S205889

Case No. S _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE
Respondent;

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Real Party In Interest.

After a Decision by the Court of Appeal, Fourth Appellate District, Division Three Civil Case No. G045579

Following a Grant of Review and Transfer by the Supreme Court of California, Case No. S 196592

Petition from the Superior Court of the State of California for the County of Orange Case No. 06CC00016, Honorable Ronald Bauer, Presiding

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PETITIONER FLUOR CORPORATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW

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Pursuant to California Rules of Court, rule 8.252, and Evidence Code sections 452 and 459, Petitioner Fluor Corporation (hereinafter, "Fluor") respectfully requests that this Court take judicial notice of the following document:

Exhibit 1: Reporter's Certified Transcription of Audio Recording of Oral Argument on July 24, 2012, in *Fluor Corporation v. Superior Court, Hartford Accident & Indemnity Company, Real Party in Interest*, California Court of Appeal, Fourth Appellate District, Division Three, Appeal Case No. G045579, before Justices Kathleen E. O'Leary, William F. Rylaarsdam, and Raymond J. Ikola. A copy of the transcription is attached hereto as Exhibit 1 and authenticated by the Declaration of John M. Wilson ("Wilson Declaration"), filed concurrently herewith in support of Fluor's Petition for Review.

MEMORANDUM OF POINTS AND AUTHORITIES

California courts may take judicial notice of the records of any court of this state. (Evid. Code, § 452, subd. (d)(1); *id.*, § 459, subd. (a).) This includes judicial notice of pleadings and motions filed in connection with related actions, as well as transcripts of those proceedings. (See, e.g., *Hotels NV, LLC v. L.A. Pac. Center, Inc.* (2012) 203 Cal.App.4th 336, 346, fn. 4 [taking judicial notice of pleadings and transcripts from prior bankruptcy filing]; *Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 210, fn. 3 [taking judicial notice of trial court hearing transcript after finding the transcript was a "proper subject" of judicial notice and relevant to the court's determination on appeal]; *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 914, fn. 1 [taking judicial notice of clerk's transcript from prior appeal]; *Alexander v. Super. Ct.* (1994) 22 Cal.App.4th 901, 905, fn. 1 [taking judicial notice of municipal and superior court files, including transcripts of proceedings].)

This Court should judicially notice the transcript of the oral argument before the Court of Appeal (following this Court's grant of Fluor's prior Petition for Review and transfer to the Court of Appeal for further proceedings) pursuant to its authority. (Evid. Code, § 452; Evid. Code, § 459, subd. (a) ["The reviewing court may take judicial notice of

any matter specified in Section 452."]; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

Fluor has given notice of this request, which is sufficient to enable Real Party in Interest Hartford Accident & Indemnity Company to prepare to meet this request (see Proof of Service, concurrently filed herewith), and has furnished this Court with sufficient information to enable it to take judicial notice of the items requested. Consequently, this Court should take judicial notice of the document requested under Evidence Code section 452, subdivision (d).

STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Fluor requests that the Court take judicial notice of Exhibit 1 to Fluor's Request for Judicial Notice in support of its Petition for Review, and consider this document in ruling on the Petition.

DATED: October 9, 2012

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson

By: _____
John M. Wilson
Attorneys for Petitioner
Fluor Corporation

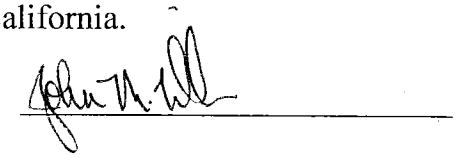
DECLARATION OF JOHN M. WILSON

I, John M. Wilson, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and a partner in the law firm of Latham & Watkins LLP, counsel for Plaintiff and Petitioner Fluor Corporation in the above-entitled case. As such, I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would testify as follows.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Reporter's Certified Transcription of Audio Recording of Oral Argument on July 24, 2012, in *Fluor Corporation v. Superior Court, Hartford Accident & Indemnity Company, Real Party in Interest*, before Justices Kathleen E. O'Leary, William F. Rylaarsdam, and Raymond J. Ikola, California Court of Appeal, Fourth Appellate District, Division Three, Appeal Case No. G045579.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on October 9, 2012, at San Diego, California.



John M. Wilson

IN THE CALIFORNIA COURT OF APPEAL

FOR THE FOURTH APPELLATE DISTRICT

DIVISION THREE

FLUOR CORPORATION,

Petitioner,

vs. Case No. G045579

SUPERIOR COURT,

Respondent.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Real Party in Interest.

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REPORTER'S TRANSCRIPTION OF AUDIO RECORDING

ORAL ARGUMENT

JULY 24, 2012

Before: Justice Kathleen E. O'Leary
Justice William F. Rylaarsdam
Justice Raymond J. Ikola

Transcribed by

Renee Kelch, RPR, CLR, CSR No. 5063
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

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TRANSCRIPTION OF AUDIO RECORDING OF ORAL ARGUMENT

JULY 24, 2012

MR. WEIL: Your Honors, before you hear argument, Alan Weil for respondent, I have a request of the court.

JUSTICE O'LEARY: All right.

MR. WEIL: We were informed this morning just before argument that Mr. Ruggeri, who is lead counsel in this matter, and has been lead counsel for over three years, that there was an administrative problem in that his pro hac vice application for appearance in this court has not been filed.

He has prepared -- since he prepared the briefs in this case, he appeared in the supreme court on the petition. And I'm asking that the court permit him to answer the court's questions and make whatever argument is appropriate. He's come out here from Washington, DC, for this appearance, and he is best prepared to do so.

Alternatively, if that's not possible, we can have the necessary forms in the court this morning.

JUSTICE RYLAARSDAM: No. They're filed with the state bar; not with this court.

MR. WEIL: Yes, Your Honor. There is -- we can get that done this morning, and I can represent to the

court as a member of the bar for the last 39 years, that Mr. Ruggeri is of utmost integrity and is competent to represent the respondent in this case.

JUSTICE O'LEARY: He appeared in the superior court, did he not?

MR. WEIL: He did, Your Honor.

JUSTICE O'LEARY: Did the appellants want to be heard?

MR. WILSON: We have no objection, Your Honor, if the court is prepared to proceed with argument and hear from Mr. Ruggeri, we won't oppose.

JUSTICE O'LEARY: All right. We did review the California Rules of Court, as the state bar, and under Rule 9.40(g) the court does have the discretion to allow an attorney to appear pro hac vice without the formalities. But just in the future, please make sure -- apparently you have to file it -- you have to file it, under the rules, every time you make an appearance in a different court. Okay? So we will allow it. Okay.

MR. WILSON: Good morning, Your Honors. John Wilson on behalf of Fluor Corporation.

May if please the court, Section 520 establishes as a matter of California law, the point at which anti-assignment provisions in insurance policies

become unenforceable, as a matter of law. So we are here today to address one clearly defined legal issue: When does loss happen?

JUSTICE RYLAARSDAM: The issue -- that's right. But after the loss occurs. Assignment may be made after the loss occurs so --

MR. WILSON: That is --

JUSTICE RYLAARSDAM: -- that is one of the issues, is when did the loss occur?

MR. WILSON: That is correct, Justice Rylaarsdam -- Rylaarsdam, excuse me.

The issue is when loss happens in an occurrence-based policy. And the answer to that question will determine whether Hartford's anti-assignment provisions in this case are void as a matter of law, and ensures that Hartford cannot avoid providing coverage for the very risk that they agreed to insure and for which they collected substantial premiums over a number of years.

Hartford's attempt to do so here is precisely the grossly oppressive conduct that the legislature enacted Section 520, and its predecessor statute, to protect policyholders against.

JUSTICE RYLAARSDAM: And that statute was first enacted, I think, in 1872 before anybody had even

thought of liability insurance.

MR. WILSON: That's correct, Justice Rylaarsdam. The original statute of the civil code --

JUSTICE RYLAARSDAM: Well, it's the same statute. It was just reenacted --

MR. WILSON: It is. It was --

JUSTICE RYLAARSDAM: -- with modifications.

MR. WILSON: That's correct. It was incorporated nearly verbatim into the insurance code in 1935, when liability insurance was much more common, and it was very slightly reworded without substantive change again in 1947. And when the legislature acted at that time, when liability insurance was much more common, there obviously presumed to have understood the purpose of the statute, which appears in a section of the insurance code governing all insurance policies. And in fact, in the Henkel case itself, one of the cases that was cited was the Ocean Accident case, a case from 1939, where the question of when loss happens in a liability policy was actually discussed.

JUSTICE RYLAARSDAM: Well, do we have even the authority to say, "Well, the Supreme Court did wrong so we'll go the other way?" Maybe we'll --

MR. WILSON: I think the answer to that question, Justice Rylaarsdam, is yes.

JUSTICE RYLAARSDAM: Well, I think the answer to that question is no.

MR. WILSON: Well, under California law, statutory law controls, regardless of whether the Supreme Court may declare the common law to be something different. And in this case, the Henkel court did not consider the governing statute or the overriding principle that supports --

JUSTICE RYLAARSDAM: Well, it seems to me when you file your petition for re-hearing, that argument will undoubtedly be considered. I mean, your petition for hearing in the supreme court.

MR. WILSON: I think that's right. And that's precisely the issue that was teed up in Fluor's petition for relief.

JUSTICE RYLAARSDAM: That's where this case is going in any event; right?

MR. WILSON: I think that's probably right, Your Honor. I think that ultimately the supreme court is going to be the arbiter of what it did or didn't do in the Henkel decision.

When you read the decision, it seems pretty clear that the supreme court did not consider when loss happens, because it never even mentions the term. And it also didn't consider the underlying policy principle

that governed Section 520 preventing the gross oppression of insurers trying to escape providing coverage for the very risks they intended to insure --

JUSTICE RYLAARSDAM: You know --

MR. WILSON: -- because the court had applied the statute.

JUSTICE RYLAARSDAM: That's -- I was just going to suggest that, you know, to just characterize it as gross something or other doesn't particularly help either side. So let's just talk about the facts of the case.

JUSTICE IKOLA: Well, I was going to suggest, the 1872 statute, as I understand it, was enacted at a time when the only kind of insurance around were fire type policies, first party property casualty policies for which payments on claims were made only after the actual event. And the money was due under the policy.

MR. WILSON: Well, there are two --

JUSTICE IKOLA: So isn't there good reason why the supreme court in Henkel didn't address 520, given those -- that history?

MR. WILSON: There's not, Your Honor.

JUSTICE IKOLA: Because under that -- under the facts as existed historically at the time 520 was enacted, or its predecessor was enacted, it would be

completely consistent with the supreme court's resolve in Henkel. If you define loss as the time when it's reduced to a monetary claim.

MR. WILSON: Well, that's the key, Justice Ikola, is that if you begin from the proposition and view the case through the prism as loss arising only when money is due from the insurance company, then obviously you presume the result, and come to that conclusion. But that's not what loss means, either in the statute, or in a series of well-developed case law over the years in the specific context of third-party occurrence-based liability policies.

What loss means under all insurance policies, whether it's in first party context, whether it's in the occurrence policy context, or whether it's a claims made context, loss means the event that triggers coverage, the event that activates the policy.

In the first-party context, that loss is the beginning of the fire. In the third-party context, as Montrose versus Admiral made clear, that loss is the underlying injury that gives rise to the policy obligations.

JUSTICE IKOLA: But in 1872, isn't it true that even in the first-party context, the policies were strictly indemnity type policies, where, first of all,

the insured paid for the loss, and then sought indemnity from the carrier?

MR. WILSON: Respectfully, Justice Ikola, I'm not sure that that's correct. I believe that the -- it is correct that first-party policies were the primary form of insurance available at that time. I'm not sure that they were necessarily indemnity policies, which are a different class.

JUSTICE IKOLA: If my hypothetical or hypothesis is true, then wouldn't it be reasonable to say that the word "loss" in the context -- historical context in which the word was first enacted meant a monetary claim?

MR. WILSON: No. Because what the loss is is the event that triggers the coverage obligation. The quantity of that loss --

JUSTICE IKOLA: Well, you say that now because of occurrence policies, where that term has been defined in a different manner.

MR. WILSON: I think the same is true, Your Honor, in the first-party context. Once a fire starts, the policy is activated. There's a loss. The house is burning down. The quantity of that loss may be subject to further determination once we see whether the loss continues or progresses over time, whether the entire

house burns down, or only the third story of the house burns.

JUSTICE IKOLA: Well, the question is -- that's the way we do it now. But in 1872, the question is, is that the way it was done? Or was it the fact that the insured had to pay for the loss and then seek indemnity from the carrier?

JUSTICE RYLAARSDAM: The problem, Mr. Wilson, is you're not as old as Justice Ikola.

JUSTICE O'LEARY: None of us are.

JUSTICE RYLAARSDAM: Well, some of us.

MR. WILSON: The first-party insurance context is a different animal than the indemnity policy context. And under an indemnity policy, there may be a different event that triggers coverage. Just like in liability policies, under occurrence-based forms, one event triggers coverage, which is the underlying injury. Whereas in claims-based forms, a different event may trigger coverage, the filing of the lawsuit during the policy period.

Similarly in a first-party context, first-party fire insurance covers the loss. It covers the thing that happens that otherwise activates the insurance obligation.

Indemnity policies may have a different time

that the loss happens because the may not -- the coverage obligations may be not activated until such time as the policyholder paid money out. That's a different analysis. But under all circumstances, the loss arises at the time of the coverage-triggering event, whatever that coverage-triggering event is in the particular policy.

And in the occurrence-based form, the Montrose court has told us, and frankly every court across the country has agreed, that the coverage-triggering event, the loss, happens when the underlying injury occurs.

To answer the question that the Henkel court should have been asked, had the parties in that case called Section 520 to the court's attention, this court need look no further than that decision in Montrose versus Admiral. What Montrose explained is that the occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage.

Once the contingent event that has -- insured against has occurred during the period covered, the liability of the carrier becomes contractual rather than potential only. And the sole issue remaining is the extent of the obligation.

Now, where did Montrose -- where did the court

in Montrose come up with those principles? Primarily, the court relied on traditional tort principles concerning when liability attaches. Because that's the focus of a liability policy is to protect against liability. When does that attach?

But in addition, and importantly, the Montrose court relied on the insurance industry's own purpose in enacting the occurrence-based form.

As Montrose noted, the definition of "occurrence" identifies the time of loss for purposes of defining coverage. The injury must take place during the policy period. That's the fundamental risk at the heart of an occurrence-based policy.

Hartford has never even addressed that critical admission. That's the insurance industry's purpose in identifying the word "occurrence," and tying it to loss as the triggering event that triggers coverage under these policies.

JUSTICE IKOLA: That's all very well and good. But Henkel disagreed with that analysis; right?

MR. WILSON: I don't think it did, Justice Ikola. Because Henkel was never asked to weigh in on that analysis. Section 520 was never brought to the court's attention and the court engaged in a policy debate about whether the line should be drawn at loss,

or whether it should instead be drawn at chose-in-action.

And every court across the country that has analyzed Henkel and explained what the court held in that case has said exactly the same thing, regardless of where they come out on the assignment issue.

We cited, for example, the Thorpe case from the Central District of California. We cited the Sanberg case from the Southern District of Texas.

Now, those two courts came out different ways on where, as a matter of common law, the line should be drawn. When do anti-assignment provisions become unenforceable?

In the Thorpe case, they -- excuse me, in both cases the court defined what the Henkel decision -- what the Henkel court held as even after a loss has occurred, liability insurance may still be barred by anti-assignment clauses as long as that has not matured into a liquidated sum of money due from the insurer. That's not the rule that's dictated by Section 520.

JUSTICE RYLAARSDAM: You say repeatedly, and you stated in your brief, that the 520 was never called to the attention of the court in Henkel.

MR. WILSON: That's correct.

JUSTICE RYLAARSDAM: How can you say that? On what basis do you say that? I mean, maybe the court

just decided it wasn't relevant.

MR. WILSON: Well, the basis that we relied on, Justice Rylaarsdam, is the papers of the parties and everything was cited up and down, from the trial court to the supreme court. I believe that we submitted with the papers to the superior court, and certainly did our best to pull every single paper that was filed in the case at each level of Henkel, reviewed those papers, and provided to them to this court as part of the record to demonstrate that Section 520 was never cited. And so --

JUSTICE RYLAARSDAM: Okay. I see what you mean. It was not cited by any party in any of the written materials.

MR. WILSON: Correct. And then for the same reason, it was never cited by the supreme court, which, as I said, engaged in a policy debate. They asked themselves, "Do we believe that anti-assignment provisions should remain enforceable past the time when a loss has happened if the claim has not yet been reduced to a liquidated sum of money due to the insurer?"

And fairly, the court decided that, "Yes, we think that's the appropriate place, believing ourselves to be operating on a blank common law slate, that the line should be drawn."

Whereas Justice Moreno had argued, also as a matter of common law, for the opposite conclusion. Justice Moreno said, "No, I think the line should be drawn at loss, because that's when the coverage-triggering event happens."

The majority disagreed and said, "We don't agree that the line should be drawn at loss. We think those provisions should be remain enforceable past loss, until the point that it's -- that a claim is reduced which shows an action.

And that's simply not what the statute demands. The supreme court wasn't operating on a blank slate of common law. They were operating, or should have been operating had the parties called the statute to their attention, within the scope and purview of a legislatively crafted rule that had been determined by the legislature for the purposes articulated in the statute.

JUSTICE RYLAARSDAM: I'm assuming that the original Fluor Corporation, now Massey -- was it Massey Energy Company -- is not being sued in these claims?

MR. WILSON: No. Fluor Corporation is being sued, Your Honor.

JUSTICE RYLAARSDAM: The original Fluor Corporation. Massey Energy.

MR. WILSON: The underlying claims are almost exclusively against the current Fluor Corporation.

JUSTICE RYLAARSDAM: Okay.

MR. WILSON: There are a few instances where Massey is also named along with Fluor Corporation.

JUSTICE RYLAARSDAM: And your position is that the insurance company should cover both companies?

MR. WILSON: No, not at all. Our position is that the insurance company's obligations with respect to the asbestos suits run to Fluor Corporation.

JUSTICE RYLAARSDAM: All right. The new Fluor Corporation.

MR. WILSON: To the new Fluor Corporation.

JUSTICE RYLAARSDAM: And that Massey is not covered even though they had the policies at the time you say the loss occurred?

MR. WILSON: Not for these claims, no. Both the liabilities and the assets related to the asbestos suits reside with Fluor, not with Massey. Now, there are circumstances --

JUSTICE RYLAARSDAM: Well, Massey's potentially also liable, is it not?

MR. WILSON: It's not, Your Honor. The same process by which the rights under the policies were transferred to Fluor Corporation, also

transferred liabilities --

JUSTICE RYLAARSDAM: Well, they're still being sued, are they not?

MR. WILSON: They are being sued.

JUSTICE RYLAARSDAM: And you're defending them? Is the carrier defending them?

MR. WILSON: The attorney that is hired to represent Fluor Corporation also provides a defense on behalf of Massey --

JUSTICE RYLAARSDAM: Okay.

MR. WILSON: -- in those cases.

JUSTICE RYLAARSDAM: It's your position that they owe a duty of defense to both corporations?

MR. WILSON: No. As a matter a fact, what the testimony in the case showed -- and we're getting into some disputes about the underlying cases. But what the testimony in the case showed is that what Hartford has done over time is to provide a defense on behalf of Massey as a courtesy to its insured, Fluor Corporation.

And so the attorney that's hired in a particular case where both Fluor and Massey are named, steps in on behalf of all the Fluor-related entities and provides a defense, one defense, one defense, on behalf of all the Fluor-related entities.

And in those circumstances, what typically

happens is that Fluor Corporation -- the defense counsel that's been appointed to represent all of those entities then works with plaintiff's counsel to dismiss Massey from the case because Massey's not the liable party.

JUSTICE RYLAARSDAM: Just want to get it straight. Your position is that Hartford does not owe a duty to defend Massey.

MR. WILSON: Not with respect to these claims, that's correct. And to the extent that there was a dispute between Fluor and Massey about which party holds the rights to a defense against these claims -- and Hartford was truly left in a position of not being sure which of the two entities it was supposed to defend. It can go into court and seek a declaratory relief judgment from the court to declare which of those two entities are the one to which it owes its coverage obligations. Hartford only owes a defense --

JUSTICE RYLAARSDAM: Now, you're saying under no circumstances could they owe that obligation to both? Is that your position?

MR. WILSON: With respect to these claims, that's correct.

JUSTICE RYLAARSDAM: Thank you.

MR. WILSON: So viewed through the correct lens of Section 520, rather than operating on the common law

slate that the Henkel court believed that they were operating on, in applying the established definition of "loss" to the terms of the statute, anti-assignment clauses should be rendered enforceable as a matter of law under Section 520.

JUSTICE RYLAARSDAM: One more question.

MR. WILSON: Sure.

JUSTICE RYLAARSDAM: What evidence is there that there actually was an assignment?

MR. WILSON: The evidence of these -- well, let me step back a second. Fluor's motion for summary adjudication actually targets Hartford's cause of action. And Hartford's cause of action did not depend on whether or not there was assignment. Its first cause of action, which is the only thing that's at issue, because that's what Fluor targeted with its motion, acknowledges that there was an assignment, but argues that the assignment is not good against Hartford.

JUSTICE RYLAARSDAM: Okay. So there's no dispute between the parties as to whether there was an assignment.

MR. WILSON: Not with respect to Hartford's first cause of action. Hartford's first cause of action presumes an assignment, and instead argues that it should not be effective against Fluor because of the

anti-assignment provisions.

JUSTICE RYLAARSDAM: Apparently there are other causes of action where the assignment is being disputed?

MR. WILSON: There are other causes of action. And Hartford's defense, for example, Hartford's affirmative defense regarding consent, specifically alleges that Hartford did not consent to any assignment of interest and argues that Fluor is not entitled to the affirmative relief that it seeks because it didn't provide --

JUSTICE RYLAARSDAM: Short answer. Has any evidence been presented that there actually was an assignment?

MR. WILSON: Absolutely, Your Honor.

JUSTICE RYLAARSDAM: What does that evidence consist of?

MR. WILSON: The distribution agreement that reflects the transaction itself. The testimony regarding the fact that the --

JUSTICE RYLAARSDAM: No, no. I'm not talking about testimony. Evidence. There were contracts signed between Fluor 1 and Fluor 2; correct?

MR. WILSON: That's correct, Your Honor. And that's --

JUSTICE RYLAARSDAM: Is there any reference to

assignment of insurance policies?

MR. WILSON: There is. And I'm going to read from Hartford's first cause of action because this is exactly how they tee it up.

"Although the Distribution Agreement provides for a transfer to new Fluor of all assets and liabilities related to any insurance policies issued to old Fluor, including general liabilities policies, Fluor never sought or obtained Hartford's consent to the purported assignment of interest of rights under the distribution agreement." And that's at Appellant's Exhibit 1, pages 7 to 8, paragraphs 43 and 44.

Hartford acknowledges that there was an assignment and litigated the case when Fluor targeted that cause of action as a basis for its summary adjudication motion.

If Hartford had a dispute about whether there was an assignment, or disputed the way that Fluor had characterized its cause of action when we addressed it and moved to dispose of it through the summary adjudication process, it was Hartford's obligation to raise its hand and tell the superior court that it should deny Fluor's motion because there was some factual question about whether there was an assignment.

Hartford never did that. Hartford never

contended that there was some dispute over assignment because that wasn't Hartford's claim.

Hartford's claim is that no assignment will ever be good against it because its anti-assignment provision should be enforced. And Fluor disputed that as a matter of law by reliance on Section 520.

And lest there be any doubt, Hartford expressly stated in response to Fluor's separate statement, and this is from Appellant's Exhibit 28 at page 10792, that "Fluor Corporation attempted to transfer and assign certain assets and liabilities relating to the EPC business to a newly created entity, but that the policies did not effectively transfer because the transfer was subject to the terms and conditions of the policies, including any consent to assignment clauses."

Hartford, having never raised its hand to the superior court and contested or suggested that there was any dispute about assignment, didn't deviate from that paradigm on appeal.

In fact, what Hartford told the supreme court is that it is undisputed that that the purported assignment took place before a loss. And you can find that at their answer, page 26.

What Hartford is effectively trying to do, having asserted at every level, both at superior court,

in the informal briefing for this court, and to the supreme court, both a declaratory relief claim and a parallel affirmative defense. Both of which were predicated on there having been an assignment.

JUSTICE RYLAARSDAM: Okay. That's a very long answer to a very short question.

MR. WILSON: I apologize, Your Honor. Wanted to make sure that we had the full context.

One thing that has emerged from the papers very clearly is that although Montrose versus Admiral makes clear what California law is with respect to loss in a occurrence-based policies, it defines that loss as the coverage-triggering event that activates the policy obligations. And although the data accords with the fundamental risk insured by insurance policies, liability-based policies, as the insurance industry itself declared it when it drafted the occurrence-based language, it accords with the purpose of liability insurance that is intended to protect the interests that the insured has in the safety of persons or freedom from damage to property.

Despite all that, Hartford has never cited a single case, not one, that disputes that received and accepted definition of loss in an occurrence-based policies.

The loss in an occurrence-based policy, as every state agrees, Montrose for California, Illinois Tool Works for Illinois, Elliott for Ohio, Edgar for Pennsylvania, the latter two citing a series of additional -- of other states that also recognize loss happens in an occurrence-based policy at the time of the underlying injury. Hartford has never cited a single case to refute that principle because it's undisputable.

Instead, what Hartford has done in its papers, rather than identifying a case that endorses its faulty characterization of loss, is to misconstrue an unrelated section of the code, Section 108, that merely confirms the purpose of liability insurance: To protect the policyholders against the risk that is shifted by the tort system from a claimant to the tortfeasor. The claimant's injuries; tortfeasor's loss.

The tort system is obviously predicated on a shifting of risk. We as a society have decided that when someone is legally responsible for another person's injury, that the risk associated with that injury should be shifted to the responsible party. The method by which we do that is the tort system. It's liability.

In the asbestos bodily injury context, which brings us here, the effect that asbestos fibers after inhalation have on an individual as they course through

his lungs and cause a number of deleterious conditions, reflect that claimant's injury.

Liability is the tort law's method for transferring that injury to a responsible party.

Loss is merely the expression of the risk that is shifted from the claimant to the tortfeasor as a consequence of that legal responsibility.

The injured lung and the claimant's other medical conditions can't literally be shifted from claimant to tortfeasor, obviously. So what the law does, what tort law does, it's required the tortfeasor to bear the consequences of that injury's legal equivalent. That's loss.

Thus, Section 108 merely confirms that what liability insurance protects against is the risk of the tort system. Loss results from liability for a claimant's injury because it is through liability that the claimant's injury is transferred to the tortfeasor as loss.

Once the insured event, which in the case of occurrence-based liability policies is that injury, bodily injury or property damage, once that insured event happens, liability attaches, and the claimant's loss or injury becomes the tortfeasor's loss as a matter of law.

Section 108 is perfectly consistent with Montrose in recognizing that principle.

And so Hartford's argument, boiled down to its essence, without any support from a single case or commentator, depends on conflating the word "liability" with a judgment quantifying that liability as a sum certain. But liability is not the same as a judgment. Liability is simply legal responsibility.

And just to ensure that I wasn't misremembering some principles from law school, I pulled out a copy of Black's Law Dictionary last night. "Liability" is defined as legal accountability. That's it. When a third party is injured by another person's act or omission, the tortfeasor is either liable or not at that moment for the person's injury.

JUSTICE RYLAARSDAM: Well --

MR. WILSON: Now --

JUSTICE RYLAARSDAM: -- all I can say is your entire argument, but for Section 520, has been decided by Henkel. Right? If we ignore 520, the supreme court's ruled against you on all of that argument.

MR. WILSON: The supreme court did not apply the rule that is mandated by Statute 520, that's true. So if all we are operating on was a blank common law slate of where the line should be drawn of

anti-assignment clauses becoming unenforceable, then the supreme court's rule in Henkel would govern. But the supreme court didn't rely on those governing statutes.

JUSTICE RYLAARSDAM: And so your argument then depends, apart from the possibility the supreme court rethinks Henkel, which we can't do, it's up to them to do that --

JUSTICE O'LEARY: They do that on occasion, rethink things.

JUSTICE RYLAARSDAM: But here at this court, your entire argument is premised on the idea that these modern ideas of liability and transfer of risk, and all that, somehow gets transported in time back to 1872 to give meaning to a statute enacted in that time frame, in that context.

MR. WILSON: Our argument is, that is true, depending on Section 520. The term "loss" in Section 520, which, as Your Honor rightly points out, was originally enacted in 1872, but was incorporated into the insurance code in 1935, when liability insurance was much more common.

The concept of loss is the same under all circumstances. It's the event that triggers coverage. And it is true that under first-party policies, the loss that triggers coverage activates a policy obligation, to

use the terms that Montrose court used, it is true that's different in a first-party context. And so loss may happen at a different point in a first-party context. But the key, the issue on which everything should have turned in Henkel had the parties cited Section 520 to the court, is when loss happens. And in an occurrence-based policy --

JUSTICE RYLAARSDAM: You may very well have an opportunity to do that, cite 520 to the supreme court.

MR. WILSON: The parties should have brought Section 520 to the court's attention. The supreme court should have considered the policy rationale that underlies section 520.

JUSTICE RYLAARSDAM: You know, you continue to say that. And you know, there's some -- I know -- I guess I'm proud to say in the state of California we have very some very bright people on the supreme court, and we have very bright staff up there, you know. We've met them. We know them. They're pretty smart people.

JUSTICE O'LEARY: We've worked with them.

JUSTICE RYLAARSDAM: And to say continually that they didn't consider it, maybe is an assumption that's not appropriate. It was not brought to their attention.

MR. WILSON: It wasn't brought to the court's

attention. And all I can go by is the words that the court chose to use in its opinion. And the debate in that case was clear that Justice Moreno argued that as a policy matter, the line should be drawn at loss. The majority decided as a policy matter that the line should be drawn at chose-in-action. And as a consequence, under the common law, that may be correct. But Henkel is not good law when it ignores a statute that provides the governing rule of law. And having presented that question to the court in our petition for review, with three of the justices, including its author, still currently sitting, I think the court recognizes that there is disconnect between a policy debate that was being conducted in that case and the rule that we all play by that when the legislature speaks, they've declared the law of California, and that's what's must be applied.

So it is -- I will grant that Henkel made a policy determination, and I don't sit here to question the supreme court's judgement about what the policy should be. But that's not the rule that governs. Section 520 is the rule, and that's the one that ought to be applied.

I'll reserve the balance of my time for --

JUSTICE RYLAARSDAM: I don't think you have any

left.

JUSTICE O'LEARY: I have five minutes.

MR. RUGGERI: May it please the court, I'm James Ruggeri for Hartford Accident and Indemnity Company. Again, thank you, Your Honors, for letting me appear before the court today.

Your Honors, I think you put your finger on the point, in that the court has limited ability, if any, to reverse the supreme court in Henkel. I was pleased that the petitioner acknowledged that he -- this court cannot overturn Henkel, and I certainly agree with that.

Some questions about why 520, the one that's cited by Hartford, by the parties, by the court, I think, Your Honor also touched on this as well, and that is that -- let's start with what record evidence of an assignment there was. An assignee, of course, has the burden of pleading and proving an assignment. And both parties in this case agree that in the absence of an assignment, a transfer, then 520 doesn't apply on its face.

In fact, petitioner distinguishes Henkel by saying that 520 wouldn't have changed the result in Henkel, because in Henkel the parties didn't intend to transfer any rights.

Well, that's exactly right. And if parties

didn't intend to transfer any rights, that means that 520 is not implicated, and that means that nobody would be expected to cite 520, particularly Hartford, where we had the successor to our insured, Rhone Poulenc, the successor to Amchem 1 in the case brought a cross-complaint against Henkel, the successor to the Amchem Number 2, and said, "We didn't transfer anything. And you don't have any rights to coverage under the policies that Hartford and the other carriers issued to Amchem Number 1.

Those were the facts of Henkel. So our policyholder, the successor to our policyholder, was saying no rights transferred to anyone. So 520 wasn't implicated, and one shouldn't be surprised that Hartford --

JUSTICE RYLAARSDAM: Henkel will govern this case if a fact, as Mr. Wilson suggests, you have conceded that there was a transfer.

MR. RUGGERI: Your Honor, to say that Hartford conceded that there was a transfer misstates the record. And I think it's important. It's all put in one place for the court in the appendix.

JUSTICE RYLAARSDAM: Does whether or not we have to follow Henkel depend upon whether or not there was an assignment?

MR. RUGGERI: Your Honor, I do not believe so. I think this court is bound to follow Henkel regardless. But the record evidence is that there was no concession by Hartford of an assignment. In fact, in the statement of material facts that petitioner filed in support of its summary adjudication motion against Hartford, and this at the record 10792, they said that the policies were retained by new Fluor. I don't know how a company that existed, that was created in 2000 can retain policies that were issued in '71 to '86, but perhaps more importantly, when we responded to the statement of facts, Hartford said at the same 10792, "Dispute it, new Fluor did not retain the assets."

And we were said, quote, "The policies --"

JUSTICE RYLAARSDAM: The summary judgment motion, was there ever a contention asserted by the moving party that there was an assignment?

MR. RUGGERI: Your Honor --

JUSTICE RYLAARSDAM: Was this the extent of it retained?

MR. RUGGERI: -- the allegation was that the policies were retained by the new company. And what we did is we responded to that and said they weren't retained, and the policies, quote, "did not transfer," end quote. That is in our opposition to the statement

of material facts.

JUSTICE RYLAARSDAM: It seems to me there's a difference between retaining something and obtaining an assignment to something.

MR. RUGGERI: Indeed there is, Your Honor. We have said they didn't have either. That is the point of our opposition.

JUSTICE RYLAARSDAM: Did anybody contend in the summary judgment motion that there had been an assignment.

MR. RUGGERI: Your Honor, in the summary judgment motion down below, Fluor's primary, if not exclusive argument, was that it acquired rights by operation of law. It's throughout the papers, it's throughout the argument --

JUSTICE RYLAARSDAM: In Fluor's separate statement of undisputed facts --

MR. RUGGERI: Yes, Your Honor.

JUSTICE RYLAARSDAM: -- is there any statement that these policies were assigned?

MR. RUGGERI: No, Your Honor. The statement is that the policies were retained --

JUSTICE RYLAARSDAM: Okay.

MR. RUGGERI: -- by new Fluor.

JUSTICE RYLAARSDAM: Thank you.

MR. RUGGERI: And my point was, in the reply, when we disputed there was a transfer, they didn't say, "Move on." They said, "No, the policy stayed with new Fluor. We retained them. We didn't say transfer."

Your Honor, the other point on that is --

JUSTICE RYLAARSDAM: Well, was there any argument in the trial court that there was an assignment, as distinguished from a retention?

MR. RUGGERI: Your Honor, there really wasn't. And here is why. I had the pleasure of deposing Fluor's managing general counsel, Eric Helm, and this is actually record evidence supported in Fluor's paper. They cite to Mr. Helm's testimony. And I asked over a six-page period, at Exhibit 10, at 3379 to 3384 -- and I could probably get in trouble for this -- but I asked Mr. Helm 10 times over those 6 pages, "Does the distribution agreement provide for a transfer of the interests under the Hartford policy?" I asked it every way that I knew how to ask it without getting myself in trouble. He not once said there was a transfer. He said, "No, I did not say -- "

JUSTICE RYLAARSDAM: Can this case simply decided by looking at the documents involved in the transfer and say that there was or was not an assignment?

MR. RUGGERI: Your Honor, the documents -- the distribution agreement is a fun little document too. It purports that there -- they may take action to transfer to the extent it hasn't already transferred. There's no transfer provided per the agreement.

There are two provisions they cite in the document. Section 5.01, which is the general asset transfer, akin to what the court dealt with in the Henkel case, and said, "No, there's no transfer there of the insurance policies." And if you look at the referenced schedule, it has nothing to do with insurance.

And then you go to Section 5.08. And that's entitled, "Insurance." And what that does is it purports to substitute new Fluor for old Fluor as the sole named insured with regard to policies that hadn't expired as of the distribution date, is what they call it, which was on or about November 30th, 2000.

Of course, the Hartford policies expired 14 years earlier, and I probed Mr. Helm on that issue as well. And I said, "Is there anything in the agreement that deals with Hartford policies?"

Answer, "No."

"Well, what does 5.08 deal with?"

JUSTICE RYLAARSDAM: Let's get back to

counsels's argument, was that the cause of action, or summary -- that they sought summary adjudication on, was a cause of action in which Hartford alleged that there had been a transfer.

MR. RUGGERI: Your Honor, Hartford --

JUSTICE RYLAARSDAM: So how does that play out? Or was that true?

MR. RUGGERI: Your Honor, to the extent that we pled that we believe they would allege an assignment, that is what I thought they would do in light of Henkel, which makes it darn clear that you're not going to recover on an operation of law theory in light of Henkel, because you have both Massey Energy Company, which, Your Honor, they do get named in tort suits today. In fact, I'm in coverage dispute with them right now under these same policies.

JUSTICE RYLAARSDAM: Well, if that alternative theory was a theory being attacked on Fluor's motion for summary judgment, is the assignment really an issue? Or lack thereof an issue --

MR. RUGGERI: Your Honor --

JUSTICE RYLAARSDAM: -- for that purpose?

MR. RUGGERI: Your Honor, it wasn't an issue down below because they didn't move on the theory of assignment. They moved on a theory of operation of law.

And when they got close to suggesting an assignment, they suggested a retention, that the policies were retained. And that's when I felt it was appropriate for me say they weren't retained because a company that didn't exist while they were in effect couldn't retain them. And also, just to make darn clear, you didn't transfer anything, no, the policies did not transfer, and you didn't do what you would have needed to do to effect a transfer. That's the record down below.

JUSTICE RYLAARSDAM: And maybe it's partly my mistake of lack of proper focus, but the whole focus of the appeal, as I viewed it, was whether or not an assignment would be permitted. Not whether or not an assignment was made.

MR. RUGGERI: Your Honor, the reality is that the theory changed from the trial court to the appellate court. So I have to respond to the theory that's made down below in front of Judge Bauer. It was operation of law. On appeal it's an assignment.

And I think that there's no record evidence of an assignment at all. But what I can darn sure say is Judge Bauer didn't find an assignment. And frankly, if they're permitted to change their legal theory now, then it seems to me the place where they would be directed to change that legal theory, if they're going to alleged an

assignment where there is not factual all record, would be in a superior court. That would be the court, it seems to me, that would have the first obligation, the first instance.

JUSTICE RYLAARSDAM: Well, I'm terribly confused because I thought counsel's argument was that they were not obligated to prove whether there was assignment or not by reason of the pleading that they were attacking. And that -- there was a cross-motion for summary judgment as well; right? But that's not at issue before us, as I understand it.

MR. RUGGERI: That's not at issue, you're correct.

JUSTICE IKOLA: So it's only Fluor's motion for a summary adjudication of a single cause of action, as I understand it. And their argument, as I heard it, was that they had no obligation to prove whether there was an assignment or not because the pleading they were attacking did not require them to make that showing.

MR. RUGGERI: Your Honor, I don't believe the pleading makes that clear. But I think the papers down below make that clear, that they weren't arguing for an assignment. I think it really is sort of black leather that an assignee has to plead and prove an assignment. And here, they didn't plead it or prove it.

JUSTICE RYLAARSDAM: You're saying they never contended in the trial court that there was an assignment?

MR. RUGGERI: That's correct, Your Honor, the record evidence is clear. They contended that there was a retention. If the court goes through the very pages they cite from Mr. Helm's testimony, again, Exhibit 10 at 3379 to 3384, the court will see that it was all about not saying that there was assignment and all about saying that there was a retention. So we don't believe the court ever gets to 520 because they haven't made the predicate showing of an assignment, as the purported assignee.

Another point is that they reply to the reply that the supreme court directed this court to re-examine Henkel, ostensibly, without regard to whether there was an assignment.

That's not so. The court's order transferring makes it clear that -- transfer the directions to the superior court to issue an order to show cause directing the superior court to show cause why the relief in the petition should not be granted. The relief in new Fluor's petition was an order granting New Fluor summary adjudication motion on Section 520. The record evidence shows either that there was no assignment or that it's a

disputed issue of fact that new Fluor is not entitled to the relief that it seeks.

And we believe the summary court's order, which just denied the motion for summary adjudication, should be affirmed.

Your Honor, if I may, if the court gets to the Section 520, there are a couple of points I would like to address under 520. One, I think it's important to realize what 520 is intended to prevent, which is to prevent a consent requirement for transfers of claims of the insured against the insurer.

Is that what we have here? We think this case presents a far cry from that, where you have not a claim of the insured against the insurer that's being proposed, but a wholesale substitution of new Fluor as the insured for old Fluor, now Massey Energy Company.

And a problem with that, obviously, is one we think that goes directly to what Henkel says you can't do. In our policies say you can't assign the interest in the policies. And substituting one for the insured is a transfer of an interest, to be sure. So we say you certainly -- you can't do that.

But if they could do it here, then what would stop new Fluor from substituting Johns-Manville? Or Turner and Newall? And those folks have ubiquitous

product lines to put them on the word processor of every plaintiff's lawyer in not only the US, but the UK. And under their theory, Hartford would be obligated to defend any and all claims where it -- there was an allegation that could be interpreted to apply to Fluor. Now, that is the material increase in the obligation that we agreed to take on. To be sure, 520 says we can't prevent the transfer of a claim of the insured after the loss. Hartford doesn't disagree with that.

If old Fluor is named as a defendant, and it is in some cases, some asbestos cases, and if old Fluor tenders that suit to Hartford, and we say no, then old Fluor may transfer that claim, that breach claim, not just claims that are reduced to some certain, a show of action. It's a right that one has.

At that point they have a claim if they believe Hartford breached a claim for breach. And they can assign that claim of the insured against the insurer to new Fluor, or anyone else for that matter.

And that's what 520 says we can't stop. And that's the rule of 520. That's rule of Henkel. That's the rule of Hartford policies. Hartford is not saying they can prevent that. Henkel says we can't. Our policies talk about transfer of interest, not transfers of a claim of the insured against insurer.

But we have here is a wholesale substitution, where Fluor is not here saying, "I'm entitled to coverage for claims against old Fluor." It's here saying, "I'm entitled to coverage for claims against new Fluor."

We didn't take on that obligation. And old Fluor could not have transferred rights to coverage for new Fluor, because it doesn't hold those right.

JUSTICE RYLAARSDAM: Pardon my interruption. But --

MR. RUGGERI: Please.

JUSTICE RYLAARSDAM: -- just I'm trying to figure out what happened in the trial court. Was 520 every argued in the trial court?

MR. RUGGERI: Your Honor, 520 was a secondary argument made by Fluor Corporation in the summary judgment papers. And we did respond to 520. And the court in regard to 520 said it was bound to apply Henkel. So it didn't --

JUSTICE RYLAARSDAM: Is there any suggestion in that argument that there was no evidence of an assignment?

MR. RUGGERI: Your Honor, we didn't even get that far because the papers made it clear, the respective --

JUSTICE RYLAARSDAM: I mean, 520 obviously only applies to assignments.

MR. RUGGERI: 520 --

JUSTICE RYLAARSDAM: If it applies at all, it applies to assignments.

MR. RUGGERI: Indeed, Your Honor. The court never got there because it said it was duty bound to apply Henkel. But the respective statements of facts and opposition in regard to Fluor's summary adjudication motion made it very clear in bold point -- in bold print for my client to dispute it, when we saw that retention, and said it wasn't retained, and indeed it didn't transfer, as well.

Your Honor, a bit about loss. Petitioner is saying that loss is defined in Section 520. I've looked high and low at those 14 words, and I don't see the definition of loss there.

It wasn't until Fluor's reply brief at page 39, when they told us what they believe loss means. And they borrowed from Justice Moreno in Henkel. And they said, "Loss happens when the injury or damage first takes place, even if loss isn't fully quantified."

So let's assume that's so, and in asbestos-related context they say it's when the person was first exposed, the claimant was first exposed.

That's when injury, that's when loss would happen.

Well, what does that mean to his 520 argument? It really means that 520 wouldn't apply to the vast majority of cases, because the vast majority of the claimants were exposed to asbestos before the Hartford policies even incepted in 1971. In those cases, and this is the vast majority, then the loss would have predated the agreed --

JUSTICE RYLAARSDAM: So their argument would lead to the conclusion that there would be no coverage at all.

MR. RUGGERI: Well, it would -- they would be covered under policies that were issued prior to the Hartford policies. That's the injury -- the time of injury is what triggers coverage.

But it's just the Whitney case, the case that they -- the petitioners feature prominently. That's easiest example, where they say -- and again, Exhibit 39 at pages 10953 through 54. Mr. Whitney was exposed at a Fluor job site even before 1970. Under Fluor's argument, that's when loss occurred. Okay?

Well, the Hartford policies didn't incept until 1971 to 1986. So to take their argument, the loss predated the Hartford policies, which would mean that 520 didn't apply either because we're talking about an

agreement not to assign made after the loss, not before the loss. Again, it just doesn't make sense.

With regard to this notion that Fluor holds all the rights under the Hartford policy, they have argued in their papers that and indemnitee holds all the rights under the coverage and that, "We don't have any duty to provide coverage to our successors through our insured, Massey Energy Company."

Well, that's news to me. And the court pointed out Massey Energy still has tort liability, and that's another thing that Henkel makes clear, that the predecessor corporation continues to have liability in tort under California law.

And if I didn't have any coverage obligations to Massey Energy, it certainly would make my life a lot easier, because I'm battling three coverage actions right now in West Virginia state court against Massey Energy Company under at least two of the same policies we're talking about here. So I just don't think it's fair. And certainly our -- Massey Energy Company doesn't believe that it's lost it rights to coverage.

Much like Rhone Poulenc took the position in the Henkel case, which again shows that they believe they're the holder of rights to coverage. Where does it leave us if -- on the issue of loss? We pointed to

Section 108, and we believe that is the only record evidence of what the legislature means by loss in the context of a liability policy.

The court defined liability insurance, as you all know, insurance against loss resulting from liability for injury. I may not be the world's best grammarian, but I can sort of put it together that "loss resulting from liability for injury," tells me that loss isn't the injury, and loss has to come after liability.

They pooh-poohed my references to Section 108 by saying it's a general statute identifying the classes of insurance that may be issued in California. There's nothing general about the reference or the definition for liability insurance, and that's the title of Section 108.

Your Honors, I guess I should mention Montrose because it's featured so prominently, and then I'll yield. Again the petitioner's argument on Montrose only comes into play if we get to the issue of what loss means.

In making its argument, Fluor essentially argues that loss has a static meaning and it means the same thing in every context. On the first-party context or third-party context, or the setting of reserves, or IBNR, are all the same.

Montrose isn't an assignment case, of course. It never cites Section 520. Rather, Montrose is a trigger of coverage case, and it makes clear right on page 1. And what it also does on page 1 is tells us that context matters for words. Because what it says is "first party policies are different than third party policies. There are substantial analytical differences between first party policies and third party policies. 10 Cal.4th at 654."

And then court proves its point because it applies a different trigger of coverage rule to the third-party context than it did in the first-party context in the Prudential-LMI case.

Another thing about Montrose, which was kind of fun, is that if you go through the opinion and really look at every time they use the word "loss," the supreme court uses the word "loss" differently, depending on context. At page 333 -- I'm sorry, 10 Cal.4th 665, the court talks about loss in the context of a carrier's contribution claims. And it says that loss refers to paid -- what was paid out to the insured under one or more policies. There the court is referring to the insurer's loss, not the underlying claimant's loss. And not even the insured's loss.

I make that point only because Montrose tells

us that context matters. And in the context of this case, as I believe the court indicated earlier, what we have to look to for what -- when rights and what rights can be assigned under an insurance policy without the insured's consent is Henkel. And Henkel's controlling here. And for that reason we'd ask the court to affirm the superior court. Thank you.

JUSTICE RYLAARSDAM: Can we just affirm by finding that there's a disputed fact as to whether there was an assignment or not?

MR. RUGGERI: Your Honor, I do believe the court can answer the supreme court's transfer question, which it -- that it would be responsive to why the motion -- the court's order on summary adjudication should not be reversed. It would be no. And the first reason would be that there's no record evidence of an assignment, which again is the burden of the assignee to plead and prove.

Thank you.

JUSTICE O'LEARY: Brief reply?

MR. WILSON: Thank you, Your Honor.

A couple of brief issues. I would like to clarify some of the confusion that exists. And Justice Ikola actually described the situation in the trial court correctly.

There were two separate motions at play. Fluor filed a motion for summary adjudication, targeting Hartford's cause of action. That's the only issue that is before this court. We have to look at the words that Hartford's pleaded. And Hartford's cause of action is pleaded on the basis that there is an assignment that Hartford contends is not effective against Hartford in light of the anti-assignment clauses. That's what Fluor argued in its motion --

JUSTICE RYLAARSDAM: And apparently that was not argued in the trial court?

MR. WILSON: There was no argument in the trial court that Fluor's motion should be denied because there was no assignment.

JUSTICE RYLAARSDAM: There was no argument concerning assignment.

MR. WILSON: That's correct. Because the cause of action --

JUSTICE RYLAARSDAM: Your contention was that they retained their rights under the policy. And you're not suggesting that retention and assignment are the same thing, are you?

MR. WILSON: That's not -- that's not exactly what the evidence said. The testimony was --

JUSTICE RYLAARSDAM: I'm talking about your

separate statement of undisputed facts. Is it correct that you never stated an assignment as one of the undisputed facts?

MR. WILSON: That's correct. And the reason is because Hartford's cause of action doesn't question the issue of whether there was an assignment. Their cause of action --

JUSTICE RYLAARSDAM: You use "retention." You mean something different than assignment.

MR. WILSON: I'll explain exactly why that is, Your Honor. There were two different sets of motions that were proceeding before of superior court. Fluor's motion targeted the question of, as Hartford laid it out in its papers, assuming there was assignment, is effective against Hartford? Legal question.

JUSTICE RYLAARSDAM: And you said, "Doesn't matter, because we retained it."

MR. WILSON: That's not correct with respect to Fluor's motion.

JUSTICE RYLAARSDAM: Okay.

MR. WILSON: Hartford separately -- Fluor targeted the legal issue that's teed up by Hartford's own claim. And we said, "You recognize that there was assignment, and say it's not good against you; we say you're wrong as a matter of law, among other reasons,

because of Section 520."

JUSTICE RYLAARSDAM: Did you argue Section 520 in the trial court?

MR. WILSON: We absolutely did.

The second motion that was pending was Hartford's motion for summary adjudication of Fluor's claims. And Hartford argued, "Well, there is an anti-assignment provision in our policies, and we think it's enforceable."

JUSTICE RYLAARSDAM: Okay.

MR. WILSON: Fluor oppose --

JUSTICE RYLAARSDAM: The statement that Fluor 2, quote, "retained the rights under the policy," was that in the motion that we're considering here?

MR. WILSON: The retention argument? Was an argument that -- the mere continuation argument, was in opposition to Hartford's motion.

JUSTICE RYLAARSDAM: You did not in this particular motion -- we're only concerned with one of the motions. You did contend there was an assignment?

MR. WILSON: We contended. We used the same words, that the policy rights were retained.

JUSTICE RYLAARSDAM: Well, there's a difference. You agree there's a difference between retention and assignment?

MR. WILSON: I do. And the reason is this: There are two ways that these policy rights transfer to Fluor. We argued, in opposition to Hartford's motion, that as a matter of law --

JUSTICE RYLAARSDAM: We're not concerned with your opposition to Hartford's motion.

MR. WILSON: And that's the point. Under Fluor's motion to adjudicate Hartford's claim, whether or not we could prove an assignment was not a burden that we had to bear. Because Hartford's claim --

JUSTICE RYLAARSDAM: Okay.

MR. WILSON: -- proceeds on the basis that there was an assignment.

JUSTICE RYLAARSDAM: You've told me that about seven times now. But you never used that term. You used "retention" instead.

MR. WILSON: What we said was, in our separate statement was retention. We cited testimony in which Fluor's general counsel said the assets went with the new Fluor corporation. And Hartford opposed that, not by contending that there was a factual dispute about assignment.

They contended that, "Assuming there was an assignment, it's not good against us," because that was the issue teed up by their cause of action.

Hartford never told the superior court that it should deny Fluor's motion because there was a factual dispute about assignment. Because that wasn't what their cause of action was about. Their cause of action was about, assuming there was an assignment, is it effective against Fluor?

So the -- all of the facts that Hartford's counsel referred to today about the mere continuation argument are neither here nor there. Because those had only to do with Fluor's arguments that assuming anti-assignment provisions remain valid -- which we believe Section 520 makes clear they don't.

But assuming they remain valid, there are a number of reasons why they are not effective against Fluor. One of them is that Fluor is entitled to these rights as a matter of law. The other is a factual dispute about whether Hartford did, in fact, provide its consent. None of those have to do with Fluor's motion. Because Fluor's motion targeted Hartford's cause of action that assumed there was assignment, and just asked the legal question of whether they are effective or not.

And the last issue I'd like to address is simply one of the last comments that was made in the opposition argument, that Fluor contends somehow "loss" is a static term. No. To the contrary. What Hart --

what Fluor contends is that loss, as embodied in Section 520, and as the Montrose court made clear, refers to the coverage-triggering event. That may evolve over time. It may have different meanings, depending on the context, depending on the type of policies that are at issue. But at its core, loss is the coverage-triggering event, and all that remains for the court to ask itself, is when did loss happen in the context of a particular policy. In occurrence-based policies, Montrose tell us that that's when the underlying injury happens.

Thank you.

JUSTICE O'LEARY: All right. Thank you very much. We're in recess.

REPORTER'S CERTIFICATION

I, Renee Kelch, a Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing is a correct transcription from the audio recording of the proceedings in the above entitled matter.

I further certify that I am neither financially interested in the action nor a relative or employe of any attorney or any of the parties.

IN WITNESS WHEREOF, I have subscribed my name this 2nd day of August, 2012.

/S/ Renee Kelch

Renee Kelch, CSR No. 5063

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West Broadway, Suite 1800, San Diego, CA 92101-3375.

On **October 9, 2012,** I served the following document described as:

PETITIONER FLUOR CORPORATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW

by serving a true copy of the above-described document in the following manner:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 9, 2012**, at San Diego, California.

Elisa Carlucci

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