COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1569-FT **Cir. Ct. No. 2012SC134**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CINDY LOU ALBINIAK,

PLAINTIFF-APPELLANT,

V.

NORTH COUNTRY CLOSEOUTS

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Cindy Albiniak appeals a small claims judgment entered in favor of North Country Closeouts. Albiniak brought suit against North

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). Furthermore, this is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Country, alleging it failed to pay her a sales bonus she earned while employed at one of its Snap Fitness Club franchises. The circuit court interpreted the terms of the bonus program, concluded Albiniak failed to meet the terms, and entered judgment in favor of North Country. Albiniak argues the circuit court erred in its interpretation of the bonus program. We reject Albiniak's argument, and affirm.

BACKGROUND

¶2 North Country owns and operates several Snap Fitness Club franchises in northern Wisconsin. It employed Albiniak as a manager of one of its facilities. In May 2009, North Country announced a sales bonus program for the managers of its fitness facilities. The intent of the sales bonus program was to generate new business and increase the number of membership contracts in each of its fitness facilities. The terms of the sales bonus program were not reduced to writing.

¶3 Albiniak testified the bonus program provided that, if she maintained 350 members for twelve consecutive months, she would receive a $5,000 bonus. Albiniak believed "a member is a body" as opposed to a membership, such as "single memberships, joint memberships, [or] family memberships." She also believed "member" referred to both active and inactive, or frozen, members.

¶4 Albiniak testified she met the terms of the sales bonus program. In support, she submitted Exhibit 2, which was a daily member log from January 2010 that showed the total number of members, both active and frozen, for each day in January. She also submitted Exhibit 1, which was a document she generated based on the daily member logs for each month. Exhibit 1 listed the month and the total member number for that month. It showed her facility had more than 350 members from December 2009 to November 2010. Albiniak

testified the total member number for each month in Exhibit 1 included active and frozen members. The court admitted both exhibits into evidence.

¶5 North Country president Allen Metcalf[2] testified the sales bonus program provided that, if Albiniak maintained 350 memberships, i.e., membership contracts, for twelve consecutive months, she would receive a $5,000 bonus. Allen testified Albiniak did not meet the terms of the bonus program. In support, North Country submitted Exhibit 8, which was comprised of monthly reports that showed the number of membership contracts for each of the months that Albiniak testified she met the terms of the bonus program. Exhibit 8 showed Albiniak did not have 350 membership contracts for twelve consecutive months. The court admitted Exhibit 8 into evidence.

¶6 North Country secretary Dawn Metcalf testified that, even if the court concluded the sales bonus program applied to the number of members, not memberships, Albiniak did not meet the sales bonus goal. Dawn explained that, contrary to Albiniak's testimony, the sales bonus program would never have included inactive, or frozen, members. Dawn explained a frozen member is someone who has put his or her membership on hold and cannot access or use the fitness club during that period. The frozen member pays $3 per month to keep his or her membership in a frozen or hold status, and North Country receives no revenue from frozen memberships. The $3 fee is retained by Snap Fitness corporate. Relying on the monthly reports in Exhibit 8, Dawn testified Albiniak did not have more than 350 active members for three of the twelve months

[2] Allen Metcalf's wife, Dawn Metcalf, also testified. For clarity, we refer to Allen and Dawn by their first names.

Albiniak identified—specifically, for December 2009, January 2010, and February 2010.

¶7 Ultimately, the circuit court determined the bonus program required Albiniak to retain 350 members, not memberships, for twelve consecutive months. However, the court determined "members," as used in the bonus program, referred to the number of "active members in each club." It concluded a frozen member was not an active member. It reasoned the goal of the sales bonus program was to increase revenue and,

> [I]t is absurd to think that a bonus program would rely on inactive members who are simply paying $3 a month to keep themselves available to get their membership renewed and get back into active status without having to enter into a new contract and be subject to a new fee structure. It's absurd for the plaintiff to think she could count frozen members, or frozen memberships toward this bonus program.

¶8 Because frozen members could not be included in Albiniak's total member count, the court determined Albiniak failed to meet the terms of the bonus program for twelve consecutive months. It entered judgment in favor of North Country.

DISCUSSION

¶9 On appeal, Albiniak argues the circuit court erroneously exercised its discretion by construing "members," as used in the sales bonus program, to include only active members. "Where the terms of an oral contract are to be gathered from conduct and conversations, or where they are in dispute, or are ambiguous or vague, the question as to what the understanding or agreement in fact was" is a question for the fact finder. ***James v. Carson***, 94 Wis. 632, 636-37, 69 N.W. 1004 (1897). We will only reverse a circuit court's factual determination

if it is clearly erroneous. ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶¶38-39, 319 Wis. 2d 1, 768 N.W.2d 615. A circuit court's factual determination is clearly erroneous if "it is against the great weight and clear preponderance of the evidence." ***Id.***, ¶39.

¶10 Albiniak argues the circuit court erred by excluding inactive, or frozen, members from the sales bonus program. She argues it makes "good business sense" to include frozen members because "the purpose of keeping inactive members was to prevent them from leaving Snap Fitness." Albiniak also argues that ambiguities in written contracts must be construed against the drafter, and the circuit court erred by failing to construe the ambiguity in the oral bonus program against North Country.

¶11 We reject Albiniak's arguments. First, putting aside the fact that the oral bonus program was not a written contract, the contract principle that ambiguities should be construed against the drafter does not mean the court is required to accept any definition proposed by the nondrafting party. Rather, the court must construe "[a]mbiguities in an agreement … in a manner consonant with its dominant purpose and conducive to the accomplishment of that purpose." ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 190-91, 280 N.W.2d 254 (1979) (citation omitted).

¶12 In this case, the purpose of the sales bonus program was to increase revenue. North Country does not receive any revenue from frozen members and, therefore, including frozen members in the sales bonus program would not increase North Country's revenue. Further, under Albiniak's proposed definition of "member," she could hypothetically be eligible for the sales bonus if she had an empty fitness club with no active members and 350 frozen members. North

Country would be losing revenue in that situation—not increasing it as the sales bonus program was designed to do. Given the purpose of the sales bonus program, we agree with the circuit court that it would be "absurd" for Albiniak to believe she could include frozen members in her total member count. We conclude Albiniak has not shown the circuit court's determination—that "member," as used in the sales bonus program, referred only to active members—was clearly erroneous.

¶13 Albiniak next objects to North Country's exhibits showing the number of active members, frozen members, and active memberships for each of the months Albiniak claimed she was eligible for the bonus. She argues the circuit court should not have considered these exhibits. It is unclear whether Albiniak is objecting to the exhibits' admission into evidence, the weight the circuit court gave to these admitted exhibits, or both.

¶14 In any event, we observe Albiniak objected to the admission of these exhibits in the circuit court. There, she argued the exhibits were irrelevant because they were not generated until after litigation commenced. The circuit court overruled that objection, concluding the exhibits were relevant because they were corporate records showing "one method of keeping track of who is a member, what is a membership, and … whether Ms. Albiniak was meeting the goals of the bonus program." Circuit courts have discretion to admit or exclude evidence. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. "We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision." ***Id.***, ¶29. Albiniak has not shown the circuit court's determination that the exhibits were relevant was an erroneous exercise of discretion.

¶15 Further, once the exhibits were admitted into evidence, it is the function of the trier of fact, and not of an appellate court, to evaluate the weight given to the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Any weight the circuit court gave the exhibits was within the province of the circuit court and will not be disturbed on appeal. The circuit court's determination that Albiniak failed to meet the terms of the bonus program is supported by the evidence. Accordingly, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.