COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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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.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. The Heritage Federal Credit Union appeals a summary judgment dismissing its action to recover on a discovery bond issued by

the CUMIS Insurance Society, Inc. The circuit court ruled that Heritage lacked standing to enforce the bond because it had been issued to the Greyhound Credit Union and had not been assigned by CUMIS. On appeal, Heritage asserts there are genuine issues of material fact concerning whether the bond was assigned because: (1) CUMIS offered no documentary evidence to dispute Heritage's contention that consent to assign was given; (2) CUMIS' written approval was not required because the loss occurred prior to the assignment; and (3) CUMIS effectively gave written approval of the assignment when it accepted a premium payment and issued a written extension of the bond. We conclude that CUMIS submitted sufficient evidence to support its position that written approval of an assignment was required for any losses not yet discovered at the time of the liquidation; and that acceptance of a premium payment from Heritage was insufficient to prove consent to assign to Heritage. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On June 1, 1976, CUMIS issued a credit union fidelity bond[1] to Greyhound, providing insurance coverage for those losses sustained as a result of fraud, dishonesty, or the failure of an employee to faithfully perform his trust, which were discovered during the term of the bond. The bond stated that it could "not be assigned without written consent of the Society." In March of 1990, the

[1] The bond insured against "losses sustained by the Insured as a result of any of the occurrences or events stipulated in this Bond … subject to the Declarations, if any, and all other terms and limitations expressed in this Bond, which losses shall happen at any time but which are discovered by the insured subsequent to 12:01 a.m. Standard Time of the effective date of this Bond and while the coverage of this Bond applicable thereto is in force, and prior to the cancellation or termination of this Bond as an entirety, as hereinafter set forth, or by mutual agreement …."

Greyhound bus workers began a three-year, nationwide strike which dramatically impaired the ability of Greyhound's credit union members to make their loan payments, resulting in numerous defaults. Thereafter, the State of Missouri's Division of Credit Unions placed Greyhound in liquidation proceedings. It named the National Credit Union Administration (NCUA) as the liquidating agent.

The NCUA arranged to have Heritage inspect the Greyhound books and records on-site, as a potential buyer. After doing so, Heritage submitted a bid which provided that the NCUA would pay Heritage $909,000 to take over Greyhound's troubled loan portfolio and related obligations. The bid was accepted and the NCUA and Heritage executed a Purchase and Assignment Agreement on August 30, 1991.

In December of 1991, CUMIS sent the NCUA notice that Greyhound's discovery bond was to be canceled effective December 31, 1991, "due to the liquidation of the credit union." However, in January of 1992, CUMIS sent Greyhound a premium statement, allowing the period of time for discovering losses under the bond to be extended until December 31, 1992. Although the statement was sent to Greyhound, Heritage paid the additional premium of $888.40[2] to extend coverage under Greyhound's name. CUMIS accepted the payment, and issued an extension listing Greyhound as the insured.

On December 21, 1992, after a detailed review of all the files in the Greyhound loan portfolio, Heritage submitted a proof of claim to CUMIS for losses allegedly sustained under the bond. These losses included all of the loans

[2] Due to $272.44 worth of credits on Greyhound's account, Heritage actually only sent a payment of $615.96.

which had been deemed uncollectable and charged off by Greyhound over the preceding 18 years. The basis for Heritage's claim was that certain documents were missing from each of the loan files. Heritage claimed that this inadequate loan documentation resulted from the failure of a Greyhound employee to faithfully perform his trust, as provided in the bond.[3] CUMIS denied the claim on September 1, 1993, and this lawsuit followed.

CUMIS moved for summary judgment under § 802.08(2), STATS., on several alternate grounds, including lack of standing, inadequate notice of claim, and prior payment by the NCUA. The circuit court concluded that Heritage lacked standing to enforce the bond because the bond had not been validly assigned to it. Heritage appeals.

DISCUSSION

Standard of Review.

We review a grant of summary judgment *de novo*, applying the same methodology as the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint, to determine whether it states a claim. Then we review the answer, to determine whether it joins an issue of fact or law, or whether the moving party is entitled to judgment as a matter of law. ***Id.*** If judgment is not then appropriate, we examine the moving

[3] The complaint attempted to lay the blame for the documentation problems on the shoulders of a single Greyhound employee. CUMIS pointed out that even though certain documents were missing that did not mean they were never generated, since they could have been sent to collection agencies in the course of attempting to collect on the loans. However, since we are to construe the facts liberally in favor of the party against whom the summary judgment is sought, we will accept that there is at least a factual dispute as to whether a Greyhound employee failed to discharge his trust.

party's affidavits, to determine whether that party has made a *prima facie* case for summary judgment. ***Id***. If it has, we review the opposing party's affidavits "to determine whether there are any material facts in dispute which entitle the opposing party to a trial." ***Id***. at 372-73, 514 N.W.2d at 49-50. Standing is a legal issue which we decide independently of the circuit court's decision and for which summary judgment may be appropriate. *See* ***Wisconsin Hosp. Ass'n v. Natural Resources Bd.***, 156 Wis.2d 688, 700, 457 N.W.2d 879, 884 (Ct. App. 1990).

Standing.

The doctrine of standing requires "a party [to have] a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." ***State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma***, 95 Wis.2d 303, 307-08, 290 N.W.2d 321, 325 (1980) (citation omitted). Where a plaintiff's right to recover depends on an assignment, the plaintiff must prove the assignment was valid in order to establish that he has a legal right to bring suit. *See* ***Felger v. Kozlowski***, 25 Wis.2d 348, 350, 130 N.W.2d 758, 759 (1964). Therefore, because Heritage was never an insured, it cannot sue under the bond unless it can show some legal right which allows it to do so. *See* ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis.2d 704, 709, 456 N.W.2d 359, 361-362 (1976).

Heritage claims that Greyhound's discovery bond was assigned to it pursuant to its Purchase Agreement with the NCUA, and was then extended by CUMIS. CUMIS disputes that the language of the Purchase Agreement operated to assign the bond, and further asserts that such a transfer would be invalid anyway, because CUMIS did not give its written consent to an assignment. Because this last contention would be dispositive if true, we address all of the

consent-related issues first, including whether consent was required and whether it was given or waived.

1. Assignment.

An assignment restriction in an insurance policy prevents one insured from transferring coverage under the policy to another insured without the written consent of the insurer. ***Loewenhagen v. Integrity Mut. Ins. Co.***, 164 Wis.2d 82, 92, 473 N.W.2d 574, 577 (Ct. App. 1991). The discovery bond in this case had such a clause.

Heritage cites ***Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co. of Milwaukee***, 72 Wis.2d 84, 240 N.W.2d 140 (1976), for the proposition that insurance claims (as opposed to the policies under which they arise) may be assigned without consent after a loss has already occurred. However, the loss at issue in ***Gimbels*** was due to fire. Thus, the assignment in that case did not affect the insurer's risk because the fire had preceded the assignment and the insurer had notice that it was going to have to cover the loss.

In contrast, the CUMIS bond provided coverage for losses which occurred at any time, but which were *discovered* during the term of the policy. There was no loss discovered prior to Heritage's purchase of Greyhound's accounts. Therefore, even if a Greyhound employee failed to faithfully perform his trust before the liquidation proceedings commenced, CUMIS was not liable for that breach of trust, and Greyhound had no claim under the terms of the bond. Stated another way, if there were a breach of trust, it was *discovered* after Heritage made the payment to CUMIS. Since CUMIS was not liable under the bond until the losses were discovered, its risk *would* be affected by extending the bond to a

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

lacked knowledge of the circumstances which would operate to terminate the policy. ***Id***. at 326-27, 57 N.W.2d at 333.

Heritage places great significance on the fact that CUMIS sent a cancellation notice for the Greyhound bond to the NCUA, indicating CUMIS' awareness that Greyhound was in liquidation. It contends that fact distinguishes this case from ***Whirry***, because it demonstrates that CUMIS had actual knowledge that "someone other than Greyhound" would be making any future claims on the bond, when it accepted Heritage's payment. However, the premium check which Heritage sent to CUMIS was signed by Greyhound's former president. Just because CUMIS knew that the NCUA was acting as the liquidating agent for Greyhound, it does not necessarily follow that CUMIS knew that Heritage had purchased Greyhound's accounts from NCUA or that it had waived its right to reject Heritage as an insured.

There has been no showing that Heritage, and its relationship to the Greyhound accounts, was made known to CUMIS by the payment CUMIS accepted. For example, the December 21, 1991 endorsement which resulted from that payment continued to list Greyhound as the insured. Furthermore, Heritage did not communicate with CUMIS in any way until it submitted its first notice of claim. Yet, in order to assess its risk on the alleged assignment, CUMIS needed to know precisely who would be managing the portfolio and making future claims. In the absence of that information, CUMIS lacked knowledge of sufficient facts and conditions to weigh the liability of insuring Heritage. Therefore, we conclude that ***Whirry*** controls and no waiver of the bond provision which required a written assignment occurred. Similarly, we cannot conclude that the bond extension endorsement represents actual written consent to the assignment of Greyhound's bond to Heritage because that document makes absolutely no mention of Heritage.

Heritage produced no evidence or legal theory sufficient to prove consent to an assignment of the bond to it. Therefore, we conclude Heritage had no legal right to collect under the bond and no standing to sue CUMIS.

Documentation for Summary Judgment.

Heritage also contends that summary judgment was inappropriate because CUMIS produced no documents to show that it refused its consent to an assignment of Greyhound's bond to Heritage. However, this argument misconstrues the summary judgment methodology discussed above. Heritage sued to recover on a bond which had been issued to Greyhound, and it alleged it had complied with all of the conditions precedent for payment. CUMIS answered that a discovery bond was issued to Greyhound and that its provisions speak for themselves. It denied that Heritage had met all the conditions precedent to payment. When CUMIS moved for summary judgment, it alleged Heritage lacked standing to sue on the bond. CUMIS attached a copy of the bond showing that Greyhound was the only insured and that the bond could not be assigned without written consent of CUMIS. In order to prevail on summary judgment, CUMIS was not required to prove a negative — that is, the non-existence of consent to assign. The bond stated, "This Bond shall not be assigned without written consent of the Society." With the filing of the bond in proper evidentiary form (which occurred here), that became a material fact and it was incumbent on Heritage to controvert it. *See* ***Johnson v. Vickers*** 139 Wis. 145, 149, 120 N.W. 837, 839 (1909). When Heritage could not produce any evidence to show either satisfaction or waiver of the written consent requirement under the bond, summary judgment was appropriate.

Purchase Agreement.

In light of our decision, we do not address whether the language of the Purchase Agreement could be construed to assign the bond to Heritage.

Photocopy Costs.

The trial court erroneously awarded CUMIS $17,303.58 in photocopy costs. ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis.2d 138, 549 N.W.2d 714 (1996). However, the respondent concedes on appeal that the costs were unrecoverable, and it has already agreed to repay that amount. Therefore, we do not consider this issue further.

CONCLUSION

CUMIS presented sufficient evidence to show its written consent to an assignment of the Greyhound fidelity bond was required before a claim for losses could be made by Heritage. Heritage failed to secure CUMIS' consent by sending in a premium payment to extend the bond. Without CUMIS' approval, any assignment to Heritage was invalid, and Heritage lacked standing to sue to enforce the bond. Summary judgment was properly granted.

By the Court.—Judgment affirmed.

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