No. 18-____

IN THE

Supreme Court of the United States

CONESTOGA TRUST SERVICES, LLC, as Trustee of the Conestoga Settlement Trust, dated May 1, 2010,

Petitioner,

v.

SUN LIFE ASSURANCE COMPANY OF CANADA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a court considering a motion for summary judgment may, under the guise of applying the "reasonable jury" standard, weigh and discredit direct evidence from a disinterested witness that is favorable to the nonmovant and, if believed, would prove the material fact at issue.

PARTIES TO THE PROCEEDING

The Petitioner is Conestoga Trust Services, LLC, as Trustee of the Conestoga Settlement Trust, dated May 1, 2010 (hereafter "Conestoga").

The Respondent is Sun Life Assurance Company of Canada (hereafter "Sun Life").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Conestoga Trust Services, LLC, as Trustee of the Conestoga Settlement Trust, dated May 1, 2010, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit, *Sun Life Assurance Co. of Canada v. Conestoga Tr. Services, LLC,* 717 Fed. Appx. 600 (6th Cir. 2018), is reproduced at App. A. The district court's memorandum opinion, published at *Sun Life Assurance Co. of Canada v. Conestoga Tr. Services, LLC,* 263 F.Supp.3d 695 (E.D. Tenn. 2017), is reproduced at App. B.

The Sixth Circuit's order denying rehearing en banc and denying rehearing by the panel is reproduced at App. C. The district court's final judgment is reproduced at App. D.

JURISDICTION

The Sixth Circuit entered judgment on April 3, 2018. Petitioner filed a timely motion for rehearing en banc or for rehearing by the panel on April 17, 2018. The Sixth Circuit denied the motion for rehearing en banc or for rehearing by the panel on May 10, 2018. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 56(a) of the Federal Rules of Civil Procedure provides:

> A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

STATEMENT OF THE CASE

This petition arises from a declaratory judgment action by an insurer seeking to have a life insurance policy declared void *ab initio* after the death of the insured. Summary judgment was granted in favor of the insurer and affirmed by the court of appeals.

A $2 million policy was issued by Respondent Sun Life on the life of Erwin Collins. Years later, Petitioner Conestoga acquired ownership of the policy on behalf of its clients, who are numerous individual investors, many of whom invested substantial portions of their retirement funds. When Mr. Collins died—although all policy premiums had been paid and the "contestability" period had long passed—Sun Life filed suit asserting that it should not be obligated to pay the policy benefit. Both parties requested trial by jury.

Under applicable Tennessee law, a life-insurance policy is void *ab initio* if the insured initially took out the policy pursuant to a preexisting agreement with a "stranger" investor that the policy is for the benefit of

the investor. *See Clement v. N.Y. Life Ins. Co.*, 46 S.W. 561, 564-65 (Tenn. 1898). When there is such a pre-existing agreement, the policy is treated as if it had been procured directly by the investor and, since a stranger investor would lack a valid insurable interest in the life of the insured, such a policy would be void *ab initio*. *Id*.

However, the law *allows* someone like Mr. Collins to take out a life insurance policy on his life and thereafter sell it to a stranger investor. *See Clement*, 46 S.W. at 564.[1] Thus, timing can play a decisive role: only a *preexisting* agreement with an investor that a policy procured in the insured's name is in fact being taken out for the benefit of the investor would void a policy. *Id.*

The material fact in dispute in this case is whether Mr. Collins took out his policy pursuant to a preexisting agreement that it was for the benefit of Life Asset G, LLC ("Life Asset"), an entity that did ultimately acquire the policy after it was issued. Sun Life moved for summary judgment arguing evidence showed there was already an agreement in place to sell the policy when it first issued. Conestoga also moved for summary judgment, arguing the evidence showed that Life Asset had not, for its part, agreed it would buy the policy back when the policy was issued. The presence of a cross motion did not change Sun Life's burden to establish its own right to summary judgment. Fed.R.Civ.P. 56(a).

Mr. Collins has passed away, and Sun Life chose not to ask any questions of anyone representing Life

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[1] *See also, e.g., Grigsby v. Russell,* 222 U.S. 149, 156, 32 S. Ct. 58, 56 L. Ed. 133 (1911).*Volunteer State Life Ins. Co. v. Pioneer Bank*, 327 S.W.2d 59, 64-65 (Tenn.Ct.App. 1959).

Asset. Testimony regarding Life Asset's acquisition of the policy came almost exclusively from David Wolff, who had acted as a go-between for Life Asset and the insurance agent helping Collins.

In response to Sun Life's motion for summary judgment, Conestoga relied primarily on Wolff's deposition testimony regarding Life Asset and the policy. The insurance agent working with Mr. Collins was apparently interested in making commissions when his insurance clients sold their life insurance policies to investors. Wolff testified that he was asked by this insurance agent to obtain a "valuation" from Life Asset of a policy for Mr. Collins as well as for other clients of the agent. Wolff testified that although "hundreds" of such "valuations" were requested and provided, Life Asset only ultimately *agreed* to buy twelve such policies through the agent.

Wolff explained that such initial valuations did not constitute an offer or promise from Life Asset to do anything. Rather, as Wolff testified, an initial valuation from Life Asset—including the initial valuation that was provided for the Collins policy—was an estimate of what Life Asset would typically pay for such a policy *if* there was such as policy actually in force and for sale, and *if*, after Life Asset then conducted its own due diligence, it then decided to indeed purchase that policy. Wolff testified that these initial valuations (including the $80,000 valuation provided on the Collins policy) were based solely on information that was self-servingly provided by a would-be seller. Accordingly, it is hardly surprising to learn that, as Wolff testified, Life Asset did not commit to anything, much less to a price, until it later conducted its own due diligence on a policy that was, by then, issued and in force.

As to whether Life Asset had already agreed to buy the policy from Collins when the policy was issued, Wolff testified that Life Asset did not make an actual offer to buy the policy until after the policy was issued; he was not aware of Life Asset ever making an offer to buy a policy before it had issued; Life Asset was under no obligation to buy the Collins policy when it issued; and Life Asset did not pay anything to anyone for the policy to issue. Indeed, Wolff testified that Life Asset did not agree to buy the policy until months later when, among other things, Collins was able to provide proof from the insurer that the policy was already issued and in force. There was no evidence contradicting Wolff's testimony regarding Life Asset's role.

In short, according to Wolff, there was no preexisting agreement in place when the policy was applied for and taken out by Collins because Life Asset, for its part, had not promised, committed, or agreed to *anything* at that time. Rather, according to Wolff's testimony, when Collins procured his policy, Collins was free to sell it to someone other than Life Asset or to not sell it to anyone, and, for its part, Life Asset was free to not purchase it.

To be sure, there is summary judgment evidence suggesting that Collins and his insurance agent were already willing to sell the policy to Life Asset before it issued. However, as to whether *Life Asset* had committed to anything, Wolff's testimony was uncontradicted. For example, Wolff's testimony that Life Asset would not have agreed and did not agree to buy the Collins policy at any price until after, among other things, the policy was demonstrated to be already in force was uncontradicted.

In ruling that Sun Life established as a matter of law that there was a preexisting agreement between

Life Asset and Collins, the district court and the court of appeals both fail to even mention—much less attempt to explain away—this direct evidence from a disinterested witness favorable to the non-movant which, if believed, proved the material fact at issue (*i.e.*, no preexisting agreement). Instead, for example, the court of appeals' opinion states that "Life Asset represented through its broker, David Wolff, that Life Asset would pay $80,000 for Collins's interest in the policy" before it issued. *See* App. at 2a. This characterization of the record ignores (rather than accepts as true) Wolff's testimony. In his testimony, Wolff explained that the $80,000 initial "valuation" from Life Asset was not an offer or promise to buy the policy at that (or any) price. Wolff explained, for example, that Life Asset made hundreds of such valuations without thereafter purchasing the vast majority of policies involved. Wolff testified that he was not aware of Life Asset ever making an offer to buy a policy before it issued. He testified that Life Asset never agreed to actually purchase any policy—including the Collins policy—without first obtaining, among other things, verification of coverage from *the insurer, i.e.* proof that the policy was *already in force*. Wolff testified that Life Asset did not commit to anything, much less to a price, until it later conducted its own due diligence on a policy that was issued and in force. In this instance, other evidence corroborates Wolff: after the policy had issued, Life Asset did conduct its own research into the policy, into Mr. and Mrs. Collins, and into the trust that held the policy *before* later committing to purchase the policy

The court of appeals notes that the insurance agent helping Collins sent an email to Wolff before the policy issued to say that "[w]e will then close with you at 4% [i.e. $80,000]." App. at 2a. The court is clearly inferring

(in favor of *the movant*) that the insurance agent was accepting an offer from Life Asset on behalf of Collins. However, the court is again ignoring (rather than accepting as true) Wolff's testimony regarding the $80,000 initial valuation by Life Asset and how such valuations were created and used by Life Asset. The agent's email evidences only that the insurance agent (and perhaps Collins) were ready, willing, and hoping to be able to sell the policy to Life Asset at that price. But a hopeful seller by himself does not an agreement make. An agreement, of course, requires mutual assent.

Life Asset did ultimately purchase the right to the Collins policy benefit. However, that Life Asset in this instance *later* offered and agreed to buy the policy for the same amount as its earlier initial "valuation" does not even contradict, much less nullify, Wolff's testimony that Life Asset had not yet agreed to anything back when the policy was issued.

The court of appeals states as follows:

> Conestoga says that Collins did not have an agreement with Life Asset prior to the policy's issuance because Life Asset agreed to pay the $80,000 only after the policy in fact issued. But that means only that Life Asset had a condition precedent to its performance under the agreement. [. . .] And an agreement with a condition precedent is an agreement nonetheless.

App. at 2a-3a. This is a strawman invented and duly dispatched by the court of appeals. First, the court of appeals confuses a necessary condition for a sufficient condition. More importantly, the court does not fairly describe Conestoga's position or Wolff's testimony.

Wolff (and Conestoga) did not say that Life Asset had agreed, back when the policy was issued, that it would purchase the policy after it was in force; rather, Wolff testified (and Conestoga thus said) that Life Asset had *not* agreed it would buy the policy when the policy was issued—*i.e.,* there was no preexisting agreement with Life Asset when the policy issued that Life Asset would either then or subsequently buy the policy. Rather, only later did Life Asset for the first time agree to buy the policy. Before Life Asset did agree to buy the policy, Life Asset required, among other things, proof that the policy had already been issued and was in force.

To deny Sun Life's motion, the courts below only needed to accept Wolff's testimony as true. Despite the testimony from Wolff that was favorable to Conestoga and which, if believed would have proved the material fact at issue, the court of appeals states that "Conestoga demands that we credit a raft of inferences that in our view no reasonable jury would make." App. 3a. In other words, the court of appeals treats the weight and credibility of direct evidence (Wolff's testimony on the very issue at hand) as an "inference" that the court could evaluate under a "reasonable jury" standard. Based on its view of the sufficiency of the evidence, the court of appeals discredited (ignored) this uncontradicted testimony from a disinterested witness that was favorable to the non-movant and thus improperly affirmed the summary judgment in favor of Sun Life. *Id.*

The district court had jurisdiction pursuant to 28 U.S.C. § 1332 as the matter in controversy exceeds $75,000 and, for purposes of diversity jurisdiction, Conestoga is a citizen of Texas and Sun Life is a citizen of Canada and Massachusetts. The court of appeals

had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

REASONS THE WRIT SHOULD BE GRANTED

Credibility determinations should be reserved for trial by a real jury and not be made at summary judgment by a judge applying the concept of a fictive "reasonable jury." This case presents a compelling vehicle for the Court to define the boundaries of the "reasonable jury" inquiry in the context of summary judgment. In particular, the Court should clarify that a reviewing court *first* accepts direct evidence favorable to the nonmovant as true and *then* considers whether the record taken as a whole could lead a rational trier of fact to find for the non-moving party.

"Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Id.*

> There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. *That part of every case, such as the one at bar, belongs to the jury*, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, *so long as we have jury trials, they should not be disturbed*

> *in their possession of it*, except in a case of manifest and extreme abuse of their function.'

Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 628, 64 S. Ct. 724, 88 L. Ed. 967 (1944) (emphasis added), quoting *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S. Ct. 720, 35 L. Ed. 371 (1891).

Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A "judge's function" in evaluating a motion for summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In doing so, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the . . . motion.'" *Scott v. Harris,* 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) (*per curiam*)).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150–51, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), quoting *Liberty Lobby,* 477 U.S., at 255, 106 S. Ct. 2505. "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." Advisory Committee Notes, 1963 Amendment to Fed.R.Civ.P. 56(e); *see*, *e.g.*, *Agosto v. INS*, 436 U.S. 748, 756, 98 S. Ct. 2081, 56 L.Ed.2d 677 (1978) ("a district court generally

cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *United States v. Hurt*, 676 F.3d 649, 653 (8th Cir. 2012) ("Credibility is the quintessential factual question."); *AutoZone, Inc. v. Strick,* 543 F.3d 923, 934 (7th Cir. 2008) ("Whether Strick was telling the truth when he testified that he was not aware of the AutoZone mark when he created Oil Zone is for the trier of fact to decide").

The Court has held that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). In *Matsushita*, the Court explained that the applicable substantive law may limit "the range of permissible inferences from ambiguous evidence." 475 U.S. at 588, 106 S. Ct. at 1356. However, the Court did not suggest that the weight or credibility of *direct evidence* could be determined by the judge on summary judgment.

The plaintiffs in *Matsushita* alleged that the defendants conspired to monopolize the American market for television sets through predatory pricing in violation of the Sherman Act. The plaintiffs' purported "direct evidence" offered in response to the defendants' motion for summary judgment "had little, if any, relevance to the alleged predatory pricing conspiracy." *Matsushita*, 475 U.S. at 595. Further, even accepting the plaintiff's circumstantial evidence as true, there was still no hint of a "plausible motive [for the defendants] to engage in predatory pricing" as alleged. *Id.* In such a case, "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [the defendants] had no rational economic motive to

conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id*., at 596–97. In short, no rational factfinder could infer that the defendants had engaged in the alleged predatory pricing conspiracy given the circumstantial evidence relied on by the plaintiffs as there was nothing to suggest a plausible motive for defendants to have done so. *Id.*[2]

Even assuming the judicial inquiry into the "plausibility" of inferences that is described in *Matsushita* applies outside the antitrust context of that case, most courts have agreed that such an inquiry could apply "only where the non-movant relied on inferences from *circumstantial* evidence." *See McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988) (emphasis added), citing *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630–31 (9th Cir.1987). In contrast, "[w]hen a non-movant presents *direct* evidence that creates a genuine issue of material fact, the only issue becomes one of credibility, and the court may not grant summary judgment as there is no legal issue for it to decide." *Connor v. Halifax Hosp. Med. Ctr.*, 01-16207, 2002 WL 32290997, at *3 (11th Cir. June 26, 2002) (emphasis added), citing *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996); *see also R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58 (2d Cir. 1997) ("[E]ven where the surrounding circumstances indicate what has been termed, perhaps unfortunately, "implausibility," at the summary judgment stage the court

[2] The case was remanded for the court of appeals "to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that [defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so." *Id*.

should not "weigh" the evidence in the same manner as a trier of fact. . . . *Matsushita* authorizes only "an inquiry on summary judgment into the 'implausibility' of inferences from circumstantial evidence, . . . not an inquiry into the credibility of direct evidence"). In sum, "[a]lthough *Matsushita* places limits on the inferences courts may draw from ambiguous evidence, it does not change the summary judgment standard that courts may neither evaluate the credibility of witnesses nor weigh the evidence." *Evergreen Partnering Group, Inc. v. Pactiv Corp.,* 832 F.3d 1, 14 (1st Cir. 2016) (citation omitted), *cert. denied*, 138 S. Ct. 62, 199 L. Ed. 2d 20 (2017). For example, finding a district court had misconstrued *Matsushita*, the Fifth Circuit held:

> The district judge erred in basing his decision on finding Dixie Well's documentary evidence inherently more "reliable" or "accurate" than Leonard's and his co-workers' testimony and sworn statements from memory. The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed; it is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. *A judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable*.

Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 294 (5th Cir. 1987) (emphasis added); *see also*, e.g. *Washington v. Haupert*, 481 F.3d 543, 550 (7th Cir. 2007) ("However implausible the Washingtons' account might seem, it is not our place to decide who is telling the truth.").

There are certain exceptional instances where a non-movant's direct evidence will not create a genuine issue for trial. The "sham affidavit" doctrine "allows a court to disregard an affidavit [by a party] as a matter of law when, without explanation, it flatly contradicts his or her own prior deposition testimony for the transparent purpose of creating a genuine issue of fact where none existed previously." *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1306 (11th Cir. 2016); *see also, Jiminez v. All Am. Rathskeller, Inc.,* 503 F.3d 247, 253 (3d Cir. 2007) ("A sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment. A sham affidavit cannot raise a genuine issue of fact because it is merely a variance from earlier deposition testimony, and therefore no reasonable jury could rely on it to find for the nonmovant.").

In a somewhat similar vein, this Court refused to credit a plaintiff's version of a high speed chase with police in *Scott,* 550 U.S. at 372, 127 S. Ct. 1769. Even though that plaintiff was a non-movant at summary judgment, the Court noted that the case involved the "added wrinkle" of "a videotape capturing the events in question." *Scott,* 550 U.S., at 378. The Court explained:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving

> in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Scott, 550 U.S., at 380–81.

No such exceptions even remotely apply here. This case has nothing to do with the "sham affidavit" doctrine which, as a general rule, is not even applied to a non-party witness such as Wolff. *See, e.g. Wilson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009), citing *Lane v. Celotex Corp.,* 782 F.2d 1526, 1531 (11th Cir. 1986). More importantly, there was no prior testimony by Wolff and no suggestion that Wolff was somehow contradicting himself.

There is also nothing at all comparable to the video in *Scott* that could be said to "blatantly contradict" and "utterly discredit" Wolff. On the contrary, Wolff was the *only* witness to testify with personal knowledge of the transaction at issue and the *only* witness to testify with personal knowledge of Life Asset's business practices both in general and with regard to the specific transaction. (If anything, Wolff's testimony blatantly contradicts and utterly discredits the claims of Sun Life that Life Asset was party to a preexisting agreement to purchase the policy back when it was issued).

In the present case, summary judgment for Sun Life is plainly improper if only the testimony of Wolff, a disinterested witness with personal involvement and knowledge of the material issue at hand, is accepted as true (as it should be). However, the court of appeals

felt free to treat the weight and credibility of Wolff's testimony as something that could be subjected to some sort of judicial plausibility analysis. *See* App. at 3a (dismissing Conestoga's position as requiring "inferences that in our view no reasonable jury would make" when merely accepting Wolff's testimony as true was plainly sufficient to defeat Sun Life's motion). The failure of both the district court and the court of appeals to even discuss Wolff's testimony favorable to Conestoga only exacerbates the problem: it is as if Wolff's testimony favorable to the nonmovant did not even exist.

It is an understatement to say here that "[i]n articulating the factual context of the case, the [Sixth] Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *See Tolan v. Cotton,* 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895 (2014), quoting *Liberty Lobby,* 477 U.S. at 255, 106 S. Ct. 2505. Similar to *Tolan,* the facts in the present case "lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. *Tolan,* 134 S. Ct. at 1867-68. By ignoring Wolff's testimony, "the court did not credit directly contradictory evidence." *Id.* at 1867.

Given the court below's reliance on the "reasonable jury" standard as justification for *ignoring* direct evidence favorable to the nonmovant, this case highlights an important and improper drift away from having factual disputes heard by real juries and instead judges deciding such disputes through means of a fictive "reasonable jury" standard. *See,* Michael S.

Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation,* 51 B.C. L. Rev. 1451, 1465–66 (2010) (arguing courts have not been provided criteria "to guide and constrain judicial decision making on the crucial issue: whether a particular inference from the evidence in the record could be made by 'reasonable jury'" and that "the familiar guidelines—to consider the burden and standard of proof; to draw reasonable inferences in favor of the nonmoving party; and to not consider witness credibility—fail to provide a principled way of drawing this crucial distinction and instead leave it to, in Professor Arthur Miller's apt phrase, 'the general anarchy of trial court discretion.'"); Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. Pa. J. Const. L. 195, 217 (2009) ("The rules associated with summary judgment are easy to state, but application of the standard is necessarily complex, as it involves a legal determination about a set of facts. This characteristic makes the standard malleable in factually intensive cases, and provides an avenue by which judges can conceivably frame the summary judgment question in terms of the strength of a claim rather than the presence or absence of material factual issues."); Suja A. Thomas, *The Fallacy of Dispositive Procedure,* 50 B.C. L. Rev. 759, 784 (2009) ("The Supreme Court has failed to show how judges are to determine whether no reasonable jury could find for the plaintiff. Instead, the justices of the Court and other judges on the lower courts have themselves decided motions based on their own views of the sufficiency of the evidence."); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?,* 78 N.Y.U. L. Rev. 982, 1074–75 (2003) ("[T]he question of when

a court may determine a case before trial 'as a matter of law' has taken on greater significance—one that reaches some of our system's most cherished traditions. Absent sensitivity to the appropriate judge-jury balance, lower courts may curtail litigants' access to trials—and obviously a jury—through arbitrary, result-oriented, or efficiency-motivated determinations at the pretrial motion stage.").

"Credibility is the quintessential factual question." *Hurt*, 676 F.3d at 653. "Determining the weight and credibility" of direct evidence "belongs to the jury" and "so long as we have jury trials, they should not be disturbed in their possession of it[.]" *Sartor,* 321 U.S. at 628. It is trial by a real jury—*not* a judge's interpretation of the "reasonable jury" standard—that is "the hallmark of 'even handed justice'" in this country. *Poller*, 368 U.S. at473, 82 S. Ct. 486. Citizens have a right to have factual disputes heard by juries and they have a right to be involved in the resolution of the disputes of others through participation on such a jury.

As one commentator has noted, although "[t]he Supreme Court has stated that a judge can decide whether summary judgment should be granted by determining whether a reasonable jury could decide for the nonmoving party," the Court "has never undertaken to explain how a judge can make this determination." Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 Fordham L. Rev. 2241, 2242–43 (2018) (notes and citations omitted). The Court should grant this petition in order to define the boundaries of the "reasonable jury" inquiry in the summary judgment context and, in particular, to clarify that a reviewing court should *first* accept direct evidence favorable to the nonmovant

as true and only *then* consider whether the record taken as a whole could lead a rational trier of fact to find for the non-moving party.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 8, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 04/03/2018]

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Nos. 17-5877/5895

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SUN LIFE ASSURANCE COMPANY OF CANADA,

Plaintiff-Appellee / Cross-Appellant,

v.

CONESTOGA TRUST SERVICES, LLC, as Trustee of the Conestoga Settlement Trust, dated May 1, 2010,

Defendant-Appellant / Cross-Appellee.

———

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

———

Before: KEITH, KETHLEDGE, and THAPAR, Circuit Judges.

KETHLEDGE, Circuit Judge. In this case Conestoga Trust Services, LLC seeks to recover on a $2 million insurance policy that Sun Life Assurance Company of Canada issued on the life of Erwin Collins. Collins sold the policy to Life Asset G LLC as soon as the policy was issued. At the time of Collins's death, about six years later, Conestoga held the policy as its sixth assignee. The district court granted summary judgment to Sun Life, holding that the policy was void from the outset as an illegal "wagering contract" under Tennessee law. We affirm.

We have little to add to the district court's thorough and soundly reasoned opinion. Under Tennessee law, a life-insurance policy is void if the insured takes out the policy with a preexisting agreement to sell the policy to an investor. *See Clement v. N.Y. Life Ins. Co.*, 46 S.W. 561, 564-65 (Tenn. 1898). The district court held that Collins had a preexisting agreement with Life Asset here, noting among other things that Collins originally applied for the policy using his (actual) Tennessee address, but then reapplied using a phony Georgia address when Life Asset said that it would not buy Tennessee policies (presumably because wagering contracts are illegal there); that—once the application was "on Georgia paper"—Life Asset represented through its broker, David Wolff, that Life Asset would pay $80,000 for Collins's interest in the policy; that Collins's agent, Eugene Houchins, replied that, once the policy was issued in Georgia, "[w]e will then close with you at 4% [*i.e.*, $80,000]"; that Houchins rather than Collins fronted the first premium payment for the policy; and that Life Asset in fact paid $80,000 for the policy, as soon as it was issued, with $60,000 going to Collins's wife (as the policy's formal assignor) and $20,000 going to Houchins (who took the Fifth in his deposition in this case) as a commission for the deal. We could go on; but suffice it to say that the district court correctly held as a matter of law that, at the time of the policy's issuance, Collins had a preexisting agreement to sell the policy to Life Asset for $80,000.

Conestoga says that Collins did not have an agreement with Life Asset prior to the policy's issuance because Life Asset agreed to pay the $80,000 only after the policy in fact issued. But that means only that Life Asset had a condition precedent to its performance under the agreement. *See* 13 Williston on

Contracts § 38:7 (4th ed.). And an agreement with a condition precedent is an agreement nonetheless. *See Miller v. Resha*, 820 S.W.2d 357, 360 (Tenn. 1991). Nor do we think the district court drew improper inferences in favor of Sun Life. To the contrary, Conestoga demands that we credit a raft of inferences that in our view no reasonable jury would make. The reality—on the record here and by all appearances in fact—is that the agreement between Collins and Life Asset was exactly what the district court said it was.

We also affirm the district court's order directing Sun Life to repay the premiums that Conestoga (but not the five other assignees) paid to Sun Life on this policy. In our view the district court's reading of Tennessee law on this issue was correct. *See Vinson v. Mills*, 530 S.W.2d 761, 763 (Tenn. 1975); *Washington v. Atlanta Life Ins. Co.*, 136 S.W.2d 493, 494 (Tenn. 1940).

The district court's judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 07/12/2017]

No. 3:14-cv-00539

SUN LIFE ASSURANCE COMPANY OF CANADA,

Plaintiff,

v.

CONESTOGA TRUST SERVICES, LLC,
As Trustee of Conestoga Settlement Trust,

Defendant.

REEVES/GUYTON

MEMORANDUM OPINION

This case concerns a life insurance policy issued by Sun Life Assurance Company of Canada on the life of Erwin Collins. Sun Life filed this action seeking a declaration that the policy is void due to having been procured as a wagering contract on the life of Collins. Sun Life contends the policy is a "stranger originated life insurance (STOLI)" policy, wherein investors utilized Collins' life as a conduit to procure the policy, wager on his life, and profit from his death. Therefore, Sun Life argues Conestoga has no right to recover proceeds from the life insurance policy because the policy is void *ab initio*.

Defendant, Conestoga Trust Services, LLC, is the sixth assignee of the ownership rights in the policy.

Conestoga responds there is no evidence that "stranger investors" procured the policy, and it is permissible to take out a life insurance policy with the hope of trying to sell the policy on the secondary market. In the event the court declares the Sun Life policy void, Conestoga asserts Sun Life must return to Conestoga the premiums paid to Sun Life.

For the reasons that follow, the court finds there was a pre-existing agreement for Erwin Collins to obtain the policy and transfer it to a stranger investor. Therefore, the policy constitutes a STOLI scheme, and under Tennessee law, it violates public policy and is void *ab initio*. As a result, Sun Life does not have to pay the death benefit to Conestoga. However, Sun Life must refund the premiums to Conestoga so that Sun Life does not obtain a windfall.

Prior to discussing the motions for summary judgment, the court will address Conestoga's motion to amend and Sun Life's motion to strike.

I. Motion to Amend

Conestoga moves to amend its answer and counter-complaint to include an alternative claim for bad faith under Tennessee law, and an alternative claim for return of premiums paid by Conestoga to Sun Life [R. 71]. Sun Life opposes the motion as untimely, futile, and delaying the proceedings [R. 82].

Pursuant to Federal Rule of Civil Procedure 15(a)(2), a party may amend its pleading only with the opposing party's written consent or the court's leave. Although the decision to permit amendment of pleadings is committed to the discretion of the court, the court's discretion is limited by Rule 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits. *Marks v. Shell Oil*

Co., 830 F.2d 68, 69 (6th Cir. 1987). Because Rule 15(a) envisions liberal allowance of amendments to pleadings, there must be some substantial reason justifying denial of the motion. *Smith v. Garden Way, Inc.*, 821 F.Supp. 1486, 1488 n. 2 (N.D.Ga. 1993). In evaluating the interests of justice, courts typically consider whether the amendment is brought in bad faith or for dilatory purposes, would result in undue delay or prejudice to the opposing party, or would be futile. *Graham v. Luttrell*, 191 F.3d 452 (6th Cir. 1999).

Here, Conestoga's motion to amend is timely under the court's order extending the trial date and all associated pretrial deadlines. *See* R. 37. Further, the court finds the proposed amendments will cause Sun Life no prejudice or delay because the parties' summary judgment filings already address the claims for bad faith penalty and for return of premiums. Accordingly, in the interests of justice and pursuant to Rule 15(a), Conestoga's motion to file an amended answer and counter-complaint [R. 71] is GRANTED.

II. Motion to Strike

Following the close of briefing on the parties' cross-motions for summary judgment, Sun Life filed a notice of supplemental authority to apprise the court of a development in one of the cases cited in Sun Life's brief [R. 107]. Conestoga filed its own notice of supplemental authority that included argument regarding the relevance of Sun Life's supplemental authority and Conestoga's supplemental authority [R. 108]. Sun Life, in turn, filed a motion to strike Conestoga's notice of supplemental authority on the grounds Conestoga was attempting to expand on its previous arguments [R. 109]. Conestoga filed a response to Sun Life's motion to strike arguing that Conestoga merely

responded to Sun Life's characterization of the supplemental authority [R. 110].

The court appreciates the parties providing notice of supplemental authority decided since the close of briefing. However, the court will decide for itself whether the cited authority is relevant to the issues in this case. Accordingly, the court finds no merit to Sun Life's motion to strike [R. 109], and the motion is DENIED.

The court will now address the parties' motions for summary judgment.

III. Motions for Summary Judgment

A. Standard of Review

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of establishing that no genuine issues of material fact exist. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 330 n. 2 (1986); *Moore v. Philip Morris Co., Inc.,* 8 F.3d 335, 339 (6th Cir. 1993). All facts and inferences to be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Burchett v. Keifer*, 301 F.3d 937, 942 (6th Cir. 2002).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. *Celotex*, 477 U.S. at 317. To establish a genuine issue as to the existence of a particular element, the nonmoving party must point to evidence

in the record upon which a reasonable finder of fact could find in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law. *Id.*

The Court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper question for the factfinder. *Id.* at 250. The Court does not weigh the evidence or determine the truth of the matter. *Id.* at 249. Nor does the Court search the record "to establish that it is bereft of a genuine issue of fact." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989). Thus, "the inquiry performed is the threshold inquiry of determining whether there is a need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250.

B. Background

Eugene Houchins[1] was an insurance broker who sold life insurance policies. Houchins was also President of Bonded Life Company, an entity he used to procure life insurance policies. Houchins approached Robert and Nicole Coppock asking whether the Coppocks were interested in earning fees by referring persons to him for a program where they would earn money through life insurance policies

[1] At his deposition in this case, Houchins declined to answer questions, asserting a Fifth Amendment right to do so. Facts regarding Houchins' actions in this matter have been taken from the record and testimony of other parties/witnesses.

taken out on the lives of elderly persons. Under a written agreement, Mr. Coppock was retained as Bonded Life's agent. Pursuant to this agreement, Bonded Life paid the Coppocks a referral fee of 20% of the first year premium on any completed transaction. As part of this arrangement, the Coppocks referred Erwin Collins to Houchins.

Houchins worked with David Wolff, whose business (Iron Core Capital) brokered the acquisition of beneficial interests in life insurance policies on behalf of Life Asset. Life Asset would acquire a beneficial interest in exchange for payment of a percentage of the face amount of the policy and reimbursement of any premiums paid on the policy before acquisition. When an acquisition closed, Houchins compensated Wolff for his services by paying him a portion of the insurance commissions received.

On September 25, 2007, Houchins submitted an informal inquiry to Sun Life to determine if Erwin Collins was healthy enough to qualify for a Sun Life policy. On October 4, 2007, Sun Life responded with a tentative offer for a policy on Collins' life, subject to submission of a formal application and full underwriting.

On November 1, 2007, Houchins wrote Wolff and provided information necessary for Life Asset to evaluate the prospective policy, including Collins' age and estimated life expectancy. Wolff testified that a life expectancy projection would allow the Fund to make a valuation of the policy.

On November 5, 2007, a formal application for a Sun Life policy was signed in Knoxville, Tennessee by Collins' wife, as trustee of the Erwin A. Collins Irrevocable Life Insurance Trust. The trust named Mr. Collins as the grantor; Mrs. Collins as the trustee; and

listed their address in Knoxville, Tennessee. Between January 31 and February 8, 2008, the application and supporting documentation were submitted to Sun Life.

On February 26 or 27, 2008, Life Asset informed Wolff that it would not acquire a beneficial interest in a policy on Collins' life because the transaction was connected to Tennessee. Tennessee was one of a number of states where Life Asset would not conduct business. Houchins then had a different trust, with a Georgia address, reapply for a policy with Sun Life. The new application, which was dated March 31, 2008, was purportedly signed in Tucker, Georgia by Erwin Collins as the insured, Ms. Gordillo (friend of Houchins) as trustee of the trust, and Houchins' father as the broker/registered representative. Houchins controlled the Georgia trust with his friend Gordillo as trustee, as the policy applicant, and proposed owner. Houchins removed any references to Tennessee from the policy application and trust documents, including using a false Georgia address as the residence of the Collins and having their signatures falsely notarized in Georgia by his employee.

On March 17, 2008, Houchins sent an email to Wolff informing him that the Tennessee problem had been resolved and that the policy transaction was "now on Georgia paper." Houchins asked Wolff to have Life Asset price the policy. On March 18, 2008, Wolff forwarded life expectancy reports and a policy illustration provided by Houchins to Life Asset. A week later, Life Asset priced the policy at 4% of its $2 Million face amount ($80,000). Wolff communicated Life Asset's 4% price to Houchins.

On April 3, 2008, four weeks before the policy was issued, Houchins informed Wolff that Mrs. Collins would sell her beneficial interest in the trust at 4% of

face amount Life Asset had quoted. In his April 3, 2008 email, Houchins stated: "Collins (SUN) – is being re-issued in GA. We will then close with you at 4%."

On April 5, 2008, Wolff informed Houchins of the closing requirements for Life Asset's acquisition. Wolff also provided Houchins with the sales contract documents for Mrs. Collins to sign. With the arrangements in place to sell the beneficial interest, Houchins paid the $27,000 initial premium to place the policy in force. The premium was paid by two cashier's checks payable to Sun Life issued by the Bank of America branch in Dunwoody, Georgia – check number 0897264 was issued on April 22, 2008 for $19,580, and check number 08997265 was issued on April 25, 2008 for $7,420. Houchins funded these checks using funds from Bonded Life's bank account payable to Sun Life in the trust's name. After receiving the premium payment, Sun Life issued the policy on April 30, 2008.

The closing documents for the acquisition of Mrs. Collins' beneficial interest contained no references to Tennessee and, instead, stated that the Collins resided in Georgia and that all documents had been signed by Mr. and Mrs. Collins in Georgia. Houchins forwarded the signature pages for the contract documents to the Collins in Tennessee, on May 5, 2008, and returned the signed documents to Wolff on May 9, 2008.[2] Regarding the Georgia trust and application – Mrs. Collins testified that she and Mr. Collins resided in Tennessee; they had a winter home in Florida; they never lived in Georgia; and neither of them ever signed any documents in Georgia.

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[2] For some reason not revealed in discovery, the contract documents had to be resigned on June 9, 2008.

Life Asset acquired the beneficial interest in the trust for 4% of the face amount of the policy ($80,000) plus a reimbursement of premiums paid ($27,000) – a total of $107,000. Houchins received $47,000 and Mrs. Collins received $60,000. Houchins' father also received commissions from Sun Life in the amount of $62,605.35. The Coppocks and Wolff were compensated by Houchins for facilitating the transaction.

Conestoga Trust Services, LLC, is the sixth assignee of the ownership rights in the policy, acquiring its interest on April 30, 2013. Erwin Collins passed away on June 19, 2014. On August 13, 2014, Conestoga submitted a death claim to Sun Life for the proceeds of the policy.

Sun Life avers that the policy was at all times meant by the applicants as an illegal wager on the life of Collins. Sun Life further avers that the Collins Trust was itself an illegal sham created to give the false appearance of a valid insurance trust and thus, a legitimate insurable interest in the life of Erwin Collins. Sun Life further avers that the source of the funds for the initial premium payment on the policy was not Collins or any person possessing an insurable interest in his life. Instead, the premiums were paid by persons or entities who were wagering on Mr. Collins' death so they could collect the $2 Million death benefit.

IV. Analysis

A. STOLI SCHEME

In a STOLI scheme, stranger investors wager on the life of elderly individuals by procuring high dollar insurance policies on their lives. The death benefits are not payable to the insureds' families or loved ones, but to the investors, who have no insurable interest in

the insureds' lives, and who wager that the insureds will die as soon as possible so the death benefits can be obtained with the least possible outlay of premiums, thus maximizing their returns. The Eleventh Circuit described the scheme as follows:

> A STOLI policy is a speculative investment device that entails gambling on the lives of the elderly. In its purest form, a STOLI transaction works like this: A speculator secures an agreement with a person, who is usually elderly, authorizing the speculator to buy insurance on that person's life. The speculator usually gets the policy in the largest amount available and pays the premiums, hoping to profit in one of two ways. One way is if the insured dies before the premiums paid exceed the death benefit. Under that scenario the sooner the insured dies, the fewer the premium payments that are necessary to obtain the payout, and the greater the return on investment. The other way the speculator can profit is by selling the policy to another speculator for more than the premiums paid up to the point of that sale.

Sciarretta v. Lincoln Nat. Life Ins. Co., 778 F.3d 1205, 1207-08 (11th Cir. 2015).

Tennessee prohibits STOLI policies through both statutory and common law.[3] Since 1799, wagering contracts have been held void under Tennessee law. *See*

[3] Consistent with the common law, the Tennessee Legislature addressed the illegality of STOLI when it adopted the Viatical Settlement Act of 2009. Although the Act does not apply to the Sun Life policy because the Act was enacted after the policy transaction, the Act is instructive. The Act prohibits "entering into any agreement or undertaking any act or plan that involves

Tenn. Code Ann. § 2919-101 ("All contracts founded, in whole or in part, on a gambling or wagering consideration, shall be void to the extent of such consideration"). Consistent with this prohibition, the Tennessee legislature adopted an insurable interest requirement for insurance policies to prevent wagering contracts. See Tenn. Code Ann. § 56-7-101 ("A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party has an insurable interest"). Tennessee's insurable interest requirement serves the substantive goal of preventing speculation on human life by ensuring that a life insurance policy cannot be procured unless the person procuring it has an interest in the continued life, health, and bodily safety of the person insured.

Important to the instant discussion, Tennessee courts have held for over one hundred years that life insurance taken out as a wager is void. See *Clement v. New York Life Ins. Co., Id.* 46 S.W. 561 (Tenn. 1898); *Marquet v. Aetna life Ins. Co.*, 159 S.W. 733, 735 (Tenn. 1991) ("The rule is well established that a lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract . . . All such contracts are wagering pure and simple").

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stranger-originated life insurance." Tenn. Code Ann. § 56-50-102(6)(A(iii). The Act defines STOLI as "a practice or an act to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured." Tenn. Code Ann. § 56-50-102(12)(A).

Typically, the prospective insured acts as a nominal grantor of a life insurance trust that is used to apply for the policy. Where a policy is procured through the use of a trust, the insured must create and fund that trust in order to satisfy the insurance interest requirement. There is no insurable interest if a policy is procured as a cover for the wager. *See PHL Variable Ins. Co. v. Price Dawe*, 28 A.3d 1059, 1075 (Del. 2011).[4] When analyzing whether such a procurement is a cover, courts scrutinize the circumstances under which the policy was issued and determine who in fact procured or affected the policy. *Id.* at 1076. *Price Dawe* noted one telltale sign of such a scheme – "If a third party funds the premium payments by providing the insured the financial means to purchase the policy then the insured does not procure or affect the policy." *Id.* at 1076.

The court has scrutinized the circumstances under which the Sun Life policy issued and finds the undisputed facts support the conclusion Houchins improperly used Erwin Collins as a conduit to acquire a policy that Life Asset could not otherwise acquire. Life Asset priced the purchase of the beneficial interest at 4% of the face value of the policy plus reimbursement of the premiums paid for a total of $107,000 prior to the issuance of the policy. After confirming that Mrs. Collins would sell her beneficial interest for this price, Houchins paid and funded the initial premiums required to place the policy in force. When Life Asset closed on the acquisition, right after the policy was

[4] The Tennessee Viatical Settlement Act of 2009 states, consistent with the common law, that trusts created to give the appearance of an insurable interest, and used to initiate policies for investors, violate insurable interest laws and the prohibition against wagering on life. Tenn. Code Ann. § 56-50-102(12(B).

issued, Houchins was reimbursed from the sales proceeds for the premiums paid by his company. Life Asset acquired the beneficial interest in accordance with terms that were previously agreed upon, and the participants in the transaction (Houchins, Wolff, the Coppocks, and Mrs. Collins) were compensated for their roles in procuring the policy. Conestoga has presented no evidence that Mr. Collins or any other person with an insurable interest in his life funded any of the premiums paid on the policy. *See Price Dawe*, 28 A.3d at 1078 (a policy fails at its inception for lack of an insurable interest where a third party either directly or indirectly funds the premium payments as part of a pre-negotiated arrangement with the insured to immediately transfer ownership).

Contrary to Conestoga's argument, the policy is not supported by an insurable interest because the policy was "at least nominally issued" to a trust with Mrs. Collins as the beneficiary. Where a policy is procured through a trust, the insured must create and fund that trust in order to satisfy the insurable interest requirement. *Price Dawe*, 28 A.3d at 1076. Here, the Georgia trust lacked an insurable interest in Collins' life. Although Mr. Collins was listed as the nominal settlor of the Trust, he did not fund the trust or pay any premiums on the policy. The Trustee, Gordillo, testified the trust never had any money, did not pay any premiums on the policy, nor did she know the source of funds for any premium payments. Instead, the record shows premiums were paid by Houchins through his Bonded Life account. Under Tennessee law, a policy must be taken out in "good faith" and the rule is that if one procures a policy upon the life of another and pays the premiums, that party "must have an insurable interest in the life of that other, or the policy will be a mere wager policy." *Clement,* 46

S.W. at 561; *Sun Life v. Wells Fargo*, 2016 WL 5746352 at *11 (D.N.J. Sept. 30, 2016) (holding that policy was void *ab initio* as a wagering contract where the investors funded the premium by funneling the money through the trust account).[5]

Conestoga argues the policy is not void merely because Houchins advanced the money for the premium, characterizing the payment as a "loan." In determining whether a transaction is a loan, the Sixth Circuit instructs courts to examine certain "objective criteria" that are "normally associated with legitimate debts," including an unconditional promise to repay, a fixed maturity date, an interest rate, and a schedule for payment of principal and interest. *Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 512 (6th Cir. 1974).

Here, the record is devoid of any evidence that Erwin Collins knew that Houchins made the premium payments. In addition, the trustee and Mrs. Collins both testified they had no knowledge whatsoever about the premium payments. They did not know whether any premiums had been paid; who paid the premiums; or the source of the funds for any premium payments. Moreover, there is no loan documentation and no evidence of any repayment terms – no interest rate, no repayment date, and no payment schedule.

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[5] The Tennessee Viatical Settlement Act of 2009 is instructive as to Tennessee law. Consistent with the common law, it defines STOLI to include "cases in which life insurance is purchased with resources . . . from or through a person or entity that, at the time of the policy's inception, could not lawfully initiate the policy . . . and where, at the time of the policy's inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy or the policy benefits to a third party." Tenn. Code Ann. § 56-50-102(12)(B).

When the Life Asset acquisition closed, the trustee testified there were no loans to the trust in connection with the policy. Therefore, the court finds Conestoga's argument that the premium payment was a "loan" is without merit.

Conestoga next argues it is an "innocent bona fide assignee" under the policy. However, the Tennessee Supreme Court held in *Clement,* "the transfer and assignment must be in good faith, and not as a mere colorable evasion of the provision in regard to wagering contracts, and in order to validate or legalize the same." *Id.* 46 S.W. at 564; *see also Aetna Life Ins. Co. v. Hooker,* 62 F.2d 805 (6th Cir. 1933) ("The mere fact that an issued policy may be validly assigned to one not having an insurable interest has no legal significance in determining whether the policy was initially procured by one without such insurable interest"); *Volunteer State Life Ins. Co. v. Pioneer Bank,* 327 S.W.2d 59, 64-65 (Tenn.Ct.App. 1959) ("In this State, both at common law and by statute, a policy of life insurance is an assignable instrument and, when not forbidden by the policy itself, or otherwise, it may be assigned, in the absence of fraud or a wagering contract"). Thus, Tennessee law holds that a transferee's innocence or good faith will not revive a contract void from inception as an illegal wagering contract. *Clement*, 46 S.W. at 595. An assignor cannot transfer to his assignee any greater rights in the contract than the assignor possesses under the contract. *Tenn. Ins. Guar. Ass'n v. Century Ins. Co.,* 2005 WL 1384878 at *7 (Tenn.Ct.App. June 10, 2005) (citing *Kennedy v. Woolfolk*, 4 Tenn. 195 (1817). Once the policy has been tainted as a wagering contract, subsequent assignees take no greater rights in the policy than the initial wagerer, and the law will not permit that illegal and void contract to become valid

and enforceable by virtue of a subsequent transfer. Accordingly, the court finds Conestoga's argument that it is an "innocent bona fide assignee" under the policy without merit.

B. Return of Premiums

Having determined that there was no insurable interest at the inception of the policy, the court turns to Conestoga's request that Sun Life be directed to return all premium payments paid by Conestoga for the policy. Sun Life moves to dismiss this claim on the grounds that the policy is void *ab initio* and, therefore, the court should leave the parties where it found them. In addition, Sun Life argues it would not be unjustly enriched by retaining the premiums. As a result of this STOLI transaction, Sun Life has incurred substantial policy expenses including $62,605.35 in commissions, additional expenses related to policy underwriting and administrating, and legal expenses incurred in this action.

Tennessee follows the majority rule that an assignee who has paid premiums in good faith is entitled to recover premiums paid if the policy is later declared void because of the misconduct of others. See *Washington v. Atlanta Life Ins. Co.*, 136 S.W.2d 493 (Tenn. 1940); *Branson v. Nat'l Life & Acc. Ins. Co.*, 1927 WL 2089 (Tenn.Ct.App. 1927). As stated in *U.S. Bank Nat'l v. Sun Life Assur. Co. of Canada*, "an insurance company cannot have it both ways" by obtaining rescission of a life insurance policy and simultaneously retaining the premiums paid on the policy. *Id*, 2017 WL 347449 at *19 (E.D.N.Y. Jan. 24, 2017). The court agrees. Conestoga is not to blame for the fraud here; it merely acquired a life insurance policy from a predecessor assignee and that policy turned out to be void. Allowing Sun Life to retain the

premiums would be a windfall to the company. *See Branson*, 1927 WL 2089 at *3 (assignee of the policy who in good faith paid premiums entitled to recover premiums paid); *Washington*, 136 S.W.2d at 494 ("The contract of insurance is a conditional one. If no risk attaches, no premium, in the absence of fraud, is earned. When the risk never attached, and no risk was ever run, the premium is to be returned"). Accordingly, Conestoga's motion to recover its premium payments is GRANTED. Conestoga will be limited to return of premiums paid after acquiring the ownership rights in the policy (April 30, 2013).

C. Bad Faith Claim

In light of the court's finding that the policy at issue is void as an illegal wagering contract, Conestoga has no viable bad faith claim. The record establishes that there was a reasonable basis for Sun Life's challenge to the validity of the policy. The law is clear that there is no viable bad faith claim where the insurer's refusal to pay rests on legitimate and substantial legal grounds. *Tyber v. Great Central Ins. Co.*, 572 F.2d 562, 564 (6th Cir. 1978).

The court finds that the record evidence demonstrates that the policy lacked an insurable interest at its inception and is therefore void *ab initio* under Tennessee law.

V. Conclusion

In light of the foregoing discussion:

1. Conestoga's motion for leave to file amended answer and counter-complaint [R. 71] is GRANTED.

2. Sun Life's motion to strike [R. 109] is DENIED.

3. Sun Life's motion for summary judgment [R. 74] is GRANTED in part. The Sun Life policy on the life of

Erwin Collins is declared void *ab initio* and Sun Life does not have to pay the death benefit to Conestoga.

4. Conestoga's motion for refund of the premiums paid to Sun Life [R. 72] is GRANTED. Sun Life shall refund only the premium payments made by Conestoga. In all other respects, Conestoga's motion for summary judgment is DENIED.

Enter:

/s/ Pamela Reeves
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 05/10/2018]

Nos. 17-5877/5895

SUN LIFE ASSURANCE COMPANY OF CANADA,
Plaintiff-Appellee / Cross-Appellant,

v.

CONESTOGA TRUST SERVICES, LLC,
As Trustee of the Conestoga Settlement Trust,
Dated May 1, 2010,
Defendant-Appellant / Cross-Appellee.

ORDER

BEFORE: KEITH, KETHLEDGE, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 07/12/2017]

No. 3:14-CV-539-PLR-HBG

SUN LIFE ASSURANCE COMPANY OF CANADA,
Plaintiff,

v.

CONESTOGA TRUST SERVICES, LLC,
As Trustee of Conestoga Settlement Trust,
Defendant.

JUDGMENT

In accordance with the Memorandum Opinion filed contemporaneously herewith, it is ORDERED that the Sun Life policy on the life of Erwin Collins is declared void *ab initio* and Sun Life does not have to pay the death benefit to Conestoga.

IT IS FURTHER ORDERED that Conestoga shall be refunded the premiums paid to Sun Life on the policy.

The Clerk is DIRECTED to remove the trial scheduled for November 14, 2017, from the court's docket, and close the case.

Enter:

/s/ Pamela Reeves
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT
s/ *Debra C. Poplin*
CLERK OF COURT