No. 18-176

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a petition for *certiorari* should be granted to review a straightforward application of long-established summary judgment standards.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Sun Life Assurance Company of Canada discloses that its parent corporation is Sun Life Financial Inc., a publicly held corporation that owns 10% or more of the stock of Sun Life Assurance Company of Canada.

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STATEMENT OF THE CASE

This case involves state law claims arising out of a fraudulent life insurance scheme. Under this scheme, an insurance producer, Eugene Houchins, covertly funded the premiums on a $2 million policy issued by the Respondent, Sun Life Assurance of Canada ("Sun Life"), so that a stranger investor, Life Asset G ("Life Asset"), could acquire the policy and illegally wager on the life of the insured, Erwin Collins.

In recent years, a secondary market has developed whereby policy owners can sell their interests in life insurance policies. Such transactions are generally legal if the policy in question was originally procured for a legitimate, non-wagering purpose and any applicable regulatory requirements are satisfied. In the mid-2000s, however, the demand for such policies began to outstrip supply. Unscrupulous investors (with the assistance of dishonest insurance producers) started manufacturing large numbers of multi-million-dollar life insurance policies on elderly insureds who neither wanted nor needed insurance—a practice that came to be known as stranger-originated life insurance ("STOLI"). In contrast to legitimate life insurance policies, which typically protect an insured's family members or business associates from the financial risks associated with the insured's death, the sole purpose of a STOLI transaction is for investors to illegally wager on human life. Consequently, a STOLI investor wants the insured to die as quickly as possible in order to maximize its profits.

STOLI is not a new concept. In fact, over one hundred years ago, this Court condemned these types of wagering transactions as repugnant to public policy and declared them illegal. *See Grigsby v. Russell*, 222 U.S. 149, 154 (1911) (applying Tennessee law) ("A contract of insurance upon a life in which the [policyholder] has no interest is a pure wager that gives the [policyholder] a sinister counter interest in having the life come to an end."); *Warnock v. Davis*, 104 U.S. 775, 778 (1881) (A policy taken out by one that has no insurable interest "would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.").

Since 1799, wagering contracts have also been considered void under Tennessee statutory law. *See* Tenn. Code Ann. § 29-19-101 ("All contracts founded, in whole or in part, on a gambling or wagering consideration, shall be void to the extent of such consideration."); *see also* Shan. § 3159; 1932 Code § 7812; 1799 Acts, c. 8, § 1 (predecessor statutes to Section 29-19-101 prohibiting wagering contracts). Moreover, the Tennessee Supreme Court has confirmed that this statutory prohibition against wagering applies to human life wagers and that such wagering policies are void. *See Marquet v. Aetna Life Ins. Co.*, 159 S.W. 733, 735 (Tenn. 1913) (holding that predecessor statute, Shan. § 3159, prohibiting wagers applied to human life wagers); *Clement v. N.Y. Life Ins. Co.*, 46 S.W. 561, 564 (Tenn. 1898) (policy unsupported by an insurable interest "will be a mere wager policy, upon which the party to whom it was issued cannot recover"); *Quinn v. Supreme Council Catholic Knights of Am.*, 41 S.W. 343, 344 (Tenn. 1897) (a human life wager is "obnoxious to the law," and "violative of a sound public policy," and "such a transaction is purely speculative on the part of the assignee, entered upon by him as a wagering interest").

Consistent with these decisions, the Tennessee Legislature has also required that life insurance policies be supported by an insurable interest, which, as the district court below properly recognized, "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." *See* Pet. App. 14a; 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.").

Petitioner, Conestoga Trust Services, LLC ("Conestoga"), asserts that, under Tennessee law, (i) "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"; and (ii) "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." Pet. 2-3. Contrary to Conestoga's assertion, there is no single test (like a preexisting agreement requirement) for whether a policy is a human life wager. Instead, the fundamental issue, under Tennessee law, is whether a policy is taken out as a speculative wager on an insured's life. *See Marquet*, 159 S.W. at 735. Consequently, the existence of a human life wager can be proven in various ways. One such way Tennessee courts have determined that policies are illegal wagers is where they are procured pursuant to such a preexisting agreement, as Conestoga notes. However, Tennessee law also deems a policy an illegal wager where a party lacking an insurable interest pays the policy premiums as part of a wager on an insured's life. *See Clement*, 46 S.W. at 564-65 (holding that policy was a void wagering policy where parties lacking an insurable interest funded the initial premiums); *Quinn*, 41 S.W. at 344 (holding that funding of initial premiums by assignee lacking an insurable interest "was, in effect, a purchase of a life policy on the life of [the insured], by [the assignee]" and, thus, a "purely speculative" illegal wager); *Aetna Life Ins. Co. v. Hooker*, 62 F.2d 805, 806 (6th Cir.) (applying Tennessee law) (holding that insurer had viable defense that assignee lacking an insurable interest who funded premiums had, in fact, "procured the policy" as an illegal wager on insured's life), *cert. denied*, 289 U.S. 748 (1933).

Moreover, in STOLI transactions, stranger investors often structure a policy transaction to try to create the illusion of an insurable interest and to conceal that a party without an insurable interest is actually procuring the policy on the insured's life. Consequently, the Tennessee Supreme Court (i) rejects any notion that a wagering policy is legal simply because someone with an insurable interest is designated an initial, temporary beneficiary; and (ii) recognizes that courts must scrutinize a transaction to determine whether it is a wager by looking beyond the form and treating the transaction as what it is "in effect"—lest the form allow a "mere colorable evasion" of the prohibition against wagering contracts and improperly "validate or legalize the same." *Clement*, 46 S.W. at 564; *Quinn*, 41 S.W. at 344.

Contrary to Conestoga' argument, there was no triable issue of fact bearing on whether the policy at issue here was an illegal wagering policy. The record indisputably established ***both*** that (i) the policy premiums were paid by parties lacking an insurable interest—the insurance producer, Houchins, fronted the premium payment for the investor, Life Asset, which reimbursed him for the payment;[1] ***and*** (ii) there was a preexisting agreement at policy issuance for the investor, Life Asset, to acquire the beneficial interest in the policy for 4% of the $2 million face amount of the policy ($80,000). In this regard, the indisputable record established that:

1. To put together a STOLI deal, Houchins needed two things: (i) an elderly insured to serve as a conduit for the procurement of a policy; and (ii) an investor to purchase the policy. After securing both, Houchins would apply for a policy that met the investor's acquisition requirements and front (for the investor) the initial premiums necessary to place the policy in-force. Once the policy was issued, Houchins would close on the deal,

[1] There is no legal distinction between Life Asset paying premiums *directly* and Life Asset paying premiums *indirectly* through its reimbursement arrangement with Houchins. *See, e.g.*, *Kraft v. United States*, 991 F.2d 292, 297 (6th Cir. 1993) (rejecting distinction between payment made indirectly to party from payment made directly because it improperly "overlooks the true substance of the transaction" and places "form over substance").

with the investor purchasing the beneficial interest in the policy and Houchins receiving (from the investor) reimbursement of the premiums that he paid, plus a fee and insurance commissions.

2. To find potential insureds for his STOLI schemes, Houchins employed a network of referral sources including Robert and Nicole Coppock (the "Coppocks"), who (when recruited by Houchins) were operating a Medicare business in South Carolina and, thereby, had ready access to a large elderly population.

3. Under the written agreement, Houchins retained Mr. Coppock as his "agent" for, *inter alia*, "the establishment of life insurance policies through . . . *investment activities*." (emphasis added). Under the agreement, Houchins' company, Bonded Life, would pay the Coppocks a "referral fee."

4. The Coppocks solicited Mr. Collins (an elderly Tennessee resident) to be an insured for Houchins' STOLI program.

5. Houchins also had standing relationships with investors including Life Asset, which purchased the beneficial interests in at least twelve policies generated by Houchins (including the Sun Life policy on Mr. Collins' life) in exchange for the payment of a percentage of the face amount of the policy, plus the reimbursement of the initial premiums paid to procure the policy.

6. Houchins lined up Life Asset as an investor in the policy through Life Asset's broker, David Wolff. When an acquisition closed, Houchins compensated Wolff for his role in the scheme by paying him a portion of the insurance commissions received.

7. Life Asset informed Wolff that it could not acquire a beneficial interest in a policy on Mr. Collins' life if the transaction was connected to Tennessee.

8. When it became apparent that Life Asset would not close on a Tennessee transaction, Houchins falsely papered the policy transaction as a Georgia transaction to satisfy Life Asset's acquisition requirements. Houchins did this by (i) setting up a sham Georgia trust as policy applicant; (ii) falsifying that the Collinses were Georgia residents when, in fact, they were Tennessee residents; and (iii) fabricating notarized documents in Georgia.

9. Houchins then submitted an application to Sun Life with the sham Georgia trust as the policy applicant and initial policy owner—to satisfy Life Asset's acquisition requirements.

10. In Houchins' STOLI program, the insured had no role with regard to the trust or the policy. Instead, Houchins dictated the trust terms and policy arrangements by (i) creating the trust and providing the trust instrument for execution by the insured; (ii) deciding who would serve as the trustee

of the trust that would apply for a policy; and (iii) deciding what policy to obtain as trust property for the benefit of an investor.

11. Here, Houchins selected his friend, Maria Gordillo (who did not know, and never had any dealings with, the Collinses), as trustee of the trust to apply for the policy. And, as she confirmed, she took all her direction exclusively from Houchins.

12. Houchins submitted to Life Asset the information and documents that it needed to evaluate the deal, including life expectancy evaluations and a policy illustration. These documents allowed Life Asset to value the policy based upon Mr. Collins' life expectancy and the amount of premiums that had to be paid for the duration of that life expectancy.[2]

13. Having purged all connections to Tennessee from the policy documents and having set up a sham Georgia trust as policy owner, Houchins then informed Wolff that the transaction was "now on Georgia paper" and asked Wolff to have Life Asset price the policy.

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[2] Investors indisputably generate life expectancy reports to determine the amount of premium that they will have to pay for the duration of the insured's life so they can decide how much to pay for a wagering policy. The investors want insureds to have life expectancies long enough to survive the two-year contestable period (during which insurers can rescind policies for any material misrepresentation), but short enough to minimize the amount of premium outlay on the policies that investors acquire.

14. Life Asset then priced the policy at 4% of the face amount of the policy ($80,000), in addition to the reimbursement of policy premiums paid.

15. Wolff communicated Life Asset's 4% acquisition price to Houchins.

16. Houchins then informed Wolff that Mrs. Collins would sell her beneficial interest in the policy for Life Asset's 4% price, stating in an email to Wolff that "Collins (SUN) – is being re-issued in Georgia. ***We will then close with you at 4%.***"[3] (emphasis added).

17. *Before the policy was issued*, all of the arrangements were made for the sale of the beneficial interest in the policy, which included circulating Life Asset's sales contract documents (incorporating the previously agreed-upon deal terms) for Mrs. Collins' signature.

18. With these arrangements in place to sell the beneficial interest to Life Asset, Houchins then paid the initial premiums (totaling $27,000) necessary to procure the policy.[4]

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[3] It is indisputable that Houchins was acting as the Collins' agent in connection with the sale of the policy interest. In the transaction documents, Houchins expressly acknowledged and represented that he was acting as their agent.

[4] Houchins paid the $27,000 in premiums via two cashier's checks drawn from the bank account of his company, Bonded Life, with the trust's name typed on the cashier's checks to falsely suggest to Sun Life that they had been obtained and funded by the trust and

19. Finally, right after policy issuance, the wagering scheme was completed exactly according to plan: (i) Life Asset acquired the policy in accordance with the previously agreed-upon deal terms; (ii) Houchins was reimbursed by Life Asset for the initial premiums that he paid; and (iii) the participants in the transaction (Houchins, Wolff, the Coppocks, and the Collinses) were all compensated for their roles in participating in the STOLI scheme.[5]

Pet. App. 8a-12a.

On cross-motions for summary judgment, the United States District Court for the Eastern District of Tennessee properly "scrutinized the circumstances under which the Sun Life policy issued" and held that it was a void *ab initio* wagering contract lacking an insurable interest for two reasons. *Id.* at 15a-19a. First, the district court held that parties lacking an insurable interest in the insured's life funded the premiums. *Id.* at 15a-18a. In this regard, the

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to conceal from Sun Life that Houchins was actually paying the premiums.

[5] Out of the $107,000 paid by Life Asset, Houchins received $47,000—which reimbursed him for the $27,000 in initial premiums that he paid and provided him with $20,000 for his services in the STOLI transaction—while the Collinses received $60,000. Additionally, as per their agreements, Houchins compensated Wolff and the Coppocks for their roles in the STOLI transaction. Houchins split, with Wolff, the $62,605.35 in insurance commissions paid by Sun Life and paid the Coppocks $10,800 for their referral of Mr. Collins.

indisputable record showed that Houchins (who, unsurprisingly, invoked the Fifth Amendment in his deposition) paid the policy premiums under an arrangement where he was reimbursed by the investor, Life Asset. *Id.* Second, the district court found that, at policy inception, there was a "pre-existing agreement for Erwin Collins to obtain the policy and transfer it to a stranger investor," Life Asset. *Id.* at 5a, 15a-16a. The indisputable record showed that, prior to policy issuance, Life Asset reached an agreement with the Collinses to purchase the beneficial interest in the policy for $80,000, plus the reimbursement of the premiums fronted for Life Asset by Houchins.[6] *Id.* at 15a-16a. The district court also ordered that Sun Life refund the premiums that Conestoga paid on the policy. *Id.* at 19a-20a.

On appeal, the Sixth Circuit affirmed the district court, holding that (i) "[w]e affirm" the district court decision which "granted summary judgment to Sun Life, holding that the policy was void from the outset as

[6] The district court held that "there was a pre-existing agreement for Erwin Collins to obtain the policy and transfer it to a stranger investor" and determined that (i) "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"; (ii) "[a]fter 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"; (iii) "Life Asset acquired the beneficial interest in accordance with the terms that were previously agreed upon"; and (iv) "[w]hen Life Asset closed on the acquisition, right after the policy was issued, Houchins was reimbursed from the sales proceeds for the premiums paid by his company." Pet. App. 15a-16a.

an illegal 'wagering contract' under Tennessee law"; (ii) "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"; and (iii) "[t]he 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." *Id.* at 2a-3a. The Sixth Circuit also affirmed the district court's decision requiring Sun Life to refund the premiums that Conestoga paid on the policy. *Id.* at 3a.

REASONS THE WRIT SHOULD BE DENIED

I. Conestoga's Petition—which challenges a routine summary judgment ruling—does not present any legitimate reason, much less any compelling reason, for this Court to review the lower court decisions.

Conestoga improperly attempts to contrive a basis for this Court to exercise its discretion to review a routine summary judgment ruling. Contrary to Conestoga's argument that "[t]his case presents a compelling reason for this Court to define the boundaries of the 'reasonable jury' inquiry in the context of summary judgment," the court rulings below were not extraordinary. Pet. 9. Rather, they reflect the straightforward application of long-established summary judgment standards, and they do not warrant review by this Court.

Granting Conestoga's Petition would be unwarranted for several reasons. First, the Petition fails to assert that the lower courts misstated or misunderstood the summary judgment standard, but instead merely seeks review of an alleged misapplication of this standard to the specific facts of this case. And, Conestoga is even wrong on this because the record makes it clear that the lower courts did indeed appropriately apply the governing summary judgment standard to the specific facts of this case, and held that the policy at issue was indisputably a void *ab initio* wagering policy lacking an insurable interest. Second, granting review and accepting Conestoga's arguments would not result in a reversal of the district court's decision, which entered summary judgment not only because it was indisputable that a preexisting agreement actually existed, but also because parties lacking an insurable interest (Houchins and Life Asset) improperly funded the policy premiums as part of a wager on the insured's life—a determination not challenged in Conestoga's Petition. Third, the lower courts' summary judgment rulings are not in conflict with any of this Court's decisions, or any other Circuit Court decisions, and the Petition does not raise any issue that would significantly affect other parties or their ongoing cases.

i. Conestoga merely alleges that the courts below misapplied the summary judgment standard.

As Rule 10 of the Supreme Court Rules of Procedure cautions, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, Conestoga's Petition merely seeks review based upon the courts below allegedly misapplying the governing summary judgment standards in holding that the record indisputably established that the policy at issue is a void *ab initio* wagering policy lacking an insurable interest.

Here, the district court below identified and properly stated the summary judgment standard:

> 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).
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> 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.

Pet. App. 7a-8a. Moreover, the Sixth Circuit took no issue with this recitation of the standard, holding that the district court's review of the case was "thorough and soundly reasoned" and that it did not find improper inferences drawn in Sun Life's favor. Pet. App. 2a, 3a.

In the face of these accurate recitations of well-known summary judgment jurisprudence, Conestoga is left contending that the existence of an agreement was a factual issue warranting denial of Sun Life's summary judgment motion. This is based on Life Asset's broker, Wolff, denying that any agreement existed at policy inception for Life Asset to acquire Mrs. Collin's interest in the policy. In this regard, Conestoga contends that (i) "[i]n 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)"; (ii) "[t]o deny Sun Life's motion, the courts below only needed to accept Wolff's testimony as true"; and (iii) "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.'" Pet. 5-6, 8, 16. However, in addition to the reality that these Conestoga arguments are baseless because (i) as explained below, Wolff's testimony was nothing more than legal opinion, and (ii) because the record indisputably established a preexisting agreement, these Conestoga arguments, on their face, amount to nothing more than a simple complaint that the acknowledged summary judgment standards were improperly applied by the lower courts to the facts of this case.

ii. The district court properly ruled on the parties' Rule 56 summary judgment motions, and Conestoga's contentions to the contrary (i) overlook the role of Tennessee's substantive law in the application of the summary judgment standard; (ii) are based on Conestoga's flawed assumption of what constitutes an "agreement" under Tennessee law; and (iii) mischaracterize the record, which indisputably established a "preexisting agreement."

"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." Fed. R. Civ. P. 56(c). Conestoga's Petition recites a litany of summary judgment-related excerpts from Supreme Court decisions distinguishing the function of judge and jury in "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences." *See* Pet. 10 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000); *Liberty Lobby*, 477 U.S. at 255). As noted in *Liberty Lobby*, the summary judgment "standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. at 247-48 (emphasis in original).

Notably, and only passively mentioned by Conestoga, there must be an issue of *material* fact, and it must be *genuinely* in dispute. "[T]he substantive law will identify which facts are material . . . . and which facts are irrelevant . . . ." *Id.* at 248. And, the adverse party to a motion for summary judgment "must set forth *specific facts* showing that there is a genuine issue for trial." *Id.* at 250 (emphasis added).

Furthermore, the "genuine issue" standard is, in essence, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 250-52. When the record taken as a whole "could not lead a rational [fact-finder] to find for the nonmoving party," there is no genuine issue. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, the summary judgment standard "mirrors" that of a directed verdict and should be granted "if, under the governing law, there can be but one reasonable conclusion." *Liberty Lobby*, 477 at 250-52.

Implicit in Conestoga's argument—that there were genuine factual issues regarding whether there was a preexisting agreement—is a flawed assumption of what constitutes an "agreement" as a matter of Tennessee law. All that is required for an agreement to exist is "a meeting of the minds of the parties in mutual assent to the terms." *Johnson v. Cent. Nat. Ins. Co. of Omaha, Neb.*, 356 S.W.2d 277, 281 (Tenn. 1962). An agreement "may be either expressed or implied" and can be either "written or oral." *Id.* Moreover, a "meeting of the minds" can be found where the parties' conduct indicates mutual assent to the agreement terms. *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005); *Moody Realty Co. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. Ct. App. 2007). Also, "[i]n determining mutuality of assent, courts must apply an objective standard based upon the parties' manifestations." *Staubach*, 160 S.W.3d at 524. Under this standard, an agreement will be found to exist where "a reasonable onlooker, based upon the parties' outward manifestations, would conclude" that an agreement had been reached.[7] *Moody*, 237 S.W.3d at 674.[8]

The record here indisputably established that such a "meeting of the minds" existed *weeks before the policy was issued on April 30, 2008.* By then, (i) Houchins had scrubbed the policy transaction of any Tennessee references—and had falsely papered the transaction as a Georgia transaction—to satisfy Life Asset's acquisition requirements; (ii) Houchins had informed Wolff that the Tennessee issue had been resolved and that the policy transaction was "now on Georgia paper"; (iii) Houchins had asked Wolff to have Life Asset price the Georgia policy; (iv) Life Asset had priced the policy

[7] Although both parties briefed these issues below based upon Tennessee law, even if Georgia law had any application, the result would be the same because Georgia has adopted the same objective standard in determining whether any agreement exists. *See, e.g.*, *Cox Broadcasting Corp. v. Nat'l Collegiate Athletic Ass'n*, 250 Ga. 391, 395, 297 S.E.2d 733, 737 (1982).

[8] Sun Life does not concede that, even under an agreement standard, there needs to be a showing that is the equivalent of establishing a binding contract between the parties. Rather, as Tennessee law makes clear, all that is required to show an "agreement" is a meeting of the minds on the essential agreement terms—which indisputably existed in this case. Moreover, it is highly unlikely that parties engaged in illegal transactions, like those at issue here, would ever memorialize their illegal misconduct such that it would exist in a written form similar to what might be found in the context of a commercial contract.

at 4% of its $2 million face amount ($80,000); (v) Wolff had communicated Life Asset's 4% acquisition price to Houchins; (vi) Houchins had informed Wolff that Mrs. Collins would sell her beneficial interest in the policy for Life Asset's 4% of face amount price, stating: "Collins (SUN) - is being re-issued in GA. ***We will then close with you at 4%***" (emphasis added); and (vii) "Wolff also had provided Houchins with the sales contract documents (incorporating the previously agreed-upon deal terms) for Mrs. Collins to sign." Pet. App. 11a.

Thus, it is indisputable, under this objective standard, that the parties reached an agreement on the essential deal terms ***weeks before the policy was issued***: (i) Houchins would procure the policy on "Georgia paper" insuring the life of Mr. Collins; (ii) Mrs. Collins would sell her beneficial interest in the policy to Life Asset; and (iii) in exchange, Life Asset would pay 4% of the face amount of the policy (plus a reimbursement of the initial premiums paid). Pet. App. 2a. Moreover, it is indisputable that, right after the policy was issued, the parties closed on the Life Asset acquisition of the policy in accordance with the exact same deal terms that they had previously agreed upon.[9]

[9] Also, the record indisputably lacked evidence that there were any communications, much less negotiations, on any deal terms between early April, 2008 (when the agreement had been reached) and June 9, 2008 (when the transfer of the policy interest to Life Asset was completed), or that any of the deal terms changed during that time period.

Conestoga attempts to do an end-around on the summary judgment standards by improperly suggesting that a party can survive summary judgment simply by imagining attenuated and hypothetical explanations for otherwise clear and unambiguous evidence that has only one reasonable inference. Particularly given the objective standard in determining whether an agreement exists, this indisputable evidence of the parties' conduct and "outward manifestations" was more than sufficient to establish, on summary judgment, a preexisting agreement—notwithstanding the factually baseless opinion of Wolff (who facilitated, and participated, in an illegal wagering transaction) that no such agreement existed. *See Staubach*, 160 S.W.3d at 524; *U.S. Waste Atlanta, LLC v. Englund*, No. E2010-01865-COA-R3-cv, 2012 Tenn. App. LEXIS 219 (Tenn. Ct. App. Apr. 3, 2012).

For example, in *Staubach*, the Tennessee Supreme Court affirmed the entry of summary judgment finding, as a matter of law, that an agreement existed. Applying Tennessee's objective standard, the Court held that the parties' manifestation of assent to a brokerage agreement was established by the parties' actions, notwithstanding the submission of affidavits by the party's representatives "in which they maintained that they did not assent to the unexecuted brokerage agreement." *Staubach*, 160 S.W.3d at 524-25.

Similarly, in *U.S. Waste Atlanta*, the Tennessee Court of Appeals affirmed the entry of summary judgment holding that an agreement existed based upon the parties' conduct, notwithstanding the deposition testimony of one of the party's principals that he had not actually signed a written agreement (which purported to bear his signature) and had not actually agreed to the terms contained in the written agreement. *U.S. Waste Atlanta,* 2012 Tenn. App. LEXIS 219, at *12-13. Although the Court of Appeals held that the trial court "could not properly have granted partial summary judgment based upon the purported written agreements," summary judgment was appropriate, finding that a contract existed based on the parties' conduct. *Id.* at *13. In affirming summary judgment, the Court of Appeals held that given "the undisputed material facts concerning the parties' conduct, we conclude that the parties on appeal had a contract implied in fact." *Id.* at *15-16.

Here, the summary judgment standard must take into account Tennessee's substantive law on how and when an agreement can be made. Under the substantive law, the legal standard for finding an agreement is an objective one and courts are instructed to review the parties' conduct and outward manifestations—just as the courts did here in analyzing voluminous documentary evidence and communications between those involved. *Staubach*, 160 S.W.3d at 524-25; *U.S. Waste*, 2012 Tenn. App. LEXIS 219, at *15-16. Conestoga attempts to label Wolff's testimony that "Life Asset did not make an actual offer" as a factual dispute and that, subjectively, Wolff believed "Life Asset was under no obligation to buy the Collins policy when it issued," but the reality is that these are mere legal conclusions and not relevant to the legal analysis. Pet. 5. There is no factual dispute as to the documentary evidence, or communications involved, and Wolff's statements have no bearing on whether the parties' conduct and outward manifestations therein would cause a "reasonable onlooker" to conclude that an agreement was in place. *Moody*, 237 S.W.3d at 674. Instead, in rejecting "Conestoga['s] demands" to "credit a raft of inferences that in our view no reasonable jury would make," the Sixth Circuit properly applied the summary judgment standard and Tennessee's objective agreement standard. Pet. App. 3a.

Moreover, contrary to Conestoga's argument, the district court's finding of a preexisting agreement as a matter of law did not require any credibility determinations or that any inferences be drawn in Sun Life's favor as the movant. The reality is not that Wolff's testimony was weighed or that credibility was determined, but that his testimony on this point was legally irrelevant—(i) Wolff's subjective intent is irrelevant under the Tennessee law governing the legal analysis; (ii) Wolff offered mere legal conclusions without providing any actual facts that create any *factual* dispute; and (iii) there is no factual dispute that the *terms* of the agreement reached before the policy was issued never changed. Indeed, none of the cases cited or language quoted therein by Conestoga attempting to distinguish between "direct" and "circumstantial" evidence would ever need to be considered here. Under the summary judgment standard, as informed by the substantive law, (i) Wolff's testimony was legally irrelevant; (ii) Sun Life was entitled to judgment as a matter of law because "under the governing law, there can be but one reasonable conclusion"; and (iii) to find otherwise would have required the courts below to erroneous rely on "visible fiction." *Liberty Lobby*, 477 U.S. at 250; *Scott*, 550 U.S. at 380-81.

iii. Granting review and accepting Conestoga's arguments would not result in a reversal of the lower court decision, which determined that the policy at issue is a void *ab initio* wagering policy that lacked an insurable interest.

Conestoga's Petition raises one grievance and one grievance only—that the district court erred in holding, as a matter of law on summary judgment, that there was a "preexisting agreement," at policy issuance, for Collins to sell the policy to Life Asset for $80,000 because there were allegedly factual issues, raised by Wolff's deposition testimony, whether any such agreement existed. It would be a waste of this Court's resources to review this limited issue because granting review and accepting Conestoga's arguments would not result in a reversal of the district court's decision that the policy at issue is a void *ab initio* wagering policy lacking an insurable interest. Indeed, there are state law grounds for finding the policy void *ab initio* independent from the issue of a preexisting agreement because third parties lacking an insurable interest in Collins paid the premiums for the policy at issue.

Conestoga's myopic focus on the "preexisting agreement" issue is based upon its flawed characterization of Tennessee wagering law. Contrary to Conestoga's argument that "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" (Pet. 3), Tennessee law also deems a policy an illegal wager where a party lacking an insurable interest pays the policy premiums as part of a wager on an insured's life.

See, e.g., *Clement*, 46 S.W. at 561, 564-65[10]; *Quinn*, 41 S.W. at 344; *Hooker*, 62 F.2d at 806 (applying Tennessee law).

In this regard, the Tennessee Supreme Court has held that where a policy is "taken out and paid for" by a party lacking an insurable interest, (i) the "[policy] contract creates the sole interest" in the "life of the insured"; (ii) the premium payor "has nothing at stake except the premiums he pays under the policy"; and (iii) consequently, "[a]ll such contracts are wagering pure and simple." *Marquet*, 159 S.W. at 735. Moreover, the Tennessee Supreme Court has characterized policy transactions where a person lacking an insurable interest funds premiums as "radically differing from a case where the assured of his motion takes a risk on his own life" and "keeps [the policy] alive by his own means." *Quinn*, 41 S.W. at 344.

For example, in *Quinn*, the court looked beyond the form of the transaction, which involved an insured ostensibly taking out a policy on his own life and making himself the initial policy beneficiary. *Id.* The court scrutinized the substance of the transaction and determined that it was an illegal wager where a party lacking an insurable interest had paid the policy premiums and was later assigned the policy as part of a speculative wager on the insured's life. In this regard, the court held that "[a]s we view the transaction, it

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[10] Moreover, *Clement* held that 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 "pay[s] 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 564-65.

was, *in effect*, a purchase of a life policy on the life of Quinn [insured] by Carter [the assignee], for a small cash consideration and the agreement to take care of future payments." *Id.* (emphasis added).

Likewise, in *Clement*, the Tennessee Supreme Court looked beyond the form of the transaction, which similarly involved an insured ostensibly taking out a policy on his own life and making his estate the initial policy beneficiary. The court instead looked to the substance of the transaction and determined that it was an illegal wager where parties lacking an insurable interest had paid the premiums and later took an assignment. *Clement*, 46 S.W. at 564.

Although Tennessee law is clear on this issue, the district court was also appropriately guided by the Delaware Supreme Court decision in *PHL Variable Insurance Company v. Price Dawe 2006 Insurance Trust, ex rel. Christiana Bank & Trust Company*. 28 A.3d 1059 (Del. 2011); Pet. App. 8a-12a. As the district court recognized, citing *Price Dawe*, (i) "[t]here is no insurable interest if a policy is procured as a cover for the wager"; (ii) "[w]hen 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"; (iii) "[i]f 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." Pet. App. 15a.

Here, fully consistent with Tennessee law, the district court properly determined that the policy is an illegal wagering policy not only because there was a "preexisting agreement," ***but also because*** parties lacking an insurable interest paid the premiums as part of an illegal wager on the insured's life. In this regard, the district court recognized that a party with an insurable interest must pay the initial policy premiums "in order to satisfy the insurable interest requirement." Pet. App. 16a. The district court held that "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." *Id.* Instead, the district court held that "Houchins improperly used Erwin Collins as a conduit to acquire a policy that Life Asset could not otherwise acquire," which was accomplished by (i) "Houchins pa[ying] and fund[ing] the initial premiums required to place the policy in force"; and (ii) Houchins being "reimbursed from the sales proceeds [from Life Asset] for the premiums paid." *Id.* at 15a-16a.

Moreover, the district court properly rejected Conestoga's specious characterization of the premium payment by Houchins as a loan to the insured as "without merit," holding that (i) "the record is devoid of any evidence that Erwin Collins knew that Houchins made the premium payments"; (ii) "there is no loan documentation and no evidence of any repayment terms—no interest rate, no repayment date, and no payment schedule"; and (iii) "[w]hen the Life Asset acquisition closed, the trustee testified there were no loans to the trust in connection with the policy." *Id.* at 17a-18a.

Conestoga's Petition does not seek review of any of these rulings by the district court which are sufficient—independent of its determination that there was also a "preexisting agreement" to sell the policy to

Life Asset—to support its ruling that the policy is a void *ab initio* wagering contract under Tennessee law.

iv. The Sixth Circuit's decision properly affirmed the district court's ruling on summary judgment and does not conflict with decisions of this Court.

Given the indisputable evidence regarding the parties' conduct and "outward manifestations" of assent prior to policy issuance, the Sixth Circuit appropriately rejected Conestoga's argument that the district court erred in entering summary judgment, ruling that (i) "[w]e affirm" the district court decision which "granted summary judgment to Sun Life, holding that the policy was void from the outset as an illegal 'wagering contract' under Tennessee law"; (ii) "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"; and (iii) "[t]he 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." Pet. App. 1a-3a. The Sixth Circuit acknowledged that the district court's decision was a "thorough and soundly reasoned opinion." *Id.* at 2a. And, the Sixth Circuit properly rejected Conestoga's argument that the district court had drawn any improper inferences—emphasizing that "[n]or 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." *Id.* at 3A.

Furthermore, Conestoga has no legitimate argument that the lower courts misstated or misapplied the governing decisions of this Court on summary judgment. Instead, those decisions were followed faithfully by the lower courts. A decision such as this, that is *not* in conflict with this Court's decisions, does not merit this Court's time or attention. *See* Chief Justice Rehnquist, *The Supreme Court* 234 (2001) (An "important factor [in granting certiorari] is the perception of one or more justices that the lower court decision may well be . . . an incorrect application of Supreme Court precedent."); *cf., e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (granting certiorari because "[t]he Sixth Circuit's decision is contrary to" prior decisions of this Court).

v. Conestoga's Petition rightly does not assert that the Sixth Circuit's opinion would conflict with that of other circuits, and does not raise any issue that would significantly affect other parties or their ongoing cases.

Moreover, the Sixth Circuit's decision affirming the district court's summary judgment order does not conflict with any decisions by other circuits—as apparently conceded by Conestoga by its silence on the issue. And, although this case and the issues presented in it are very important to Sun Life and Conestoga, there is little to no value to others in this Court reviewing the decisions below. The legal issue Conestoga seeks to have reviewed is, at its core, the application of discrete and long-established federal civil procedure and state law principles; very few cases are likely to generate similar issues. Consequently, there would be no benefit in reviewing the Sixth Circuit's decision on these grounds. *Cf., e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (granting certiorari "to resolve the disagreement among the Court of Appeals on a question of national importance"); *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964) (granting certiorari where there is a conflict and "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues.").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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