation, to which the insurers did not agree—that is clearly precluded by the contracts and South Carolina law.

App. 166-67. The trial court's conclusion is amply supported by South Carolina law. "[N]ovation is the substitution *by mutual agreement*, of one debtor, or one creditor, for another, whereby the old debt is extinguished. . . ." *Greenwood Cotton Mill v. Pace*, 172 S.C. 531, 539, 174 S.E. 473, 476 (1934) (emphasis original). "Novation exists only by reason *of an agreement and in the absence of such an agreement there can be no novation. . . . The sole intention of the obligor that the existing contract should be discharged by the new agreement is not sufficient; the creditor must concur in this.*" *Id.* at 540, 174 S.E. at 476 (quoting 46 C.J. Novation at 573-74) (emphasis original). *See also Adams v. B&D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317

(1989) ("There can be no novation unless both parties so intend."); *McDonald v. South Carolina Farm Bur. Ins. Co.*, 336 S.C. 120, 125, 518 S.E.2d 624, 626 (Ct. App. 1999) (substituting named insureds on a policy "was the creation of a new insurance policy with a new named insured").

On appeal, PCS raised no argument regarding the correctness of this holding—which Respondents noted in their Appellees' Brief, App. 106, and to which PCS made no reply. PCS's failure to appeal this holding constitutes a waiver that itself justified affirmance of the trial court's decision and justifies denial of the Petition here. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atlantic Coast Bldrs. & Cont., LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (citation omitted); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (in insurance coverage case, trial court affirmed based on appellant's failure to raise on appeal second ground of trial court's decision; "The appellant excepted to the court's first conclusion, but has not excepted to its second ground of decision nor argued against it in the brief"; unappealed issue was "the law of this case and requires affirmance").

The holding that PCS improperly seeks to force a novation on the Respondents is law of the case requiring affirmance. Because on this record the Court of Appeals could have affirmed on the ground of PCS's failure to appeal the unappealed "novation" issue, there is no reason this Court should review the Court of Appeals' decision.

B. The Decision of the Court of Appeals Is in Full Accord with this Court's Precedent and Involves No Novel Question of Law

Even putting aside whether certiorari should be granted based on an unappealed issue, the decision of the Court of Appeals does not merit review because it is in full accord with the rulings of this Court and does not involve a novel question of law.

The Court should cast aside the framework that PCS seeks to impose on analysis of its claims. PCS argues as if the issue is whether a "consent-to-assignment" clause in insurance policies is enforceable, and it pretends that this Court and other courts have held it is not enforceable as long as the assignment does not "increase the insurer's risk." In fact, the issue is more stark: The issue is whether a court can rewrite a contract to allow a stranger to step into the shoes of one contracting party without the consent of all contracting parties, as long as the court believes that the "risk" is not increased. That is not, and has never been, the law. "[T]his Court has held that it would violate public policy to allow a court to insert a [contractual] limitation where none existed," as it "would add a term to the contract that the parties neither negotiated nor agreed to," and "such an extension 'would essentially re-write the parties' contract, a service the courts of South Carolina do not perform.' " *Poynter Invs., Inc. v. Century Bldrs. of Piedmont, Inc.*, 387 S.C. 583, 587-88, 694 S.E.2d 15, 17-18 (2010) (citation omitted). Rewriting the policies is what PCS seeks here, to strike in its entirety the contractual provision prohibiting assignment of interest under the policies without the consent of the insurer and to substitute its name on the contracts.

That some decisions and treatise writers have used language regarding "increase of risk" in enforcing an assignment clause is beside the point. Instead, *the real basis of the rule must be understood*, because the real basis is *not* that courts are free to excise or rewrite contract language, even as long as they believe that one party's risk is unaffected. Rather, the real basis of the rule is the firmly-established common law distinction between the law of contract and the law of property, and the acknowledgment, based on that distinction, that while contracting parties are free to agree to limit each other's ability to assign contract interests to third parties,[5]

[5] *See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492, 763 S.E.2d 19,

they are not free to bar transfer when a contract right matures into a right to receive money due, because that right is a debt—*a piece of property* that the law of property declares may not be restricted from alienation.[6] Thus, it is the law of property that may bar enforcing a consent-to-assignment clause, but only when what is sought to be transferred *is property*. A chose in action to recover money due is property that can be transferred; a contractual relationship is not. This is the holding of the Court of Appeals and the trial court here, which is in perfect accord with all South Carolina cases and, indeed, the true "overwhelming consensus" of decisions elsewhere.

1. Insurance Policies Cannot Be Transferred Without Insurer Consent

PCS argues that insurance policies may be freely transferred to a stranger at any time after "loss," under a "post-loss" exception to enforcement of the policies' consent-to assignment clause. Pet. at 3-4. This Court rejected that proposition 83 years ago, in a case that PCS does not even cite. *Silverman v. Dew*, 182 S.C. 457, 189 S.E. 756 (1937). In *Silverman*, the plaintiff in a car accident case obtained judgment against the defendant and executed judgment by attaching and selling the defendant's car, obtaining only $100. He then sought to sue the defendant's automobile insurer for collision coverage for damage to the *car* (not for the insured's liability), saying that the insurance coverage transferred to him when he attached it. The Court rejected the plaintiff's claim, holding that the insurance policy was "the purely personal contract of insurance between the indemnity company and the defendants," and stating, "The insurance policy being a personal contract, did not run with or attach to the thing insured." *Id.* at 460, 189 S.E. at 757.

21-22 (2014) (noting South Carolina's "longstanding regard for parties' freedom to contract"); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose.").

[6] *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984) ("any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect"); *Mason v. Finley*, 129 S.C. 367, 124 S.E. 780, 782 (1924) (an "essential incident" of title to property is "the power of alienation").

PCS makes essentially the same argument as the plaintiff in *Silverman*, asserting that it should be entitled to Old CNC's liability insurance because it was held liable for Old CNC's liability, as if insurance should "run with" the liability. Pet. at 3 ("PCS was held liable for environmental remediation costs based entirely on Old CNC's operations"). *Silverman* rejected that argument, and it did so even though the damage to the car had already occurred *prior to the attachment*, and the plaintiff was therefore attempting to transfer the policy "post-loss." The Court therefore has already rejected PCS's argument that insurance policies may be transferred to a new insured any time "after loss."

Moreover, in *Silverman* the Court rejected a stranger's claim that he should be allowed to step into a contractual relationship with someone else's insurer–just like PCS's claim here. Indeed, an insured cannot unilaterally make a new person or entity an "insured" under the policy without the insurer's consent. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 154-55, 64 S.E.2d 258, 264 (1951) (prohibition on assignment of life insurance policy "obviously refers to a situation where the insured undertakes to assign his policy of insurance during his lifetime"); *see also Hack v. Metz*, 173 S.C 413, 420, 176 S.E. 314, 317 (1934) ("if the assignment be not made with the consent of the [insured] and the insurer, it is void"). Under long-standing South Carolina law, therefore, an insurance policy's prohibition on transfer of the policy to a new insured is enforceable, and this bar on *policy transfer* applies whether or not "loss" has already occurred.

2. PCS's Effort to Misread Dictum in *Narruhn* to Reach a Different Result Should Be Rejected

Ignoring this prior South Carolina case law, PCS attempts to twist the Court's words—in a discussion that the Court noted was dictum—to argue that the Court of Appeals failed to adhere to this Court's guidance. Pet. at 3-4 (citing *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745

S.E.2d 90 (2013); *Narruhn*, 404 S.C. at 344, 745 S.E.2d at 93-94 (as to cited discussion the Court said, "we need not reach the issue here"). Yet *Narruhn* did not purport to overturn prior South Carolina caselaw discussed above. In addition, its actual holding—which PCS also ignores—confirms the correctness of the Court of Appeals' ruling here. And when the Court's full discussion in *Narruhn* is considered, and not just the snippets PCS pulls out of context, it is clear that the Court of Appeals faithfully followed that guidance, too.

In *Narruhn*, the Court extensively discussed the difference between transfer of a contractual relationship (disallowed) and assignment of an accrued chose in action (allowed). The Court quoted Couch on Insurance as saying, "the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim," *id.* at 344, 745 S.E.2d at 94. Such a right to receive money payment "is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property." *Id.* (quoting 17 Williston on Contracts § 49:126).

The actual holding of *Narruhn* makes the distinction clear. There, the plaintiff had obtained a *judgment* against the insured nightclub for damages for personal injuries and thereafter sought to collect insurance proceeds under the nightclub's liability insurance policy. *Id.* at 339, 745 S.E.2d at 91. The issue was whether the insurer, as a non-party to the supplemental proceedings, could move to set aside the master's order assigning insurance proceeds. *Id.* The Court upheld the assignment but noted that the insurer could assert all defenses in a separate action the plaintiff could file to recover the proceeds. *Id.* at 343, 745 S.E.2d at 93. Thus, the insured had already suffered a *judgment* in an underlying case by the time the assignment was made, and, if the judgment was covered by the insured's liability insurance, the insurer already had a payment obligation to indemnify the insured, which the

Court stated was a chose in action that could be assigned to the claimant.

PCS asserts that *Narruhn* supports its position that all policy rights may be assigned "after loss." But *Narruhn* did not involve an assignment of *policies*, meaning assignment to a new entity who sought to substitute itself as the insured for all purposes—which is what PCS seeks here. It involved a claimant who sought to be paid for a judgment she had already obtained against the insured. The Court's comment that "an assignment *after* a loss has already occurred does not require an insurer's consent," *id.* at 344, 745 S.E.2d at 94, referred to assignment of a chose in action for accrued money due, which could be assigned to the claimant, and not the substitution of insureds. Indeed, the Court explained its "note," leaving no doubt what it meant: "the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer *of a contractual relationship* while the assignment after loss *is the transfer of a right to a money claim*;" "a vested claim against the insurer . . . can be freely assigned or sold *like any other chose in action* or piece of property." *Id.* at 344-45, 745 S.E.2d at 94 (emphasis added; citations omitted). *Narruhn* does not support "assignment of the policy, as distinguished from a claim arising under the policy," or the notion that the claimant *against* the insured could *become* the "insured" after the assignment. Thus, what *Narruhn* observed was merely that an accrued right to receive a payment from an insurer could be assigned, as it is a chose in action. It *rejected* the contention (made by PCS here) that a *contractual relationship* could be assigned without consent.

The Court's comments in *Narruhn* only repeat what other South Carolina cases previously said, which PCS does not even mention. Insurance policies are contracts personal to the insured and cannot be transferred to another—even after "loss"—without consent of the

insurer. *Silverman v. Dew*, 182 S.C. 457, 460, 189 S.E. 756, 757 (1937). A policyholder may assign only a money claim, for "insurance money then due," after it has accrued. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 155, 64 S.E.2d 258, 264 (1951). The Court of Appeals' decision is in perfect fidelity to these holdings.

3. A Chose in Action Accrues Only After a Tort Claimant Obtains a Judgment of Liability Against the Insured

The foregoing cases make clear that the insured does not have an assignable chose in action until it has a right to payment from the insurer. With respect to liability insurance, under the terms of the policies and South Carolina law, the insured has a right to payment from its *liability* insurer only when its *liability* accrues: that is, only when a tort claimant obtains a judgment against the insured for covered damages (or when the insured enters into a settlement with the claimant and the insurer). Continental's policies provide as follows:

> **Action Against Company** No action shall lie against [Continental], unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.*

E.g., App. 254 (Continental Policy Condition 5) (emphasis added).[7] Thus, the insurers have no payment obligation to the insured until a claimant has obtained a judgment or the parties have settled. The insurers' promise to indemnify the insured is only for "sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies." App. 249. The insured becomes so "legally obligated to pay" only when a judgment is entered against it or when it enters into a settlement with the claimant and the insurer. *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (1968) (until injured

[7] The policies of the other Respondents contain similar provisions.

party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured]"; "Stated another way, no right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay.").[8] The insurers' duty to indemnify and the insured's chose in action to recover that indemnity payment therefore do not arise, at a minimum, until there is such a judgment or settlement. *See Narruhn*, 404 S.C. at 344-45, 745 S.E.2d at 93-94 (holding that right to payment of liability insurance proceeds could be assigned after insured was held liable in a *judgment*).

Many of the cases addressing assignment of insurance rights have arisen in the context of first-party insurance (for loss the insured itself suffers, as from fire, wind, theft, etc.), and the insurer's payment obligation arose with the insured-against contingency (the fire damage, the wind damage, the theft). These cases refer to the event permitting assignment as the "loss," even though in fact the event they are referring to is the insured contingency and the no-longer-contingent insurance payment obligation arising out of it. Thus, although their language may refer to a "post-loss" exception, it is more accurately described as a "chose in action" exception.

Nevertheless, those seeking coverage under liability policies, such as PCS here, misconstrue those cases to assert that the "loss" permitting assignment under a third-party liability policy is the injury or damage suffered by third-party claimants, even though the *insured* has no "loss" arising from that injury unless and until it is held liable in a judgment. Through this linguistic sleight-of-hand, they argue that rights under a liability policy may be assigned as soon as underlying third-party injury allegedly occurred.

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[8] PCS tries to argue that the Court of Appeals improperly relied in part on the "no action" clause quoted above, saying "it does not govern when the insurer must provide coverage to the insured." Pet. at 12. But that argument ignores *Park*, which specifically held that a third party claimant could not sue an insurer to obtain coverage because *the insured* could not sue: "An injured person has no greater right against an insurer under a liability insurance policy *than the insured*." *Park*, 251 S.C. at 413, 162 S.E.2d at 710 (emphasis added).

Yet in the context of insurance for liability the insured contingency arises only when the third party obtains a judgment against the insured. The insured contingency, for a *liability* policy, is not a third party's injury; it is the insured's *liability* for that injury. *See Park,* 251 S.C. at 413, 162 S.E.2d 709 at 710 (insurer has no obligation to pay on behalf of insured "until and unless [the insured] becomes liable to pay"). Although the third-party claimant's injury is *one* contingency to that obligation, the most salient contingency—that the insured have "become legally obligated to pay"—does not occur until the claimant obtains a judgment, and that contingency may never occur if the claimant does not file suit, if she fails to do so timely, if the law of liability does not provide a remedy, if the claimant fails to satisfy her burden of proof on every element of her claim, or if the insured has valid defenses. In short, there are a myriad of contingencies beyond the happening of an injury that must be fixed before an insurer can have an obligation to indemnify an insured's liability. For liability insurance, therefore, the proper analog to the first-party cases' use of "loss" (the insured contingency, *i.e.*, the fire damage, the wind damage, the theft) as the point when insurance rights may be assigned is when a tort claimant obtains a judgment against the insured. *That* is the insured contingency, and that is when the nature of the relationship changes from insured-insurer, with the insured risk being uncertain and contingent (and subject to increase by the insured's action), to debtor-creditor, with the insured risk transformed into actuality (and no longer subject to change).

Furthermore, any rule that permits assignment to a new insured of all policy rights as soon as an underlying injury occurs, even if that injury is unknown to the insured or even the claimant at the time (as may be the case with environmental contamination), necessarily increases the risk to the insurer. This is because the assignment, made prior to the determination of the insured's liability, results in a division of interests that the insurer counts on being aligned:

the insured's and insurer's common interest in defeating liability. For example, the new entity may seek to cast blame on the insured for the injury, to avoid or diminish its own liability (as PCS did in the *Ashley II* case, see p. 7 above), then seek to recover from the insurers *for the liability it helped to establish.* It may even claim (as PCS claims here[9]) that the costs of *prosecuting* claims against the insured should be recoverable from the insurers, even though the policies cover only costs of *defending* the insured. Indeed, an insured who assigns its policies to a corporation that assumes its liability loses all interest in *defeating* its own liability, and the new entity/assignee may have an interest in *demonstrating* the original insured's liability to reduce its own. This is a risk for which the insurers did not bargain.

Despite *Narruhn's* observation that what can be assigned is a "vested claim . . . like any other chose in action or piece of property," 404 S.C. at 345, 745 S.E.2d at 94, PCS does not discuss what a chose in action is or when an insured has one owing from its insurer. Instead, PCS merely argues that policies are fully transferable without reference to whether the insured has a chose in action. But South Carolina cases, including *Narruhn*, reject that proposition.[10]

Accordingly, the decision of the Court of Appeals does not involve a novel issue of law and is not contrary to a decision of this Court. The writ should be denied.

4. PCS's Reliance on Out-of-State Authority Is Misplaced

Attempting to distract attention away from the lack of support under South Carolina law, PCS characterizes the decisions of the trial court and the Court of Appeals as contrary to an

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[9] App. 342 ¶ 50(c) (listing, as a cost for which PCS seeks coverage, "[t]he costs to defend itself in the *Ashley II* litigation"). As noted, part of that defense involved seeking to establish Old CNC's liability. See p. 7 above.

[10] An insurer's duty to defend its insured *never* becomes a "chose in action" that the insured may transfer to others. *Howard v. Allen*, 254 S.C. 455, 461, 176 S.E.2d 127, 129 (1970) (if insurer satisfies duty to defend to insured, "there is nothing of economic value to which the insured may make claim, receive *or assign*") (emphasis added).

"overwhelming nationwide consensus." Pet. at 8. But since the decisions below are consistent with (and indeed compelled by) South Carolina law, that argument presents no basis for review.

PCS's arguments also lack merit. In the courts below, Respondents exhaustively reviewed PCS's preferred cases as well as others to show that, indeed, South Carolina law is completely consistent with the law of nearly every other jurisdiction, and that the few cases that hold otherwise either were lower-court or federal decisions that misapplied binding supreme court precedent or are themselves contrary to South Carolina law. App. 95-103. Given the lengthy discussion of multiple cases necessary to refute PCS's assertion, Respondents respectfully rely on their brief in the Court of Appeals on this point. *Id.*

Yet even the cases PCS relies on most heavily do not support PCS here. They involve assignment of rights from one corporate affiliate to another as part of an intra-corporate-family reorganization, and the two entities remained *aligned* with respect to defense of tort claims as a result. *Fluor Corp. v. Super. Ct.*, 354 P.3d 302, 307 n.6 (Cal. 2015) (noting that assignor (Massey) and assignee (Fluor) agreed that only Fluor would be responsible for asbestos claims; "there never has been any dispute between Fluor and Massey" regarding coverage); *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 151 A.3d 576, 580 (N.J. 2017) (noting that assignor and assignee "are now affiliated companies owned by a corporate parent named Givaudan Flavors and Fragrances, Inc."). Based on those facts, the courts there found the assignments created no increased risk to the insurers.[11] Here, in stark contrast, PCS was at all times a third-party stranger to Old CNC, whose interests have always been adverse to Old CNC, which led it to sue Old CNC's parent company for contribution in the underlying environmental litigation and to allege that "[d]iscovery recently taken in this case has revealed that [Old CNC's] *activities*

[11] Respondents respectfully disagree with the courts' holdings in this regard.

at the Charleston Site substantially contributed to the contamination of the Charleston Site property." App. 416 ¶ 37 (emphasis added). In this case, the *adversary* seeks to be the *insured.* No case, anywhere, supports that result.

5. PCS's *De Facto* Merger Theory Is Legally Untenable

In the underlying environmental litigation, PCS consistently denied that it succeeded to Old CNC under a *de facto* merger theory. After being found in that litigation to have contractually assumed the environmental liability, it opportunistically switched positions for coverage purposes and in this case now argues the opposite.

If PCS was not the *de facto* merger successor of Old CNC for liability purposes, then certainly it cannot be Old CNC's successor for coverage purposes. But on the merits, the theory does not apply here, precisely because PCS has already been found liable for environmental costs *under a legal theory*, namely, contractual assumption. Under this Court's precedent, the "surrounding circumstances" or *de facto* merger theory, which equitably impresses liabilities on a purchaser of corporate assets in certain circumstances, does not apply where the purchaser *contractually assumes* those liabilities—which PCS did here. *Brown v. American Ry. Exp. Co.*, 128 S.C. 428, 431-33, 123 S.E. 97, 98-99 (1924) (noting that theories imposing liability on corporate asset purchaser may apply where corporation "had gone out of existence, leaving no one to be sued by its creditors"). Express assumption of liabilities gives creditors a legal remedy of "someone to sue," and thus precludes an equitable remedy of *de facto* merger. As an equitable theory, *de facto* merger cannot apply where the law already provides a remedy through contractual assumption: "equity follows the law." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 426 n.1, 746 S.E.2d 35, 38 n.1 (2013). Under *Brown*, express assumption and *de facto* merger are *alternative* theories because, most simply, there is no need for a "*de facto* merger" theory in a particular case if "there was an agreement to assume such debts" in the first place.

Beyond this, based on the undisputed facts of record, the remaining factors necessary for the theory to apply are not satisfied in this case. New CNC did not purchase all of the assets of Old CNC, and it did not have the same directors, shareholders, employees and management of Old CNC after the transaction. App. 440, 450. The Court of Appeals was therefore correct to leave the trial court's decision on this score undisturbed, and there is again no novel question or departure from precedent.

VI. CONCLUSION

The unanimous decision of the Court of Appeals is in full accord with the decisions of this Court and involves no novel question of law. Indeed, it resolves the dispute in reliance upon foundational principles of law, which are firmly established. A contractual relationship cannot be transferred without consent of all parties, as it is a novation. PCS seeks a novation by force, which is plainly contrary to law. There was no attempt to assign policies here, as the parties knew that consent of insurers was required and not obtained. But any assignment could assign only a chose in action, or a right to obtain a payment already accrued, and no such chose in action was in existence here. Accordingly, the writ should be denied.

Dated: May 28, 2020

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Supreme Court Case No. 2020-000445

Appellate Case No. 2016-001140

Case No. 2011-CP-10-00387

PCS Nitrogen, Inc. .....Petitioner,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, and Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America) .....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Return to Petitioner's Petition for a Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, to counsel listed below on May 28, 2020:

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