

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO 1437 Bannock Street Room 256 Denver, CO 80202 303-606-2300	DATE FILED: May 17, 2022 12:13 PM FILING ID: CB813D24E8427 CASE NUMBER: 2022CV31376
<b>Plaintiffs:</b>  <b>The Estate of Elijah McClain and Sheneen McClain,          Individually and as Co-Personal Representative of the          Estate of Elijah McClain;</b>  v.  <b>Defendant:</b>  <b>Killmer, Lane &amp; Newman, LLP</b>	<b>▲ COURT USE ONLY ▲</b>
<b>Attorneys for Plaintiff:</b> Daniel A. Wartell, #34902 Ciancio, Ciancio & Brown, P.C. 1660 Lincoln Street, Suite 2000 Denver, Colorado 80264 Tel: 303-451-0300 Fax: 303-464-8000 E-Mail: <a href="mailto:dwartell@colo-law.com">dwartell@colo-law.com</a>	Case No.:  Div:            Ctrm:
<b>COMPLAINT</b>	

Plaintiffs the Estate of Elijah McClain (“**the Estate**”) and Elijah’s mother Sheneen McClain (collectively “**Plaintiffs**”), by and through their attorneys, Ciancio, Ciancio & Brown, P.C., allege the following for their Complaint against the Defendant law firm Killmer, Lane & Newman, LLP (“**KLN**”):

### **INTRODUCTION**

1. This case arises out of KLN’s recent demand for almost \$4 million in attorney fees against Elijah McClain’s single mother, Sheneen McClain, from the proceeds of a federal wrongful death action. The demand was made in this context:

- Shortly after Elijah McClain’s death, KLN met with Sheneen McClain to discuss legal representation. KLN insisted that it also represent Lawayne Mosley (Elijah’s absentee father who denied paternity and owed substantial back child support) and the Estate, of which Ms. McClain and Mr. Mosely were the sole beneficiaries. KLN did not obtain any written or signed conflict waiver from either client.

- KLN’s contingency fee agreement with Ms. McClain and Mr. Mosely provided that KLN forfeits its entitlement to attorney fees if it is terminated for wrongful conduct. KLN did not enter into a written fee agreement (contingency or otherwise) with the Estate.
- Early in the federal lawsuit, and well before settlement, Ms. McClain fired KLN because of its wrongful conduct. KLN continued to represent Mr. Mosely for the duration of the federal lawsuit and beyond.
- KLN attorneys repeatedly engaged in wrongful conduct including breach of fiduciary duty, negligence, and violations of the Colorado Rules of Professional Conduct by (without limitation) placing KLN’s desire for publicity and self-aggrandizement ahead of Ms. McClain’s interests and instructions, collecting a contingency fee from the Estate without a written and signed contingency fee agreement; providing erroneous legal advice to Ms. McClain while under a substantial conflict of interest; and, after Ms. McClain’s termination of KLN, surreptitiously advocating against her.

2. Pursuant to C.R.C.P. 57 and Colo. Rev. Stat. §§ 13-51-101, *et seq.* (the “Uniform Declaratory Judgments Law”), Plaintiffs ask this Court for declaratory relief in the form of a judgment that concludes:

- (a) Pursuant to the terms of KLN’s fee agreement and Colorado law, KLN forfeited any attorney fees it otherwise would have been entitled to from Ms. McClain because of her termination of KLN for its wrongful conduct;
- (b) Alternatively, KLN is not contractually entitled to the 40% contingency fee it has demanded from Ms. McClain because the contingency, *i.e.*, a judgment or settlement, did not occur during KLN’s representation;
- (c) Alternatively, under principles of *quantum meruit*, KLN is not entitled to any additional attorney fees from Sheneen McClain; and
- (d) KLN improperly collected a contingency fee from the Estate for an early settlement with an ambulance company (Falck) without having obtained a signed, written contingency fee agreement with the Estate and that, at most, KLN is entitled to *quantum meruit* fees for its representation of the Estate.

3. Plaintiffs expressly reserve the right to amend this Complaint as additional information becomes available and depending on any claims or defenses asserted by KLN.

## **PARTIES, JURISDICTION AND VENUE**

4. Plaintiff the Estate of Elijah McClain was established in *In re Elijah McClain*, No. 2019PR30783 (Adams Cnty.) (the “**Probate Action**”). Ms. McClain is a Co-Personal Representative for the Estate.

5. Plaintiff Sheneen McClain, Elijah’s biological mother, is a Denver County resident. Ms. McClain, together with the Estate and Mr. Mosley, were plaintiffs in an underlying federal action concerning the wrongful death of Elijah McClain, *Estate of Elijah Javon McClain v. City of Aurora, Colorado*, No. 1:20-cv-2389-DDD-NRN, District of Colorado (the “**Federal Action**”). All filings from the Federal Action are incorporated by reference herein. Ms. McClain brings this action individually to address KLN’s formal demand for payment of fees and costs and as Co-Personal Representative for the Estate to address KLN’s improper collection of a contingency fee related to an early settlement with the ambulance company (Falck) that employed the paramedics involved in Elijah’s death.

6. Defendant Killmer, Lane & Newman, LLP (“**KLN**”) is a Colorado limited liability partnership conducting business as a law firm. Its principal place of business is 1543 Champa Street, Suite 400, Denver, Colorado. At all times relevant to this action, KLN, through its principals, attorneys and employees, each of whom was acting within the course and scope of their partnership, employment and agency, provided legal representation of and legal services to the Estate, Ms. McClain and/or Mr. Mosley.

7. This Court has personal and subject matter jurisdiction over the Defendant and this dispute. Venue is proper in this court pursuant to C.R.C.P. 98(c) because KLN’s principal place of business is in the City and County of Denver (“Denver”), the fee agreement at issue was executed and to be performed primarily in Denver, and most of the acts, errors or omissions complained of occurred in Denver.

## **GENERAL ALLEGATIONS**

8. On August 24, 2019, Aurora police officers and paramedics murdered 23-year-old Elijah McClain. Some of these officers and paramedics were subsequently charged with crimes related to his death.

9. From Elijah’s birth until his murder, Ms. McClain was his sole parent and provider. During Elijah’s life, Mr. Mosley had contested his paternity and, after paternity was established, was a permanently absent father who owed substantial back child support. He was a father in name only. Ms. McClain bore all the burdens of a single parent.

10. After Elijah’s death, KLN advised Ms. McClain that a probate court would need to create an estate for Elijah, both Ms. McClain and Mr. Mosley should be appointed as the estate’s personal representatives, both would share equally in the estate’s recovery of any damages, and KLN was required to represent not only Ms. McClain but also Mr. Mosley. At the time she gave this advice, Ms. Newman knew of the facts in the previous paragraph and knew Ms. McClain

objected to Mr. Mosley's sudden participation in the wake of Elijah's death when he was AWOL during Elijah's life.

11. On about September 3, 2019, KLN prepared a "Fee Agreement" that was presented to, and signed by, both Ms. McClain and Mr. Mosley. Mari Newman signed the Fee Agreement for KLN. The Fee Agreement is incorporated by reference herein.

12. After KLN commenced the Probate Action, the probate court appointed Ms. McClain and Mr. Mosley as the Estate's Co-Personal Representatives. All filings from the Probate Action are incorporated by reference herein.

***KLN Improperly Collects Contingency Fee from the Estate***

13. KLN never entered into a contingency or any other fee agreement with the Estate.

14. On about July 27, 2020, KLN, representing the Estate, procured a \$350,000 settlement between the Estate and the ambulance company, Falck Rocky Mountain.

15. Although it had no contingency or other fee agreement with the Estate, KLN charged the Estate a 40% contingency fee. As a result, KLN received substantially and disproportionately more remuneration for its legal services than it would have received had its fees been calculated on an hourly basis.

16. KLN's conduct was impermissible. Under Colorado law, no contingent fee is permissible unless the lawyer and client have entered into a written contingent fee agreement, no contingent fee agreement is enforceable unless the lawyer has substantially complied with the rule, and without a contingent fee agreement the lawyer is not otherwise entitled to compensation from the client.

17. The August 10, 2020, Disbursement Schedule prepared by KLN, and incorporated by reference herein, states that 60% of the \$350,000 Falck settlement (exclusive of costs and liens) was paid to the "Estate of Elijah McClain" and 40%--or \$140,000—was paid to KLN "Based on Fee Agreement." However, there is no fee agreement with the Estate and KLN was, ***at the very most***, only permitted to charge the Estate a reasonable fee under *quantum meruit*.

18. Prior to commencing this action, Sheneen McClain specifically requested that KLN provide any documentation or other evidence that would allow her to assess the reasonableness of KLN's fees and the amount that should have been paid by the Estate under *quantum meruit*. KLN did not provide Ms. McClain with any responsive information or support for their attorney fees.

### ***Sheneen McClain Terminates KLN for Wrongful Conduct***

19. KLN filed the Federal Action on August 11, 2020.
20. As the Federal Action progressed, Ms. McClain became increasingly concerned with KLN's representation.
21. From the inception of KLN's joint and simultaneous representation of the Estate, Ms. McClain, and Mr. Mosley, KLN faced obvious conflicts of interest.
22. One conflict of interest resulted from Colorado's Wrongful Death Act, which provides that the parents of a child whose estate is seeking a wrongful-death recovery are not necessarily treated equally. An absentee parent who had little or no relationship and who provided minimal financial support for the deceased child is not entitled to recover the same amount as the parent who had the most significant relationship with the child and who provided the predominant financial support for him. Nor, in such circumstances, are both parents equally entitled to serve as personal representatives of their child's estate.
23. Colorado's ethics rules required KLN explain these and any other conflicts of interest to their clients and, if the conflicts are waivable, to obtain written, informed consent from the Estate, Ms. McClain, and Mr. Mosley. KLN violated these ethics rules. It failed to explain these conflicts to the Estate, Ms. McClain, and Mr. Mosley and failed to obtain any written, informed consent from them.
24. KLN exacerbated its ethical violations by leading Ms. McClain to believe that she had no choice but to be joined in the litigation with Mr. Mosely; each parents' respective relationship with Elijah made no difference under the law; and each parent would receive 50% of the proceeds regardless of his or her relationship with or support of Elijah when he was alive. Ms. McClain relied on this advice to her detriment.
25. During KLN's representation, it became clear to Ms. McClain that KLN's attorneys were more concerned about promoting their own careers than in honoring their client's—Ms. McClain's—wishes, interests and directives. Despite Ms. McClain's directives, KLN's attorneys incessantly sought media attention for their own self-aggrandizement campaign and, in doing so, made inappropriate and unauthorized public comments that did not reflect the client's position. Ms. McClain pursued the Federal Action to obtain justice for Elijah; she did not bring the Federal Action as a platform for KLN attorneys to promote themselves.
26. In or around April 2021, Ms. McClain fired KLN and retained new counsel, Rathod Mohamedbhai, LLC, to represent her in the Federal Action.
27. At the time of KLN's termination, no depositions had taken place, no significant motions practice had occurred, and the Federal Case was in its preliminary stages.

***KLN Attempts to Harm Sheneen McClain’s Interests During Settlement of  
Federal Action While Still Representing Lawayne Mosley***

28. After its termination, KLN, while still representing Mr. Mosley, continued to operate under a conflict of interest and breached its fiduciary and ethical obligations to Ms. McClain by actively litigating against her and in support of Mr. Mosley.

29. KLN, through its partner and attorney Darold Killmer, went so far as to offer sworn testimony in the Federal Action through an affidavit in support of Mr. Mosley’s settlement position and in opposition to Ms. McClain’s settlement position regarding the language of the settlement agreement and the inclusion of certain language by KLN.

30. On other occasions, KLN attempted to conceal its ongoing legal campaign against Ms. McClain. Acknowledging the clear conflict of continuing to represent Mr. Mosley in proceedings adverse to a former client, KLN purported to renounce any representation of Mr. Mosley concerning the allocation of any settlement proceeds. *See, e.g., 2021.09.28 Communication from KLN Attorney* (“We have assiduously avoided putting KLN in a conflicted position by ensuring that the Plaintiffs had separate counsel to advise and represent them regarding any issues pertaining to the division of settlement funds. . . . [W]e continue to maintain that KLN not be involved in the discussion of the division of the settlement funds as between the Plaintiffs.”). Indeed, KLN had offered these assurances to Ms. McClain before. *See, e.g., 2021.09.06 Communication from KLN Attorney* (“but I confirm that neither I, nor anyone else at KLN, have or are negotiating regarding the allocation of settlement funds as between the parties”).

31. Nevertheless, KLN began taking legal positions adverse to—and actively litigating against—Ms. McClain. On July 23, 2021, as the plaintiffs in the Federal Action discussed a tentative settlement with defendants, KLN inexplicably took the position that the settlement proceeds should be “payable to the *estate* of Elijah McClain.” *See 2021.07.23 Communication from KLN Attorney* (emphasis added).

32. KLN’s demand that Defendants pay the proceeds to the Estate was an intentional and premeditated effort to bypass the apportionment proceedings permitted under Colorado’s Wrongful Death Act—proceedings in which KLN feared that Ms. McClain, the sole custodian and provider for Elijah throughout his life, would receive more funds than Mr. Mosley. In other words, before the Parties had even signed the settlement agreement, KLN was taking a legal position designed to reduce the amount of settlement proceeds that Ms. McClain could recover.

33. Despite KLN’s continued assurances that it was not involved in the allocation dispute, Mr. Mosely’s new attorneys from the law firm of Dill & Dill took positions in the Federal Action at the direction of KLN and consistent with KLN’s strategy to harm Ms. McClain. *See, e.g., November 15, 2021, Mosley Brief filed by Dill & Dill* (“...payment must be made *solely* to Elijah’s Estate.”)

34. After numerous hearings and settlement conferences, KLN's attempt to undermine Ms. McClain's interests through the settlement agreement failed, although KLN's efforts delayed the case and caused Ms. McClain to incur substantial attorney fees. On or about September 1, 2021, the plaintiffs and the defendants in the Federal Action executed a settlement agreement that did not include the language championed by KLN and, instead, expressly permitted Ms. McClain to seek judicial apportionment of the settlement proceeds pursuant to the Wrongful Death Act

***KLN Surreptitiously Litigates Against Ms. McClain During Apportionment Proceedings  
Between Ms. McClain and Mr. Mosely***

35. After finalizing the settlement agreement in the Federal Action, KLN continued to provide assurances to opposing counsel and the federal court that it would not be involved in any controversy between Ms. McClain and Mr. Mosely for the obvious reason that KLN's former client (Mr. Mosely) and current client (Ms. McClain) were pitted directly against one another.

36. An exhibit attached to one of Mr. Mosely's filings in the Federal Action demonstrated with startling clarity that, despite its assurances and representations, KLN was continuing to surreptitiously advocate against Ms. McClain. In one of Mr. Mosely's filings, Dill and Dill represented to the federal court that its "Exhibit 5" was an email sent to Ms. McClain's attorneys. In reality—as shown by the recipients to the email and its subject line—Exhibit 5 was a ***proposed*** email to Ms. McClain's attorneys, a draft of which was being sent to KLN for their review and comment ***prior to*** sending. The purpose of this email was to solicit KLN's comments and obtain KLN's approval to send a response designed to harm Ms. McClain's interests.

37. On information and belief, Exhibit 5 was not the only time that Dill and Dill worked together with KLN regarding the allocation dispute. Instead, the tone and substance of Exhibit 5—along with KLN's history of seeking to maximize Mr. Mosely's apportionment of the settlement proceeds—suggests an ongoing process whereby KLN was actively litigating in the shadows against its former client while outwardly assuring Ms. McClain and the federal court that KLN was not involved in the dispute. Ms. McClain never consented to KLN's representation of Mr. Mosely in the allocation dispute.

38. Despite KLN's ongoing interference, on March 10, 2022, Ms. McClain and Mr. Mosely reached a settlement in the apportionment proceedings in the Federal Action.

***Within 24 Hours of the McClain/Mosely Apportionment Settlement,  
KLN Demands that Ms. McClain pay KLN \$3.9 Million in Attorney Fees***

39. On March 11, 2022, Mr. Killmer sent a formal letter to Ms. McClain's counsel demanding that she pay KLN \$3,900,000 in attorney fees (the "Demand Letter").

40. KLN's Demand Letter also purported to charge Ms. McClain over \$50,000 for all remaining costs that KLN had advanced in the Federal Action. KLN made no attempt to apportion

these costs between Ms. McClain and Mr. Mosley (their own client), inexplicably choosing to instead allocate all costs to Ms. McClain.

41. In the Demand Letter, KLN stated that Ms. McClain was “contractually bound to pay [KLN] 40% of all monies received, or \$3,900,000.” In fact, KLN’s fee agreement provides for an entirely different result.

42. Paragraph 13 of the KLN Fee Agreement provides:

Clients are not to be liable to pay compensation otherwise than from amounts collected for clients by law firm, except *in the event clients terminate this Agreement without wrongful conduct by law firm which would cause law firm to forfeit any fee*, or if law firm has a justifiable reason for withdraw from the representation of clients, law firm may ask the court or other tribunal to order clients to pay law firm a fee based upon the reasonable value of the services provided by law firm. *If law firm and clients cannot agree how law firm is to be compensated in this circumstance*, law firm will request the court or other tribunal to determine: 1) *if clients have been unfairly or unjustly enriched if clients do not pay a fee to law firm*; and 2) *the amount of the fee owed, taking into account the nature and complexity of clients' case, the time and skill devoted to clients' case by law firm, and the benefit obtained for client as a result of law firm's efforts*. Any such fee shall be payable only out of the gross recovery obtained for or on behalf of clients and the amount of such fee shall not be greater than the fee that would have been earned by law firm if the contingency described in this Agreement had occurred.

(Emphasis supplied.)

43. By the terms of KLN’s *own Fee Agreement*, withdrawal or termination *without cause* requires a determination that (1) Sheneen McClain will be unjustly enriched by not paying KLN a fee and (2) if so, a reasonable fee based on the factors stated in Paragraph 13. By necessary implication, when the termination is *for cause*—as is the case here—the law firm forfeits any fee. Nowhere does the Fee Agreement support KLN’s position that a former client who has terminated KLN for cause and well before settlement is nevertheless obligated to pay a contingency fee.

44. Colorado law does not support KLN’s position either. “*Quantum meruit* literally means ‘as much as [is] deserved.’” *Dudding v. Norton Frickey & Assoc.*, 11 P.3d 441, 444 (Colo. 2000) (quoting *Black’s Law Dictionary* 1255). An attorney’s claim to *quantum meruit* recovery may be mitigated or reduced in several ways: (1) demonstrating termination for cause or voluntary withdrawal by the attorney; (2) if the retainer agreement does not speak to the possibility of quantum meruit recovery; (3) the attorney caused substantial harm to the client; or (4) the work on the case was unnecessary or superfluous. Here KLN was terminated for cause and KLN caused substantial harm to Ms. McClain.

45. An attorney terminated *without cause* has the right to payment based on *quantum meruit*. ABA Comm'n on Prof'l Ethics, Formal Op. 487 at 6 (2019). However, if the client asserts that the prior attorney was terminated *for cause*, the attorney may not have any right to proceeds from the recovery. *Id.*; *People v. Gilbert*, 348 P.3d 970, 982 (2013) (“forfeiture has been deemed appropriate in cases where a lawyer represented a client despite a conflict of interest”).

46. Colorado precedent places an emphasis on limiting recovery where an attorney is discharged with cause. In such cases, attorney misconduct may forfeit the right to earn a fee. Additionally, the client may bar recovery if she can demonstrate “actual or substantial prejudice to [the client’s] interests occurred.” *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989).

47. KLN was terminated for cause and/or forfeited its right to collect a fee through the following, without limitation:

- KLN repeatedly failed to listen to or follow Ms. McClain’s instructions regarding public statements and appearances concerning Elijah’s death. KLN repeatedly placed its own self-aggrandizement ahead of its client’s interests and directives. When Ms. McClain refused to participate in KLN’s campaign for media attention, KLN subverted her wishes by using Mr. Mosley as an improper surrogate to represent “the family” of Elijah.
- KLN failed to advise Ms. McClain of known and obvious conflicts of interest in representing two plaintiffs with disparate legal rights and interests. This failure was compounded by KLN’s failure to obtain a written and signed consent and conflict waiver (assuming such a conflict was waivable), as required by the Colo. R. Prof. Conduct 1.7(b)(4).
- KLN erroneously advised Ms. McClain that KLN was required to represent jointly and simultaneously both her and Mr. Mosley in the probate and wrongful-death proceedings.
- KLN erroneously advised Ms. McClain that both she and Mr. Mosley were required to serve as co-personal representatives of the Estate.
- KLN purported to represent the Estate without advising Ms. McClain that she could and should engage her own probate counsel.
- KLN improperly collected a contingency fee from the Estate in the absence of a written and signed contingency fee agreement.
- KLN erroneously advised Ms. McClain that any settlement proceeds from the wrongful-death action must be shared evenly with Mr. Mosley under Colorado law.

- KLN distributed the settlement proceeds from the Falck settlement to the Estate without explaining to Ms. McClain the applicability and operation of the Wrongful Death statute.
- KLN distributed the Falck settlement proceeds to Mr. Mosley without requiring him to remit unpaid child support owed to Ms. McClain or advising Ms. McClain of her right to assert a lien on his portion of the settlement proceeds.
- KLN failed to withdraw from representing Mr. Mosley after Ms. McClain's termination and instead actively and surreptitiously advocated for Mr. Mosley in direct opposition to its former client Ms. McClain and her legal interests.

48. The Demand Letter also attached an April 2, 2021, email between KLN and Rathod Mohamedbhai regarding a purported fee split between the firms. Sheneen McClain is not a party to this Agreement, and it has no bearing on her contractual obligations *vis a vis* KLN.

49. Ms. McClain, through her counsel, requested that KLN produce any documents or other information—such as a contemporaneous records of the time KLN attorneys and staff spent in relation to its representation of Ms. McClain—that would allow her and, if necessary, a court to undertake a meaningful evaluation of any fees that may be owed under *quantum meruit*. KLN has produced nothing in response to this request.

### **FIRST CLAIM FOR RELIEF (Declaratory Judgment)**

50. Plaintiffs incorporate paragraphs 1-49 of this Complaint as if fully set forth herein.

51. Pursuant to C.R.C.P. 57 and Colo. Rev. Stat. §§ 13-51-101, *et seq.*, Plaintiffs request that this Court enter declaratory judgment in favor of Plaintiffs and against KLN as follows:

(a) KLN is not contractually entitled to the 40% contingency fee it has demanded from Sheneen McClain pursuant to the terms of its own Fee Agreement and because the contingency (judgment or settlement) did not occur during KLN's representation;

(b) Pursuant to the terms of KLN's fee agreement and Colorado law, KLN's termination for wrongful conduct resulted in a forfeiture of any attorney fees it would otherwise have been entitled to from Sheneen McClain;

(c) Under principles of *quantum meruit*, KLN is not entitled to any additional attorney fees from Sheneen McClain;

(d) KLN improperly collected a contingency fee from the Estate of Elijah McClain without first procuring a signed, written contingency fee agreement from the Estate as required by law. At the very most, KLN is entitled to *quantum meruit* fees for its representation of the Estate, the evidence of which has never been provided; and

(e) Any further relief the Court deems just and proper to effectuate Plaintiffs' claim for declaratory judgment including an award of attorney fees and costs of suit as authorized by law.

Respectfully submitted, this 16th day of May, 2022.

**CIANCIO, CIANCIO, BROWN, P.C.**

*Original signature is on file at Ciancio, Ciancio, Brown, P.C.,  
pursuant to C.R.C.P. 121 § 1-26*

By: /s/ **Daniel A. Wartell**

Daniel A. Wartell, #34902

*Attorneys for Plaintiffs*

**Plaintiffs' address:**

c/o Ciancio Ciancio Brown, P.C.  
1660 Lincoln Street, Suite 2000  
Denver, Colorado 80264