IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LINDA SCHMIDT, Individually, and as the Special Administrator of the Estate of DAVID SCHMIDT, deceased,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I.,

Defendant,

v.

BULL ATTORNEYS, P.A. f/k/a Brad Pistotnik Law, P.A.,

Intervenor Plaintiff.

Case No. 21-1036-DDC

MEMORANDUM AND ORDER

Plaintiff Linda Schmidt has moved to dismiss (Doc. 70) the Verified Complaint in Intervention (Doc. 60) filed by Intervenor Bull Attorneys, P.A. (formerly known as Brad Pistotnik Law, P.A.). Her motion advances two principal arguments. *One*, she claims the Intervention Complaint asks the court to exercise its "ancillary jurisdiction over the attorney fees in this case." Doc. 70 at 1. The court shouldn't do so, she contends. *Two*, a malpractice action that plaintiff filed in Kansas state court "is inherently related to the issue of attorney fees allegedly owed to [Bull Attorneys] in this action." *Id*. This second argument references a legal malpractice action that plaintiff filed against Intervenor Bull Attorneys and its principal, Brad Pistotnik, in the District Court of Reno County, Kansas. *See* Doc. 70 at 21–25. In abridged fashion, plaintiff claims in the legal malpractice case that Bull Attorneys acted "negligent[ly] in

representing Plaintiffs and breached their fiduciary duty[.]" Doc. 70 at 24–25. Plaintiff contends that litigating the issues in the state court will prove more efficient and avoid the potential for inconsistent results in the two cases. Doc. 70 at 9.

The court finds both arguments unpersuasive. Her first—the court shouldn't invoke ancillary judgment—fundamentally misapprehends ancillary jurisdiction. Plaintiff's second argument—that her state court lawsuit "is inherently related to" this case and offers a more efficient means to resolve the attorneys' fees dispute—is of no consequence. Below in Part A, the court explains why ancillary judgment doesn't play any role here. Part B then addresses plaintiff's "inherently related to" argument.

Analysis

A. The remaining issue presented in case does not involve ancillary jurisdiction.

1. Ancillary Jurisdiction, Generally

For starters, it's important to understand what is and what isn't—ancillary jurisdiction. The widely respected *Federal Practice and Procedure* treatise has explained it this way:

> This section addresses an area of jurisdictional law in which terminology has evolved and [for] which there is needless confusion. Today, the terms "ancillary," "pendent," and "supplemental" are all used, essentially interchangeably. This form of jurisdiction—whatever term is used—is to be contrasted with what may be called "independent" bases of subject matter jurisdiction. In this context, "independent" refers to a form of federal subject matter jurisdiction by which a plaintiff may properly get a *case itself* into federal court. The two most familiar examples of independent bases of subject matter jurisdiction are federal question and diversity of citizenship.
>
> ***
>
> But sometimes federal courts are permitted to entertain a *claim* or an *incidental proceeding* (not a *case* itself) that does *not* satisfy requirements of an independent basis of subject matter jurisdiction. Accordingly, by whatever name—ancillary, pendent or

> supplemental—this form of jurisdiction cannot bring a case into federal court. There must be a case that invokes an independent basis of federal subject matter jurisdiction, such as federal question or diversity of citizenship jurisdiction. Once that civil action is properly in federal court (whether by plaintiff's initial filing or by removal), the court may hear additional *claims* and even *related proceedings* that by themselves do not invoke an independent basis of subject matter jurisdiction. Doing so can be justified only if that additional claim or related proceeding is so closely related to a case properly in federal court as to justify the conclusion that they are all part of a single case or controversy.

13 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3523 (3d ed. 2008). Ancillary jurisdiction is the more obscure version of the three kinds of supplemental jurisdiction. As Professor Wright's treatise puts it:

> Less commonly, courts exercise jurisdiction over incidental or related *proceedings* that are closely related to a case that invoked an independent basis of federal subject matter jurisdiction. That form of supplemental jurisdiction is still generally treated as a matter of case law, and is still usually called "ancillary."

Id. *See also id*. at § 3523.2 ("It seems clear that § 1367 does not apply to this form of jurisdiction. Accordingly, this form retains the appellation 'ancillary' and is governed by case law." (citing *Garcia v. Teitler*, 443 F.3d 202, 207 (2d Cir. 2006))).

Our Circuit has embraced these principles. In 1982, Judge Logan explained:

> Ancillary jurisdiction rests on the premise that a federal court acquires jurisdiction of a case or controversy in its entirety. Incident to the disposition of the principal issues before it, a court may decide collateral matters necessary to render complete justice.
>
> ***
>
> Determining the legal fees a party to a lawsuit properly before the court owes its attorney, *with respect to the work done in the suit being litigated*, easily fits the concept of ancillary jurisdiction. The federal courts often exercise jurisdiction over attorneys' fees in the cases before them, and if counsel withdraws or is discharged during the litigation, the courts have often ordered the clients to

> pay reasonable attorneys' fees or post a bond as security before requiring the lawyer to relinquish the clients' papers.

Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir. 1982) (emphasis added). *See also Aikens v. Deluxe Fin. Servs., Inc.*, No. 01-2427-CM-DJW, 2006 WL 2714513, *2 (D. Kan. Sept. 22, 2006) (explaining "most common" use of ancillary jurisdiction is "to resolve disputes between a party to the lawsuit and that party's attorneys" over "fees due" for "work performed in the lawsuit").

2. The Unresolved Dispute Here

Plaintiff Linda Schmidt commenced this action in early 2021. Among others, she asserted a clam under Kansas's Wrongful Death Act, Kan. Stat. Ann. §§ 60-1901–60-1906. Doc. 1 at 9. Alleging complete diversity of citizenship, she asserts that 28 U.S.C. § 1332(a) conferred subject matter jurisdiction on our court. *Id*. at 1–2.

Earlier this year, counsel for plaintiff and defendant American Family Mutual Insurance Company informally advised the court that they had resolved all their disputes with one another. So, they asked the court to schedule the apportionment hearing mandated by the Kansas Wrongful Death Act. *See* Kan. Stat. Ann. § 60-1905. The court complied and on May 12, 2022, conducted part of the hearing required by § 60-1905. *See* Docs. 61, 62.

During the run up to that hearing, the court learned of a fee dispute between plaintiff's former counsel (Bull Attorneys) and her current counsel (Bretz Injury Law). The court conferred with counsel and the parties generally agreed to bifurcate the issues assigned the court by § 60-1905. Specifically, the competing factions of plaintiff's counsel agreed that their fee dispute "doesn't affect plaintiff's net recovery" and so, the court deferred the fee dispute for later proceedings. Doc. 62 at 6. On May 16, 2022, the court issued its Memorandum and Order apportioning all of the recovery—exclusive of "costs and reasonable attorneys fees"—to plaintiff Linda Schmidt. *Id*. at 7.

Understanding the scope of the court's work in a wrongful death settlement informs an understanding of the current dispute. The controlling Kansas statute—§ 60-1905—precisely defines the scope of the court's work. It provides: "The net amount recovered in any [wrongful death] action, after the allowance by the judge of costs and reasonable attorneys fees to the attorneys for the plaintiffs, in accordance with the services performed by each if there be more than one, shall be apportioned by the judge upon a hearing, with reasonable notice to all of the known heirs . . . ." *Id*. In a sense, the Wrongful Death Act presaged the situation presented here because it envisioned the possibility that more than one attorney might represent the settling plaintiff. And, the Kansas statute adopted a mechanism for courts to use to apportion the fees between multiple groups of attorneys, *i.e.*, "in accordance with the services performed by each[.]" *Id.*

3. The fee dispute here doesn't require the court to invoke its ancillary jurisdiction.

As recited at the outset, a federal court exercises ancillary jurisdiction when it decides "incidental or related *proceedings*" that are "closely related to a case" which properly has invoked the court's subject matter jurisdiction. *See* Wright, *et al.*, *supra*, at § 3523. But here, it's an understatement to say that the dispute over attorneys' fees is "incidental" or "closely related" to plaintiff's wrongful death claim. Instead, the fee is part of the claim itself. The text of the Kansas statute establishes as much.

Specifically, it directs the court where the case is pending—whether a state court or a federal court applying its diversity jurisdiction—to "allow[ ]" both "costs and reasonable attorneys fees[.]" § 60-1905. And more particularly, when more than one attorney (or one firm) has represented the settling plaintiff, the controlling statute calls on the court, after a hearing, to "apportion[ ]" those costs and fees "in accordance with the services performed by each . . . ."

The Kansas appellate courts have confirmed this interpretation of the court's judicial responsibilities.

In *Baugh v. Baugh ex rel. Smith*,[1] the Kansas Court of Appeals decided whether a Kansas trial court had erred by refusing to award fees to plaintiff's counsel—the Pistotnik law firm. 973 P.2d at 206. The *Baugh* trial court had declined to award fees because, in the trial court's judgment, the Pistotnik firm suffered from a conflict of interest "ab initio" and so, "it was contrary to the best interests of [the minor] to deplete this recovery by awarding fees." *Id*. The court of appeals reversed and, in doing so, it explained the essential responsibilities of a court reviewing a putative settlement under § 60-1905 of the Kansas Wrongful Death Act. "The statute clearly contemplates that fees for plaintiffs' counsel will be awarded out of the recovery obtained." *Id*. at 207. Also, the appellate court emphasized, this statutory provision "requires the district court to determine a reasonable fee for the plaintiffs' attorneys in a wrongful death case." *Id*.

Given the content of the controlling statute and the guidance provided by *Baugh*, the court concludes that the claim asserted by the Complaint in Intervention isn't "incidental," "related," or even "closely related" to this wrongful death action. Instead, the fee claim is part and parcel of the wrongful death claim itself. Given this conclusion, plaintiff has misaimed her arguments against invoking ancillary jurisdiction.

One final thought: Even if plaintiff could convince the court that the Complaint in Intervention seeks to invoke the court's ancillary jurisdiction, the court still would deny plaintiff's motion to dismiss. As the court noted at the onset of this Order, our Circuit has identified attorneys' fees issues as a proper use of ancillary jurisdiction. "Determining the legal fees a party to a lawsuit properly before the court owes its attorney, with respect to the work

[1] 973 P.2d 202 (Kan. Ct. App. 1999).

done in the suit being litigated, easily fits the concept of ancillary jurisdiction." *Jenkins*, 670 F.2d at 918. Intervenor's claim here asks the court to decide a fee claim just like the one envisioned by *Jenkins*. *See* Doc. 60 at 5 (asserting claim of entitlement to recover costs and an award of attorneys' fees). In short, binding Circuit authority approves use of ancillary jurisdiction in this circumstance.

B. Plaintiff's malpractice action in state court provides no reason to dismiss the Complaint in Intervention.

Plaintiff's second argument asserts that plaintiff's malpractice action in state court "is inherently related to the issue of any attorney fees" allegedly owed to the Intervenor. Doc. 70 at 1. This argument continues, reasoning that resolving "the fee issue in the state court action" is "the most efficient means of determining this controversy." *Id*. at 9. But if this proposition is so, it is not self-evidently so. And plaintiff does next to nothing to support her proposition. The best argument she can muster is to assert that "the amount of discovery necessary to fully thresh out the claims of owed attorneys fees brought by [Bull Attorneys], and that this discovery is the same which is necessary to Plaintiff's malpractice claims[.]" But even if all that is true, it's no reason to dismiss Intervenor's claim here in favor of the claim lodged by plaintiff in the forum that she (or her counsel) seems to prefer. It is, at best, a reason for the parties to confer about coordinating discovery in the two cases—a consideration that the court must leave to them.

Plaintiff supplements this argument with another vague assertion, *i.e.*, that allowing the Intervention Complaint to go forward alongside plaintiff's malpractice action in state court risks "inconsistent rulings." But plaintiff never explains how or why this risk might materialize, and the court easily can imagine reasons why it wouldn't. For instance, perhaps the court will decide that both of plaintiff's firms is entitled to an award of fees "in accordance with the services performed by each" based on their work in this federal case. Kan. Stat. Ann. § 60-1905. That

hypothetical outcome, at first blush, at least, wouldn't necessarily foreclose a claim that plaintiff would have recovered more money had counsel's representation complied with the standard of care. In any event, the court is confident that it and the Kansas state court can resolve plaintiff's concerns about potentially conflicting results once the parties develop the record more fully. For now, her vague and unsupported reasons provide no reason to dismiss Intervenor's Complaint.

Finally, the court isn't persuaded by plaintiff's citation to *Brettschneider v. City of New York*, No. 15-CV-4574-CBA-SJB, 2020 WL 5984340 (E.D.N.Y. Aug. 25, 2020). That decision resulted from materially different facts and followed an equally different procedural history. It does not inform the decision here.[2]

Conclusion

Because plaintiff provides no good reason to do so and for the reasons expressed in this Order, the court denies plaintiff's Motion to Dismiss.

THEREFORE, the court denies plaintiff's Motion to Dismiss the Complaint in Intervention filed by Bull Attorneys, P.A. f/k/a Brad Pistotnik Law, P.A. (Doc. 70).

IT IS SO ORDERED.

Dated this 3rd day of October, 2022, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

[2] While neither party cites it, the court is aware of the decision in *Munoz v. Ekl, Williams & Provenzale LLC*, No. 13 C 1454, 2013 WL 1611373 (N.D. Ill. Apr. 15, 2013). There, the court concluded it lacked ancillary jurisdiction to hear a fee dispute between two groups of attorneys who, earlier, had served as co-counsel for a recovering plaintiff in a separate federal suit. *Id*. at *1–2. But, unlike here, a new, separate, and later filed case presented the fee dispute. *Munoz* reasoned that "once judgment was entered in the original suit, the ability to resolve simultaneously factually intertwined issues vanished." *Id*. at *2 (quoting *Peacock v. Thomas*, 516 U.S. 349, 355 (1996)) (quotation cleaned up).