FIRST DIVISION
June 17, 2013

No. 1-12-2976

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAXUM SPECIALTY INSURANCE GROUP, a/s/o Z&K FUEL TRANSPORTATION, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant/Cross-Appellee,	)	
v.	)	No. 11 L 010241
MCLEAN COUNTY TRUCK COMPANY d/b/a PETERBILT CHICAGO-BOLINGBROOK, JX LEASING, INC., d/b/a JX PACLEASE-BLOOMINGTON, and JX ENTERPRISES, INC.,	)	Honorable Thomas R. Mulroy, Jr., Judge Presiding.
Defendants-Appellees/Cross-Appellants.	)	

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: On plaintiff's appeal, we reversed the trial court's order dismissing counts I through V and counts XI through XV of plaintiff's amended complaint on *res judicata* grounds, as there was no final judgment on the merits acting as a *res judicata* bar to those counts. We affirmed the dismissal of counts VI through X of plaintiff's amended complaint, as those counts improperly attempted to subrogate against an additional insured on plaintiff's insurance policy. We dismissed defendants' cross-appeal from the trial court's order denying their motion to dismiss counts XVI through XVIII of plaintiff's amended complaint, as the denial of the motion to dismiss was a non-final judgment and, therefore, we lacked appellate jurisdiction to consider defendants' cross-appeal.

¶ 2 Z&K Fuel Transportation, Inc. (Z&K) leased a tractor-trailer truck that detached from its tractor while its driver was making a left turn, struck a guardrail, and spilled nearly 2,000 gallons of gasoline. Z&K's insurer, Maxum Specialty Insurance Group (plaintiff), paid for damage to the tractor-trailer truck and also paid property damage claims of multiple other parties damaged by the fuel spill. Plaintiff, as subrogee of Z&K, then filed an amended, 18-count complaint against the following defendants: JX Enterprises, Inc., which owned the heavy and medium-duty truck dealership that provided the tractor-trailer truck involved in the accident here; JX Leasing, Inc. d/b/a JX Paclease Bloomington (JX Leasing), which leased Z&K the tractor-trailer truck; and McLean County Truck Company d/b/a Peterbilt Chicago-Bolingbrook (McLean), which was a JX Enterprises and JX Leasing subsidiary engaged in servicing, maintaining, and inspecting vehicles leased by JX Leasing. Counts I through XV of plaintiff's subrogation action sought recovery for defendants' alleged negligence in repairing, maintaining, cleaning, servicing, inspecting and testing the tractor-trailer truck. Counts XVI through XVIII sought recovery against defendants for breach of contract by failing to properly maintain, clean, inspect, service and test the tractor-trailer truck. Defendants moved to dismiss plaintiff's subrogation case on *res judicata* grounds, predicated on a settlement of a previous lawsuit arising out of the same incident. The trial court dismissed with prejudice the counts in plaintiff's subrogation action sounding in negligence (counts I through XV). The trial court denied the motion to dismiss as to the counts in plaintiff's subrogation action sounding in breach of contract (counts XVI through XVIII). Plaintiff then voluntarily dismissed counts XVI through XVIII without prejudice and filed this appeal from the trial court's order dismissing counts I through XV. Defendants filed this cross-appeal from the trial court's order denying their motion to dismiss counts

XVI through XVIII. For the reasons that follow, on plaintiff's appeal we affirm the dismissal of counts VI through X, reverse the dismissal of counts I through V and counts XI through XV and remand for further proceedings. On defendants' cross-appeal, we dismiss for lack of appellate jurisdiction.

¶ 3 On August 9, 2010, a Z&K employee, Yousef F. Mansour, was driving a tractor-trailer truck that had been leased by Z&K from JX Leasing. Mr. Mansour made a routine left turn and, in the course of doing so, the fifth wheel allegedly malfunctioned, causing the trailer to detach from the tractor and collide with a guardrail. The trailer ruptured, spilling approximately 2,000 gallons of gasoline. The spilled gasoline damaged the property of several third parties and required extensive remediation and environmental clean-up.

¶ 4 The tractor-trailer truck was insured under an insurance policy issued by plaintiff to Z&K. Plaintiff paid over $30,000 for the repair of the extensive damage to its insured's tractor and trailer. Plaintiff further paid in excess of $83,000 to settle claims made by 10 fire departments and emergency response teams that responded to the fuel spill and subsequently contained and treated the fuel spill. Plaintiff paid in excess of $23,000 to Mabas 21 Hazmat for the equipment and products (such as fire fighting foam) necessary to treat the fuel spill. Plaintiff also paid the Illinois Department of Transportation more than $3,000 for property damage as a result of the fuel spill.

¶ 5 Plaintiff also settled a lawsuit that had been filed against Z&K, Mr. Mansour, and JX Enterprises by JKC Trucking, Inc. and Chicago Title Land Trust Company (collectively referred to as JKC Trucking). Counts I and II of JKC Trucking's lawsuit were against Z&K and Mr. Mansour and alleged they:

"a. Carelessly and negligently operated the tractor-tanker trailer combination.

b. Approached and entered an intersection at a speed greater than was reasonable and proper, having regard to traffic conditions and the use of the roadway, in violation of the Illinois Consolidated Statutes.

c. Drove a motor vehicle at a speed greater than was reasonable and proper, having regard to traffic conditions and the use of the roadway, in violation of the Illinois Consolidated Statutes.

d. Failed to inspect the connection between the tractor and trailer tanker to insure said connection was safe and secure."

¶ 6 Count I of JKC Trucking's complaint sought damages for the costs of: replacing the tires of JKC Trucking's tractor-trailers that were parked in the area affected by the fuel spill; paying its employees for their down-time while they waited for the spill to be cleaned; and paying cargo claims for perishables that had spoiled when the refrigeration units on JKC Trucking's tractor- trailers exhausted their fuel while the spill was cleaned. Count II of JKC Trucking's complaint sought damages due to the spilling of gasoline on JKC Trucking's property, which diminished its value.

¶ 7 Counts III and IV of JKC Trucking's lawsuit were against JX Enterprises, and alleged that JX Enterprises:

"a. Carelessly and negligently maintained the tractor-tanker trailer combination, knowing that if the connection failed, the trailer would disconnect and the contents therein discharge if ruptured.

b. Carelessly and negligently maintained the Fifth Wheel connection between tractor

and tanker trailer combination, knowing that if the connection failed, the trailer would disconnect and the contents therein discharge if ruptured.

c. Failed to inspect the connection between the tractor and trailer tanker to insure said connection was and would at all times be safe and secure, knowing that if the connection failed, the trailer would disconnect and the contents therein discharge if the trailer ruptured."

¶ 8 Counts III and IV sought the same damages against JX Enterprises as were sought against Z&K and Mr. Mansour in counts I and II.

¶ 9 JX Enterprises filed an answer to JKC Trucking's complaint and a three-count counterclaim. Count I of the counterclaim sought contribution against Z&K and Mr. Mansour in the event JX Enterprises was found liable to JKC Trucking. Count II sought indemnity from Z&K in the event JX Enterprises was found liable to JKC Trucking. Count III alleged breach of contract against Z&K.

¶ 10 Plaintiff defended Z&K in JKC Trucking's lawsuit and ultimately paid $40,000 to settle JKC Trucking's claims. The case was dismissed with prejudice pursuant to the settlement agreement on August 12, 2011.

¶ 11 After paying approximately $109,000 to settle the various claims by multiple third parties, and approximately $30,000 to repair the damaged tractor-trailer truck as well as $40,000 to settle the JKC Trucking lawsuit, plaintiff, as subrogee of Z&K, filed a six-count complaint sounding in negligence and breach of contract to recoup the costs it had paid on Z&K's behalf. Plaintiff named as defendants: (1) McLean; (2) JX Leasing; and (3) JX Enterprises.

¶ 12 In the negligence counts, plaintiff alleged that defendants had negligently failed to properly

maintain, clean, inspect and service the tractor-trailer truck and its component parts, including the fifth wheel, to insure that the fifth wheel would lock properly. In the breach of contract counts, plaintiff alleged defendants had breached the lease agreement for the lease of the tractor-trailer truck by failing to properly maintain, clean, inspect and service the tractor-trailer truck and its component parts, including the fifth wheel.

¶ 13 Defendants filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), arguing in relevant part that plaintiff's negligence and breach of contract claims were barred under the doctrine of *res judicata* as they could have been brought in the earlier lawsuit filed by JKC Trucking against Z&K. The trial court found that plaintiff's negligence counts were barred by *res judicata* but that plaintiff's breach of contract counts survived under an exception to the application of *res judicata* in subrogation actions pursuant to section 2-403(d) of the Code (735 ILCS 5/2-403(d) (West 2010)) (which we will discuss later in this order).

¶ 14 The trial court granted plaintiff leave to file an amended complaint. Plaintiff, as subrogee of Z&K, subsequently filed an 18-count amended complaint against defendants sounding in negligence and breach of contract. Counts I through XV again alleged negligence against defendants for failing to properly maintain, clean, inspect, service and test the tractor-trailer truck and its component parts, including the fifth wheel. The amended complaint addressed in greater detail items of damage that were never specifically raised or settled in JKC Trucking's prior action against Z&K, including: (1) the claims of 10 fire departments and emergency responders for their emergency services (counts II, VII and XII); (2) the claim of Mabas 21 Hazmat for the products and equipment

used to clean up the gasoline spill (counts III, VIII and XIII); (3) the claim of the Illinois Department of Transportation for the damage caused to State assets (counts IV, IX and XIV); and (4) the costs plaintiff paid to repair the damage suffered by Z&K's tractor- trailer truck (counts I, VI and XI).

¶ 15 Counts XVI through XVIII alleged beach of contract against defendants for failing to properly maintain, clean, inspect, service and repair the tractor-trailer truck and its component parts, including the fifth wheel.

¶ 16 Defendants filed a section 2-619 motion to dismiss, arguing, in part, that because counts I through XV alleged defendants acted negligently, those claims were barred by the trial court's previous order finding that plaintiff's negligence claims were barred by *res judicata*. Defendants also argued that plaintiff's breach of contract claims in counts XVI through XVIII should be dismissed because: (1) neither McLean nor JX Enterprises were parties to the lease contract and cannot be held liable for any breach thereof; (2) plaintiff's insured (Z&K), to whom plaintiff is subrogated, waived any claim against JX Leasing for the purported damages alleged here; and (3) JX Leasing is an additional insured under the insurance policy issued to Z&K by plaintiff, and Illinois law prevents an insurer from subrogating against an additional insured under the policy. Defendants further argued that even assuming any recovery can be made against JX Leasing, the contract limits recovery to the cost of the repair of the tractor-trailer's fifth wheel.

¶ 17 The trial court granted defendants' section 2-619 motion to dismiss counts I through XV of the amended complaint (the subrogation counts alleging negligence), and denied the motion to dismiss counts XVI through XVIII (the subrogation counts alleging breach of contract). After the trial court denied plaintiff's motion for an Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a)

(eff. Feb. 26, 2010)) finding, plaintiff moved the court to allow it to voluntarily dismiss counts XVI through XVIII without prejudice so as to be able to file an immediate appeal of the order dismissing counts I through XV. The trial court granted plaintiff's motion. Plaintiff filed a timely appeal of the order dismissing counts I through XV of its amended complaint. Defendants cross-appealed from the order denying their motion to dismiss counts XVI through XVIII of plaintiff's amended complaint.

¶ 18 A section 2-619 motion to dismiss admits as true all well-pleaded facts, along with all reasonable inferences gleaned from the facts. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 17. "An appeal from a section 2-619 dismissal is the same in nature as one following a grant of summary judgment; both are matters given to *de novo* review. [Citation.] In such cases, the reviewing court must determine whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Guzman v. C. R. Epperson Construction, Inc.*, 196 Ill. 2d 391, 397 (2001).

¶ 19 I. Plaintiff's Appeal

¶ 20 First, we address whether the trial court erred in dismissing counts I through XV of plaintiff's amended complaint, the subrogation counts alleging negligence. Subrogation is an equitable remedy allowing one who has involuntarily paid a debt or claim of another to succeed to the rights of the other with regard to the claim or debt so paid. *CNA Insurance Co. v. DiPaulo*, 342 Ill. App. 3d 440, 442 (2003). The right of subrogation may be grounded in equity or on an express or implied agreement. *Id.* "The doctrine rests on the principle that justice is attained by placing ultimate responsibility for the loss on the one against whom in good conscience it ought to fall." *Id.*

¶ 21 "A subrogee 'steps into the shoes' of the person whose claim he has paid and may only enforce those rights which the latter could enforce." *Id*. In the present case, plaintiff may assert a right of subrogation against defendants if: (1) Z&K could maintain an action against defendants; and (2) it would be equitable to allow plaintiff to enforce a right of subrogation against defendants. *Id*. at 442-43.

¶ 22 Plaintiff argues it should be allowed to enforce a right of subrogation against defendants, and that the trial court erred in dismissing counts I through XV based on *res judicata*. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent lawsuits between the same parties or their privies involving the same cause of action. *Rein v. David A. Noyes & Co*., 172 Ill. 2d 325, 334 (1996); *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The bar extends to what was actually decided in the first lawsuit, as well as those matters that could have been decided in that suit. *Id*. "[T]he doctrine bars suits based on facts that would have constituted a counterclaim or defense in the earlier proceeding where successful prosecution of the later action would either nullify the earlier judgment or impair the rights established in the earlier action." *Kosydor v. American Express Centurion Services Corp*., 2012 IL App (5th) 120110, ¶ 19.

¶ 23 "For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *River Park*, 184 Ill. 2d at 302.

¶ 24 Plaintiff argues the trial court erred in finding that the dismissal of JKC Trucking's lawsuit

against Z&K acted as a *res judicata* bar to plaintiff's subrogation action sounding in negligence against defendants. Plaintiff contends that since the JKC Trucking lawsuit ended in a dismissal pursuant to an agreed settlement, there was no final judgment on the merits that would act as a *res judicata* bar to plaintiff's subrogation suit against defendants. Plaintiff waived review by failing to raise this argument in the trial court or in its initial brief on appeal. See *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 29; *Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (2010). However, waiver is a limitation on the parties, not this court. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 202 (2007). We will address the issue on the merits.

¶ 25 Courts in Illinois are split on the issue of whether a dismissal with prejudice pursuant to a settlement agreement operates as a final judgment on the merits. See *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 340 (2005) (noting split of authority). Some earlier cases held that a dismissal with prejudice pursuant to a settlement does operate as a final judgment on the merits for *res judicata* purposes. See *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (1999); *4901 Corp. v. Town of Cicero*, 220 F. 3d 522, 529 (7th Cir. 2000). However, we agree with more recent cases from the Appellate Court, First District, holding that a dismissal with prejudice pursuant to a settlement agreement is not a final judgment on the merits, because such an agreed order is not a judicial determination of the parties' rights, but rather is a recordation of the parties' agreement. See *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011) and *Currie v. Wisconsin Central, Ltd*., 2011 IL App (1st) 103095, ¶ 29. Since the dismissal of the JKC Trucking lawsuit pursuant to a settlement agreement did not constitute a final judgment on the merits, plaintiff's subrogation action is not barred by *res judicata*.

¶ 26 The parties next argue the applicability of section 2-403(d) of the Code to plaintiff's subrogation action. Section 2-403(d) states:

> "A judgment in an action brought and conducted by a subrogee by virtue of the subrogation provision of any contract or by virtue of any subrogation by operation of law, whether in the name of the subrogor or otherwise, is not a bar or a determination on the merits of the case or any aspect thereof in an action by the subrogor to recover upon any other cause of action arising out of the same transaction or series of transactions." 735 ILCS 5/2-403(d) (West 2010).

¶ 27 Plaintiff argues section 2-403(d) provides an exception to the application of *res judicata* in insurance subrogation actions such as the one here. Having determined that the dismissal of the JKC Trucking lawsuit pursuant to a settlement agreement was not a final judgment on the merits and thus did not act as a *res judicata* bar to plaintiff's subrogation action, we need not address whether any exception to *res judicata* as set forth in section 2-403(d) applies.

¶ 28 Defendants argue that several of plaintiff's counts (specifically, counts V, X, XV, and paragraph 16(e) of counts XVI, XVII, and XVIII) seek contribution from defendants with respect to the JKC Trucking lawsuit in violation of section 2(e) of the Contribution Among Joint Tortfeasors Act (Contribution Act) (740 ILCS 100/2(e) (West 2010)). Section 2(e) states:

> "A tortfeasor who settles with a claimant pursuant to paragraph c [*i.e.*, in good faith] is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement." 740 ILCS 100/2(e) (West 2010).

¶ 29 Our supreme court has held, under section 2(e), that "[a] party that settles may seek

contribution only from parties whose liability was extinguished by that same settlement." *Dixon v. Chicago and North Western Transportation Co*., 151 Ill. 2d 108, 116 (1992). Defendants argue that the settlement plaintiff entered into on behalf of Z&K in the JKC Trucking lawsuit did not extinguish any of defendants' liability and, therefore, that plaintiff cannot now seek contribution from defendants under section 2(e).

¶ 30 We need not address this argument, as plaintiff's claims against defendants are subrogation claims, not contribution claims. Subrogation and contribution are two distinct equitable doctrines. "Contribution as it pertains to insurance law is an equitable principle arising among coinsurers which permits one insurer who has paid the entire loss, or greater than its share of the loss, to be reimbursed from other insurers who are also liable for the same loss." *Home Insurance Co. v. Cincinnati Insurance Co*., 213 Ill. 2d 307, 316 (2004). "In contrast to contribution, subrogation and indemnification are devices for placing the *entire* burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged." (Emphasis in original.) *Id*.

¶ 31 Plaintiff's subrogation action seeks to place the entire burden for the loss on defendants. As such, the Contribution Act does not apply here to bar plaintiff's cause of action.

¶ 32 Defendants next argue that plaintiff cannot subrogate against JX Leasing, because JX Leasing is an additional insured on plaintiff's policy. "[I]t is well settled that an insurer may not subrogate against its own insured or any person or entity who has the status of a co-insured under the insurance policy." *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 60 (2004). "The anti-subrogation rule is intended to prevent an insurer from recovering back from its insured that loss or damage the risk of which the insured had passed along to the insurer under the policy." *Id*. at 62.

" 'The anti-subrogation rule is supported by two public policy considerations. First, the insurer should not be able to pass its loss to its own insured, thus avoiding coverage which its insured has purchased and paid in the forms of premiums. * * *

The second public policy concern is that the insurer should not be placed in a situation where there exists a potential conflict of interest, thereby possibly affecting the insurer's incentive to provide a vigorous defense for one of its insureds.' " *Id*. (quoting Couch on Insurance 3d § 224.3, at 18-19 (2000)).

¶ 33 Although the trial court here did not dismiss the counts against JX Leasing pursuant to the anti-subrogation rule, we review the trial court's judgment rather than its reasoning, and may affirm on any basis in the record. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62. Accordingly, we will consider defendants' argument.

¶ 34 We begin by considering the insurance policy. JX Leasing is listed as an additional insured under plaintiff's policy for " 'bodily injury' or 'property damage' *resulting from* the acts or omissions by [Z&K]." (Emphasis added.) "[T]he phrase 'resulting from' is 'synonymous with the phrases "arising out of," "connected with," "originating from," "growing out of," and "flowing from" which have been recognized repeatedly as being broad as well as vague.' " *St. Paul Fire and Marine Insurance Co. v. Antel Corp*., 387 Ill. App. 3d 158, 165 (2008) (quoting *Farmers Automobile Insurance Ass'n v. Hunt*, 301 Ill. App. 3d 716, 719 (1998)). "Accordingly, 'but for' causation rather than proximate causation satisfies this language." *Id*. Thus, JX Leasing is an additional insured here as long as the accident, gasoline leak, and resulting property damage would not have occurred but for Z&K's acts or omissions. It is undisputed that Z&K's employee, Mr. Mansour, was driving the

tractor-trailer truck at issue and making a left turn when the fifth wheel allegedly malfunctioned, causing the trailer to detach from the tractor and collide with a guardrail. The trailer ruptured, spilling about 2,000 gallons of gasoline. "But for" Z&K's use of the tractor-trailer truck, it would not have struck the guardrail, and the accident and resulting property damage would not have occurred. Accordingly, JX Leasing is an additional insured under plaintiff's policy with respect to the property damage resulting from the accident and, thus, plaintiff may not subrogate against JX Leasing. Therefore, we affirm the portion of the order dismissing the subrogation counts alleging negligence against JX Leasing, specifically, counts VI, VII, VIII, IX, and X.

¶ 35 We reverse the order dismissing the remaining subrogation counts alleging negligence against McLean and JX Enterprises (counts I through V and counts XI through XV) on *res judicata* grounds and remand for further proceedings thereon.

¶ 36 II. Defendants' Cross-Appeal

¶ 37 Defendants cross-appeal from the trial court's denial of their motion to dismiss plaintiff's breach of contract counts (counts XVI, XVII, and XVIII) in its amended complaint. Although the denial of a motion to dismiss is generally not a final and appealable judgment (*Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135 (1995)), defendants contend the denial of their motion to dismiss was made final and appealable here when the trial court subsequently granted plaintiff's motion to voluntarily dismiss counts XVI through XVIII. We disagree. An order granting a plaintiff's motion for a voluntary dismissal is final and appealable by the defendants and also by the plaintiff to the extent that it assesses costs against him or her. *Valdovinos v. Luna-Manalac Medical Center, Ltd*., 307 Ill. App. 3d 528, 535 (1999). A voluntary dismissal also renders all other final orders

immediately appealable; however, an otherwise non-final order does not become final and appealable upon voluntary dismissal of a suit. *Hernandez v. Bernstein*, 2011 IL App (1st) 102646, ¶ 10. See *Saddle Signs*, 272 Ill. App. 3d 132 (denial of motion to dismiss was not a final order and could not be appealed after entry of voluntary dismissal). We may address the substantive merits of non-final orders entered by the trial court prior to the granting of a voluntary dismissal only if those orders constituted a procedural step in the progression leading to the entry of the final judgment from which the appeal was taken. *Valdovinos*, 307 Ill. App. 3d at 537-38. Defendants here have made no argument that the denial of their motion to dismiss counts XVI through XVIII of plaintiff's amended complaint was a step in the procedural progression leading to the voluntary dismissal. Therefore, we lack jurisdiction to consider defendants' cross-appeal.

¶ 38 For the foregoing reasons, on plaintiff's appeal we affirm the dismissal of counts VI, VII, VIII, IX, and X of plaintiff's amended complaint and reverse the dismissal of counts I, II, III, IV, V, XI, XII, XIII, XIV, and XV of plaintiff's amended complaint and remand for further proceedings. On defendants' cross-appeal from the denial of their motion to dismiss counts XVI through XVIII of plaintiff's amended complaint, we dismiss for lack of appellate jurisdiction. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 39 Plaintiff's appeal affirmed in part, reversed in part, and remanded; defendants' cross-appeal dismissed.