

No. 96-0756

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

HERITAGE FEDERAL CREDIT UNION, AS ASSIGNEE OF
THE ASSETS OF GREYHOUND CENTRAL CREDIT UNION,
AS SOLD AND ASSIGNED BY THE NATIONAL CREDIT
UNION ASSOCIATION,

PLAINTIFF-APPELLANT,

v.

CUMIS INSURANCE SOCIETY, INC., A WISCONSIN
CORPORATION,

DEFENDANT-RESPONDENT.

ERRATA SHEET

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Trial Court Judge
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Judith Coleman, Trial Court Clerk
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PLEASE TAKE NOTICE that the attached page seven is to be substituted for page seven in the above-captioned opinion which was released on July 3, 1997.

Dated this 30th day of July, 1997.

third-party assignee, even though the alleged assignment occurred after the losses had taken place.

Furthermore, prior to Heritage's purchase, Greyhound had not discovered any losses which would be covered by the bond. Therefore, it did not have any matured, assignable claims — only an insurance policy which, by its own terms, could not be assigned without CUMIS' written consent. Therefore, we conclude that the holding in *Gimbles* does not extend to a discovery bond of this nature. See *State Bank of Viroqua v. Capitol Indem. Corp.*, 61 Wis.2d 699, 708-09, 214 N.W.2d 42, 46-47 (1974) (noting that bond claims differ from fire claims in several respects). We turn our attention, then, to Heritage's claims that either CUMIS waived the consent requirement or it was satisfied when CUMIS accepted the premium payment from Heritage.

2. *Waiver/ Premium Payment.*

An insurer may waive its right to rely on a certain policy provision when it acts in a manner inconsistent with that provision to the prejudice of the policyholder. *Whirry v. State Farm Mut. Auto Ins. Co. of Bloomington, Ill.*, 263 Wis. 322, 326, 57 N.W.2d 330, 332 (1953) (citation omitted). However, “[w]aiver implies actual knowledge of a fact or condition going to the liability of the insurer.” *Id.* Thus, in *Whirry*, an insurance company was not liable for damages resulting from a widow's automobile accident which occurred when she was driving a car for which her deceased husband had been the insured, even though the widow had paid the renewal premium, because she had not notified the company of her husband's death and the company had not accepted her as the insured. *Id.* The insurance company's retention of the premium was held insufficient in and of itself to waive the company's defense, because the company