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, 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), and First State Insurance Company,

.....Respondents.

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I. INTRODUCTION

Petitioner PCS Nitrogen, Inc. ("PCS") seeks to require the Respondent insurance companies to treat it as the insured, for all purposes, under general liability insurance policies that Respondents issued to a different company, Columbia Nitrogen Corporation ("Old CNC"). Contrary to its repeated characterizations, PCS does not seek assignment of a "chose in action" for money payments. Rather, PCS seeks to step into the shoes of Old CNC for all purposes, as a new party to the contract. This is not an assignment, but would be a novation, and as the trial court held, in a ruling that PCS did not appeal, a novation requires the consent of all parties, which was not obtained. PCS continues to ignore this ruling here, but because it was not appealed it is law of the case, and it disposes of PCS's appeal. On this ground alone the trial court should be affirmed.

The trial court further ruled on summary judgment, based on the undisputed facts, that the parties to the 1986 corporate sale transaction did not, in fact, attempt to assign "all rights" under Respondents' policies to PCS. The facts demonstrated that the parties to the 1986 corporate transaction acknowledged that consent of the insurers was required for any such assignment, and while for other policies they did seek and obtain consent to make PCS the insured, they did not seek or obtain consent from the insurers here. Accordingly, the conclusion that no assignment in fact occurred moots every other issue.

There were good reasons why the parties to the 1986 corporate transaction would not seek to transfer Old CNC's insurance to PCS, but chief among them was that Old CNC's parent company and *co-insured on its policies* (a company called "Nipro, Inc.," later called "DSM Chemicals North America") ("DSM Chemicals") continued in existence after 1986. Indeed, after PCS was sued by the current landowner of the Old CNC site in Charleston, PCS turned around and sued DSM Chemicals, alleging that DSM Chemicals was liable for Old CNC's

conduct on an alter-ego theory and *seeking to establish that Old CNC was responsible for environmental contamination* at the site. PCS was therefore Old CNC's *adversary* in the underlying litigation, attempting to establish, not defend, Old CNC's liability. It lost in that attempt, because the federal court ultimately held that PCS had contractually agreed to assume Old CNC's liability. PCS's status as the insured's adversary distinguishes this case from every case upon which PCS relies: No case approves assignment of insurance policies without insurer consent *to an adversary of 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 now 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.

PCS's Brief ("PCS Br.") sweeps under the rug these inconvenient, but dispositive, reasons why affirmance is required. Ignoring the facts, PCS simply argues that, if such an assignment had occurred, it would not have required the insurers' consent. Essentially, PCS asks the Court to rule that a valid assignment did occur, without consent, even though the trial court properly held that the parties intended to effect no assignment at all. Although PCS does not say so, PCS actually seeks a "transfer by operation of law," that is, a conveyance of insurance *even in the absence of an assignment* by the parties, a proposition that its own cases *do not support*. While some cases elsewhere allow policyholders to assign policies without insurer consent—in circumstances not present here, and on a theory that South Carolina law rejects—no state has approved the "operation of law" theory that PCS effectively asks the Court to adopt.

Even if the issue were as PCS attempts to frame it, and involved an assignment to PCS by Old CNC of "all rights" under its insurance policies, PCS's arguments *still* fail because they are firmly rejected by South Carolina law, which is in perfect consonance with the rule followed by

nearly every other state. As PCS concedes, an insured can assign without insurer consent only a "chose in action." PCS argues only about timing: It argues that the trial court and the Court of Appeals erred in concluding *when* such a chose in action arises. The courts below held that, under a liability insurance policy, the insured has no chose in action—that is, a right to recover money from the insurer, money that is the insured's property because it is due and owing—until a tort claimant obtains a judgment against the insured in an underlying tort suit, because that is when, under the policies, the insurer's payment obligation arises. PCS argues, by contrast, that an insured holds a chose in action to recover the insurance payment as soon as an "occurrence" takes place. PCS also argues that the "no-action" clause in Respondents' policies, which makes clear that the insurers have no duty to indemnify damages for which the insured may be liable until a judgment is entered against the insured, applies only to restrict the rights of *third-party claimants* against the insurer, and does not limit the rights of the *insured* against the insurer.

But this Court has already specifically rejected each of these propositions, holding (1) that an insured does *not* have a chose in action to obtain payment by the insurer pursuant to its duty to indemnify prior to entry of a tort judgment against the insured, and therefore an insured *may not assign* anything until then; (2) that an insured *may never assign* rights to claim the insurer's duty to defend; and (3) that the "no-action" clause *does apply* to the insured's rights to claim against the insurer. *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970). *Howard* forecloses any argument that a "chose in action" for insurance recovery arises before there is a judgment entered in an underlying case against the insured. Given that PCS concedes that Old CNC must have had a "chose in action" to be able to assign one to PCS, and given that *Howard* shows that the trial court and the Court of Appeal here correctly held that Old CNC had no chose in action in 1986 (and never had one at any time since) because no judgment had been entered

against Old CNC that would give rise to the insurers' payment obligation, PCS's arguments that the courts below were "wrong" are utterly without merit.

The Court need go no further because *Howard* speaks to the very issue that PCS attempts to argue is undecided in South Carolina and rejects what PCS now contends. In fact, *Howard* provides especially compelling precedent, as it was in the vanguard of a series of cases nationwide that sought to put an end to mischief that a few courts had permitted, based on the same fundamental mischaracterization that is at issue here—the mischaracterization of an insurer's obligations to its insured and whether or not the right to obtain those obligations was "property" that could be transferred to others. Several courts, including the Supreme Court of California, cited *Howard* with approval and followed its lead, and the U.S. Supreme Court, noting *Howard* as among many cases rejecting the jurisdictional theory, ultimately put an end to the mischief, declaring unconstitutional the jurisdictional hijinks that *Howard* rejected. That same mischaracterization of an insurer's obligations to its insured is the root of the PCS's current effort to obtain, under the guise of an "assignment" theory, insurance coverage for which it never paid a premium. Thus, the Court can stand confident that its ruling in *Howard*, followed by others, stated the correct rule then and states it now.

Indeed, the Court's more recent ruling *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013) is in full accord with *Howard*. *Narruhn* allowed assignment to the plaintiff of a defendant's right to recover an insurance payment for the plaintiff's damages *after the plaintiff had obtained a judgment* against the defendant. That is exactly what *Howard* said was permitted. Other statements in *Narruhn*, which the Court took pains to note were *dicta*, also accurately state South Carolina law but should not be recast, as PCS suggests, to mean something the Court did not hold. Assignment of policies (what PCS seeks) is not permitted.

Assignment of a chose in action when the insurer's obligation has matured into a payment obligation is permitted. Under *Howard*, the insured does not have a chose in action to recover an insurer's payment until an underlying tort judgment is entered against it.

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 its environmental litigation. It is also flatly contrary to South Carolina law, because it seeks to rely on equity to dictate succession to corporate rights and obligations when the parties already provided a different result by contract. In any event the argument is unsupported by the facts here. The courts below gave no credence to PCS's argument, and neither should this Court.

For these and additional reasons set forth below, the Court should affirm the judgment of the trial court.

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below 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 alleged 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. Insurance Policies Issued to Old CNC

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).

Continental's policies contain a provision, often called the "no action" clause, that states:

> **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).[1] Thus, the insurers have no payment obligation to the insured until a claimant has obtained a judgment or the parties have settled with the consent of the insurers. App. 249 & 277.

The Respondents' policies prohibit assignment of interest under the policies without insurer consent: "Assignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon." App. 255; 375 ¶ 9; 384 ¶ 10.[2]

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

PCS is not the "alleged successor" to Old CNC. PCS Br. at 4. Rather, in October 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

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

[2] 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.

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.[3] Old CNC dissolved (App. 376 ¶ 15; 385 ¶ 16), and CNC Corp. changed its name to "Columbia Nitrogen Corporation" ("New CNC") (App. 376 ¶ 16; 385 ¶ 17). PCS eventually merged with New CNC. 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 contractually 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. Accordingly, PCS's suggestion that it was somehow unaware, as a

[3] In its Brief PCS asserts that Old CNC "sold the Old CNC business" to the new entity. PCS Br. at 4. 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").

result of its own contracts with Old CNC, that "it would not be entitled to insurance coverage," PCS Br. at 2, is directly contradicted by the undisputed contracts themselves.

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, which they did not obtain here. 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. App. 2524 (stating that where policies could not be canceled for a refund, "*the benefits of such prepaid policies were assigned* to Nipro, Inc. and to [New CNC]") (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.[4]

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

In this coverage case filed by PCS against Old CNC's insurers, Continental (joined by all insurers) moved for summary judgment 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.[5] Continental argued that PCS was not the corporate

[4] The alternative holdings of the federal district court that PCS was a corporate successor to Old CNC under other theories therefore are a nullity. *In re Peters*, 642 F.3d 381, 386 (2d Cir. 2011) (alternative issues not considered in prior appellate proceeding were not "affirmed" and had no *res judicata* effect).

[5] 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 prior site owner, Ross Development Corporation, with a pollution exclusion identical to the one found in most of the policies here. *Ross Dev.*

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 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.

The trial court granted the insurers' motion for summary judgment in an extensive opinion. 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.

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

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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.

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 permits an "assignment after loss" 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.[6] 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

On appeal from a grant of summary judgment, the appellate court applies the same standard as the trial court to determine the correctness of the judgment. *Law v. South Carolina Dep't of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr*., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

V. ARGUMENT

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

The trial court here granted summary judgment to the Respondents in part on the ground

[6] PCS suggests the holding of the Court of Appeals is unclear as to whether a chose in action under a liability insurance policy may be assigned when a tort suit results in a "judgment" against the insured or when a tort suit is "filed" against the insured. PC Br. at 6 n.5. 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 purported assignments 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.

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 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. Substitution of parties to a contract is a novation that requires consent of all parties. "[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 affirmance 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) (appellant's failure to raise on appeal second ground of trial court's decision required affirmance; "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. Regardless, the trial court's ruling in this regard was clearly correct under South Carolina precedents, and once again PCS does not attempt to show otherwise. PCS seeks to have itself substituted as the insured for all purposes under Respondents' policies, so that insurers who owed a duty to defend to Old CNC would have to defend PCS instead (as of 1986 and thereafter), and so that insurers who would owe Old CNC a duty to indemnify any future (as of 1986) covered judgments would have to pay judgments entered against PCS instead. Substituting PCS as the insured party is a novation requiring consent of all parties, which was not obtained. The judgment therefore should be affirmed.[7]

[7] Alternatively, the Court may dismiss the writ of certiorari as improvidently granted given there is an independent basis for the trial court's ruling that was not appealed. *See Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (dismissing writ as improvidently granted when second

B. PCS Urges the Court to Adopt a Theory of Assignment "By Operation of Law," Which No State Has Ever Adopted

The trial court held that the parties to the 1986 corporate transaction knew that they needed to obtain insurer consent to assign policies to PCS, but did not seek or obtain any such consent from the insurers here. App. 158-59. The Court of Appeals affirmed this holding, noting that "if PCS Nitrogen 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. PCS thus asks this Court to hold that PCS can claim insured status under Respondents' policies, even if *the parties themselves did not assign them*.

This argument therefore does not seek to enforce an assignment by the insured without insurer consent; it seeks to force the insured to transfer its policies even where it did not intend to, or "transfer by operation of law," a theory put forth by the Ninth Circuit. *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1357 (9th Cir. 1992) (holding that where product liability transferred to corporate asset purchaser under "product-line successor" theory, "the right to indemnity under the policy transferred to [the asset purchaser] by operation of law"). Indeed, PCS expressly relies on *Northern Insurance* for support here. PCS Br. at 22-23. But the theory of "transfer of operation of law" enunciated in *Northern Insurance* was rejected by the states whose law it purported to apply and has never been adopted by any state. Specifically, although the Ninth Circuit purported to apply California and Washington law in reaching its decision,

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issue (denial of intervention) was not preserved); *South Carolina Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020) ("This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion."); *Hair v. Roberson*, 366 S.C. 277, 278, 621 S.E.2d 658 (2005) (dismissing writ as improvidently granted after death of party rendered issue moot).

California courts have repeatedly rejected it, including the California Supreme Court,[8] as has the Court of Appeals of Washington.[9] The theory was rejected by the Supreme Court of Ohio in a case PCS cites. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 131 (Ohio 2006) (holding that the *Northern Insurance* rationale 'is generally incorrect for cases in which liability is contractually assumed," as here). Other state courts have similarly rejected *Northern Insurance*,[10] as have multiple other federal courts.[11]

To Respondents' knowledge, no state high court has adopted the "transfer by operation of law" theory, and therefore PCS asks this Court to be the first. Yet that theory allows a court to rearrange what contract parties have arranged for themselves, creating a new contract the parties did not agree to, ostensibly based on public policy or fairness. It is therefore plainly contrary to South Carolina law. "No jury—nor any judge—is permitted by law to rewrite a contract to

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[8] *Henkel Corp. v. Hartford Acc. and Indem. Co.*, 62 P.3d 69, 74 (Cal. 2003); *Quemetco, Inc. v. Pacific Auto. Ins. Co.*, 29 Cal. Rptr. 2d 627 (Ct. App. 1994); *General Acc. Ins. Co. v. Superior Ct.*, 64 Cal. Rptr. 2d 781 (Ct. App. 1997). Although a portion of the *Henkel* decision was later overruled by the California Supreme Court, that part rejecting *Northern Insurance* was left undisturbed. *Fluor Corp. v. Superior Ct.*, 354 P.3d 302, 304 & 333 (Cal. 2015). Accordingly, *Henkel's* holding that insurance rights do not transfer "by operation of law" to a new corporate entity that assumes some of the insured's liability—precisely what happened here—remains good law. *Henkel*, 62 P.3d at 73-74.

[9] *Unigard Ins. Co. v. Leven*, 983 P.2d 1155, 1164 (Wash. App. 1999) ("There is no reason to extend *Northern Insurance* . . . to nonsuccessors who voluntarily enter into partial indemnification agreements").

[10] *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172, 1179-80 (Ind. 2008) (rejecting *Northern Insurance* and following *Henkel*); *Red Arrow Prod. Co. v. Employers Ins. of Wausau*, 607 N.W.2d 294, 301 (Wis. Ct. App. 2000) ("*Northern Insurance's* holding that insurance benefits follow liability has been rejected by several cases"); *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734, 745 (Haw. 2007) (refusing to follow *Northern Insurance*).

[11] *Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co.*, 635 F.3d 734, 737 (5th Cir. 2011) (Texas law); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 538 (W.D. Mich. 2003) (Michigan law); *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 2005 WL 5660476, at *18 (M.D. Fla. Mar. 22, 2005) (Florida law), *aff'd on other grounds*, 463 F.3d 1201 (11th Cir. 2006); *Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 496 (Ohio law), *on reconsideration*, 239 F.R.D. 479 (N.D. Ohio 2006).

impose liability based on some vague personal sense of what is fair." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 25, 850 S.E.2d 1, 13 (2020). Given that multiple state and federal decisions have rejected that theory and that it is directly contrary to South Carolina law, the Court should reject PCS's invitation and hold that, because the parties did not assign the policies at issue here, there can be no assignment "by operation of law."

C. Any Assignment Would Have Required Insurer Consent, Because Old CNC Did Not Have a "Chose in Action" Assignable Without Insurer Consent

Even if the Court considers PCS's far-ranging arguments on "assignment" notwithstanding the fact that PCS failed to appeal an independent basis for the trial court's ruling, the decisions below are in full accord with the rulings of this Court and should be affirmed.

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 fundamental: 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. Courts are in no position to substitute their judgment for that of the contracting parties on whether allowing *substitution of parties* to the contract creates more, or less "risk." *See Crenshaw*, 432 S.C. at 25, 850 S.E.2d at 13. Indeed, "this 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 it as a party to the contracts.

It is true that some decisions and treatise writers have used language regarding "increase of risk" in enforcing an assignment clause, but the real basis of the rule allowing assignment of choses in action 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,[12] they are not free to bar transfer when a contract right matures into a vested right to receive money, because that right is a debt—*a piece of property* that the law of property declares may not be restricted from alienation.[13] 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 capable of transfer*. 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.

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

[13] *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").

Finally, it bears emphasizing that the important distinction here—between a non-assignable contractual relationship and an assignable right to a piece of property—does not depend on how that "piece of property" is named. At common law, the right to obtain property held in the hands of a third person was called a "chose in action" or a "thing in action," because the owner did not have possession, but had the right to obtain possession of the "chose" or "thing" through an "action" at law.[14] The term "chose in action" may have broadened over time to include a right to assert other types of claims, and today, courts and practitioners may use that term less precisely than they did in earlier times.[15] But as discussed below, the court-made "chose in action" exception to the consent-to assignment clause at issue here has permitted assignments by the insured without insurer consent because after the insurer's obligations mature into a *payment* obligation, the insured then has a *transferable property interest* that cannot be restrained from alienation—no matter what name is given that piece of property. Inchoate contract rights that may never result in payment, because payment depends on contingencies that may never occur, are not transferable property, because the insured has no right to obtain the payment *at the time of transfer*. *See Arredondo*, 2021 WL 908508, at *4 (power of attorney could not convey to attorney-in-fact right to sign arbitration agreement for principal "because the arbitration agreement did not concern a chose in action or any other *property right* [the principal] *possessed at the time* [the attorney-in-fact] signed it") (emphasis added). But that is what PCS argues here.

[14] The word "chose" is French for "thing." It came into use in the English common law, along with other "Law French" words like "seisin," thanks to the Norman Conquest of 1066. 1 Pollock & Maitland, *The History of English Law Before the Time of Edward I*, 76 (1895) (due to the Norman Conquest, "[i]t would be hardly too much to say that at the present day almost all our words that have a definite legal import are in a certain sense French words").

[15] *See Arredondo v. SNH SE Ashley River Tenant, LLC*, ___ S.C. ___, 2021 WL 908508, at *7-8 (Mar. 10, 2021) (Few, J., concurring) (discussing how the term "chose in action" has changed over time and advocating abandonment of the term).

1. Insurance Policies Cannot Be Transferred Without Insurer Consent

It is clear under South Carolina law that an insurance policy cannot be assigned to a new insured without insurer consent. In *Silverman v. Dew*, 182 S.C. 457, 189 S.E. 756 (1937), 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. PCS makes 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. PCS Br. at 4-5 ("Ashley alleged that PCS was liable for the remediation at the Ashley Site solely because of the conduct of Old CNC"). *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 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. An Insured Can Assign as a "Chose in Action" a Debt an Insurer Owes It Under a Policy, But the Duty to Indemnify Does Not Mature Into a Debt Until an Underlying Tort Judgment Is Entered Against the Insured, and the Duty to Defend Never Becomes a Transferable Debt

PCS concedes that an insured can assign only a "chose in action" without insurer consent. PCS Br. at 6. Although it muddies what a "chose in action" is and the rationale courts traditionally have used to allow such assignments—that is, because a vested right to receive money is property that its owner can transfer, notwithstanding a contract restriction to the contrary—PCS argues only that the courts below erred in identifying *when* such a chose in action arose. PCS argues that a chose in action arose in favor of Old CNC, and Old CNC could transfer it, as soon as the accident or "occurrence" that caused environmental property damage occurred, or when that environmental damage itself occurred.[16] PCS Br. at 7. It argues that a chose in action arose with respect to obtaining the insurer's duty to defend at that time, too, and that such a chose in action was transferable. *Id.* at 7-12. It argues that the courts below erred in concluding that the insured has no transferable chose in action for payment pursuant to the duty to indemnify until a tort judgment is entered against the insured, as a liability insurer has no payment obligation before then. *Id.* at 7.

PCS further argues that the courts below, in supporting this conclusion, misconstrued the "no-action" clause to bar actions *by the insured* against the insurer prior to an underlying tort

[16] PCS's arguments in this regard are not clear. Its Brief refers at times to the time of the "occurrence" and other times to the time of the environmental damage. PCS Br. at 7-10.

judgment, saying the clause bars such actions only *by third-party claimants*. PCS Br. at 13-16.

Contrary to PCS's accusations of error, however, the courts below correctly determined that an insured has no "chose in action" to recover payments from its insurer—that the insurer owes the insured no "debt"—until a tort judgment is entered in an underlying case against it, as this Court held in *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970).

In that case, the plaintiff sought to sue a resident of Ohio in South Carolina with respect to an accident that occurred in South Carolina. *Id.* at 457, 176 S.E.2d at 128. The plaintiff could not effect service of process on the defendant, and instead she sought to serve the defendant's insurer, who did business in South Carolina, by serving a warrant of attachment on the insurer. *Id.* The plaintiff argued that the attachment established *in rem* jurisdiction over the insurer's limits of liability and its duty to defend, claiming these potential obligations of the insurer were the property of the Ohio defendant that gave South Carolina courts jurisdiction over him. *Id.* The trial court quashed the warrant, and the plaintiff appealed to this Court stating the sole question as:

> Does the duty to defend and the limit of liability contained in a policy of liability insurance constitute a "debt" owed the policyholder which is subject to attachment, thereby conferring jurisdiction upon the Courts of this State?

Id. at 458, 176 S.E.2d at 128.

The Court held that neither the duty to indemnify nor the duty to defend were "debts" owed to the policyholder that the policyholder could assign, and therefore they were not subject to attachment. *Id.* at 459, 176 S.E.2d at 129 ("We are not convinced that the contractual obligations of defendant's insurer are a debt subject to attachment under the law of this state. . . ."). The basis of the Court's ruling was that, as to the duty to indemnify, the insurer *owed the insured nothing* until there was an underlying tort judgment against the insured:

> The form of 'no action' clause in common use provides that no action can be brought against the insurer until after the determination of the liability of the insured *by a final judgment*, or by an agreement entered into between the insurer, the insured and the claimant. It follows that insofar as the 'applicable limits of liability' are concerned, *the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined.* Even after determination of such, whether the insurer owes the insured anything is dependent upon the contingencies of whether or not the insured has complied with the various provisions of the insurance contract, and whether or not the insurer has discharged its obligation to indemnify.

Id. at 460, 176 S.E.2d at 129 (emphasis added). In reaching this determination, the Court relied on its earlier holding in *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (1968), which similarly held that "no right to recover can accrue to plaintiff against either insurance company until and unless [the defendant] becomes liable to pay [as fixed in a judgment]. An injured person has no greater right against an insurer under a liability insurance policy than the insured." The trial court here also relied on *Park* in reaching its decision. App. 148, 162.

Although *Howard* involved an attempted attachment, it disallowed the attachment specifically because *the insured* could not assign or transfer to third parties the insurer's inchoate contract obligations, which meant that the third-party claimant could not attach them:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. *There is no obligation to defend until an action is brought* and *no obligation to indemnify until a judgment against the insured is obtained.* Even then, if the insurer's obligations to defend and indemnify are fully performed, *there is nothing of economic value to which the insured may make claim, receive or assign.*

254 S.C. at 460, 176 S.E.2d at 129 (emphasis added). The plaintiff there argued that the insurer's inchoate and contingent contractual obligations constituted a "debt" to the insured, but the Court said, "We do not agree. To the contrary, here the policy obligations to defend and indemnify are attempted to be used as a sufficient basis for jurisdiction to start an action which

might *or might not*, depending on various and sundry events, at some future date, convert such policy obligations into a monetary debt to the insured." *Id.* at 461, 176 S.E.2d at 130 (emphasis added). Because the insured could not claim, receive or assign the duty to defend or the duty to indemnify as a debt currently owed to it, neither could the plaintiff seek to attach them. *Id*. at 462, 176 S.E.2d at 130 ("the attachment of a creditor operates only upon such rights in property as the defendant-debtor has at the time of levy"). The Court held the insurer was "not indebted to [the defendant] in any amount," and "the insured did not have such interest in, or power over, the contractual obligations due him by the insurer as to permit him to dispose of his interest adversely to others." *Id.* Finally, the Court said, "The provisions of the policy, insofar as they inure to the benefit of only the insured, are, prior to any breach by the insurer, of no value to anyone other than the insured," and "we cannot conceive of his being able to *assign or dispose* of such for a valuable consideration of any consequence." *Id.* (emphasis added). Provisions that "inure to the benefit of only the insured" and therefore cannot be assigned include, among other things, the insurer's duty to defend the insured. *Javorek v. Superior Ct.*, 131 Cal. Rptr. 768, 780 (Cal. 1976) (following *Howard*; holding that the duty to defend "is not the type of interest which is subject to attachment. . . . 'Because the insurance carrier could not be obligated to defend a stranger to the contract by such a sale, we cannot conceive what there is to be sold. Rather, we are convinced that whatever value inheres in the contractual duty of the insurer is personal to the insured.' ") (citations omitted).

Contrary to the argument by PCS here, the Court also ruled in *Howard* that the "no action" clause makes clear that, as to the duty to indemnify, the insurer owes *the insured* nothing until an underlying tort judgment is entered against the insured. 254 S.C. at 460, 176 S.E.2d at 129. Thus the Court has already rejected PCS's argument that the "no action" clause applies

only to third parties.

Here, PCS argues that Old CNC was owed a chose in action by the insurers, which Old CNC could assign to PCS as soon as an "occurrence" or property damage occurred. *Howard* firmly rejects that proposition. The Respondents did not owe Old CNC anything with respect to their duty to indemnify until and unless a judgment covered by their policies was entered against Old CNC, and then only if Old CNC satisfied all conditions to coverage. The Respondents did not owe a duty to defend unless and until an action was brought against Old CNC seeking damages within the coverage of their policies, and the duty to defend, being personal to and of benefit to only the insured, was "of no value to anyone other than the insured" and could not be assigned. *Howard*, 254 S.C. at 462, 176 S.E.2d at 130. As PCS acknowledges, no actions had been filed against Old CNC as of the 1986 corporate transaction, and no judgments had been entered against it. Old CNC therefore had no chose in action or other debt it could assign to PCS, and PCS's argument that the courts below erred in determining *when* such a chose in action arose is decidedly incorrect as a matter of South Carolina law.[17]

3. *Howard* Is Compelling Precedent, and Many Other States Followed It

Howard disposes of PCS's arguments as this Court's precedent, but it is especially compelling precedent, given the context in which it was decided and the cases that followed it.

The issue presented in *Howard* was whether South Carolina would follow New York in allowing personal jurisdiction for a tort suit to be established against a non-resident defendant based on the fact that the defendant's insurer was present in the state and based on the

[17] PCS argues that Old CNC has the "right to seek coverage" from Respondents as soon as property damage took place during their policy periods. PCS Br. at 7, 15. But as held in *Howard*, having a "right to seek coverage" is not synonymous with having a transferable piece of property—a debt—unless many other contingencies occur, and if they do not occur the debt never arises. PCS's effort to conflate Old CNC's "right to seek coverage" with Old CNC's "right to transfer" its coverage as a debt therefore is rejected under South Carolina law.

supposition that the insurer held the insured's "property," in the form of owing the insured a duty to defend and a duty to indemnify. *Howard*, 254 S.C. at 458, 176 S.E.2d at 128. Specifically, the Court was asked to adopt *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). *Id.* The Court refused, saying no other state had followed *Seider*, and its ruling had been much criticized. *Id.* at 459, 176 S.E.2d at 128. The Court noted that other states had rejected *Seider*, but that was not the basis of the Court's decision—rather, the Court made clear that it rejected *Seider* because (as discussed above) the insurer owed the insured nothing until a judgment against the insured was entered in an underlying case, and the duty to defend was not assignable, as it was of no value to anyone other than the insured, such that the insured had no "property" in the hands of the insurer that could be attached.

Howard took note of the "strong dissent" in *Seider*. *Id.* Judge Breitel, who took the New York bench after *Seider* was decided, later wrote a bristling opinion amplifying the dissent:

> It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.
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> * * *
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> [New York's attachment statutes] are not intended or designed to reach every obligation created by contract, however inchoate, conditional or personal. The obligation to defend and, even more, that obligation to indemnify are just such inchoate, conditional, contingent and personal obligations. Before they come into play, there must be an external event (usually an accident) within the coverage of the policy, performance of conditions precedent by the insured, and co-operation by the insured. Even then, if the insurer's obligation to defend is fully performed, there is nothing of economic value to which the insured may make claim, receive or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.

Simpson v. Loehmann, 234 N.E.2d 669, 674 (N.Y. 1967) (Breitel, J., concurring). *Howard* echoed Judge Breitel in his stinging criticism of *Seider*. 254 S.C. at 460-61, 176 S.E.2d at 129.

The Supreme Court of California, citing *Howard* with approval, agreed that the duty to

indemnify did not mature into a debt that the insured could transfer until there was a judgment against the insured, and that the duty to defend was personal to the insured and could not be assigned. *Javorek*, 131 Cal. Rptr. at 775 n.7, 777-78, 780. Courts in New Hampshire and New Jersey also cited *Howard* in refusing to adopt *Seider*-type jurisdiction. *Camire v. Scieszka*, 116 N.H. 281, 284, 358 A.2d 397, 399 (1976); *Hart v. Cote*, 145 N.J. Super. 420, 425, 367 A.2d 1219, 1221 (Law. Div. 1976). Multiple other decisions similarly rejected *Seider*. *E.g.*, *Robinson v. Shearer & Sons, Inc.*, 429 F.2d 83 (3d Cir. 1970); *Ricker v. LaJoie*, 314 F. Supp. 401 (D. Vt. 1970) (applying Vermont law); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *Missouri ex rel. G.E.I.C.O. v. Lasky*, 454 S.W.2d 942, 947 (Mo. App. 1970) (duty to defend "is clearly not an indebtedness absolutely due as a money demand;" duty to indemnify "will mature only as, if and when the plaintiff . . . obtains a valid judgment"); *Johnson v. Farmers Alliance Mut. Ins. Co.*, 499 P.2d 1387, 1390 (Okla. 1972) (if no judgment is entered against insured, "no indebtedness would accrue under the policy"); *De Rentiis v. Lewis*, 258 A.2d 464, 467 (R.I. 1969) (insured's interest in policy "was not attachable property"); *Housely v. Anaconda Co.*, 427 P.2d 390 (Utah 1967); *Werner v. Werner*, 526 P.2d 370 (Wash. 1974).

The U.S. Supreme Court ultimately ruled that *Seider*-type jurisdiction was unconstitutional, noting *Howard* as one of many cases rejecting it based on state law or constitutional reasons. *Rush v. Savchuk*, 444 U.S. 320, 329-32 & n.13 (1980). Although the Court did not address whether an insurer's obligations were garnishable under state law, *id.* at 328 n.14, it was clearly skeptical: "The State's ability to exert its power over the 'nominal [tort] defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the 'garnishee' into the action." *Id.*at 330-31.

Thus, *Howard's* analysis of when an insurer's obligations to the insured mature into a debt that the insured may transfer is in good company.

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

The Court's more recent decision in *Narruhn* fits seamlessly with *Howard*. Yet PCS seeks to upend South Carolina law by attempting to twist the Court's words in *Narruhn*—in a discussion that the Court noted was *dicta*. PCS Br. at 17-18; *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"). Far from purporting to overturn prior South Carolina caselaw, *Narruhn's* actual holding, as well as its *dicta*, is consistent with that law and confirms the correctness of the rulings below here.

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, a *judgment against the insured* had already been entered in an underlying case by the time the assignment was made, and, subject to any coverage defenses, 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, *because* 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* perfectly align with its holding in *Howard* and prior South Carolina cases. Insurance policies are contracts personal to the insured and cannot be transferred to another—even after "loss"—without consent of the insurer. *Silverman*, 182 S.C. at 460, 189 S.E. at 757. A policyholder may assign only a money claim, for "insurance money then due," after it has accrued. *Ligon*, 219 S.C. at 155, 64 S.E.2d at 264. The duty to indemnify does not accrue into a payment obligation until there is a judgment against the insured. *Howard*, 254 S.C. at 459, 176 S.E.2d at 129; *Park*, 251 S.C. at 413, 162 S.E.2d at 710. And the duty to defend is personal to the insured and never matures into a debt that is transferable. *Howard*, 254 S.C. at 462, 176 S.E.2d at 130.

5. The So-Called "Post-Loss" Exception Is Really A "Chose in Action" Exception and Does Not Apply Here

Although PCS uses the word "loss" repeatedly and seeks to argue what it means so as to determine when Old CNC had a chose in action it could assign to PCS, the Respondents' policies do not use "loss" to define what their policies cover or when their obligations arise. 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 (such as the policies at issue here) 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.

Yet in the context of liability insurance 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 Howard*, 254 S.C. at 460, 176 S.E.2d at 129 ("the insurer owes the insured nothing until the *liability* of the insured and the amount thereof has been determined") (emphasis added); *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 multiple contingencies beyond the happening of an injury that must be fixed before an insurer can have an obligation to indemnify an insured's liability. *Howard*, 254 S.C. at 460, 176 S.E.2d at 129. 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).[18]

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. 10 above), then seek to recover from the insurers *for the liability it helped to establish*. It may even claim 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.[19] 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

[18] To be clear, there is no issue in this case regarding "trigger of coverage," meaning what must happen during the policy period to give rise to an insurer's potential duties to defend or indemnify. *See Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997) (for progressive property damage, applicable policies are those in effect at time of injury-in-fact during the progressive damage). Moreover, the insurers here do not contend that they could unilaterally abrogate, terminate or cancel their obligations *to their insured* (Old CNC) once property damage occurred during their policy periods. They thus have never sought to "walk away" from their insured or their contracts. They do contend, however, that the obligations under their policies, even once "triggered," do not mature into a debt owing to the insured until an underlying suit results (if ever) in a judgment for covered damages. Thus "trigger" is a necessary, but not sufficient, condition for the insurers' payment obligation, and many other conditions must be satisfied, the most important of which is that the insured be held liable in a judgment. PCS effectively argues that trigger is necessary *and sufficient* to establish the insurers' payment obligation, which South Carolina law rejects.

[19] Indeed, PCS seeks to be paid to *prosecute* Old CNC here. 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. 10 above.

which the insurers did not bargain.

6. 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 "overwhelming nationwide consensus." PCS Br. at 17. But since those decisions are consistent with (and indeed compelled by) South Carolina law, that argument presents no basis for reversal.

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.[20] 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 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*.

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

No case, anywhere, supports that result.[21]

Other cases from other jurisdictions on which PCS relies are not controlling here, but in any event they either do not support PCS's argument, are distinguishable or are contrary to the law of the state whose law they purported to apply. As discussed below, there is a consistent view throughout the decisions, with some errant cases in other jurisdictions failing to follow it: Insurance policies may not be assigned *in toto* to a new insured without insurer consent, but a policyholder may assign only an accrued right to receive money from an insurer as a chose in action. That is precisely South Carolina law as well.

The rule that insurance policies may not be assigned, but a chose in action for money already due may be assignable, is recognized by many other courts. As the Indiana Supreme Court said, "At a minimum, for an insured loss to generate an assignable coverage benefit, it must be identifiable with some precision. It must be fixed, not speculative. . . . A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at a moment when the policyholder could have brought its own action against the insurer for coverage." *U.S. Filter*, 895 N.E.2d at 1180. *See also Del Monte*, 183 P.3d at 746-47 (duties to defend and to indemnify cannot be transferred by insured without insurer consent); *Holloway v. Republic Indem. Co.*, 147 P.3d 329, 335 (Ore. 2006) (policy "prohibits the assignment of the insured's rights or duties without regard to whether they arose pre-loss or post-loss"); *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 875-78 (5th Cir. 2010) (predicting Texas would reject assignment of insurance "by operation of law"); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714

[21] A case cited by PCS relies principally on *Fluor* and *Givaudan*. *Olin Corp. v. Lamorak Ins. Co.*, __ F. Supp. 3d __, 2021 WL 396781, at *12 (S.D.N.Y. Feb. 4, 2021). *Olin* also did not involve an alleged assignment to the insured's adversary. *Id.* In addition, because *Fluor* and *Givaudan* conflict with South Carolina law, *Olin* provides no authority for PCS's arguments.

(Tex. 1996) (insured's assignment of claims against insurer is invalid if made before judgment); *Red Arrow*, 607 N.W.2d at 302 (insurance policies do not "follow the liability" to entity that had been held successor to insured's environmental clean-up obligations), *review denied*, 612 N.W.2d 733 (Wis. 2000); *Straz v. Kansas Bankers Sur. Co.*, 986 F. Supp. 563, 569 (E.D. Wis. 1997) (assignment was valid because under third-party liability policy "loss occurred when [the insured] settled" the underlying lawsuit), *aff'd*, 165 F.3d 33 (7th Cir. 1998); *EM Indus., Inc. v. Birmingham Fire Ins. Co.*, 141 A.D.2d 494, 496, 529 N.Y.S.2d 121, 123 (1988) (insurer did not "become the plaintiff's insurance carrier by virtue of plaintiff's acquisition of the 'business and properties' " of the insured; rejecting assignment theory), *appeal denied*, 73 N.Y.2d 704, 534 N.E.2d 330 (1989); *Time Fin. Corp. v. Johnson Trucking Co.*, 458 P.2d 873, 875 (Utah 1969) (insured could not assign "contractual relationship," but only "money claim"); *Water Applications & Sys. Corp. v. Bituminous Cas. Corp.*, 986 N.E.2d 124 ¶ 60 (Ill. App. 2013) (insurer consent required for assignment of liability insurance policy, under Maryland law); *In re Katrina Canal Breaches Litig.*, 63 So. 3d 955, 959 (La. 2011) (post-loss unliquidated claims for coverage under first-party property policy not assignable without consent; "There is a difference between a liquidated claim for policy proceeds, where an insurer simply has to pay an undisputed amount of money, and an unliquidated claim for additional damage to the property. . . .").

Multiple cases around the country confirm that an insured may assign merely a chose in action for an accrued money payment, not policies to make a new person or entity an insured. In *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 160 N.E. 145, 145-46 (Ill. 1928) (which PCS cited to the trial court, but omits to cite here), the insured's car had already been stolen when he assigned the claim for recovery from his insurer. The court held that a claim is assignable after "nothing remains to be done except pay the money." *Id.* at 146. The insurer's consent would have been

required "if [the claimant] had bought the automobile covered by the policy prior to the time it was stolen and an attempt had been made *to assign the policy*." *Id.* (emphasis added). Instead, after the car was stolen the insured's claim "became a chose in action." *Id. See also Citicorp Indus. Credit, Inc. v. Federal Ins. Co.*, 672 F. Supp. 1105, 1105-07 (N.D. Ill. 1987) (thefts had occurred before assignment of assets to creditor; under Missouri law, "insureds had not assigned the policy at issue, but instead, had assigned a matured claim or debt, which, like any other chose in action, was assignable"); *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388-89 (D.C. 1996) (fire had occurred; "policies for fire insurance are normally considered 'personal' in nature;" but assignment of claim as "chose in action" permitted because after the fire "the relationship of insured and insurer is now one of 'creditor and debtor' "); *Peck v. Public Serv. Mut. Ins. Co.*, 114 F. Supp. 2d 51, 56 (D. Conn. 2000) (permitting assignment to judgment creditor of bad faith claim against insurer "after the loss has occurred *and a judgment has been obtained* against the insured") (emphasis added); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) (windstorm damage had occurred; the "assignment followed the windstorm. After the loss was incurred the issue became not an assignment of the policy, but the assignment of a chose in action—the right to compel defendant's payment. . . ."); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001) (following *Kintzel*; after windstorm, "the insurer-insured relationship is more analogous to that of a debtor and creditor"); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1224 (Pa. 2006) (claimant had entered into settlement agreement with insured prior to verdict, and insured assigned to claimant its claim against insurer; assignment permitted based on Pennsylvania case law stating " 'it is against public policy so to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer an absolute right in the nature of a chose in action' ") (citations

omitted).[22] In all of these cases, then, the insurer's payment obligation had accrued, and all that the insured attempted to assign was the right to receive an accrued payment; the insured did not attempt to make a new person or entity an insured.[23] Therefore, these cases conform to South Carolina law and do not support PCS here.

PCS relies on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. 2011). There, the Illinois Appellate Court permitted the insured to assign its liability insurance policies to a purchaser of the insured's assets, even though, as noted above, the Supreme Court of Illinois had made clear in *Ginsburg* that an assignment would be effective only as to a chose in action: that is, only when "nothing remains to be done except pay the money." *Ginsburg*, 160 N.E. at 146. *Ginsburg* had also stated that consent *would* be required to assign the policy. *Id.* *Illinois Tool Works* simply failed to adhere to this precedent. Indeed, the Appellate Court stated, "There is little distinction between assignment of an insurance policy and assignment of benefits under a policy." 962 N.E.2d at 1054 n.8. Yet, as *Ginsburg* held, there is a significant difference: A policy cannot be assigned without consent, because such an assignment seeks to transfer a contractual relationship; whereas the accrued right to a money

[22] To the extent *Egger* may be read as permitting an assignment *before* a chose in action arose, it approved such an assignment only to a *claimant*, not to a new insured, and therefore offers PCS no support.

[23] PCS seeks to rely on *Johnson v. CSAA Gen. Ins. Co.*, 478 P.2d 422 (Okla. 2020), but like many of the cases cited above, *Johnson* involved a first-party property policy and assignment of an insured's claim for proceeds after a storm had damaged her property—not assignment of a policy to a new insured. *Id.* at 425. Indeed, the court said, "Generally, when an insurance policy is deemed to be a personal contract between insured and insurer, a policy provision requiring insurer's consent for an assignment will be enforced." *Id.* at 427. PCS also cites *In re Ambassador Ins. Co.*, 965 A.2d 486 (Vt. 2008), but that case also does not help PCS. There, the insured continued to defend and actively manage cases filed against it, but assigned to one insurer its rights to recovery in the liquidation of a second insurer. *Id.* at 488, 492. Thus, there was no change in the identity of the insured. In addition, the first insurer could claim recovery from the liquidation estate only as future claims were proven in amount and validity, *id.*, making the assignment essentially a "chose in action" assignment only as each chose in action matured.

payment can be assigned without consent because it is the property of the insured (money already owing) held in the insurer's hands. 160 N.E. at 146. That *Illinois Tool Works* failed to appreciate the distinction shows it is not an authoritative statement of Illinois law.[24]

Of particular note for its failure to adhere to state law is the federal decision in *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939). While some courts seem to view *Ocean Accident* as a leap forward in the development of the law, it is just one decision by a federal court which was obligated to give effect to controlling state law. It is therefore only as persuasive as its fealty to the state law it claimed to apply—but it utterly failed to honor that law.[25] *Ocean Accident* is premised on the assertion that a "claim" under a liability insurance policy is an assignable "chose in action" immediately upon the occurrence of a claimant's injury, because "the liability of the [liability insurer] arose immediately upon the happening of the accidents resulting in the injuries." *Id.* at 444-45. Yet that assertion is completely contradicted by the cases the court cites. One Missouri case held the exact opposite, holding that an insurer's obligation under an indemnity policy "did not become fixed . . . until plaintiff had paid the judgment." *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 133 S.W. 156, 159 (Mo. App. 1911). Another case involved an automobile insurance policy that did not contain a "no action" clause, noting that if such a clause had been included (as it is here, see p. 6 above) the insurer's liability would not attach until there was a judgment against the insured.

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[24] *Illinois Tool Works* also equated a "future claim" for "defense and indemnification" with a "chose in action." 962 N.E.2d at 1055. Yet a chose in action is not a future contingency, but a fixed debt payable to its holder. *Crum v. Sawyer*, 24 N.E. 956, 960 (Ill. 1890) (contrasting choses in action, which are "absolutely fixed and *in esse*," with "contingent interests and expectancies"). The fact that the court confused a future contingency with a chose in action makes its analysis all the more unpersuasive.

[25] *Ocean Accident's* cavalier treatment of controlling Missouri law may have been a consequence of an accident of timing. The Supreme Court's ruling in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring federal courts to apply state law in diversity cases and to stop attempting to apply a "federal common law," was issued just months before *Ocean Accident*.

Wehrhahn v. Fort Dearborn Cas. Underwriters, 1 S.W.2d 242, 244 (Mo. App. 1928). A final case involved a specific Missouri statute that fixed the insurer's *responsibility* at the time of the accident,[26] *Schott v. Continental Auto. Ins. Underwriters*, 31 S.W.2d 7, 10 (Mo. 1930), but that case *still* recognized that the insurer had no *payment obligation* until *judgment* was entered against the insured, *id.* at 12 ("the obligation on the part of the insurer to pay accrues the moment judgment against the insured has been rendered"). There was therefore absolutely no basis for *Ocean Accident's* assertion that an insurer has a payment obligation, or that the insured has a chose in action it can assign, immediately upon the happening of an accident. Rather, Missouri law held the opposite—that the insured had no chose in action for the insurers' payment until a judgment had been entered against it—exactly the rule in South Carolina.[27] In sum, *Ocean Accident* simply contravened the state law it purported to apply in violation of *Erie* and should be

[26] There is no such statute here.

[27] Stretching further to find support for its analysis, *Ocean Accident* also relied on an older New Jersey case (although New Jersey had no connection to the policy at issue). *Ross v. American Empl. Liab. Ins. Co.*, 56 N.J. Eq. 41, 38 A. 22 (Ct. Ch. 1897). But that case addressed what priority, in equity, to give competing claims made by insureds against an insolvent insurer's remaining assets and did not involve assignability at all. *Id.* at 42, 38 A. at 22. In addition, the policy language interpreted in *Ross* was completely different from the policy language at issue here. In *Ross*, the insuring agreement covered damages "with which the insured may be *legally charged*." *Id.* (emphasis added). By contrast, Continental's (and other insurers') policies here apply to sums that the insured "shall become legally obligated to pay." See p. 6 above. The distinction is critical, because the court in *Ross* interpreted the "legally charged" language as attaching the insurer's obligation at the time of the accident, since the insured could be "legally charged" with liability then, with a judgment being "a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured." 56 N.J. Eq. at 44, 38 A. at 23. *Ocean Accident* failed to account for a later New Jersey Supreme Court case that held, under the language in the policies at issue in *Ocean Accident* (and here)—"sums the insured shall become legally obligated to pay"—that liability be fixed *by a judgment or settlement* before the insurer has a payment obligation. *Nakonieczny v. Commonwealth Cas. Co.*, 111 N.J.L. 137, 142-43, 167 A. 213, 215 (Sup. Ct. 1933) (policy promising "to pay all sums which the assured shall become liable to pay" "entitled the assured to sue the insurer after a final judgment had been recovered against him on a claim covered by the policy"). Thus *Ross* and *Ocean Accident* provide no support for concluding that an insurer's payment obligation is fixed at the time of an underlying accident under the policy language at issue here, or that policy rights are assignable then.

rejected as authority for any proposition. Indeed, the Supreme Court of Missouri later rejected *Ocean Accident's* holding that the insurer's obligation to pay accrues upon the claimant's injury, holding that a tort claimant could *not* sue the insurer of a dead defendant to recover under his insurance policy, because the tort claim abated by death, and for the insurer to have any obligation to pay "the claim must be reduced to judgment." *Haines v. Harrison*, 211 S.W.2d 489, 492 (Mo. 1948) (citing but not following *Ocean Accident*).

Finally, yet other cases upon which PCS relies are clearly distinguishable. *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015), explicitly rested its holding on the court's interpretation of an 1872 California statute, which the court concluded required overturning aspects of its recent precedent in *Henkel Corp. v. Hartford Acc. and Indem. Co.*, 62 P.3d 69 (Cal. 2003). *Fluor*, 354 P.3d at 330. No such statute exists here.

Fluor also cited many non-California cases, but as shown above these cases either permitted assignment of actual choses in action (not full policies) or failed to adhere to the law of the state they purported to apply (particularly *Ocean Accident*). Also, in conducting its analysis of the California statute, the decision made a critical mistake: It misread the New York precedents upon which the California statute was predicated as not requiring a judgment *against the insurer* to permit assignment of *an accrued right to payment*. 354 P.3d at 320-21. Based on this, it held that no judgment *against the insurer* was required to assign policies. But in those New York cases the question of whether the insured had a judgment against the insurer was irrelevant: they involved first-party fire insurance, not third-party liability insurance, and therefore they had no need to discuss a "tort judgment" at all. Rather, the issue in those New York cases was whether the insurer had a payment obligation, and in the first-party context such a payment obligation arises upon the happening of covered property damage or other casualty—

the insurer's payment obligation arises then (upon proof of loss) whether or not the insured later obtains a judgment to enforce it. Thus, the *Fluor* court's reliance on those cases as not requiring a "judgment" to allow assignment fundamentally misread what they stood for.

By contrast, under California law, a third-party liability insurer's payment obligation does not arise until a tort claimant obtains an underlying judgment *against the insured*, as California precedents establish. *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I)*, 16 P.3d 94, 102 (Cal. 2001) ("the duty to indemnify can arise only after damages are fixed in their amount"); *Javorek*, 552 P.2d at 737-38 ("The insurer has no duty to pay until the insured becomes 'legally obligated to pay as damages' a sum of money. In other words, State Farm has no liability to pay until defendants' liability has been determined. If it is determined that they have no liability, the insurer's liability never accrues."). *Fluor* did not discuss or purport to overturn these precedents, showing that its analysis was severely flawed. To the extent *Fluor* holds that a liability insurer owes an insured a payment obligation prior to a judgment *against the insured* in an underlying case, it contravenes South Carolina law. *Howard*, 254 S.C. at 460, 176 S.E.2d at 129; *Park*, 251 S.C. at 413, 162 S.E.2d at 710.[28]

Finally, PCS relies on *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 131 (Ohio 2006). But there a majority of the justices actually disagreed with PCS's position here. A plurality of three justices would have followed *Henkel* and held that insurance rights are contractual and cannot be transferred by operation of law, and that they cannot be assigned without consent of the insurers, either, as they are not a chose in action for money due. *Id.* at

[28] For this reason, *Egger* is also distinguishable. It rested its holding on the conclusion that the insurer's payment obligation could arise before a judgment against the insured in the underlying case. 903 A.2d at 1225-26. But *Howard* and *Park* hold that a liability insurer's payment obligation does *not* accrue until the insured is held liable in a judgment. *Egger* therefore is at odds with South Carolina law.

135-38. Two justices would have held that the right to indemnity, but not defense, is a chose in action that is assignable by the insured once the "covered loss" occurs; but if liability is assumed by contract, insurance does not convey by operation of law. Thus five justices would reject PCS's arguments here. Only two justices would have rejected *Henkel* and allowed liability insurance rights to "follow the liability" whether or not they have matured into a chose in action. *Id.* at 132-35.

In sum, the cases upon which PCS relies either permitted only assignment of a chose in action (not assignment of policies to a new insured), failed to adhere to the state law they interpreted, or are inconsistent with South Carolina law. They provide no authority for a rule of "free assignment of policies" that PCS seeks.

D. PCS's Appeal to Public Policy Has No Merit

Lacking any factual or legal argument in its favor, PCS resorts to an appeal to public policy, by which it seeks to nullify all of the law laid out above. PCS made no such argument to the trial court and did not preserve it for appeal; it therefore should not be considered.[29] *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.") (citation omitted).[30]

Even if PCS's public policy arguments were considered, however, they have no merit. The public policy of South Carolina favors the enforcement of contracts as written; it prohibits

[29] Although PCS did make a "windfall" argument based on the insurers' receipt of premiums (different from its current "windfall" argument), it did not raise a "public policy" argument, including any argument that granting the insurers' motion would impair cleanup efforts or result in a restraint on trade.

[30] In contrast, an appellate court has discretion to address any additional sustaining grounds for the judgment, shown by the record, raised by the respondent. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

courts from rewriting contracts. "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). *Schulmeyer* rejected the insured's appeal to "public policy" as a means to rewrite an insurance policy: "Rather, this Court is required to give effect to the plain meaning of the words in an unambiguous contract." *Id.* at 497, 579 S.E.2d at 134. As the Court said: "[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." *Poynter*, 387 S.C. at 587-88, 694 S.E.2d at 17-18. 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. Far from requiring that outcome, public policy in fact prohibits it.

Moreover, enforcing the policies so that the insurers' obligations extend only to their insured and not to a stranger does not result in a "windfall." As the trial court noted, the insurers have not "walked away" from their insured. App. 166. If Old CNC had been sued, and if its liability were covered, the insurers would pay.

> Yet it is undisputed that PCS Nitrogen did not sue Old CNC, even though it sued Old CNC's parent companies, DSM N.V. and DSM Chemicals North America, Inc., and ultimately lost its claims against them. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 n.4 (4th Cir. 2013). There may be reasons why PCS Nitrogen could not sue Old CNC, but those reasons relate to Old CNC's liability. PCS Nitrogen's problem therefore is a liability problem, not an insurance problem. It may not seek to upend South Carolina law to obtain insurance to which it is not entitled to circumvent that problem. Holding PCS Nitrogen to the consequences of the law of liability does not provide the insurers a windfall.

Id. PCS ignores that it *lost* its liability suit against the true insureds here. *PCS Nitrogen*, 714 F.3d at 174-76. PCS cannot blame the insurers for that loss and seek coverage for liability *that*

PCS failed to prove.

Nor does denying PCS status of an "insured"—a status to which it is not entitled—impair efforts to remediate the environment. PCS is part of Nutrien, Ltd., a multi-national fertilizer producer that describes itself as "the world's largest provider of crop inputs and services."[31] Together with other parties found responsible for clean-up of the Charleston Site, it has the means to pay for the clean-up, and it has told its shareholders that its liability for sites like the Charleston Site "is not reasonably likely to have a material adverse effect on our consolidated financial statements." *Id*. at 122. Thus, holding that PCS is not the insured under the Respondents' policies will have no effect on whether the Charleston Site will be cleaned up by PCS and others—it will be.[32]

Finally, enforcing the policy language and South Carolina law will not result in a "chilling effect" on corporate transactions. PCS's prime support for this argument is a treatise by Jeffrey Stempel, a professor at the University of Nevada-Las Vegas (which was also cited in *Fluor*). The Court should be aware of Mr. Stempel's background. He has acknowledged that views he has published critical of enforcing the consent-to-assignment provision in insurance policies were formed in part as a paid expert working for policyholders. As Mr. Stempel disclosed in a law review article that criticizes the Supreme Court of California's ruling in

[31] 2020 Annual Report to Shareholders of Nutrien, Ltd. at 84, 114, 123 (available at https://www.nutrien.com/sites/default/files/uploads/2021-03/Nutrien-2020-Annual-Report-Enhanced.pdf).

[32] In any event, most of the respondents' policies contain pollution exclusions, which exclude coverage for property damage arising out of the discharge of pollutants, unless the discharge was sudden and accidental, as discussed in the brief and joinders filed in support of the pollution exclusion motion in this case. App. 756-800. Notably, PCS has already litigated and lost its argument that identical pollution exclusions in other insurers' policies do not apply to this very site. *Ross Devp. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013). Accordingly, the policies with pollution exclusions would not provide coverage for the cleanup of the Charleston Site in any event. This further weakens PCS's argument that affirming the ruling below could impede the cleanup effort.

Henkel, "Some of my views on insurance coverage issues relating to asbestos claims were formed in the course of examining those issues as an expert witness or consultant, primarily for policyholders who manufactured, sold or used asbestos in some form." Jeffrey W. Stempel, "Assessing the Coverage Carnage: Asbestos Liability and Insurance after Three Decades of Dispute," 12 Conn. Ins. L.J. 349, 349 n.* (2006). At a minimum, therefore, whether his analysis is objective is open to question. Even so, the fact that jettisoning insurance contract language may "lower transaction costs" and may be more convenient for the corporations who seek to engage in sophisticated reorganizations does not mean it is in the public interest. As noted above, forcing insurers into contracts with strangers necessarily increases their risk, for which they will have to account by raising rates on prudent policyholders. Public policy clearly discourages that result.

E. 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 equitable 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.[33] 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.[34]

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.

VI. CONCLUSION

The decisions of the courts below are in full accord with the decisions of this Court.

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[33] As *Brown* recognized, the theory that the purchaser of corporate assets could be held liable for corporate debts in the absence of express assumption is an equitable theory. *Brown*, 128 S.C. at 432, 123 S.E. at 99 ("If [the purchaser] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it.") (citation omitted). But while equity may bind a party to the corporate transaction, it cannot adversely affect non-parties to the transaction (such as the insurers here): "[E]quitable maxims do not operate to place burdens on individuals made party to a particular transaction through no fault or expressed interest of their own, or, as in this case, through the fault and mistake of others." *Wachovia*, 404 S.C. at 426 n.1, 746 S.E.2d at 38 n.1. Thus, even if *de facto* merger applied to PCS, it does not bind the insurers.

[34] The Court reaffirmed *Brown* as the law of South Carolina in *Simmons v. Mark Lift Indus., Inc.* 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005). *See also Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 266, 818 S.E.2d 447, 453 (2018) (applying *Brown* and *Simmons* and holding that "mere continuation" exception requires "commonality of officers, directors and shareholders").

Indeed, the foundational principles of law they apply 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, because the parties knew that consent of insurers was required and not obtained. In any event, any assignment could assign only a chose in action, or a right to obtain a debt already accrued, and no such chose in action was in existence here. Accordingly, the judgment should be affirmed.

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