[Cite as *Shaw v. Fairfield Academy, Ltd.*, 2010-Ohio-5087.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
GINA SHAW DBA GMS CATERING	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 10-CA-4
FAIRFIELD ACADEMY, LTD	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Fairfeld County Municipal Court, Lancaster, Ohio, Case No. 08CVF02981
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 14, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. RANDOLPH BURCHFIELD 1313 East Broad Street, Ste. 101 Columbus, OH 43205	DAVID B. STOKES 21 W. Church St., Ste. 206 Newark, OH 43055

Gwin, J.

{¶1} Defendant-appellant Fairfield Academy, Limited appeals a judgment of the Municipal Court of Lancaster, Fairfield County, Ohio, entered in favor of plaintiff-appellee Gina Shaw dba GMS Catering. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN AWARDING APPELLEE $5,275.75, PLUS COSTS AND INTEREST BEGINNING 30 DAYS AFTER DATE OF INVOICES.

{¶3} "II. THE TRIAL COURT ERRED IN AWARDING NOTHING TO APPELLANT, AND DISMISSING APPELLANT'S SECOND AMENDED COUNTERCLAIM."

{¶4} After a bench trial, the trial court made findings of fact and conclusions of law. The court found on or about October 4, 2007, the parties entered into a written contract wherein appellee agreed to provide meals for appellant's residents for breakfast, lunch, and dinner, at the rate of $12.00 per day, per resident. On or about January 8, 2008, appellant's manager, Paul J. Billy, sent a letter to appellee indicating dissatisfaction with the food service, alleging uncooked and unsanitary food. Billy gave appellee 30 days notice of cancellation of the contract pursuant to the parties' written contract. During January 2008, appellee cleaned up her business establishment to pass health inspections, and the parties mutually agreed to continue the contract.

{¶5} On March 20, 2008, appellant's manager Billy sent a letter to appellee advising her appellant was still dissatisfied with the food service for receiving uncooked food and unsanitary food. Billy advised her she was in violation of the terms of the contract. Appellant again gave her 30 days notice of the cancellation of the contract. Appellee continued to provide meals for the appellant until April 18, 2008.

{¶6} Appellant admitted it did not pay the last two invoices submitted by appellee for meals provided in the amount of $3,679.75 for 304 meals, on Invoice No. 13 and $1,596.00 for 133 meals on Invoice No. 14.

{¶7} The trial court found appellee stated her copy of the written contract contained a sixty-day notice of cancellation clause, while appellant's representative testified its copy of the contract provided for only a 30-day notice of cancellation. The 30-day notice of cancellation was referenced in two letters written by Billy to appellee. The court concluded appellee had failed to prove by a preponderance of the evidence that the written contract contained a 60-day notice of cancellation clause.

{¶8} In its counterclaim, appellant alleged appellee overcharged it for meals to the residents, because appellee billed for 19 residents per day, and appellant asserted while the number of residents varied, there were never 19 on any day during the contract. Appellant's counterclaim argued appellant had been defrauded, and should receive credit against the two unpaid invoices, as well as damages for the overcharges.

{¶9} The court found appellant submitted business records to establish that during the time appellee provided meals to appellant the number of residents varied daily from 12 to not more than 16, but at no time were there 19 residents.

{¶10} Appellee responded that when she took over the catering business, the daily meal count was 19, and during the entire time she provided meals, no one from appellant's business ever advised her of any change in the daily attendance. Appellant's representative testified that in the past it was their policy to call the caterer to advise them of any change in the number of residents, but appellant could provide no evidence it ever notified appellee she was sending too many meals. The court

concluded appellant had failed to prove by a preponderance of the evidence it was overcharged for any meals provided to its residents during the contract period. The court found appellant was negligent because it knew there were fewer than 19 residents, but never conveyed this information to the appellee.

{¶11} The trial court entered judgment in the amount of $5,275.75, representing Invoices 13 and 14, plus interest at the statutory rate for 30 days after the date of the invoices. The court dismissed appellant's counterclaim for over charges. The trial court found appellee was not entitled to lost profits for an additional 30 days, because it found there was a 30-day cancellation clause, not a 60-day notice of cancellation in the parties' contract.

I.

{¶12} In its first assignment of error, appellant argues the trial court erred in awarding appellee $5,275.75 plus costs and interest beginning 30 days after the date of invoices. Appellant argues the court's judgment was unreasonable and/or an abuse of discretion. Appellant points out appellee cannot dispute the numbers on its exhibits indicating the number of residents, and that fact, coupled with the poor quality of food appellee provided, renders the verdict unsupported by the record.

{¶13} Our standard of reviewing an allegation a court's judgment is against the manifest weight of the evidence is to review the record and determine whether there is sufficient competent and credible evidence going to all the essential elements of the case present in the record. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279. This court may not substitute its judgment for that of the trial court in assessing the weight and credibility of the evidence. "The underlying

rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Company v. Cleveland* (1984), 10 Ohio St. 3d 77, 80**,** 461 N.E.2d 1273.

{¶14} Our review of the record leads us to conclude the trial court's judgment is supported by competent and credible evidence going to each element of the claim for breach of contract.

{¶15} The first assignment of error is overruled.

II.

{¶16} In its second assignment of error, appellant argues the trial court erred in not awarding it judgment on its counterclaim. Appellant asserts the evidence clearly showed appellee over charged appellant. The trial court, as the trier of fact, was entitled to conclude appellant's negligence occasioned appellee to provide more meals than necessary, and thus, appellant was responsible for the additional costs.

{¶17} The second assignment of error is overruled.

{¶18} For the foregoing reasons, the judgment of the Municipal Court of Lancaster, Fairfield County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Farmer J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER

WSG:clw 0830

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FIFTH APPELLATE DISTRICT

GINA SHAW DBA GMS CATERING	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
FAIRFIELD ACADEMY, LTD	:	
Defendant-Appellant	:	CASE NO. 10-CA-4

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Lancaster, Fairfield County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER