Received 02/03/2016 Supreme Court Middle District

In the Supreme Court of Pennsylvania

No. ______________________

LORI GRAY, derivatively on behalf of FIRST NATIONAL COMMUNITY BANCORP, INC.
v.
LOUIS A. DENAPLES and FIRST NATIONAL COMMUNITY BANCORP, INC.

FARUQI AND FARUQI
v.
JOSEPH R. SOLFANELLI,
Appellant

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 2198 MDA 2014, filed January 4, 2016, Affirming the Order of the Court of Common Pleas of Lackawanna County, Pennsylvania, entered November 13, 2014 in No. 12 CV 3228 (Civil Action–Law)

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Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Memorandum opinion of the Superior Court of Pennsylvania filed January 4, 2016 affirming the trial court's order...... Exhibit A

Trial court's memorandum opinion entered November 13, 2014... Exhibit B

Trial court's order entered November 13, 2014 .... Exhibit C

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The non–precedential opinion of a three–judge Pa. Superior Court panel affirming the trial court's attorneys' fee allocation order, which awarded the Faruqi & Faruqi law firm a 35 percent share of the attorneys' fee award even though that law firm had been dismissed as co–counsel for plaintiff in this shareholder derivative suit long before the recovery of any contingent fee, is attached hereto as Exhibit A.

The opinion that the Court of Common Pleas of Lackawanna County, Pennsylvania issued on November 13, 2014 supplying the trial court's reasons for awarding to the Faruqi firm its full 35 percent share of attorneys' fees, despite that law firm's having been terminated from representing the plaintiff in this shareholder derivative suit long before recovery was obtained, is attached as Exhibit B.

II. THE ORDERS IN QUESTION

The final paragraph of the Superior Court's opinion states:

> Order affirmed.

See Exhibit A at page 5.

And on November 13, 2014, the trial court entered an order that stated, in full:

> AND NOW, this 5 day of Nov, 2014, upon consideration of Faruqi & Faruqi, LLP's Petition for Enforcement of an Attorney Fee Contract, Plaintiffs' Response, and hearing held before the Court, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED and DECREED Faruqi & Faruqi, LLP's Petition is GRANTED. Pursuant to the July 27, 2012 fee contract entered into between Todd J. O'Malley, Esq., Joseph R. Solfanelli, Esq. and Jacob A. Goldberg, Esq. on behalf of Faruqi & Faruqi, LLP, the sum of $875,000.00, plus all interest accrued, shall be paid to Faruqi and Faruqi, LLP representing their share of attorneys fees in the above–referenced case.
>
> All sums due shall be transferred within 10 (TEN) days of the date of this Order.

Exhibit C hereto.

III. QUESTION PRESENTED

Whether a law firm formerly serving as co–counsel for plaintiff that was dismissed during the midst of a shareholder's derivative suit, then nowhere near favorable resolution, remains entitled to recover its full contractually specified share of attorneys' fees from the total fee available to compensate all counsel at the conclusion of the suit, or in the alternative whether the dismissed law firm's recovery should instead be permitted only under a quantum meruit theory allowing reasonable compensation for work actually performed?

IV. STATEMENT OF THE CASE

This case presents an important question of first impression under Pennsylvania law as to which different three–judge panels serving on the Superior Court of Pennsylvania have divided.

Additionally, this Court's grant of review last year in the case captioned *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.* v. *Law firm of Malone Middleman, PC*, 95 A.3d 893 (Pa. Super. Ct. 2014), *alloc. granted*, 113 A.3d 277 (Pa. 2015) (pending) — a case presenting related issues involving the division of fees among law firms involved in a contingent fee representations — demonstrates that this case likewise qualifies for and deserves this Court's review on allowance of appeal.

By granting review in this case, this Court can consider and resolve whether a law firm terminated before the contingency is realized is entitled to recover its full contractual share of compensation, or only quantum meruit, in the important context of representative litigation, such as class actions or shareholder derivative suits, where unlike in individual litigation the plaintiff owes a fiduciary duty to the rest of the class or the other shareholders to be represented by the most qualified counsel at all times.

This Petition for Allowance of Appeal arises from a shareholder's derivative suit filed in the Court of Common Pleas of Lackawanna County by Lori Gray, a shareholder, against First National Community Bancorp, Inc. (FNCB) and the members of its Board of Directors who, plaintiff alleged, had brought FNCB to the brink of collapse due to imprudent lending and other wrongful conduct. R.9a–10a.* Shown as counsel for plaintiff on the complaint were the law firms of O'Malley & Langan, attorney Joseph R. Solfanelli (the petitioner herein), and the law firm of Faruqi & Faruqi, LLP. The Faruqi firm has its headquarters in New York City and satellite offices in Los Angeles, California, Wilmington, Delaware, and Jenkintown, Pennsylvania.

Both the O'Malley firm and attorney Solfanelli are based in Scranton, Pennsylvania, which is where this case began and was litigated. The Faruqi firm had extensive experience pursuing shareholder's derivative suits and similar litigation. The attorneys representing plaintiff anticipated that attorney Solfanelli and the

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* Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Superior Court. In accordance with Pennsylvania Rule of Appellate Procedure 1112(d), petitioner is filing one copy of that Reproduced Record in this Court together with this Petition for Allowance of Appeal.

O'Malley firm would be responsible for performing the day–to–day work necessary to bring the plaintiff's suit to a successful fruition and that the Faruqi firm would provide the resources and manpower necessary to overcome whatever difficult roadblocks the defendants and their counsel sought to place in the path of a successful conclusion to the lawsuit, whether through trial or otherwise.

In an email dated July 27, 2012 modifying an earlier agreement between them, the O'Malley firm and attorney Solfanelli entered into a written agreement with the Faruqi firm specifying that the Faruqi firm would receive 35 percent of the gross amount of attorneys' fees awarded to plaintiff's counsel in the FNCB case. R.129a–32a. That email presumed that the Faruqi firm would remain as co–counsel for plaintiff through the conclusion of the litigation. The email did not address or otherwise contemplate what compensation the Faruqi firm would be entitled to receive if it were terminated in the midst of the case, long before the litigation successfully concluded.

In May 2013, two obstacles arose to the successful continued prosecution and conclusion of plaintiff's suit. First, defendants filed a motion to compel plaintiff to post a sizeable costs bond. R.282a. And

second, in late May 2013, defendants filed a motion to disqualify the O'Malley firm, attorney Solfanelli, and the Faruqi firm from continuing to represent the plaintiff. R.282a. Regrettably, at that juncture the interests of the various counsel representing the plaintiff began to diverge.

The Faruqi firm, to whom the plaintiff and her other counsel were looking to post a pro–rata share of any costs bond, as well as to provide most of the financing of this complex litigation, announced that it did not intend to invest any additional money or other resources in the litigation until the trial court addressed and rejected defendants' motion to disqualify counsel for the plaintiff. R.311a, 316a. Plaintiff's other counsel disagreed, believing that plaintiff should continue to actively litigate the case against the defendants, notwithstanding the pendency of the aforementioned motions. R.388a, 390a–92a.

Simultaneously, the Faruqi firm began pressuring the other counsel for plaintiff to pursue a cash settlement of $3 million, with no corporate governance provisions, resulting in a counsel fee of $1 million. R.258a, 284a–85a, 328a, 389a. Attorney Solfanelli, did not believe, given the strength of the merits of the pending claims, that such a low–

value settlement, without any changes in FNCB's corporate governance provisions, would be in the best interests of plaintiff, the other shareholders of FNCB, and FNCB itself. R.389a–90a.

Attorney Solfanelli responded to the Faruqi firm by informing it that he intended to obtain the assistance of attorney Richard D. Greenfield as additional co–counsel for plaintiff. R.412a–13a. Attorney Greenfield had been active in the case since its initiation, representing another FNCB shareholder. Attorney Solfanelli informed the Faruqi firm that attorney Greenfield would provide expertise in complex financial litigation as well as the financial resources necessary to post any costs bond (should one be imposed) in the absence of the promised financial support from the Faruqi firm. R.412a–13a. The Faruqi firm responded to attorney Solfanelli that it was unwilling to interact or cooperate in any manner with attorney Greenfield in the event that he began working on the case as additional co–counsel for the plaintiff. R.271a, 412a–13a.

Because of these disagreements, and after attorney Solfanelli promptly reported them to plaintiff, in June 2013 plaintiff made an independent decision to terminate the Faruqi firm as her counsel.

R.364a, 366a, 369a–70a. Thereafter, attorney Solfanelli informed the Faruqi firm that it was no longer to serve as co–counsel for plaintiff. R.316a, 394a–95a. The plaintiff, Lori Gray, testified in this matter that she herself terminated the Faruqi firm's representation of her in June 2013. R.364a, 366a. Thereafter, the Faruqi firm's billing records reflect that its work on the case essentially ceased, with the only additional entries relating to phone calls with attorney Solfanelli informing it about the ongoing progress of the case. R.518a–19a, 522a, 529a.

Upon terminating the Faruqi firm's representation as co–counsel for Gray, attorney Solfanelli informed the Faruqi firm that it would be compensated for its earlier work in the case, assuming the case reached a favorable conclusion, based on what it "brought to the table," meaning based on the value that it contributed to the ultimate result, an approach that exemplifies quantum meruit. R.411a–12a.

Beginning in July 2013, following the Faruqi firm's termination as counsel for plaintiff, and now with the expertise and financial backing of attorney Greenfield, negotiations to settle the shareholder's derivative suit began in earnest. R.266a, 383a. Attorneys Greenfield and Solfanelli carried out lengthy and often acrimonious negotiations

over the settlement's provisions with the defendants' lead counsel, attorney Patrick O'Connor. R.263a. Ultimately, the plaintiff and FNCB reached a settlement whereby the individual defendants agreed to pay $5 million in cash to FNCB and agreed to critically significant corporate governance provisions. R.11a–12a, 34a, 37a–39a.

These valuable corporate therapeutics included, among other things: (a) the appointment of two additional and independent members to join FNCB's Board of Directors, one of whom would serve on the Board's Audit/Risk Management Committee; (b) the empowering of that Committee to identify and monitor material risks faced by FNCB and to establish procedures to monitor and insure compliance with the revised Audit/Risk Management Committee Charter (developed through the settlement); (c) the enhancement of FNCB's Corporate Governance Guidelines, including formulation of specific guidelines addressing, among other things, risk management, loans to and transactions involving insiders and related parties, out–of–area loans, and nominations to the Board; (d) the requirement that the Board members will use their best and collective efforts to bring the Bank into compliance with the Tier I capital requirements as set forth in the

Consent Order agreed to by the Bank's Board of Directors and the Office of the Comptroller of the Currency on September 1, 2010; and (e) to enhance the risk management functions of the Boards of Directors of FNCB and the Bank, the Compensation Committee thereof shall at least annually evaluate such entities' compensation practices to insure that incentive compensation for lending and other executives does not encourage unnecessary and excessive risks. R.11a–12a, 38a.

On December 5, 2013, the opposing parties in the underlying shareholder's derivative suit filed a stipulation of settlement. R.5a. The trial court granted preliminary approval of the settlement on December 18, 2013. R.5a. The trial court entered final approval of the settlement on February 4, 2014. R.5a.

Edward N. Cahn, the retired chief judge of the U.S. District Court for the Eastern District of Pennsylvania who served as fee mediator for the trial court, determined that the counsel fee for plaintiff's counsel should be increased from $1.5 million to $2.5 million in recognition of the very significant corporate governance provisions contained in the settlement over and above the $5 million cash recovery. R.37a–39a.

On January 14, 2014, plaintiff's counsel filed a petition for counsel fees. R.8a. One week later, on January 21, 2014, the Faruqi & Faruqi, LLP law firm filed a motion to enforce its attorneys' fee contract — which the Faruqi firm contended remained binding on plaintiff and the plaintiff's other counsel — and for the creation of a constructive trust. R.58a. Plaintiff filed a response opposing the Faruqi motion. R.191a.

On July 1, 2014, the trial court held a hearing to receive testimony and other evidence relating to the attorneys' fee dispute. R.247a–473a. Following additional briefing on the matter, the trial court by means of a memorandum and order entered November 13, 2014 ruled that the Faruqi firm, notwithstanding having been terminated from the underlying representation of plaintiff in June 2013, nevertheless remained entitled to recover the entire contractually specified 35 percent share of the attorneys' fee award to all of plaintiff's counsel (including attorney Greenfield and his firm) resulting from the settlement of the underlying lawsuit, a lawsuit to which the Faruqi's firm's contributions had ceased before settlement negotiations had begun in earnest. See Exhibits B & C hereto.

Thus, notwithstanding the fact that the Faruqi firm stopped working on this case at a point where that law firm would have been satisfied to recover 35 percent of a $1 million fee (assuming a settlement that the defendants were, in fact, unwilling to reach at that time), which would have produced a maximum $350,000 fee to the Faruqi firm, Senior Judge Leete ordered, and the Superior Court has affirmed, that Faruqi instead is entitled to recover a fee of $875,000, representing 35 percent of a $2.5 million attorneys' fee award that resulted largely if not exclusively from the efforts of other lawyers for the plaintiff who by themselves, and without the ongoing assistance of the Faruqi firm, continued to litigate plaintiff's case and thereby produced the underlying settlement.

On December 12, 2014, attorney Solfanelli, on his own behalf and, for the benefit of the other counsel for plaintiff, filed a notice of appeal from the trial court's award of a 35 percent attorney's fee share in favor of the Faruqi firm. R.551a.

Following briefing and oral argument, a unanimous three–judge panel of the Superior Court or Pennsylvania affirmed by means of a memorandum opinion issued January 4, 2016. Relying on the

distinguishable case of *Ruby* v. *Abington Mem. Hosp.*, 50 A.3d 128, 136 (Pa. Super. Ct. 2012), the Superior Court reasoned that "quantum meruit does not apply to written agreements between attorneys regarding attorneys' fees in particular." Exhibit A at page 4. Again citing *Ruby*, the panel reasoned that "Pennsylvania law holds that the firing of an attorney or law firm will not invalidate a contract between attorneys for the division of fees in a case." *Id.* at 5 (citing *Ruby*, 50 A.3d at 134. The Superior Court panel's opinion concluded by remarking, "Thus, the agreement regarding attorneys' fees is valid and Faruqi is entitled to 35% of the fees awarded in this matter." *Id.* at 5.

Exactly one day later, an entirely different three–judge Pa. Superior Court panel issued a published, precedential ruling in *Angino & Rovner* v. *Jeffrey R. Lessin & Assocs.*, No. 941 MDA 2014, 2016 WL 81848 (Pa. Super. Ct. Jan. 5, 2016). In *Angino*, the majority held that an attorney previously terminated from representing the plaintiff in a contingent fee matter is only entitled to recover under the quantum meruit approach notwithstanding that the client originally had entered into a fee contract with the terminated lawyer entitling that lawyer, in

the event of termination, to a specified percentage share of the plaintiff's recovery in the case. *Id.*, 2016 WL 81848, at **5–6.

The *Angino* ruling recognized that enforcing the discharged lawyer's claim to a contractually specified percentage share of the plaintiff's recovery "may well inhibit the client from engaging another lawyer to pursue his claim" and "would be to impose a penalty on the exercise of [a client's] right" to discharge her lawyer at any time for any reason or no reason whatsoever. *Id.*

Because this case presents an important question of first impression for this Court's resolution in the context of representative litigation, where the plaintiff owes a fiduciary duty to similarly situated shareholders or class members; because the panel's decision here conflicts with the decision in *Angino* issued the very next day; and because the question presented here is at least equally as important as the related question arising from individual, non–representative litigation that this Court has already agreed to resolve in *Meyer, Darragh*, this petition for allowance of appeal should be granted.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. This Court should resolve whether co–counsel for plaintiff in a shareholder derivative suit retains its contractually specified percentage share of any attorneys' fee award despite having been terminated long before the successful resolution of the suit, or whether recovery must be limited to quantum meruit as Pennsylvania law ordinarily requires

This case presents a question of overarching importance in this age of representative litigation and class action litigation in which the plaintiff necessarily owes a fiduciary duty to similarly situated shareholders or class members to ensure that the best and most highly qualified counsel at all times are representing the interests of the shareholders or class members.

In affirming the trial court's order awarding the Faruqi firm its full 35 percent share of attorneys' fees notwithstanding that the Faruqi firm had been dismissed long before any recovery was accomplished, the Pa. Superior Court relied on two plainly distinguishable earlier Superior Court decisions. First, the Superior Court relied on *Lackner* v. *Glosser*, 892 A.2d 21 (Pa. Super. Ct. 2006) (McCaffrey, J.), to observe that where a written contract exists, quantum meruit recovery is not appropriate. *See* Exhibit A hereto at 4. Yet the *Lackner* case involved an

employment contract of a non–lawyer business executive. *See* 892 A.2d at 24. The Superior Court's ruling in *Lackner* thus has no applicability to how a law firm should be compensated where its contingent fee representation of a plaintiff terminates well before the successful resolution of a lawsuit. Indeed, applying *Lackner* to the context of a contingent attorney's fee violated the Superior Court's holdings in several directly applicable cases, which have recognized that a plaintiff may terminate a contingent fee representation mid–case and thereby limit the terminated attorney's recovery to quantum meruit despite the existence of an express fee agreement entitling the terminated attorney to a share of the plaintiff's recovery.

The next inapplicable case on which the Superior Court relied in reaching a legally erroneous result was *Ruby* v. *Abington Mem. Hosp.*, 50 A.3d 128 (Pa. Super. Ct. 2012), which the Superior Court cited for the proposition that "Pennsylvania law holds that the firing of an attorney or law firm will not invalidate a contract between attorneys for the division of fees in the case." *See* Exhibit A hereto at page 5. The Superior Court's ruling in *Ruby* is inapplicable because it involved the clearly distinguishable situation where an attorney departed from a law

firm (the Beasley firm) taking with him one of the Beasley firm's contingent fee cases. The departing lawyer had signed an agreement while employed with the Beasley firm entitling the Beasley firm to 75% of any fees recovered in any case that the attorney took with him following his departure from the Beasley firm.

Unlike here, in *Ruby* the Beasley firm had entered into a contract with one of its attorneys specifically governing how attorneys' fees would be allocated in any case that an attorney took with him after departing from the Beasley firm. In *Ruby*, the departing attorney's departure with a contingent fee case that had previously been at the Beasley firm directly triggered that attorney's duty to pay, at the conclusion of the case, a 75% share of counsel fees back to the Beasley firm. Here, by contrast, the Faruqi firm had no similar agreement with plaintiff or its co–counsel that the Faruqi firm would retain 35 percent of the overall fee recovery even if plaintiff terminated the Faruqi firm mid–case. Therefore, the ordinarily governing Pennsylvania law, discussed below, providing that a contingent fee attorney discharged mid–case is only entitled to quantum meruit recovery, applies to the Faruqi firm under the facts and circumstances of this case.

In ruling in favor of the Faruqi firm, the trial court (but not the Superior Court) also relied on the Superior Court's ruling in *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.* v. *Law firm of Malone Middleman, PC*, 95 A.3d 893 (Pa. Super. Ct. 2014), *alloc. granted*, 113 A.3d 277 (Pa. 2015) (pending), for the proposition that "a fee agreement with an original law firm was binding on a subsequent firm after an attorney changed firms and the client followed." *See* Exhibit B hereto (trial ct. opinion at 6). However, in *Meyer*, as in *Ruby*, the case once again involved an attorney, departing from the plaintiff law firm to work for another law firm, who had signed an agreement while employed with the plaintiff law firm entitling the plaintiff law firm to a specified percentage of the contingent fee recovery ultimately achieved in any cases taken by the lawyer on departing from the plaintiff law firm. *See* 95 A.3d at 895. Thus, as in *Ruby*, it was the lawyer's departure from the plaintiff law firm that triggered that law firm's entitlement to recover a specified percentage of fees in cases that the departing lawyer took with him.

The trial court's reliance on *Meyer* thus suffers from the same flaw as the Superior Court's reliance on *Ruby*: the Faruqi firm had no

agreement with the plaintiff or its co–counsel that the Faruqi firm would retain the right to receive 35 percent of the overall fee recovery even if the Faruqi firm was terminated as plaintiff's counsel mid–case, as actually happened here. Therefore, the ordinarily governing Pennsylvania law, discussed below, providing that a contingent fee attorney discharged mid–case is only entitled to quantum meruit recovery applies here.

The Superior Court's decision affirming the trial court's fee award in favor of the Faruqi firm ignored that the following outcome–determinative distinctions exist between *Ruby* and *Meyer, Darragh* and this case:

- Both *Ruby* and *Meyer, Darragh* involved individual lawyers who worked at law firms and who entered into specific agreements before departing from those law firms addressing what percentage of the fees recovered in any cases that the individual lawyers took with them, upon departing, would be owed to their former law firms at the conclusion of the cases.

- If the individual lawyers had never departed, or if the clients had elected to have the cases remain at their original law firms, the original law firms would have remained entitled to recover 100% of the fees generated in both cases.

- Once the original law firms were dismissed from working on the cases that the departing lawyers took

with them, the original law firms were entitled by contract to recover a smaller share of the total attorneys' fees than the original law firms would have recovered had the cases remained (75% in *Ruby* and 66% in *Meyer, Darragh*).

By contrast, in this case:

- The email fee sharing agreement specified what percentage of fees the participating law firms would recover if they worked on the case from beginning to end, but the email agreement did not explicitly address how the fees of a law firm discharged before the end of the case would be determined, necessitating resort to a quantum meruit approach. R.129a.

- Unlike in *Ruby* or *Meyer, Darragh*, the Faruqi law firm was never entitled to recover 100% of the total attorneys' fees generated from the case if the client had decided to continue to use the Faruqi firm through the end of the case.

- Unlike in *Ruby* or *Meyer, Darragh*, even though the Faruqi firm was discharged before the end of the case, the trial court's order provides that the Faruqi firm's attorneys' fee recovery remained the same percentage, undiminished, as the Faruqi firm would have been entitled to recover had it continued to work on the case until conclusion of the case.

In short, *Ruby* and *Meyer, Darragh* are plainly distinguishable and thus inapplicable here because this case does not involve a contract between a lawyer employee/partner and his soon–to–be former law firm governing the respective shares of the total attorneys' fee that each will

be entitled to recover if the lawyer leaves the law firm with a client that currently belongs to the law firm. Moreover, unlike in *Ruby* and *Meyer, Darragh*, the Faruqi firm was not entitled to retain 100% of all fees recovered in the case before it was discharged. And, unlike in *Ruby* and *Meyer, Darragh*, the Faruqi firm's discharge before the final conclusion of this case did not result in any decrease in the total share of attorneys' fees that the Faruqi firm became entitled to recover. In the absence of all of these necessary elements, the Superior Court's earlier rulings in *Ruby* and *Meyer, Darragh* should not have controlled the outcome here.

Furthermore, in both *Ruby* and *Meyer, Darragh*, the plaintiff's choice of the individual lawyers representing her did not change and was not affected in any way by the fee arrangements in question. In both of those cases, the actual lawyers representing plaintiff continued without any interruption or threat to plaintiff's wishes. That is not the case here.

In this case, the plaintiff specifically wanted to and did fire the Faruqi law firm and the individuals working at the firm, and plaintiff was aware that she needed to remove the Faruqi firm to enable attorney Greenfield to have a far greater degree of involvement as

counsel for plaintiff (even though he was originally involved as one of her lawyers, she wanted to increase his involvement and needed the Faruqi firm out to do so). R.364a, 366a, 369a–70a. The Faruqi firm's insistence that its contract for fees with plaintiff's other lawyers was independent of plaintiff's choice of counsel is nonsensical and contrary to clear, indisputable public policy that the plaintiff controls the attorney–client relationship and is free to fire and hire as she wishes to advance her own best interests without economic penalty. *See Richette* v. *Solomon*, 187 A.2d 910, 917 (Pa. 1963); *Dorsett* v. *Hughes*, 509 A.2d 369, 373 (Pa. Super. Ct. 1986).

The Faruqi law firm's attempt to enforce an entitlement to fees that is untethered from the plaintiff's own wishes and best interests undermines the plaintiff's rights and is thus not consistent with the Superior Court's holdings in either *Ruby* or *Meyer, Darragh*. Upholding the Superior Court's affirmance of the trial court's ruling here would necessarily deprive a plaintiff in subsequent cases of the ability to choose her representation, to the detriment of the plaintiff's best interests in cases involving the commonly recurring scenario in which

several law firms have joined together at the outset to represent the plaintiff.

This is simply not an instance, as was the case in *Ruby* or *Meyer*, where the Faruqi firm had any agreement with its other co–counsel concerning what percentage of the fee ultimately recovered the Faruqi firm would be entitled to recover in the event that it was terminated from the representation of plaintiff mid–litigation. Consequently, Pennsylvania law providing that a quantum meruit recovery should be the means of compensating a contingent fee attorney terminated mid–litigation is what should have controlled the rulings of the trial court and the Superior Court here.

In deciding this case, the Superior Court should have relied principally on its earlier holding in *Mager* v. *Bultena*, 797 A.2d 948 (Pa. Super. Ct. 2002), in which that court explained:

> No Pennsylvania appellate court has ever awarded a proportionate share of a contingency fee to a firm discharged by the client well prior to the occurrence of the contingency, for the simple reason that a client may discharge an attorney at any time, for any reason. Once the contractual relationship has been severed, any recovery must necessarily be based on the work performed pursuant to the contract up to that point. Where the contingency has not occurred, the fee has not been earned.

Id. at 958.

The Superior Court explained in *Mager* that its holding was based on the laudable goal of protecting the client's unilateral right to discharge an attorney:

> An attorney, contrary to the argument urged upon us by ML & W, does not acquire a vested interest in a client's action. To rule otherwise would make fiction of the oft–repeated rule that a client always has a right to discharge his attorney, for any reason or for no reason, *Richette v. Pennsylvania Railroad*, 410 Pa. 6, 19, 187 A.2d 910, 917 (1963); *Dorsett v. Hughes*, 353 Pa. Super. 129, 509 A.2d 369, 373 (1986). Surely, to accept the argument of appellant would be to impose a penalty on the exercise of that right.

Id.

The outcome the Superior Court reached in *Mager* reflects longstanding Pennsylvania law. Some 75 years ago, the Superior Court recognized in *Sundheim* v. *Beaver County Building & Loan, Ass'n*, 14 A.2d 349 (Pa. Super. Ct. 1940):

> A client may terminate his relation with an attorney at any time, notwithstanding a contract for fees, but if he does so, thus making the performance of the contract impossible, the attorney is not deprived of his right to recover on a quantum meruit a proper amount for the services which he has rendered.

Id. at 351.

Similarly, in *Hiscott and Robinson* v. *King*, 626 A.2d 1235 (Pa. Super. Ct. 1993), the Superior Court explained:

> [I]t has long been the law that a client has a right to discharge an attorney, with or without cause. *Commonwealth v. Scheps*, 361 Pa. Super. 566, 574-75, 523 A.2d 363, 367 (1987), *appeal denied*, 516 Pa. 633, 533 A.2d 91 (1987); *see Richette v. Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Sundheim v. Beaver County Bldg. & Loan Ass'n.*, 140 Pa. Super. 529, 14 A.2d 349 (1940). The right of a client to terminate the attorney–client relationship is an implied term of every contract of employment of counsel, at least where the attorney has no vested interest in the case or its subject matter. *Scheps*, 361 Pa. Super. at 575, 523 A.2d at 367. In determining the method of compensating attorneys who are released from serving their clients in a case such as this one, we look to the rule set forth in *Sundheim*, *supra*:
>
>> A client may terminate his relation with an attorney at any time, notwithstanding a contract for fees, but if he does so, thus making performance of the contract impossible, the attorney is not deprived of his right to recover on a quantum meruit a proper amount for the services which he has rendered.
>
> *Id.*, 140 Pa. Super. at 533, 14 A.2d at 351; *accord Dorsett v. Hughes*, 353 Pa. Super. 129, 133-34, 509 A.2d 369, 371 (1986). *See also Lampl v. Latkanich*, 210 Pa. Super. 83, 231 A.2d 890 (1967) (discharged attorney may recover under quantum meruit); *Thole v. Martinog*, 56 Pa. Super. 371 (1914) (when client through his own action makes it impossible for attorney to perform the contract, quantum meruit recovery is permitted).
>
> It is clear from our review of the record that the contract for legal services providing for a contingent fee had

> been terminated at a time when, under its terms, there was nothing due to Hiscott and Robinson as compensation.

Id. at 1237.

As in *Hiscott*, when Ms. Gray, the plaintiff here, discharged the Faruqi firm in this case, no recovery had been achieved, and therefore the compensation to which the Faruqi firm was entitled at the time of the termination of its contract was 35 percent of zero. That is why, under Pennsylvania law, quantum meruit provides the appropriate measure of compensation to the Faruqi firm for its work before being terminated as plaintiff's counsel in this case.

If three rulings of the Superior Court in conflict with the Superior Court panel's ruling in this case were not enough, one day *after* its ruling in this case, the Superior Court issued a fourth conflicting decision, in *Angino & Rovner* v. *Jeffrey R. Lessin & Assocs.*, No. 941 MDA 2014, 2016 WL 81848 (Pa. Super. Ct. Jan. 5, 2016). There, the majority held that an attorney representing the plaintiff in a contingent fee matter is only entitled to recover under the quantum meruit approach even where the client had entered into a fee contract with the lawyer who was terminated entitling that lawyer, in the event of

termination, to a contractually specified share of the plaintiff's ultimate recovery in the case. *Id.*, 2016 WL 81848, at **5–6.

The *Angino* decision recognized that enforcing the discharged lawyer's claim to a contractually specified share of the plaintiff's ultimate recovery "may well inhibit the client from engaging another lawyer to pursue his claim" and "would be to impose a penalty on the exercise of [a client's] right" to discharge her lawyer without penalty at any time for any reason or no reason whatsoever. *Id.* The Superior Court's decision in *Angino* vindicated the very principle that is at stake here — the plaintiff's right (and, indeed, duty in representative litigation such as this) to be represented at all times by the most qualified counsel of her choosing.

The Superior Court's rulings in *Mager*, *Hiscott*, *Sundheim*, and *Angino* demonstrate that the plaintiff had the unilateral ability to, as she in fact did, discharge the Faruqi firm, thereby terminating its contract to work on this case. As a result, the Faruqi firm's recovery for the time already worked in the case became limited to quantum merit in accordance with those directly applicable holdings. *See also Novinger* v. *E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 218 (3d Cir. 1987)

(applying Pennsylvania law to recognize that a client may terminate a contingent fee agreement, in which event the terminated attorney can recover reasonable compensation for work on the case up until the time of discharge based on quantum meruit).

As demonstrated above, the lower courts' reliance on the Superior Court's rulings in *Ruby* and *Meyer* constituted legal error. This was not a case in which the Faruqi firm's co–counsel agreed in any written contract, or otherwise, that the Faruqi firm would remain entitled to receive 35 percent of the total fee recovered at the end of the litigation regardless of whether the plaintiff and her other counsel discharged the Faruqi firm in the midst of the litigation, before any recovery had been obtained or assured. Accordingly, the Superior Court's decision affirming trial court's attorneys' fee award in favor of the Faruqi firm deserves this Court's review and should not be allowed stand.

Most importantly, review from Pennsylvania's highest court and the subsequent reversal of the Superior Court's decision in this case is necessary to vindicate a plaintiff's right to determine at all times which lawyers the plaintiff desires to have serving as her counsel. Assume, for example, a case in which three law firms agree to serve as co–counsel

for the plaintiff and to divide whatever contingent fee recovery is achieved equally, at 33.3% per law firm. Assume further that in the midst of the case, the plaintiff decides to terminate one of the law firms, due to a disagreement that has arisen over the best strategy to pursue in the litigation.

Holding that the terminated law firm remains entitled to recover its full 33.3% share of the attorneys' fee ultimately recovered will leave no portion of the attorneys' fee available for the plaintiff to hire replacement counsel to assist in vindicating the plaintiff's rights. And penalizing the remaining law firms, which continue to work on the case, by lowering their percentage recovery so that the plaintiff can afford to hire counsel to replace the terminated law firm, would only serve to penalize the law firms that are continuing to deliver legal services to the plaintiff.

Recovery under a quantum meruit approach is not unfair to the Faruqi firm, because once Ms. Gray (the plaintiff) in this case had terminated it as her counsel, that law firm was free to invest the time it otherwise would have worked on this case toward working on other cases to increase the compensation to which it would be entitled in

those other cases. Quantum meruit, as its name indicates, exists to ensure fair compensation to a law firm for the work it actually performed in this case before being terminated as plaintiff's counsel.

Under the outcome that plaintiff urges this Court to adopt, the Faruqi firm would be fairly compensated using the quantum meruit method. By contrast, the trial court's decision, which the Superior Court affirmed, unfairly awarded a windfall in favor the Faruqi firm, to the financial detriment of plaintiff's other counsel who represented plaintiff through the conclusion of this case and who were most instrumental in achieving the notable outcome the plaintiff achieved here. Because the attorneys' fee in this case consisted of a specified total amount that the trial court authorized, the greater share that one law firm received, the less that remained for everyone else.

B. The Superior Court has already properly rejected any other arguments against review on allowance of appeal that the Faruqi firm might raise in its Answer in Opposition

Although even the trial court's opinion (at page 9) recognizes that the Faruqi law firm was fired before the successful conclusion of Ms. Gray's case, the Faruqi firm nevertheless argued at length in its Brief

for Appellee filed in the Superior Court that supposedly no attorney–client relationship existed between Ms. Gray and the Faruqi firm. The Superior Court did not accept the Faruqi firm's argument in this regard, because that argument lacks merit. *See* Exhibit A hereto.

When the Faruqi firm's involvement was sought, as its own Brief for Appellee filed in the Superior Court acknowledged, attorney Solfanelli and his law firm were acting in the capacity as agents for a disclosed principal, plaintiff Lori Gray. *See* Faruqi Pa. Super. Ct. Brief for Appellee at 18; *Trident Corp.* v. *Reliance Ins. Co.*, 504 A.2d 285, 289 (Pa. Super. Ct. 1986) (recognizing that agent for a disclosed principal is not bound by a contract entered into on behalf of the principal).

Even more importantly, attorney Jacob Goldberg (who worked at Faruqi at all relevant times) testified during the hearing that he and his law firm "had an attorney client relationship with [Lori Gray]." R.311a. And the Faruqi firm, in all of the many pleadings that it drafted and filed in the trial court in this case, signed those pleadings in the capacity as counsel for plaintiff. For the Faruqi law firm to hold itself out as counsel for plaintiff to the trial court and the whole world in the publicly filed pleadings in this case but then to assert on appeal

that it did not have an attorney–client relationship with plaintiff Lori Gray strains credulity, which may be why the Superior Court did not accept that argument as a ground for affirmance.

The Faruqi firm likewise missed the mark when it argued to the Superior Court that attorney Solfanelli has somehow waived his argument that the *Ruby* and *Meyer, Darragh* decisions are factually and legally distinguishable because those cases involved law firms with agreements expressly determining what share of the fees they would receive following termination from a case, whereas in this case the email agreement failed to address what share of the fees, if any, the Faruqi firm was entitled to receive following its termination from this case.

The Faruqi firm's waiver argument is meritless, as the Superior Court itself recognized by refusing to accept it. Attorney Solfanelli has consistently argued throughout the course of this fee dispute that the Faruqi firm's recovery must be limited to quantum meruit. R.202a, 487a. And attorney Solfanelli has consistently opposed the Faruqi firm's attempts to recover the same 35 percent share of the fees that the Faruqi firm would have been entitled to recover had it remained

involved as counsel for plaintiff until the end of the litigation in the trial court. R.202a, 475a–98a. Unfortunately, the Faruqi firm did not cite to the *Ruby* or *Meyer, Darragh* opinions until the parties simultaneously filed their post–attorneys' fee hearing briefs on September 2, 2014. R.532a, 534a. At that point, attorney Solfanelli had no ability to file any additional briefs in the trial court discussing the inapplicability of the cases on which the Faruqi firm was relying, for the very first time, in the Faruqi firm's final trial court brief filed on the attorneys' fee issue. Surely a party cannot be expected to argue the inapplicability of caselaw on which an opposing party relies *before* the opposing party has ever disclosed its reliance on the cases. In ruling on this case, the Superior Court did not agree with Faruqi's argument that Solfanelli has somehow waived his argument that the *Ruby* and *Meyer, Darragh* decisions are factually and legally distinguishable. Rather, the Superior Court erroneously disagreed with that argument on the merits.

Under a quantum meruit approach, the Faruqi firm will be entitled to recover fair compensation for its time and effort devoted to this case. *See Mager* v. *Bultena*, 797 A.2d 948, 957 (Pa. Super. Ct. 2002). The trial judge did not attempt to undertake a quantum meruit

calculation of the Faruqi firm's fee entitlement because the trial judge had erroneously concluded that the Faruqi firm remained entitled to recover 35 percent of the total attorneys' fees as though it had continued to actively work as counsel for plaintiff until the end of the case despite having been discharged far earlier.

To be sure, the Faruqi firm deserves to be fairly compensated for all of its good work on this case through that law firm's termination in June 2013. But for the Faruqi firm to recover its full 35 percent original fee share entitlement on a fee whose large size was ultimately the result of the efforts of lawyers whose own recovery the improperly large Faruqi fee has unfairly limited does not produce a result that can be described as justice.

VI. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: February 3, 2016

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This petition for allowance of appeal complies with the type–volume limitations of Pa. R. App. P. 1115(f) because this petition contains 7,027 words, excluding the parts of the petition exempted by Pa. R. App. P. 1115(g).

This petition complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Century Schoolbook font.

Dated: February 3, 2016

/s/ *Howard J. Bashman*
Howard J. Bashman

Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Memorandum opinion of the Superior Court of Pennsylvania filed January 4, 2016 affirming the trial court's order...... Exhibit A

Trial court's memorandum opinion entered November 13, 2014.. Exhibit B

Trial court's order entered November 13, 2014 .... Exhibit C

EXHIBIT A

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LORI GRAY, DERIVATIVELY ON BEHALF OF FIRST NATIONAL COMMUNITY BANCORP, INC.

Appellee

v.

LOUIS A. DENAPLES AND FIRST NATIONAL COMMUNITY BANCORP, INC.

*****

FARUQI AND FARUQI

v.

JOSEPH R. SOLFANELLI

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2198 MDA 2014

Appeal from the Order Entered November 13, 2014
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 12 CV 3228

BEFORE: PANELLA, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.: **FILED JANUARY 04, 2016**

Joseph Solfanelli ("Solfanelli") appeals from the order entered in the Court of Common Pleas of Lackawanna County, which sustained the objection of Faruqi & Faruqi, LLP ("Faruqi") to the attorneys' fees portion of the settlement of this matter and awarded Faruqi 35% of the attorneys' fees

---

* Retired Senior Judge assigned to the Superior Court.

pursuant to an agreement between Solfanelli and Faruqi. After careful review, we affirm.

The trial court summarized the relevant facts and procedural history as follows:

> Dr. Gray (hereinafter referred to as "Gray") was approached by Solfanelli regarding the potential for filing [a shareholder derivative] suit. Gray signed a retention agreement with the firm of O'Malley and Langan on December 15, 2011,[1] authorizing them *inter alia*, to "employ and/or work with other attorneys or law firms to prosecute the Action."
>
> Although the testimony of the parties varies greatly concerning their understanding of the contributions each brought to the table, it is undisputed that the case initially proceeded with the combined efforts of Solfanelli (and/or O'Malley) and Faruqi. For various reasons, including both personal and professional differences as identified in the testimony presented before the Court, the relationship between Solfanelli and Faruqi deteriorated. Within the same timeframe, [Richard] Greenfield came back to the case as Plaintiff's counsel. Ultimately, Solfanelli "fired" Faruqi, on/around June 2013, telling Faruqi to take an "inactive role." On August 8, 2013, Solfanelli memorialized a new retention agreement with Gray, confirming Solfanelli's position as lead counsel with the authority to ". . . terminate existing counsel, [and] retain new counsel as deemed necessary . . . ." In addition, Gray formally terminated Faruqi's representation of her interests on January 19, 2014 via letter to [Michael] Hynes.
>
> Based upon his termination of Faruqi, Solfanelli pledged to compensate Faruqi upon his determination of what they "brought to the table" regardless of the fee agreement. The fee agreement at issue was memorialized in a July 27, 2012 email exchange between [Jacob] Goldberg (on behalf of Faruqi) and both O'Malley and Solfanelli individually concerning the attorneys' fees to be paid to Faruqi in this case. The email exchange provides as follows:
>
> > . . . you agree that Faruqi & Faruqi will receive 35% of the gross fees that the court awards in the FNCB cases,

> relating to all claims and causes of action . . . This agreement supersedes and supplants any other agreement between you and Faruqi & Faruqi, LLP and cannot be altered for any reason except by agreement in writing of the parties hereto . . .

> O'Malley replied with his individual assent to the email; Solfanelli replied individually and on behalf of O'Malley and Greenfield with his assent. Solfanelli does not dispute the validity of the email exchange as a (then) valid contract.
>
> > [1] The record reveals Solfanelli was "of counsel" at O'Malley and Langan on this case, and otherwise not affiliated with the firm.

Trial Court Opinion, 11/5/14, at 2-4 (citations omitted).

Solfanelli timely filed a notice of appeal and raises the following issue for review:

> Whether a law firm serving as co-counsel for plaintiff that is dismissed during the midst of a shareholder's derivative suit that is nowhere near a favorable resolution remains entitled to recover its contractually specified share of attorneys' fees from the total fee available to compensate all counsel at the conclusion of the suit or whether the dismissed law firm's recovery instead should be limited to the amount reasonably due for work actually performed under a quantum meruit theory?

Brief of Appellant, at 5.

The trial court's determination in this case is based on its interpretation of the written fee agreement memorialized in Goldberg's July 27, 2012 email. Accordingly, our standard and scope of review is as follows:

> Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation. Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary as the appellate court may review the entire record in making its decision. However, we are bound by the trial court's credibility determinations.

Ruby v. Abington Mem. Hosp., 50 A.3d 128, 132 (Pa. Super. 2012).

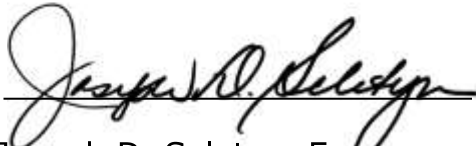
The relationship between the parties began when Solfanelli approached Faruqi to assist with Gray's derivative action. The parties initially agreed to split all fees evenly, but later agreed in writing that Faruqi's share would be decreased due to changed circumstances. This agreement clearly entitled Faruqi to 35% of the gross fees obtained from all claims and causes of action relating to the derivative suit. The agreement states that its terms could only be altered "by agreement in writing" of the parties. Solfanelli has submitted letters that he and his client Gray transmitted to Faruqi, during the period before this matter was settled, purporting to dismiss Faruqi from the case. The trial court found that none of these communications nullified the July 27, 2012 agreement between the parties, nor altered its terms in any way.

In Pennsylvania, it is well settled that the doctrine of quantum meruit does not apply when a written agreement exists between the parties. ***Lackner v. Glosser***, 892 A.2d 21, 34 (Pa. Super. 2006). This Court has previously held that quantum meruit does not apply to written agreements between attorneys regarding attorneys' fees in particular. ***Ruby***, ***supra*** at 136. Here, the July 27, 2012 email delineating that Faruqi was to receive 35% of all attorneys' fees resulting from the derivative suit represents a valid written agreement. Moreover, because the July 27, 2012 contract is one between attorneys and does not directly involve the client, it is inconsequential that Solfanelli attempted to "fire" Faruqi from the case. ***See***

Trial Court Opinion, 11/5/2014, at 5. Indeed, Pennsylvania law holds that the firing of an attorney or law firm will not invalidate a contract between attorneys for the division of fees in a case. ***See Ruby***, ***supra*** at 134. Thus, the agreement regarding attorneys' fees is valid and Faruqi is entitled to 35% of the fees awarded in this matter.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/4/2016

EXHIBIT B

LORI GRAY, derivatively on behalf of FIRST NATIONAL COMMUNITY BANCORP, INC. , Plaintiff	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
VS.	
LOUIS A. DENAPLES, et al., Defendants	CIVIL ACTION---LAW
And	
FIRST NATIONAL COMMUNITY BANCORP, INC., Nominal Defendant	12—CV—3228

MEMORANDUM AND ORDER

LEETE, S.J.

INTRODUCTION

Before the Court is the objection of Faruqi and Faruqi, LLP (hereinafter referred to as "Faruqi") to the Attorney fee portion of the Settlement/Motion for the enforcement of an Attorney fee contract and the creation of a constructive trust (hereinafter collectively referred to as "objection"). By way of background, a Shareholder Derivative Complaint was filed in May 2012 in the above-referenced underlying case, with the firms of O'Malley and Langan through Todd J. O'Malley, Esq. (hereinafter referred to as "O'Malley") and Joseph R. Solfanelli, Esq. (hereinafter referred to as "Solfanelli"), and Faruqi and Faruqi, LLP through Michael J. Hynes, Esq. (hereinafter referred to as "Hynes") and Jacob A. Goldberg, Esq. (hereinafter referred to as "Goldberg") listed as Counsel for Plaintiff. On August 5, 2013, Richard D. Greenfield,

Esq. (hereinafter referred to as "Greenfield") of the firm Greenfield and Goodman LLC also entered his appearance for Plaintiff.

Ultimately, the parties to the litigation were able to resolve their disputes through settlement. The Court, after notice and hearing of the proposed settlement, approved the terms contained within, and reserved judgment on the Attorneys' fee award. (*See,* 02/04/2014 Final Order and Judgment). On February 26, 2014, the Court filed its Order on Attorneys' Fees, approving the sum of $2.5 million in counsel fees and reimbursement of expenses to Plaintiff's various counsel. (*See,* 02/26/2014 Opinion and Order on Attorneys' Fees). As Faruqi had filed its objection regarding allocation of fees prior to the Court's approval of the proposed settlement, pointing to an agreement with O'Malley and Solfanelli for payment to Faruqi of 35% of any total award of attorneys fees, the 02/26/2014 Order directed that the attorneys fees be paid to Solfanelli as lead counsel, with the authority to allocate the fees among counsel, and the condition that the disputed 35% be placed in escrow pending resolution of Faruqi's objection. Unable to resolve the fee dispute between the parties, Faruqi filed a Praecipe for hearing on the matter. Testimony was heard before the Court on the issue on July 1, 2014, and, after submission of post-hearing briefs by the parties, the matter is ripe for resolution.

DISCUSSION

A review of the case history is warranted. Testimony revealed Plaintiff, Dr. Gray (hereinafter referred to as "Gray") was approached by Solfanelli regarding the potential for filing suit. (N.T. pp. 135-136). Gray signed a

retention agreement with the firm of O'Malley and Langan on December 15, 2011[1], authorizing them, *inter alia*, to "employ and/or work with other attorneys or law firms to prosecute the Action." (*See*, December 15, 2011 Retention Letter, Faruqi Exhibit 2; N.T. pp. 100-103; 113-114).

Although the testimony of the parties varies greatly concerning their understanding of the contributions each brought to the table, it is undisputed that the case initially proceeded with the combined efforts of Solfanelli (and/or O'Malley) and Faruqi. For various reasons, including both personal and professional differences as identified in the testimony presented before the Court, the relationship between Solfanelli and Faruqi deteriorated. Within the same timeframe, Greenfield came back into the case as Plaintiff's counsel. Ultimately, Solfanelli "fired" Faruqi, on/around June 2013, telling Faruqi to take an "inactive role". (N.T. pp. 39, 70; 148, 178-180, 184). On August 8, 2013, Solfanelli memorialized a new retention agreement with Gray, confirming Solfanelli's position as lead counsel with the authority to "...terminate existing counsel, retain new counsel as deemed necessary..." (*See*, August 8, 2013 letter, Exhibit C to Plaintiffs' Response to Faruqi's Objection). In addition, Gray formally terminated Faruqi's representation of her interests on January 19, 2014 via letter to Hynes. (*See*, January 19, 2014 letter, Exhibit E to Plaintiffs' Response to Faruqi's Objection).

Based upon his termination of Faruqi, Solfanelli pledged to compensate Faruqi upon his determination of what they "brought to the table" regardless of the fee agreement. (N.T. pp. 165-166). The fee agreement at

[1] The record reveals Solfanelli was "of counsel" at O'Malley and Langan on this case, and otherwise not affiliated with the firm.

issue was memorialized in a July 27, 2012 email exchange between Goldberg (on behalf of Faruqi) and both O'Malley and Solfanelli individually concerning the attorney's fees to be paid to Faruqi in this case. The email exchange provides as follows:

> …you agree that Faruqi & Faruqi will receive 35% of the gross fees that the court awards in the FNCB cases, relating to all claims and causes of action…. This agreement supersedes and supplants any other agreement between you and Faruqi & Faruqi, LLP and cannot be altered for any reason except by agreement in writing of the parties hereto. …

(See, Exhibit A to Hynes Declaration). O'Malley replied with his individual assent to the email; Solfanelli replied individually and on behalf of O'Malley and Greenfield with his assent. Solfanelli does not dispute the validity of the email exchange as a (then) valid contract. (*See,* N.T. p. 22).

Solfanelli submits the termination of Faruqi by Gray voided the contractual agreement that entitled Faruqi to a specific allocation of attorneys' fees. Further, Solfanelli submits Faruqi breached its fiduciary responsibilities and took multiple positions adverse to the interests of Gray, thereby essentially abandoning the case. As a result, Solfanelli submits Faruqi is not entitled to recover on the contract, and rather, is limited to recovery based on quantum meruit for work performed.

Conversely, Faruqi submits its termination by Gray has no effect on the contract between Solfanelli /O'Malley and Faruqi providing for allocation of attorneys fees, and the alleged "abandonment" by Faruqi in the case did not occur.

The effect of Gray's termination of Faruqi on the July 27, 2012 fee agreement contract

"The right of a client to terminate the attorney-client relationship is an implied term of every contract of employment of counsel, at least where the attorney has no vested interest in the case or its subject matter." A client may terminate their relationship with an attorney at any time, notwithstanding a contract for fees, but if doing so makes performance of the contract impossible, the attorney is not deprived of his right to recover on a quantum meruit a proper amount for the services rendered. Mager v. Bultena, 797 A.2d 948, 956 (Pa. Super. 2002); (Citations Omitted). However, quantum meruit is not appropriate where a written or express contract exists. Lackner v Glosser, 892 A.2d 21 (Pa. Super. 2006); (Citations Omitted).

Unlike the standard attorney-client fee contract, the July 27, 2012 contract is one between attorneys, and does not directly involve the client. Pennsylvania law holds that the firing of an attorney or law firm will not invalidate a contract between attorneys for the division of fees in the case. *See*, Ruby v. Abington Mem'l Hosp., 50 A.3d 128, 134 (Pa. Super. 2012), reargument denied (Aug. 1, 2012), appeal denied, 68 A.3d 909 (2013). The Ruby Court, dealing with an issue of a contractual fee dispute between law firms, [2] stated "[i]t is clear that a partner completing unfinished business cannot cut off the rights of the other partners in the dissolved partnership by the tactic of entering into a 'new' contract to complete such business." Id.

[2] In Ruby, the Court applied partnership principles due to the nature of the relationship between counsel, and recognizing the issue as one of first impression, looked to cases from California's appellate courts that were determined to be significantly similar in fact and legal analysis. (See, Ruby, *supra*, at 132).

Further, Ruby adds "[o]nce the client's fee is paid to an attorney, it is of no concern to the client how that fee is allocated among the attorney and his or her former partners." Id. At 136.

In addition to Ruby, the Superior Court in Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v . Law Firm of Malome Middleman, P.C., 95 A.3d 893 (Pa. Super. 2014), declining to apply quantum meruit, held that a fee agreement with an original law firm was binding on a subsequent firm after an attorney changed firms and the client followed. The Meyer court, relying heavily on the holding in Ruby, *supra*, recognized that any award of fees was subject to the terms of the existing agreement. Id.

Turning to the facts at hand, Solfanelli's contention that Gray's termination of Faruqi severed the contract for fees is flawed, as Gray never retained Faruqi nor did she enter into any agreement with Faruqi, for fees or otherwise. Gray, in both the initial and subsequent retainer agreements, gave Solfanelli (and/or O'Malley) the right to engage other counsel. It was Solfanelli, with O'Malley, who negotiated the contract with Faruqi for fees. Therefore, Gray's termination of the attorney-client relationship with Faruqi is of no effect and had no bearing on a contract for fees entered into between Solfanelli and Faruqi, to which she was not a party. Absent any breach of that contract, Faruqi is entitled to 35% of the fees, as provided for in the July 27, 2012 contract between Faruqi and Solfanelli.

Faruqi's alleged breach of the fee contract through abandonment of the case

To establish a breach of contract, a party must show: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." McCausland v. Wagner, 78 A.3d 1093, 1101 (Pa. Super. 2013);(Citation Omitted). Where the performance of a duty under a contract is due, any nonperformance is a breach. When a breach constitutes a material failure of performance, the non-breaching party is relieved from any obligation to perform; thus, a party who has materially breached a contract may not insist upon performance of the contract by the non-breaching party. Id.

Solfanelli initially submits Faruqi's position of seeking a stay of the litigation and refusal to post a bond in the case or otherwise contribute financially would have been the "death knell" of the litigation. While the principle may have merit, the facts of the case reveal Solfanelli is misguided. Although at one point in the litigation of the underlying case, Goldberg stated in an email that Faruqi should "not be expected to put another dime into the litigation", the statement has been taken out of context and misapplied by Solfanelli in furtherance of his position. (*See*, June 12, 2013 Goldberg email, N.T. Gray Exhibit 1). In fact, Goldberg testified as to the context of this statement, stating it only applied inasmuch as a motion to disqualify both O'Malley and Langan (including Solfanelli) and Faruqi was pending, and any further action on the case or financial contribution should be tabled pending the outcome of the motion. (N.T. pp. 70-71, 89-90; " '*we should not be expected to put another dime into the litigation until we know that Judge L will*

allow us to continue representing Lori. The longer we put that off, the better, especially if we are going to get Kavulich in a chair". , Gray Exhibit 1, *supra).*

In addition to Goldberg's affirmation that Faruqi would have posted its share of any bond required (N.T. pp. 37, 45-47), Nadeem Faruqi, Senior Partner at Faruqi and Faruqi, LLP, testified he would have approved and posted any bond required in the case. (N.T. pp. 206-207). In spite of Faruqi's willingness to financially support the litigation, the Court is aware of the terms of the December 15, 2011 retention agreement which places any financial responsibility solely on O'Malley and Langan in this case. Further, any assertion herein by Solfanelli is merely speculative, as the bond issue was never decided by the Court, and cannot be used as a basis for alleging Faruqi "abandoned" the litigation.

Further, the Court determines the actions alleged by Solfanelli to be an "abandonment" by Faruqi were, in fact, tactical decisions on how to handle and potentially settle the case, to which the Solfanelli and Faruqi disagreed. [3] Key among the tactical decisions, Solfanelli alleges Faruqi proposed settlement of the case for $3 million, a figure grossly under-valuing the case. Goldberg's testimony revealed not only was a settlement only discussed to assist Solfanelli with some personal and professional issues he was then facing, but more importantly, it was never followed up on, or proposed to Gray or Defendants, as it was merely an informal discussion between Solfanelli and Goldberg. (N.T. pp. 38-39, 72-73, 82-85). As a result, such actions

[3] In addition to tactical differences, the record reveals Goldberg's refusal to work with Greenfield at the onset of the case. (N.T. p. 25). In light of this, it appears this did in fact happen. (N.T. p.33). Solfanelli's allegations that the refusal was an additional indication of Faruqi's alleged abandonment was not substantiated by the record, and therefore, is not dispositive of the issue.

cannot meet the threshold of breaching fiduciary duties and ensuing abandonment which Solfanelli submits. Therefore, Solfanelli's assertion that the "irreconcilable differences" of the parties, as categorized by Gray, were an abandonment of the case and *de facto* breach of the retention agreement are disingenuous. A difference of opinion in how a case should proceed is not an abandonment of the case. The record reveals Faruqi remained committed to the case even in light of Solfanelli's directive it maintain an inactive role. In addition, the record reveals Solfanelli continued to communicate with and advise Faruqi of the status of the case, and even made requests of Faruqi to perform tasks on the case post-firing. (*See*, N.T. pp. 178-184; Faruqi Exhibits 9-13).

CONCLUSION

The Court has determined the terms of the July 27, 2012 fee contract have not been affected by the firing of Faruqi by Gray and/or Solfanelli. In addition, Solfanelli failed to allege any material to substantiate the alleged breach of the agreement or fiduciary duties owed to Gray to invalidate the fee contract.

Accordingly, pursuant to the terms of the agreement memorialized on July 27, 2012, Faruqi & Faruqi, LLP is entitled to 35% of the $2.5 million Attorneys' fees awarded in this case, which totals $875,000.00, plus all interest accrued in the interest-bearing escrow account holding such funds pending the resolution of this dispute.

An appropriate Order follows.

EXHIBIT C

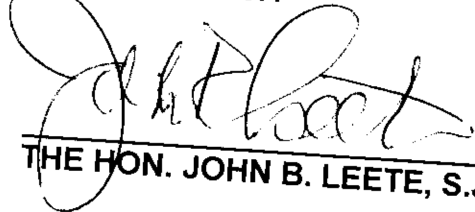
LORI GRAY, derivatively on behalf of FIRST NATIONAL COMMUNITY BANCORP, INC. , **Plaintiff** **VS.** **LOUIS A. DENAPLES, et al.,** **Defendants** **And** **FIRST NATIONAL COMMUNITY BANCORP, INC.,** **Nominal Defendant**	**IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY** **CIVIL ACTION---LAW** **12—CV—3228**

ORDER

AND NOW, this 5 day of Nov, 2014, upon consideration of Faruqi & Faruqi, LLP's Petition for Enforcement of an Attorney Fee Contract, Plaintiffs' Response, and hearing held before the Court, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED and DECREED Faruqi & Faruqi, LLP's Petition is GRANTED. Pursuant to the July 27, 2012 fee contract entered into between Todd J. O'Malley, Esq., Joseph R. Solfanelli, Esq., and Jacob A. Goldberg, Esq. on behalf of Faruqi & Faruqi, LLP, the sum of $875,000.00, plus all interest accrued, shall be paid to Faruqi and Faruqi, LLP representing their share of attorneys fees in the above-referenced case.

All sums due shall be transferred within 10 (TEN) days of the date of this Order.

BY THE COURT:



THE HON. JOHN B. LEETE, S.J.

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) by mailing time-stamped copies to:*

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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