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

REPLY BRIEF FOR PETITIONER

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A. Because there are no clear criteria for determining when a reasonable jury could rule for the nonmovant at summary judgment, the lower courts reach erratic and inconsistent results which, as this case illustrates, too often turn on a judge improperly assessing credibility and weighing evidence.

"[F]ew will deny that Brennan and Rehnquist were polar opposites during their joint service on the Court."[1] Yet both saw an unresolved tension in the Court's guidance for determining a summary judgment motion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Justice Brennan pointed out that the majority opinion is "replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions . . . [b]ut the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would[.]" *Liberty Lobby*, 477 U.S. at 265–66 (Brennan, J., dissenting).

> In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

Id. at 265; *see also id*. at 261, n. 2.

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[1] Bernard Schwartz, *"Brennan vs. Rehnquist"-Mirror Images in Constitutional Construction*, 19 Okla. City U.L. Rev. 213 (1994).

Justice Rehnquist also recognized that the majority failed to clearly articulate how a judge is to determine whether a reasonable jury could rule for the nonmovant but also avoid "credibility determinations." *Id*. at 269 (Rehnquist, J., dissenting). For him, the majority "contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now." *Id.*

Subsequent experience demonstrates that courts trying to apply the "reasonable jury" standard at summary judgment have been, to borrow a phrase from Justice Rehnquist, "erratic and inconsistent." *Id*. at 273. For example, grants of summary judgment are reversed far too often to support a credible argument that the current standard is understood and consistently applied.

> The very premise of summary judgment is that there are no genuine disputes of material fact, that no reasonable jury could find for the nonmovant, and that the law is so clear that there is no valid reason to postpone entry of judgment. By these standards, the grant of summary judgment (partial or whole) by a federal district judge (at least on no-genuine-dispute-of-fact grounds) should be affirmed nearly 100% of the time. Instead, we find that grants of summary judgment are reversed between 20% and 40% of the time, depending on the appellate court, type of case, and time period. Reversal rates this high indicate that summary judgment has failed on its own terms.

Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 Loy. U. Chi. L.J. 627, 631–32 (2012) (notes omitted).

A study has been conducted of "cases where the judge granted summary judgment for one party, thus indicating a belief that no reasonable jury could find for the nonmoving party, but where the case ended in the opposite ruling: a jury verdict for the nonmoving party." Michael W. Pfautz, *What Would A Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals,* 115 Colum. L. Rev. 1255, 1258–59 (2015). The study focused on "cases where the appellate court held that a reasonable jury could find for the party opposing summary judgment" (*id.*), and compiled "cases in which summary judgment was reversed on appeal and proceeded to a jury verdict for the nonmoving party." *Id.* at 1270. The study found "this troubling phenomenon does, in fact, occur" (*id.* at 1258), and noted "the fact that an actual jury finds for the nonmovant is strong proof that the trial court's application of the standard was incorrect." *Id*. at 1270; *see also id*. at 1258 ("[J]udges in these cases would have deprived litigants of their constitutional right to a jury trial, not to mention relief.")

Rather than illustrating that appeals can sometimes fix the problem, such data demonstrates the standard itself is a problem; *i.e.*, that the application of the standard turns too often on how trial or appellate judges subjectively perceive the evidence. Not surprisingly, scholars have reviewed our summary judgment jurisprudence and concluded "courts are impermissibly weighing evidence, construing inferences in favor of the moving party, and making credibility determinations that deny litigants the ability to reach trial

and thereby obstruct litigants from their Seventh Amendment right to a jury trial." David H. Simmons et al., *The Celotex Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial*, 1 Fla. A&M U. L. Rev. 1, 11 (2006); Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 Fordham L. Rev. 2241, 2251 (2018) ("[T]he reasonable jury standard is impossible to implement. Judges decide whether to order summary judgment based on their own opinions of the evidence."); Dmitry Bam, *Restoring the Civil Jury in A World Without Trials,* 94 Neb. L. Rev. 862, 906–07 (2016) ("Many scholars have observed that judges are essentially making factual determinations under some legal guise."); 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, 1064-1069 (2003) ("Some courts in the post-trilogy years appear to have encroached on the factfinder's role in deciding Rule 56 motions."); *see also, gen.,* Jack B. Weinstein, *The Role of Judges in A Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L. Rev. 1, 122–23 (2008).

Sun Life argues this case concerns only "the straightforward application of long-established summary judgment standards." Brief in Opposition at 12. Although the courts below did recite familiar boilerplate phrases, this case illustrates that the application of the reasonable jury standard in the summary judgment context is not yet "straightforward" but rather continues to produce not only erratic and inconsistent but untenable results.

"An order granting summary judgment that gives lip service [to this Court's past summary judgment guidance], but in reality is founded upon . . . improper grounds [such as credibility determinations] denies the non-moving party his or her constitutional right to a jury trial, an important part of which is the right to cross-examine adverse witnesses." Simmons, *supra*, at 12. As set forth in the Petition, the court of appeals here improperly treated the weight and credibility of direct evidence (Mr. Wolff's testimony) as an "inference" that the court could evaluate under a "reasonable jury" standard. *See, e.g*, Miller, supra, at 1068 ("A more obvious form of judicial intrusion into the factfinder's realm occurs when courts invoke *Matsushita* as a license to label a plaintiff's claim "implausible" and require the plaintiff to come forth with stronger evidence[.]"). The court of appeals erred by discrediting uncontradicted testimony from a disinterested witness (Mr. Wolff) that was favorable to the non-movant and which would have proved the material fact at issue (there was no preexisting agreement between Life Asset and Collins).

This case illustrates the need for this Court "to provide 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 a 'reasonable' jury." Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation,* 51 B.C. L. Rev. 1451, 1465 (2010); *see also* 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."); Miller, *supra*, at 1063 (noting confusion regarding the tension between "not weighing" evidence yet determining what a "reasonable jury" could

do). Judges should not, 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. 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 nonmoving party.

B. Because Mr. Wolff's testimony, accepted as true, could prove the material fact at issue, granting review and accepting Conestoga's arguments would result in reversal of the lower court decision.

Sun Life argues that Wolff's testimony, even if believed, was insufficient to create a material fact issue. Sun Life's incorrect arguments in this regard are a transparent attempt to muddy the waters surrounding what is, in fact, a clear question for this court regarding the relationship between testimony from a disinterested witness that would create a material fact issue and whether a "reasonable jury" could find for the nonmovant.

Sun Life first suggests that Wolff's testimony constitutes a legal conclusion that may be ignored. The courts below never remotely suggested such a thing. More importantly, Sun Life is pretending Wolff merely declared "there was no contract between Life Asset and Collins," but that is a gross misrepresentation of Wolff's testimony and of the summary judgment record as a whole. This case does not involve a statement from a brief affidavit, but rather a deposi-

tion during which Wolff was questioned at length by lawyers for both sides. Wolff described his experience with Life Asset over many hundreds of potential deals. He described the process from the time an insurance agent approached him seeking a "valuation," to the point where Life Asset later agreed – or did not agree – to purchase a policy.

Wolff did not merely proclaim that the initial "valuation" from Life Asset regarding the Collins policy was not an offer from Life Asset to buy the policy. Rather, Wolff explained that Life Asset made hundreds of such valuations on policies he was personally involved with; that Life Asset did not actually purchase the vast majority of those policies; that such valuations were based on self-reported information from a would-be seller, and Life Asset never bought a policy until it could later at least verify that information; that Life Asset made formal offers to buy policies when it was interested in actually buying a policy (and he had never known Life Asset to make such an offer before a policy had been issued by a carrier); and that Life Asset never actually purchased a policy until it first conducted its own investigation that included specifically verifying the policy had already been issued and was in force.

Wolff also explained that he was the sole point of contact between Collins and Collins' agent and Life Asset. Wolff explained that neither he nor Life Asset paid or promised to pay anything to anyone to cause the policy to issue. Wolff did not know who paid the initial premium for the policy and assumed it was Collins.

When Collins took out his policy, he created a trust to hold his policy and named his wife as the sole beneficiary of the trust. Wolff explained that neither

he nor Life Asset had anything to do with creating the trust or selecting the trustee. Wolff explained that neither he nor Life Asset knew, or even communicated with, the trustee that was selected.

The summary judgment record shows that Wolff's description of how Life Asset operated is entirely consistent with Life Asset's conduct regarding the Collins policy. The record shows that, although Life Asset had provided an initial "valuation," Life Asset made an offer to buy the policy *after* the policy had issued and Life Asset purchased the policy *after* Life Asset conducted its own investigation that included verifying the policy had been issued and was in force.

Sun Life claims "documentary evidence" and "communications involved" contradict Wolff. Brief in Opposition at 22. If that were true, conflicting evidence is why we have trials and not a reason for one party to prevail at summary judgment. But Sun Life is overstating its case. The "documentary evidence" and "communications involved" show only that, before the policy issued, *Collins' agent* sought and obtained an initial valuation of the policy from Life Asset, and *Collins' agent* indicated "we" were willing to sell the policy for the amount of the valuation. The "documentary evidence" and "communications involved" do not contradict Wolff's testimony that, *as for Life Asset*, Life Asset had not promised or committed to anything when Collins took out his policy.

Wolff's testimony is hardly a mere legal conclusion. Indeed, Wolff's testimony is, by far, the most fact-specific discussion of the events in question in the entire record. To deny Sun Life's motion, the courts only needed to accept Wolff's testimony as true. If it is accepted as true, a reasonable jury could find there was no pre-existing agreement between Life Asset and

Collins when Collins took out his policy. The judgment below must be reversed.

Sun Life also argues that proof of a pre-existing agreement was not necessary to establish the lack of a valid insurable interest when the policy issued. A life insurance policy lacks a valid insurable interest if it was procured directly by and for a stranger investor, or if it was procured by a proper insured but only as cover for a preexisting agreement that the policy is for the stranger's benefit. This case does not involve a policy on someone else's life being procured by a stranger in the stranger's name. Rather, it is undisputed that the initial beneficiary for Collins' policy was Collins' wife, and she had a valid insurance interest in his life. *See, gen., Marquet v. Aetna Life Ins. Co.,* 159 S.W. 733, 735 (Tenn. 1913) ("Husband and wife, beyond all question under the authorities, have each a reciprocal insurable interest in the life of the other."). In other words, this is nothing like a case such as *Interstate Life & Acc. Co. v. Cook*, 86 S.W.2d 887, 888 (Tenn.Ct.App. 1935) where Cook unilaterally took out a policy on the unrelated Stewart's life which named Cook the beneficiary.

Sun Life suggests it was enough to show that Collins' agent provided Collins money for the initial premium. First, Collins' agent was just that, Collin's agent, and not a stranger investor. *See, Mortgage Electric Registration Sys., Inc. v. Ditto*, 488 S.W.3d 265, 288 (Tenn. 2015) ("[I]t is axiomatic that a party cannot simultaneously be both agent and principal.") Second, Tennessee law is clear that a policy is not void just because the premium is paid by someone without an insurable interest. *See Haun v. Haun*, 872 S.W.2d 186, 188 (Tenn. Ct. App. 1993) (One who takes out a policy on his life "is possessed with all of the rights

under such policy, and such rights are not dependent upon who pays the premium for the insurance.") (emphasis added), citing *Peeler v. Doster,* 627 S.W.2d 936, 940 (Tenn. 1982); *see also Quinn v. Supreme Council Catholic Knights of Am.*, 41 S.W. 343, 345 (Tenn. 1897) ("It was lawful for Carter [who had no insurable interest in Quinn's life] to advance the money . . . to keep alive [Quinn's] insurance").

Here, to attempt to show that Collins' wife was, from the start, not the real or true beneficiary of the policy, Sun Life must establish she was named beneficiary as "cover" for a pre-existing agreement with a stranger (Life Asset) such that the policy was actually being taken out as a "wager" by the stranger. Otherwise, the policy was properly taken out by Collins with his wife named as his beneficiary. Of course, Collins was *allowed* to take out a policy on his life and thereafter sell it to a stranger.[2] *See Grigsby v. Russell*, 222 U.S. 149, 156 (1911); *Clement v. N.Y. Life Ins. Co*., 46 S.W. 561, 564-65 (Tenn. 1898); *Volunteer State Life Ins*, 327 S.W.2d at 64-65 (Tenn.Ct.App. 1959); *PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 870 (8th Cir. 2015), citing *First Penn–Pacific Life Ins. Co. v. Evans*, 313 Fed.Appx. 633, 636 (4th Cir. 2009). The court of appeals should be reversed and this case remanded for trial.

In any event, the court of appeals only addressed the question of preexisting agreement. *See* Petition

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[2] A later agreement with a stranger would not destroy the existence of a valid insurable interest when the policy issued. *Marquet v. Aetna Life Ins. Co.,* 159 S.W. 733, 735 (Tenn. 1913) ("[T]he insurable interest of the complainant in the life of Gus Marquet is not to be tested as of the date of the rider, but as of the date of original contract"); *Volunteer State Life Ins. Co. v. Pioneer Bank*, 327 S.W.2d 59, 64 (Tenn.Ct.App. 1959) (holding that insurable interest was "fixed at the inception of the policy").

App. at 2a (holding that "the district court correctly held . . . Collins had *a preexisting agreement* to sell the policy to Life Asset") (emphasis added). Thus, even assuming *arguendo* that a preexisting agreement with the stranger investor was not required to justify voiding the policy (under these facts, such an agreement must be shown), the court of appeals decision must still be reversed and, at the very least, the case remanded to that court for consideration of Sun Life's purported alternative grounds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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