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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF WILLIE L. TAYLOR,)	Appeal from the
Deceased.)	Circuit Court of
)	Cook County.
(U.S. Bank, a corporation, as Administrator of the Estate of)	
Willie L. Taylor, Deceased,)	
Respondent-Appellee,)	
)	
General Casualty Company of Illinois, Open Kitchens, Inc., and)	
Law Offices of F. John Cushing III, P.C.,)	
Petitioners-Appellees,)	No. 03 P 6022
)	
v.)	
)	
Sandra Logan, as Mother and Best Friend on Behalf of: Essence)	
Destiny Taylor; Antwon Assante Taylor; Montrell Francisco)	
Taylor; Jurea Saquill Taylor; Jordan Lenon Taylor; Kia Rashiki)	
Logan; Carrie Chanelle Taylor; Sean Deangelo Logan; Duane)	
Willie Taylor; William Leon Taylor; Angel S. Logan; and)	Honorable
Dominique Sonya Logan,)	Mary Ellen Coghlan,
Respondents-Appellants).)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Individual heirs of decedent's estate had no standing to object to the payment of attorney's fees which were contractually agreed to by the estate's administrator and its attorney; decedent's employer and its insurer had a statutory right under the Workers' Compensation Act to assert a lien against the proceeds of a wrongful death

action filed by the administrator against third-party tortfeasors.

¶ 2 This appeal arises from a January 24, 2011 order entered by the circuit court of Cook County, which awarded petitioners-appellees General Casualty Company of Illinois (General Casualty) and Open Kitchens, Inc. (Open Kitchens) reimbursement for their workers' compensation lien in the amount of \$181,176.32; awarded attorney's fees in the amount of \$127,099.14 to petitioner-appellee the Law Offices of F. John Cushing III, P.C.; and denied the objections filed by respondents-appellants Sandra Logan (Sandra) and 12 heirs of the decedent, Willie Taylor, in connection with these awards. On appeal, Sandra and the 12 heirs argue that: (1) they had standing to object to the petitions for fee distributions made by General Casualty, Open Kitchens, and the Law Offices of F. John Cushing III, P.C.; (2) General Casualty and Open Kitchens were not entitled to a reimbursement of workers' compensations payments which were paid as a result of Willie's death; and (3) the Law Offices of F. John Cushing III, P.C. was not entitled to attorney's fees and the attorney's fees awarded by the circuit court were excessive. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 **BACKGROUND**

¶ 4 This case has a complex and lengthy procedural history and only the pertinent facts are recited here. On July 28, 2003, Willie Taylor (Willie) was killed during the course of his employment when he was crushed between a parked truck and a truck driven by another employee, Harold Lindsey (Harold). At the time of the accident, Willie was a temporary employee provided by Surestaff, Inc. (Surestaff), to Open Kitchens, and the truck driven by Harold was leased from

Carmichael Leasing Company, Inc. (Carmichael Leasing). Willie was unmarried, had 14 heirs,¹ and died intestate. Thereafter, workers' compensation payments were made by Surestaff to Willie's heir beneficiaries in the amount of \$241,568.43.²

¶ 5 On September 19, 2003, Sandra was appointed as an independent administrator of Willie's estate. As administrator of Willie's estate, Sandra filed a wrongful death action in 2003 against Harold and Carmichael Leasing. In October 2004, Sandra retained the law firm of Ambrose & Cushing, P.C. (Ambrose & Cushing) to represent Willie's estate in the wrongful death action. However, in April 2007, prior to trial for the wrongful death action, Sandra resigned as the administrator of Willie's estate and U.S. Bank was appointed as the independent administrator of Willie's estate in her place. Subsequently, U.S. Bank, as the new administrator of Willie's estate, substituted as the plaintiff in the wrongful death action.

¶ 6 On April 10, 2007, U.S. Bank, as administrator of Willie's estate, executed a new "contingent fee contract" to retain Ambrose & Cushing as counsel for U.S. Bank in the wrongful death action. In May 2007, following a jury trial in the Law Division of the circuit court of Cook County, a

¹Two of Willie's heirs—sons Diante Taylor and Willie Taylor—are not part of the instant case and have not objected to the fees paid to General Casualty, Open Kitchens and the Law Offices of F. John Cushing III, P.C. Sandra is not the biological mother of these two heirs.

²In a collateral lawsuit, Surestaff sued Open Kitchens for reimbursement of the workers' compensation which Surestaff had paid to Willie's heirs (the Surestaff lawsuit). Following a jury trial, Surestaff was awarded the full amount of reimbursement, plus costs and attorney fees. On appeal, this court affirmed the trial court's judgment. *Surestaff, Inc. v. Open Kitchens, Inc.*, 384 Ill. App. 3d 172, 892 N.E.2d 1137 (2008). Thereafter, General Casualty, as insurer for Open Kitchens, satisfied the judgment by reimbursing Surestaff the workers' compensation payments in the amount of \$241,568.43, plus interests, costs and attorney's fees.

judgment was entered against Harold and Carmichael Leasing, and in favor of U.S. Bank, as independent administrator of Willie's estate, in the amount of \$3 million. The \$3 million verdict was reduced by 50%—to \$1.5 million—for the contributory negligence of Willie.

¶ 7 In May 2007, after resolution of the wrongful death action in the Law Division, the law firm of Ambrose & Cushing dissolved. In a letter dated October 4, 2007, U.S. Bank fired Ambrose & Cushing as its counsel for the wrongful death action. Thereafter, U.S. Bank retained the Law Offices of F. John Cushing III, P.C., as counsel for Willie's estate in the wrongful death action. A "contingent fee contract" was executed between U.S. Bank and the Law Offices of F. John Cushing III, P.C. The contingent fee contract specified that U.S. Bank agreed to pay the Law Offices of F. John Cushing III, P.C. a sum equal to one-third of "any amounts which may be recovered from [the wrongful death action] by way of suit, settlement of any other manner through the trial of this case," and agreed to pay 40% percent of "any amounts which may be recovered if an appeal is taken by any party at any stage of this case." Subsequently, on October 12, 2007, F. John Cushing III (Cushing), owner of the Law Offices of F. John Cushing III, P.C., filed an appearance before the Probate Division of the circuit court of Cook County as counsel for U.S. Bank in its capacity as the administrator of Willie's estate.

¶ 8 On December 7, 2009, this court affirmed the judgment of the trial court in awarding U.S. Bank, as administrator of Willie's estate, \$3 million in the wrongful death action, which was reduced by \$1.5 million for Willie's contributory negligence. *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 920 N.E.2d 515 (2009). Thereafter, \$1.5 million plus interest was paid in satisfaction of the judgment in the wrongful death action.

¶ 9 On January 12, 2010, Sandra, through her attorney Philip Schmidt (Attorney Schmidt), filed her appearance in the matter pending in the Probate Division of the circuit court. In January 2010, Sandra filed a petition to remove U.S. Bank as independent administrator of Willie's estate, requesting that the probate court appoint her as the administrator of Willie's estate.

¶ 10 In a letter dated April 6, 2010, legal counsel for Surestaff notified Cushing that Surestaff did not intend to make any workers' compensation lien claims, pursuant to section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2010)), against the proceeds of the third-party wrongful death action because the workers' compensation payments made by Surestaff to Willie's heirs had already been reimbursed by Open Kitchens as a result of the judgment in the Surestaff lawsuit. The letter stated that Open Kitchens, however, "would be entitled to this lien recovery."

¶ 11 In an order dated May 12, 2010, the probate court stated that U.S. Bank "shall continue to act as [a]dministrator in supervised administration," rather than as an independent administrator.

¶ 12 On May 21, 2010, U.S. Bank filed a petition, styled as a "petition to adjudicate liens, determine attorney's fees, costs, expenses, and net distributable amount" (petition to adjudicate), requesting that the probate court approve U.S. Bank to pay attorney's fees owed for the litigation of the wrongful death action; approve a workers' compensation lien of \$181,176.32; reserve certain funds to be available to U.S. Bank for the administration of the estate and to defend other lawsuits filed against the estate; and to determine "the net amounts distributable to the next of kin, and set a briefing schedule to allow each heir the opportunity to hire an attorney, and/or appear *pro se*, to present evidence of their relative dependency upon Willie Taylor, deceased."

¶ 13 On July 21, 2010, the probate court appointed Steven Mihajlovic as guardian *ad litem* (GAL

Mihajlovic) for all of Willie's minor heirs. On August 18, 2010, Attorney Schmidt filed, on behalf of Sandra, as the "[m]other and [n]ext [f]riend of the minor next of kin," an objection to certain requests for fees raised in U.S. Bank's petition to adjudicate.

¶ 14 On September 14, 2010, General Casualty and Open Kitchens filed a response to Sandra's objection to U.S. Bank's petition to adjudicate, arguing that they were entitled to recover \$241,568.43 in workers' compensation reimbursements, less 25% for attorney's fees, which General Casualty had paid to Surestaff in satisfaction of the judgment in the Surestaff lawsuit.

¶ 15 On September 30, 2010, the probate court entered an order finding, *inter alia*, that the April 6, 2010 letter from the legal counsel for Surestaff did not constitute a "waiver" of Open Kitchens' right to assert a workers' compensation lien against the proceeds of the wrongful death action, and that Open Kitchens and its insurer, General Casualty, were entitled to assert such a lien should they so choose.

¶ 16 On October 12, 2010, General Casualty and Open Kitchens filed a "petition for distribution," arguing that the proceeds from the underlying wrongful death action must be subjected to the lien for workers' compensation benefits that they had already paid in satisfaction of the judgment in the Surestaff lawsuit, which amounted to \$181,176.32 (\$241,568.43 - 25% attorney's fees).

¶ 17 On November 8, 2010, Cushing filed a "petition to disburse," requesting that the court direct U.S. Bank to disburse \$127,099.14 in attorney's fees for Cushing's successful legal representation of U.S. Bank on appeal before this court in the wrongful death action. See *U.S. Bank*, 397 Ill. App. 3d 437, 920 N.E.2d 515.

¶ 18 On November 9, 2010, Sandra, "and [12] of the next of kin of [Willie], by her attorney,

[Attorney Schmidt], filed a response to General Casualty and Open Kitchens' petition for distribution. On December 7, 2010, Sandra "and the next of kin who are the children of [Sandra], by their attorney, [Attorney Schmidt]," filed a response to Cushing's petition to disburse.

¶ 19 On January 21, 2011, GAL Mihajlovic filed a "supplemental report of Guardian Ad Litem," objecting to "any order of this [court] that will affect the distribution to be made to the minor children of Willie Taylor, [d]eceased, including but not limited to the [w]orkers' [c]ompensation lien of [Open Kitchens] and [General Casualty]," and generally objecting to "the payment of any lien, attorney's fees, costs or expenses that will affect the distribution to be made to the minor children."

¶ 20 On January 24, 2011, following a hearing in the Probate Division of the circuit court of Cook County, the probate judge entered an order determining that: (1) the net distributions amount of the estate shall be evenly shared by all 14 heirs; (2) General Casualty and Open Kitchens are awarded reimbursement for their workers' compensation lien in the amount of \$181,176.32 and "the [a]dministrator is directed to pay this amount"; (3) the Law Offices of F. John Cushing III, P.C. is awarded attorney's fees "for the appellate work done herein, in the amount of \$127,099.14, costs having been voluntarily waived in open court, and upon the representation that any fees owed [to] the Kralovec law firm for the work [performed in conjunction with the Law Offices of F. John Cushing III, P.C.] shall be paid out of this amount also"; and (4) GAL Mihajlovic is discharged as GAL, "subject to his petition for fees and costs." The probate court further found that Sandra and the heirs had no standing to object to Cushing's request for attorney's fees, which were determined by a contingency fee contract between Cushing and U.S. Bank, and which pertained to the litigation of the wrongful death action.

¶ 21 On February 22, 2011, Sandra, "as next of friend of the minor next of kin of [Willie] and the next of kin born of [Sandra]," filed a notice of appeal before this court.

¶ 22 ANALYSIS

¶ 23 We determine the following issues: (1) whether Sandra and the 12 heirs had standing to object to the petitions for fee distributions made by General Casualty, Open Kitchens, and Cushing; (2) whether Cushing was entitled to attorney's fees and whether the attorney's fees awarded by the circuit court were excessive; and (3) whether General Casualty and Open Kitchens were entitled to a reimbursement of workers' compensation payments which were paid as a result of Willie's death.

¶ 24 We have jurisdiction to review this case under Illinois Supreme Court Rule 304(b)(1), which permits review of judgments and orders "entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b)(1) (eff. Feb. 16, 2010).

¶ 25 As a preliminary matter, the record reveals that on January 24, 2011, a hearing was held in the Probate Division of the circuit court regarding Cushing, General Casualty and Open Kitchens' petitions to disburse fees from the proceeds of the wrongful death action, the subject of which is now before us on appeal. The record transcripts show that at the start of the hearing, the probate judge remarked that the proper procedure for requesting the court to adjudicate liens and to enter an order with respect to attorney's fees would have been for the parties to present the petitions to the judge in the Law Division, who presided over the wrongful death action. The probate judge informed the parties that any future petitions of this nature must be presented to the judge in the Law Division of the circuit court. Nonetheless, the probate judge noted that she was ready to proceed with the

hearing on the petitions, and asked if any party wished to request that the matter be transferred back to the Law Division for adjudication. No one requested that the case be transferred to the Law Division. Thus, the probate judge proceeded to hear the parties' arguments on the petitions.

¶ 26 Section 2 of the Wrongful Death Act provides that amounts recovered in any wrongful death action shall be distributed by the court in which the cause was heard. 740 ILCS 180/2 (West 2010). However, as of January 1, 1964, " Illinois has replaced the limited jurisdiction of the Probate Court with the unified general jurisdiction of the [c]ircuit [c]ourt pursuant to section 9 of the New Judicial Article VI of the Illinois Constitution, granting to the circuit court unlimited original jurisdiction of all justiciable matter[s]." (Internal citations omitted.) *In re Estate of Elias*, 408 Ill. App. 3d 301, 325, 946 N.E.2d 1015, 1037 (2011), citing *In re Estate of Breault*, 63 Ill. App. 2d 246, 268-70, 211 N.E.2d 424, 436-37 (1965). Thus, we note that the Probate Division judge of the circuit court had the same jurisdictional authority to determine the distribution of the wrongful death proceeds as the Law Division judge. Further, because no request was made by the parties to transfer the case to the Law Division, it was proper for the probate judge to determine the merits of the petitions.

¶ 27 Turning to the issues before us, we first determine the threshold issue of whether Sandra and the heirs had standing to object to the petitions for fee distributions made by General Casualty, Open Kitchens, and Cushing, which we review *de novo*. See *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 19 (issue of standing is a question of law subject to *de novo* review).

¶ 28 Sandra and the heirs argue that they were interested parties with standing to object to the petitions for fee distributions at issue because U.S. Bank, as administrator of Willie's estate, failed

to object to them. They contend that because the petitions for fee distributions affected their rights as Willie's next of kin, they should be allowed to raise an objection as interested parties under section 18-5 of the Probate Act. See 755 ILCS 5/18-5(a) (West 2010) ("[t]he representative or any other person whose rights may be affected by the allowance of a claim or counterclaim may file pleadings with the clerk of the court within 30 days after mailing or delivery of the copy of the claim"). Further, they argue that the case authority relied upon by the probate judge in finding that Sandra and the heirs had no standing to object to Cushing's request for attorney's fees was inapplicable.

¶ 29 Cushing argues that Sandra and the heirs lacked standing to object to his petition to disburse attorney's fees from the proceeds of the wrongful death action. Specifically, Cushing argues that U.S. Bank and Cushing were sole parties to the "contingent fee contract," and that payment of attorney's fees to Cushing was a routine administrative act, rather than a "claim" against the estate, to which Sandra and the heirs lacked standing to object. In support of his arguments, Cushing cites *Will v. Northwestern University*, 378 Ill. App. 3d 280, 881 N.E.2d 481 (2007).

¶ 30 At the January 24, 2011 hearing, the probate judge found that Sandra and the heirs lacked standing under the authority of *Will* to object to payment of attorney's fees that U.S. Bank owed Cushing, stating that Cushing's legal representation was "about the prosecution of the wrongful death action." The probate judge further noted that if U.S. Bank were "derelict in its duty to the beneficiaries or the estate, that's between [U.S. Bank] and the beneficiaries." At the hearing, Cushing also informed the court that Cushing's law firm, the Law Offices of F. John Cushing III, P.C., had jointly worked with another law firm, Kralovec & Meenan, on appellate matters on behalf of U.S. Bank in the underlying wrongful death action. Cushing also notified the court that he was

waiving all costs for the appellate work performed in this case. U.S. Bank, which was represented by separate independent counsel at the hearing, fully agreed to pay the attorney's fees owed to Cushing. Thereafter, the probate judge granted Cushing's petition to disburse attorney's fees, "in the amount of \$127,099.14, costs having been voluntarily waived in open court, and upon the representation that any fees owed [to] the Kralovec law firm for the work shall be paid out of this amount also."

¶ 31 In *Will*, the decedent's mother and siblings appealed the decision of the circuit court in approving a settlement arising out of a wrongful death and survival action brought by the decedent's administrators against Northwestern University. *Id.* at 284-86, 881 N.E.2d at 488-90. On appeal, the *Will* court held that the mother and siblings lacked standing in their individual capacities to appeal the circuit court's approval of the settlement because "none of them were parties of record to the underlying cause of action in their individual capacities; rather, they were part of a group for whose joint benefit the cause was being brought." *Id.* at 289, 881 N.E.2d at 492. The reviewing court further found that it was "to [the] administrator[s] that the right of action accrues and it is [the] administrator[s] who [possess] the sole right of action or control over the suit; the beneficiaries or heirs have neither a right of action nor any control," and that, "[s]imply put, wrongful death and survival actions do not create an individual right in a beneficiary to bring suit." *Id.* at 289-90, 881 N.E.2d at 492-93. The *Will* court then dismissed the mother and siblings' appeal on the basis that they were not parties in their individual capacities to the underlying wrongful death and survival action, and thus, were not entitled to appeal the circuit court's ruling. *Id.*

¶ 32 Applying the principles of *Will* to the facts of the case at bar, we find that Sandra³ and the heirs lacked standing to object to Cushing's petition to disburse attorney's fees from the proceeds of the wrongful death action, and thus, lacked standing to appeal the probate judge's decision to grant attorney's fees. U.S. Bank, as the administrator, had the sole right of action and control over the wrongful death action, including the payment of fees stemming from Cushing's legal representation of U.S. Bank in the underlying cause of action. See 755 ILCS 5/28-8(g) (West 2010) (an independent representative acting reasonably in the best interests of the estate has the power to "employ *** legal counsel *** and to pay them reasonable compensation"). Thus, we find that because Sandra and the heirs were not parties of record in the underlying wrongful death action brought by U.S. Bank against Carmichael Leasing and Harold, they were not entitled to object to Cushing's request for attorney's fees or to appeal the court's decision in granting that request.

¶ 33 Moreover, we hold that Sandra and the heirs lacked standing to object to Cushing's petition to disburse attorney's fees on the alternative basis that they could not show that they have suffered an injury in fact. "In order for a party to have standing, the party must suffer some injury in fact to a legally cognizable interest and must have sustained, or be in imminent danger of sustaining, a direct injury as a result of the complained-of conduct." *Brockett v. Davis*, 325 Ill. App. 3d 727, 730,

³Although Sandra does not explicitly argue that she was eligible to benefit from Willie's estate, to the extent that Sandra may imply she had standing in her individual capacity to object on this basis must fail because she is neither Willie's surviving spouse nor next of kin. See *Johnson v. Provena St. Therese Medical Center*, 334 Ill. App. 3d 581, 589, 778 N.E.2d 298, 306 (2002) (" 'next of kin' are those blood relatives of the decedent who are in *existence* at the time of decedent's death who would take the decedent's property if the decedent had died intestate"). (Emphasis in original.)

762 N.E.2d 513, 516 (2001). "That a party may suffer in some abstract way will not suffice; there must be a direct injury to his property or rights." *Id.* at 730-31, 762 N.E.2d at 516.

¶ 34 In *Brockett*, injured motorists brought a personal injury lawsuit against the allegedly negligent driver. *Id.* at 728, 762 N.E.2d at 514. During the litigation, the driver filed a motion for partial summary judgment, arguing that certain medical bills for chiropractic services received by the injured motorists were void as a matter of law because the doctors who had treated the injured motorists failed to obtain a certificate of registration for their medical practice. *Id.* The trial court granted the driver's motion for partial summary judgment. *Id.* On appeal, the reviewing court reversed the trial court's decision, holding that the driver lacked standing to raise the issue of whether the doctors' medical bills were void on this basis. *Id.* at 729, 762 N.E.2d at 514. In so holding, the *Brockett* court stated that a contractual relationship existed between the doctors and the injured motorists for medical services, but that the driver was not a party to the contract so as to allow him to address any alleged illegalities of the doctors' medical bills. *Id.* at 731, 762 N.E.2d at 516. The *Brockett* court further found that although the driver "would ultimately benefit from a finding that the bills are void, there is no evidence that he has suffered a direct injury from the doctors' failure to obtain a certificate of registration." *Id.*

¶ 35 Like *Brockett*, a contractual relationship existed solely between U.S. Bank and Cushing for legal services provided by Cushing to U.S. Bank as the administrator of the estate in litigating the underlying wrongful death action. Sandra and the heirs, as third parties, were not parties to the contract so as to allow them to intervene in objecting to Cushing's request for attorney's fees, which was agreed to by U.S. Bank. See generally *Szymakowski v. Szymakowski*, 185 Ill. App. 3d 746, 750,

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542 N.E.2d 372, 375 (1989) (the obligation to disclose the terms of the agreement for legal services is owed solely by the attorney to the administrator who hired the attorney; intervening-plaintiffs' objection to the attorney's fees must fail where no argument was made that the administrator did not understand the terms of the attorney's representation). The record shows that U.S. Bank fully agreed to pay the attorney's fees owed to Cushing, and did not dispute the amount requested by Cushing. Similar to the court's reasoning in *Brockett*, we find that although Willie's heirs would ultimately benefit from a finding denying Cushing's request for attorney's fees, they have not presented any evidence that they have suffered a direct, non-abstract, injury from Cushing's successful representation of U.S. Bank in the wrongful death action. Accordingly, Sandra and the heirs had no standing to object to Cushing's petition to disburse attorney's fees and have no standing to appeal the probate judge's decision on this issue. As the probate judge correctly noted, any alleged misconduct by U.S. Bank in dereliction of its fiduciary duty to Willie's heir beneficiaries is solely between U.S. Bank and the heirs, and we note that the record indicates that a separate lawsuit had already been filed by the heirs against U.S. Bank alleging, *inter alia*, a breach of fiduciary duty. See *Logan v. U.S. Bank*, (Case No. 10 L 012471).

¶ 36 Further, we reject arguments made by Sandra and the heirs that they should be allowed to raise an objection as interested parties under section 18-5 of the Probate Act (755 ILCS 5/18-5(a) (West 2010)). These arguments were never presented in their written pleadings or at the hearing before the probate court; thus, they have been forfeited on appeal. See *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1109, 859 N.E.2d 1, 12 (2006) (arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal).

Therefore, we need not address the substance of Sandra and the heirs' arguments regarding why Cushing was not entitled to his attorney's fees or whether the attorney's fees awarded by the probate court were excessive.

¶ 37 General Casualty and Open Kitchens also advance the argument in the pleadings before the probate judge and on appeal, that Sandra and the heirs lacked standing to contest their petition for distribution, which requested that the proceeds of the wrongful death action be subjected to a workers' compensation lien for benefits that they had paid as a result of Willie's death.

¶ 38 While parties cannot waive the issue of subject matter jurisdiction, other jurisdictional issues, such as personal jurisdiction and standing, can be waived. *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102, 756 N.E.2d 396, 402 (2001). Further, an issue is not preserved for review where the circuit court fails to rule upon it. *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 946, 627 N.E.2d 202, 206 (1993). In the instant case, the transcripts of the January 24, 2011 proceedings show that the probate judge made no ruling on the issue of Sandra and the heirs' standing to object to General Casualty and Open Kitchens' petition, which asserted a workers' compensation lien against the wrongful death proceeds. Because General Casualty and Open Kitchens failed to obtain a ruling on this issue, and it was their burden to do so, they have forfeited any objections to Sandra and the heirs' standing. Therefore, we proceed to address the merits of Sandra and the heirs' arguments pertaining to General Casualty and Open Kitchens' petition for fee distributions.

¶ 39 Turning to the merits of Sandra and the heirs' arguments, we determine whether General Casualty and Open Kitchens were entitled to reimbursement of workers' compensation payments which were paid as a result of Willie's death.

¶ 40 In the case at bar, Willie suffered a fatal injury while performing his work duties as a temporary employee provided by Surestaff to Open Kitchens. It is undisputed that Surestaff paid workers' compensation payments to Willie's heir beneficiaries, after which Surestaff obtained a judgment in the trial court, which was affirmed on appeal, for the full amount of reimbursement from Open Kitchens. See *Surestaff*, 384 Ill. App. 3d 172, 892 N.E.2d 1137. Thereafter, General Casualty, as insurer for Open Kitchens, satisfied the judgment by reimbursing Surestaff for the workers' compensation payments in the amount of \$241,568.43, plus interests, costs and attorney's fees. In a letter dated April 6, 2010, legal counsel for Surestaff stated that Surestaff did not intend to assert any workers' compensation lien claims against the proceeds of the wrongful death action because the workers' compensation payments made by Surestaff had already been reimbursed by Open Kitchens in satisfaction of the judgment obtained in the Surestaff lawsuit. However, the letter specifically stated that Open Kitchens "would be entitled to this lien recovery." On September 30, 2010, the probate court entered an order finding that Surestaff's April 6, 2010 letter did not constitute a "waiver" of Open Kitchens' right to assert a workers' compensation lien against the proceeds of the wrongful death action. On October 12, 2010, General Casualty and Open Kitchens filed a joint petition requesting that the wrongful death proceeds be subjected to the lien for workers' compensation benefits that were paid to Surestaff. On January 24, 2011, the probate judge awarded General Casualty and Open Kitchens reimbursement for their workers' compensation lien, less attorney's fees, in the amount of \$181,176.32.

¶ 41 Sandra and the heirs, citing *American Family Mutual Insurance Co. v. Northern Heritage Builders, LLC*, 404 Ill. App. 3d 584, 937 N.E.2d 323 (2010), argue that General Casualty and Open

Kitchens were not entitled to reimbursements for the workers' compensation payments paid to Surestaff for the benefit of Willie's heir beneficiaries because no provisions for subrogation or assignment of rights were included in the oral contract between Surestaff and Open Kitchens. They contend that only Surestaff possessed the right to a statutory lien for workers' compensation payments made as a result of Willie's death, that Surestaff relinquished this right in its April 6, 2010 letter, and that the right could not be transferred to General Casualty and Open Kitchens. Sandra and the heirs further maintain that General Casualty and Open Kitchens were not entitled to recover these payments where they had initially denied liability in the Surestaff lawsuit. Moreover, they argue that proceeds from the wrongful death action were for the exclusive benefit of Willie's heirs and cannot be subjected to workers' compensation liens.

¶ 42 General Casualty and Open Kitchens counter that the Workers' Compensation Act provides them with a statutory right to recover the workers' compensation payments paid as a result of Willie's death. They contend that allowing Sandra and the heirs to retain both the workers' compensation benefits and the proceeds of the wrongful death action would amount to an impermissible "double recovery." Further, they maintain that "subrogation" was not at issue because General Casualty and Open Kitchens jointly petitioned for the recovery of the lien amounts, and that any contractual rights between General Casualty and its insured, Open Kitchens, are irrelevant here. We agree.

¶ 43 Section 5(b) of the Workers' Compensation Act (the Act) provides that:

"[w]here the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay

damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, *** *then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.*"

(Emphasis added.) 820 ILCS 305/5(b) (West 2010).

The requirement of section 5(b) of the Act serves the important purpose of "allowing both the employer and the employee an opportunity to reach the true offender while preventing the employee from obtaining a double recovery." (Internal quotations omitted.) *Sanchez v. Rental Service Corp.*, 2011 WL 873429 *3. The term "employer" is defined in the Act as both a "loaning employer" who loans an employee to another employer, and a "borrowing employer" who borrows an employee from the loaning employer. 820 ILCS 305/1(a)(4) (West 2010). Loaning and borrowing employers have a "joint and several" liability to pay workers' compensation benefits stemming from an employee's compensable injury, absent an agreement entitling the loaning employer to a full reimbursement from the borrowing employer for all sums paid or incurred. *Id.* The "joint and several liability" language of this provision of the Act has been interpreted to mean that a primary liability shall be imposed

upon the borrowing employer, while the loaning employer is secondarily liable. *Surestaff*, 384 Ill. App. 3d at 176, 892 N.E.2d at 1141, citing *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 826-27, 734 N.E.2d 1028, 1030 (2000).

¶ 44 Under the plain language of section 1(a)(4) of the Act, Surestaff was a loaning employer who provided temporary employees, such as Willie, to Open Kitchens as the borrowing employer at the time of the accident. Under section 5(b) of the Act, both Surestaff and Open Kitchens were jointly and severally liable to pay workers' compensation benefits stemming from Willie's death, and thus, both Surestaff and Open Kitchens were entitled to assert a statutory lien to recover the workers' compensation amounts paid for the benefit of Willie's heirs. Although Surestaff elected not to pursue a workers' compensation lien, as expressed in the April 6, 2010 letter, on the basis that it had already recovered the full amount of workers' compensation payments from Open Kitchens, this did not preclude Open Kitchens, as the borrowing employer, from enforcing its statutory right to a workers' compensation lien against the proceeds of the wrongful death action. Thus, because Open Kitchens had a statutory right to assert such a lien, we reject Sandra and the heirs' arguments that Open Kitchens was not entitled to recovery on the basis that no provisions for subrogation or assignment rights were included in the oral contract between Surestaff and Open Kitchens. We further note that General Casualty, which had fully satisfied the \$241,568.43 judgment of the Surestaff lawsuit on behalf of its insured Open Kitchens, also had a right to assert a workers' compensation lien for recovery of that amount, less 25% for attorney's fees. See 820 ILCS 305/5(b) (West 2010); *Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill. App. 3d 5, 877 N.E.2d 789 (2007) (insurer of employer who paid workers' compensation benefits to injured employee was entitled to

enforce a lien against the settlement proceeds from a negligence action against third-parties); *Trogub v. Robinson*, 366 Ill. App. 3d 838, 853 N.E.2d 59 (2006) (subrogation rights arise where an insurer pays its insured for the debt owed by a third party). Therefore, both General Casualty and Open Kitchens properly filed a joint petition to enforce their statutory workers' compensation lien against the wrongful death proceeds. The \$181,176.32 awarded by the probate judge to General Casualty and Open Kitchens were to be distributed in accordance with the terms of the insurance policy, which is irrelevant and beyond the scope of the issues before us.

¶ 45 We further find *American Family Mutual Insurance Co.*, a case cited by Sandra and the heirs in support of their argument that an insurer is barred from recovery absent an assignment of rights by the insured allowing such recovery, to be inapposite. The facts in *American Family Mutual Insurance Co.* neither pertained to any provisions of the Act, nor to the enforcement of any workers' compensation liens, and thus, has no applicability to the facts of the instant case.

¶ 46 Further, we reject Sandra and the heirs' contention that General Casualty and Open Kitchens were not entitled to recovery where Open Kitchens had initially taken the position in the Surestaff lawsuit that it was not liable to pay the workers' compensation benefits. While Open Kitchens maintained during the Surestaff trial that only Surestaff, not Open Kitchens, was liable to pay the workers' compensation benefits stemming from Willie's death, the trial court resolved this factual issue in favor of Surestaff and entered judgment against Open Kitchens for the amount of workers' compensation benefits Surestaff had already paid as a result of Willie's death. *Id.* at 174, 892 N.E.2d at 1139. Subsequent to this court's decision affirming the trial court's holding in the Surestaff lawsuit, General Casualty fully satisfied the judgment by reimbursing Surestaff for the amounts it

had paid in workers' compensation benefits. See *id.* at 177, 892 N.E.2d at 1142.

¶ 47 We find the facts of this case to be distinguishable from the cases cited by Sandra and the heirs, which involved contractual disputes between insurers and their insureds and did not pertain to the statutory right of an insurer or employer to enforce a workers' compensation lien. See *Hardware Dealer v. Ross*, 129 Ill. App. 3d 217, 262 N.E.2d 618 (1970) (impermissible for an insurer to deny the existence of the insurance policy during the pendency of an underlying lawsuit, to maintain that position until after a situation arose which it believed would give rise to a defense on the policy, and then to suddenly change its position and admit the existence of the policy by raising as a defense an alleged breach of the policy in an attempt to escape liability) and *Sims v. Illinois National Casualty Co.*, 43 Ill. App. 2d 184, 193 N.E.2d 123 (1963) (insurer estopped from insisting that the insured be bound by the exclusion provisions of the policy where the insurer failed to defend its insured under the terms of the policy). Here, General Casualty and Open Kitchens were obligated to abide by the findings of the trial and appellate courts, including the finding that Open Kitchens was liable to Surestaff for the workers' compensation payments. As discussed, pursuant to section 5 of the Act, Open Kitchens and its insurer, General Casualty, were entitled to assert a lien against the wrongful death proceeds to recoup the amount paid, less 25% for attorney's fees. Unlike the contractual relationships highlighted in *Hardware Dealer* and *Sims*, neither Sandra nor the heirs had a contractual relationship with Open Kitchens or General Casualty. Moreover, Open Kitchens and General Casualty were seeking recovery based on a statutory right granted by the Act, rather than on the terms of a contract. Accordingly, Sandra and the heirs' argument against recovery on this basis must fail.

¶ 48 Sandra and the heirs next argue that proceeds of the wrongful death action were for the exclusive benefit of Willie's next of kins and were not subject to the workers' compensation lien asserted by General Casualty and Open Kitchens.

¶ 49 Section 2 of the Wrongful Death Act provides that amounts recovered in wrongful death actions shall be for the exclusive benefit of the decedent's surviving spouse and next of kin. 740 ILCS 180/2 (West 2010); see *Berard v. Eagle Air Helicopter, Inc.*, 257 Ill. App. 3d 778, 629 N.E.2d 221 (1994). However, while employers' workers' compensation liens do not attach to a surviving spouse's individual loss of consortium claim, settlement proceeds of a dramshop action, or claims brought under the Public Utilities Act or the Structural Work Act, Illinois courts have held that proceeds of a wrongful death action are subject to workers' compensation liens. See *Padgett v. Industrial Comm'n of Illinois*, 327 Ill. App. 3d 655, 764 N.E.2d 125 (2002) (holding that an employer was entitled to a lien against the proceeds of the underlying wrongful death action to prevent double recovery by beneficiaries); *Borden v. Servicemaster Management Services*, 278 Ill. App. 3d 924, 663 N.E.2d 153 (1996) (holding that the employer's workers' compensation lien attached to the settlement proceeds of the administrator's wrongful death action). In *Borden*, the reviewing court, citing *Esin v. Liberty Mutual Insurance Co.*, 99 Ill. App. 3d 75, 424 N.E.2d 1307 (1981), stated that the legislature was presumed to have been aware of the "exclusivity" language of the wrongful death statute at the time it enacted the workers' compensation statute in 1913—which was 60 years after the original Wrongful Death Act was enacted in 1853. *Borden*, 278 Ill. App. 3d at 929, 663 N.E.2d at 156. Because the legislature in enacting section 5(b) of the Act was cognizant of the exclusivity provision of the Wrongful Death Act, "this circumstance gives some indication

that the legislature may have intended to override the literal words of the Wrongful Death Act and to impose the [w]orkers' [c]ompensation lien on the proceeds of ** [the] wrongful death suit." *Id.* Here, the proceeds at issue originated from a wrongful death action against third parties, rather than from a claim for loss of consortium, a dramshop action, or claims brought under the Public Utilities Act or the Structural Work Act. We further find inapposite the cases cited by Sandra and the heirs in support of their contention that wrongful death proceeds are not subject to the claims of creditors, where none of the cases addressed any issues similar to those at bar nor pertained to statutory liens under the Act. See *Vukovich v. Custer*, 415 Ill. 290, 112 N.E.2d 712 (1953); *Greenock v. Merkel*, 71 Ill. App. 3d 958, 390 N.E.2d 78 (1979); *Wright v. Royse*, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963); *Voorhees v. Chicago & Alton R.R. Co.*, 208 Ill. App. 86, 1917 WL 2824 (1917); *Broadnax v. ABF Freight Systems, Inc.*, 58 F. Supp. 2d 917 (1999). Therefore, we hold that General Casualty and Open Kitchens were entitled to attach a workers' compensation lien to the wrongful death proceeds.

¶ 50 We further reject Sandra and the heirs' contention that General Casualty and Open Kitchens were not entitled to enforce a workers' compensation lien against the proceeds at issue because Carmichael Leasing was found to be liable for Willie's death under the "logo liability doctrine" in the underlying wrongful death action. See *U.S. Bank*, 397 Ill. App. 3d at 447-48, 920 N.E.2d at 526. Although unclear, they appear to argue that because Carmichael Leasing was found to be vicariously liable for the negligence of Willie's co-worker, Harold, but was not immune from claims arising out of Willie's death under the Act, proceeds from the wrongful death action were similar to those awarded in loss of consortium claims, dram shop actions, and uninsured motorist claims. We find

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this argument to be without merit. General Casualty and Open Kitchens' enforcement of their statutory lien was separate and apart from any liability imposed upon Carmichael Leasing in the underlying wrongful death lawsuit. We simply do not see how one relates to another. Thus, this contention must also fail.

¶ 51 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 52 Affirmed.