2015 IL App (2d) 141085-U
No. 2-14-1085
Order filed June 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ADEPT CONSTRUCTION, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff,	)	
	)	
v.	)	No. 11-CH-1509
	)	
STRATOS, LTD.,	)	
	)	
Defendant and Counterdefendant	)	
	)	
(Stephen Hipskind and Nora Hipskind, Defendants and Counterplaintiffs and Third-Party Plaintiffs-Appellants; The Private Bank and Trust Company, Marius Moldovan, C&B Drywall, Inc., and Unknown Owners, Unknown Necessary Parties, and Unknown Permissible Parties, Defendants; Strat's Restaurant Group, Strat Matsas, Chicago Title and Trust Company, and Stone Studio Inc., Third-Party Defendants-Appellees).	)	Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Holding*: The trial court abused its discretion when it granted the Hipskinds' renewed motion for a Rule 304(a) finding because the dismissed counts were not separate and distinct claims from the remaining counts. We therefore dismissed the appeal for lack of proper appellate jurisdiction.

¶ 2 Defendants and third-party plaintiffs, Stephen W. and Nora Hipskind, filed a 12-count suit against Strat's Restaurant Group, Strat Matsas, Chicago Title and Trust Company (Chicago Title), and Stone Studio, Inc., as a result of defects associated with the construction of their home. As it relates to Chicago Title, the only third-party defendant to this appeal, two of the six counts against it sounded in breach of contract, and four of the counts against it sounded in tort. Chicago Title brought a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), and the trial court granted the motion as to the four tort claims. The trial court granted the Hipskinds' request for a Rule 304(a) finding, and the Hipskinds appealed. We dismiss this appeal for lack of proper appellate jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 In 2009, the Hipskinds undertook to build a home. They arranged a bank loan to finance the project, hired defendant Stratos, Ltd. to act as the project manager, and arranged for Chicago Title to act as escrow trustee, as reflected in the Construction Loan Escrow Trust and Disbursing Agreement.

¶ 5 Chicago Title opened and managed the Hipskinds' escrow out of its Westchester office, where it employed Elvir Sinikovic as its Construction Escrow Administrator, effectively the manager of that office. As such, Sinikovic was assigned and empowered by Chicago Title to manage the Hipskinds' escrow. All of the Hipskinds' contact with Chicago Title was in the person of Sinikovic, who was represented as having full authority to act for Chicago Title.

¶ 6 Thereafter, it was discovered that Sinikovic diverted funds that were earmarked for other projects to himself. See *Chicago Title Insurance Co. v. Sinikovic*, 11-CV-2504, United States District Court, Northern District of Illinois, and *United States v. Sinikovic*, 11-CR-265, United

States District Court, Northern District of Illinois. Chicago Title restored the full amount of the funds to the Hipskinds' escrow account.

¶ 7 The Hipskinds filed a 12-count third-party complaint against Chicago Title and others for $634,000 in losses they incurred due to construction defects and diversion of funds for their home. As amended, and as it relates to Chicago Title, the Hipskinds alleged that Sinikovic was acting individually, or as an actual or apparent agent or employee of Chicago Title and acting within the course and scope of his agency, apparent agency, or employment with Chicago Title.

¶ 8 The Hipskinds attached a copy of the contract between them and Stratos. The Hipskinds alleged that Matsas (the owner and operator of Stratos, Ltd.) referred them to Chicago Title and specifically to its Westchester office where Sinikovic worked as an escrow agent for Chicago Title. Sinikovic represented himself in writing and orally as having full authority to act by, for, and on behalf of Chicago Title. All of the Hipskinds' substantive contact with Chicago Title was through Sinikovic.

¶ 9 On December 10, 2009, the Hipskinds entered into a Construction Loan Escrow Trust and Disbursing Agreement (Escrow Agreement) with Chicago Title. Sinikovic executed the Escrow Agreement on behalf of Chicago Title and was designated as its "Contact Person." On February 10, 2010, the Hipskinds obtained financing for the project from The Private Bank and Trust Company, secured by a mortgage. The Escrow Agreement reflected, *inter alia*, that Chicago Title agreed to provide a disbursing service for the benefit of the Hipskinds as a means to pay for construction and related development costs. The Hipskins alleged that Chicago Title was their fiduciary with respect to the disbursement of funds placed with it and owed them all attendant fiduciary duties. Chicago Title appointed, authorized, and employed Sinikovic to act

as its agent and representative to carry out and meeting all of its fiduciary obligations to the Hipskinds.

¶ 10 The Hipskinds further alleged that the terms of the Escrow Agreement provided that no disbursements were to be made unless explicitly approved and authorized in advance by the Hipskinds in the "Sworn Owner's Statement." There were nine disbursements, and of those nine, eight were not made in conformity with the Sworn Owner's Statement; rather, Chicago Title, Sinikovic, Stratos, and Matsas acted in concert and caused the disbursements to be misdirected to unauthorized payees. The Hipskinds alleged that Chicago Title's wrongdoing was carried out "by and through Sinikovic."

¶ 11 Count I of the 12-count suit, directed only at Stratos, sounded in breach of contract for failing to adhere to and carry out the Hipskinds' direction and authority with respect to the payment of subcontractors and otherwise acting in bad faith. Counts III, V, and VII, directed at Stratos and Matsas, sounded in tort. Count III (common-law fraud) alleged that "Stratos and Matsas defrauded the Hipskinds' by misrepresenting and concealing from the Hipskinds the fact that disbursements of the Hipskinds' money were being made and/or had been made contrary to the Hipskinds' direction and authority and by taking undisclosed 'kickbacks' from the subcontractors." Count V (Illinois Consumer Fraud Act) alleged that, because "the Hipskinds were 'consumers' and their transactions *** were 'consumer transactions' under the Act *** Stratos and Matsas violated the Act by misrepresenting and concealing from the Hipskinds the fact that disbursements of the Hipskinds' money were being made and/or had been made contrary to the Hipskinds' direction and authority and by taking undisclosed 'kickbacks' from subcontractors." Count VII (conversion) alleged "by misdirecting disbursements from/by [Chicago Title] for their own purposes and by soliciting and taking 'kickbacks' from

subcontractors, Stratos and Matsas unlawfully converted the Hipskinds' money for their own purposes."

¶ 12 Counts XI and XII were directed against Natural Expressions, Inc., and sounded in breach of contract. Count XI (breach of sub-contract) alleged that "Stratos entered into a subcontract with Natural *** related to the installation of cabinets, doors, shelves, molding and trims." Count XI further alleged that, as intended third-party beneficiaries of the sub-contract, the Hipskinds were damaged by Natural's breach in failure to complete the contracted work. Count XII (breach of contract) alleged that the "Hipskinds and Natural entered into a written contract *** within which Natural could either complete or correct its work on the project, which, to that point, was defective and/or incomplete." Count XII further alleged that Natural breached by failing to perform its obligations under this contract.

¶ 13 Of the 12 counts, 6 were directed at Chicago Title: count II (breach of Escrow Agreement); count IV (common-law fraud); count VI (Illinois Consumer Fraud Act); count VIII (conspiracy to defraud and convert); count IX (civil conspiracy); and count X (breach of fiduciary duty). Count II alleges that Chicago Title "breached the Escrow Agreement by failing to strictly adhere to and carry out the Hipskinds' direction and authority with respect to the payment of subcontractors and otherwise acting in bad faith." Count II further alleges that the Hipskinds sustained "direct, consequential and special damages in amounts still to be determined," and asks for damages in excess of $50,000. Count IV alleges that Chicago Title, by and through Sinikovic, defrauded the Hipskinds by misrepresenting and concealing the disbursements were being made or had been made contrary to their direction and authority. They alleged that they sustained damage as a proximate result of Chicago Title's frauds and sought in excess of $50,000. Count VI alleged that Chicago Title misrepresented and concealed the

disbursements from the Hipskinds contrary to their direction and that Chicago Title took undisclosed "kickbacks" from "subcontractors." They alleged that they sustained damage as a proximate result of Chicago Title's violations and asked for damages in excess of $50,000. Count VIII alleged that Chicago Title, Stratos, and Matsas acted in concert to unlawfully defraud the Hipskinds by unlawfully altering documents, soliciting or receiving kickback payments from subcontractors, converting and embezzling their money. They alleged that they sustained damage as a proximate result of the conspiratorial misconduct of Chicago Title, Stratos, and Matsas and asked for damages in excess of $50,000. Count IX alleged that Chicago Title, Stratos, Matsas, and others violated the Racketeering Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. par. 1961 et seq.). The Hipskinds alleged that Chicago Title and the others "operated as an enterprise under RICO and engaged in a course and pattern of unlawful and tortuous [sic] misconduct *** that constituted a 'pattern of racketeering activity.' " Count IX further alleged, "on information and belief" that the "pattern of racketeering activity" "was not limited to the Hipskinds' project and extended to other projects in which Stratos acted as general contractor and/or Chicago Title acted as escrow agent by and through Sinikovic." They alleged that they sustained damage and asked for damages in excess of $50,000. Count X alleged that Chicago Title owed the Hipskinds fiduciary duties as their escrow trustee and breached those duties "as alleged herein." They "sustained damages" as a result of Chicago Title's breaches of its alleged duties and asked for damages in excess of $50,000.

¶ 14 In February 2012, Chicago Title filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2012)). Chicago Title argued, *inter alia*, that the trial court should strike all of the Hipskinds' claims for punitive damages because they failed to allege facts that it approved the "doing and the manner of"

Sinikovic's conduct or that Sinikovic was a managerial employee, and they failed to allege facts establishing a reckless hiring or ratification; rather, they established that Sinikovic was not acting within the scope of his employment. Chicago Title also argued that the Hipskinds failed to allege facts demonstrating a pattern of racketeering activity affecting interstate commerce and comprising at least two predicate acts of racketeering committed within a 10-year period; the Hipskinds failed to allege any tortious conduct by Chicago Title other than conduct by Sinikovic and failed to allege that any of Sinikovic's conduct was motivated by an intent to serve Chicago Title; the Hipskinds failed to establish any monetary or other harm they suffered by Chicago Title; the Hipskinds failed to allege that Chicago Title participated in or was aware of the kickbacks.

¶ 15 The parties fully briefed the issues, and the trial court conducted a hearing on June 29, 2012. The trial court granted Chicago Title's motion to dismiss with respect to counts IV (common-law fraud), VI (Illinois Consumer Fraud Act), VIII (conspiracy to defraud and convert), and IX (civil conspiracy). With respect to count X (breach of fiduciary duty), the trial court dismissed with prejudice the Hipskinds' claim for punitive damages against Chicago Title. The Hipskinds orally requested a finding pursuant to Illinois Supreme Court Rule 304(a), and the trial court denied the request, finding it not appropriate and stating that it was "not going to let this go piecemeal."

¶ 16 In August 2013, plaintiff Adept Construction filed a motion to sever its claims from the remaining claims in the case. In their response, the Hipskinds objected to the motion to sever by emphasizing the interconnection of all the claims relating to the construction of their house. Moreover, the Hipskinds stressed that the shared actions of the various parties contracted to construct the house involved "one common issue of fact and law." In opposing the motion, the

Hipskinds also noted the overlap inherent in the claims and the possibility of inconsistent outcomes as a result of severance. They argued that, despite some differences, the various claims shared "a common question of fact" in regards to the responsibility of relief that would make severance improper.

¶ 17 In October 2013, the Hipskinds filed a renewed motion for a Rule 304(a) finding, arguing that '[t]hings have changed, a lot" since the trial court's prior denials and "the only remaining parties are the Hipskinds and [Chicago Title] and the only remaining claims are the Hipskinds' claims against [Chicago Title]." Chicago Title opposed the motion, arguing that the dismissed claims were not separate and distinct, but rather, shared factual bases and common relief. In September 2014, the trial court allowed the Hipskinds' October 2013 renewed motion for a Rule 304(a) finding and to stay further proceedings; the order, however, reflected an incorrect date. As corrected in its written order of October 28, 2014, the trial court expressly found that "there exists no just reason to delay enforcement of or appeal from" its June 29, 2012 order "which struck/dismissed various of Hipskinds' claims against Chicago Title." The Hipskinds filed their notice of appeal on October 28, 2014.

¶ 18 II. ANALYSIS

¶ 19 Prior to addressing the merits, we must dispose of the jurisdictional challenge. During the pendency of this appeal, Chicago Title filed a motion to dismiss for lack of a proper Rule 304(a) finding. The Hipskinds filed a response and objection, and this court now orders the motion and objection taken with the case.

¶ 20 Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims

> only if the trial court has made an express finding that there is no just reason for delaying either enforcement or appeal or both. *** In absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. R. 304(a).

¶ 21 Rule 304(a) does not allow for a trial court to confer appellate jurisdiction merely by using the Rule 304(a) language that "there is no just reason for delaying enforcement or appeal." *Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 416 (2006) (citing *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992)). In determining appellate jurisdiction, Illinois courts have looked to federal case law regarding Rule 54(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 54(b)), which is substantially similar to Rule 304(a). *AT&T v. Lyons & Pinner Electric Co.*, 2014 IL App (2d) 130577, ¶ 20 (citing *In re Estate of Stark*, 374 Ill. App. 3d 516, 522 (2007) (stating that Rule 304(a)'s policy and language are patterned after Rule 54(b))). Courts use the following two-part test for determining appellate jurisdiction under Rule 54(b) or Rule 304(a): (1) whether the order is "final" and (2) whether there is any just reason for delaying the appeal. *Id.*

¶ 22 "For a judgment to be 'final,' it must provide for the ultimate disposition of an individual claim entered in the course of an action involving multiple claims." *AT&T*, 2014 IL App (2d) 130577, ¶ 21 (citing *Estate of Stark*, 374 Ill. App. 3d at 523); see also *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372, 379 (1992). The parties do not dispute the finality of the trial court's dismissal of the four counts with prejudice.

¶ 23 In determining whether there is any just reason for delaying the appeal, a court must consider the following factors: " '(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made [appealable]; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.' " *Geier*, 226 Ill. App. 3d at 383 (quoting *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975)). Depending on the particular facts of the case, some or all of these factors may come into play. *Geier*, 226 Ill. App. 3d at 383.

¶ 24 The *Geier* court noted the United States Supreme Court's decisions emphasized a pragmatic approach by using a severability analysis. "Where the dismissed claims 'can be decided independently of each other,' that is, they are not 'so inherently inseparable from, or closely related to' the remaining claims, then the trial court does not abuse its discretion in certifying that there exists no just reason for delay of the appeal." *Geier*, 226 Ill. App. 3d at 385 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). However, significant factual overlap between the decided and the retained claims means that they are not separate, and an appeal must be deferred until the latter are resolved. *Lozman v. Putnam*, 328 Ill. App. 3d 761, 771 (2002).

¶ 25 The trial court's decision to grant Rule 304(a) relief as entered here is reviewed under an abuse-of-discretion standard. *Lozman*, 328 Ill. App. 3d at 771. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable

person would agree with the view adopted by the trial court." *In re Estate of LaPlume*, 2014 IL App (2d) 130945, ¶ 49.

¶ 26 With respect to our standard of review, this court has little basis upon which to conclude that the trial court did or did not abuse its discretion at the hearing concerning the Hipskinds' renewed motion for a Rule 304(a) finding. In determining what occurred at the hearing, the record on appeal does not include a transcript of that particular hearing or, for that matter, a bystander's report or an agreed statement of facts, as required by Illinois Supreme Court Rule 323 (eff. Dec.13, 2005). In any appeal, it is the appellant (in this case, the Hipskinds) who bears the burden to present a sufficiently complete record. But here, it is Chicago Title's motion to dismiss for lack of jurisdiction, and it too then, bore the burden to present a sufficiently complete record so that we may review the purported jurisdictional finding. Thus, not only the Hipskinds, but also Chicago Title, have failed to present the relevant portions of the report of proceedings to assist this court in determining whether the trial court abused its discretion when it granted the Hipskinds' renewed motion to include a Rule 304(a) finding. Nevertheless, there is enough information in the record presented to allow us to determine what occurred and, more importantly, to what extent the court exercised its discretion.

¶ 27 Chicago Title argues that the dismissed counts are not "separate and distinct" claims within the meaning of Rule 304(a) because of the shared factual bases and the common relief sought, even though separate counts are alleged. Alternatively, Chicago Title argues that, even if the dismissed counts were separate and distinct claims, an appeal pursuant to Rule 304(a) would still be improper because "the Hipskinds' implied contention that they should recover $634,000.00 based on a $34,806.00 breach of contract claim assures that: (a) there will be an

appeal when this case is concluded in its entirety, regardless of whether there is an appeal before that time; and (b) the factual underpinnings of both appeals will be the same."

¶ 28 The Hipskinds counter that the trial court's Rule 304(a) finding was proper, despite the common nexus of transactional facts, because the legal bases for recovery and relief sought under the dismissed counts are different from the remaining counts. The Hipskinds assert that "[a] survey of the pleading and proof elements of each of the dismissed counts and claims in comparison to the two counts which still stand seems unnecessary because the distinctions are self-evident and well known to the court." The Hipskinds conclude, therefore, that the dismissed claims constitute separate and distinct claims. The Hipskinds also maintain that the trial court's Rule 304(a) finding was not an abuse of discretion, and counsel stated at oral argument that the trial court "carefully exercised" its discretion and "did appear to have thought through carefully the *Geier* considerations."

¶ 29 Contrary to counsel's recollection at oral argument, we do not know whether or to what extent the trial court "carefully" reviewed its decision because, as we stated earlier, we have no transcript or bystander's report. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Merely pointing to the trial court's written order, which reflects nothing substantive other than the Rule 304(a) language, does little to highlight the trial court's thinking. At oral argument, counsel for the Hipskinds noted that *Geier* did not require the trial court to memorialize what it thought when it granted the Rule 304(a) finding. We do recognize that a trial court need not articulate its consideration of the *Geier* factors when determining under Rule 304(a) that there is no just reason for delaying an appeal. See *AT&T,* 2014 IL App (2d) 130577, ¶ 27. However, when a jurisdictional issue concerns the trial court's discretion as it relates to its consideration of the *Geier* factors, and when counsel on appeal represents to this court a recollection of the trial

court's "careful[] exercise" of its discretion, then a transcript of the proceedings or a bystander's report to substantiate the representations would be, at the very least, helpful to this court. Of import to our understanding of the trial court's reasoning is found at the Hipskinds' initial request for a Rule 304(a) finding at the hearing on June 29, 2012, for which we do have a transcript. Following the trial court's dismissal of four of the six counts against Chicago Title, the Hipskinds orally moved for a Rule 304(a) finding. The trial court denied the request, finding it not appropriate and stating that it was "not going to let this go piecemeal."

¶ 30 Our supreme court adopted Rule 304(a) to discourage piecemeal appeals while permitting early appeals when a delay might inflict needless hardship on a litigant. *Davis v. Loftus*, 334 Ill. App. 3d 761, 766 (2002). The rule permits an appeal from an order that finally disposes of a claim in a suit involving multiple claims. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). A "claim" is " 'any right, liability or matter raised in an action.' " *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008) (quoting *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill.2d 458, 464 (1990)). For a judgment to have sufficient finality for appealability under Rule 304(a), the judgment must dispose of an entire claim, even if the plaintiff stated the claim in several different ways in several different counts of the complaint. *Viirre v. Zayre Stores, Inc.*, 212 Ill. App. 3d 505, 511-12 (1991). Permitting an appeal from a disposition of part of a single claim wastes judicial resources by requiring the appellate court to relearn the operative facts for a second appeal following a final judgment on the entire claim. *Davis*, 334 Ill. App. 3d at 767. Moreover, an appeal from a disposition of only part of a claim might require the appellate court to address facts still at issue before the trial court. *Id.*

¶ 31 With the foregoing principles in mind, it appears that the "same core operative transactional facts" all stem from the Hipskinds' agreement, or contract, with Chicago Title, that

is, the Construction Loan Escrow Trust and Disbursing Agreement; neither party disputes this matter. Without remarking on the validity of the document or its substance, it is clear that, without this agreement, there likely would not have existed a relationship between the Hipskinds and Chicago Title. See, *e.g.*, *Selch v. Columbia Management*, 2012 IL App (1st) 111434, ¶ 59 (reflecting that, if there is no contract, there can be no breach of contract). Count II of the Hipskinds' third-party complaint, which alleges a breach of the agreement, remains pending in the trial court. Again, without remarking on the substantive merits, even if the agreement establishes a legal relationship between the Hipskinds and Chicago Title, there remains an issue regarding the duties of the parties. See, *e.g.*, *Trident Industrial Products Corp. v. American National Bank & Trust Co., N.A.*, 149 Ill. App. 3d 857, 866 (1986) (finding no fiduciary duty owed and therefore, no breach occurring). Count X of the Hipskinds' third-party complaint, which alleges a breach of fiduciary duty, also remains pending in the trial court. The record reflects the parties have yet to conduct discovery, as the trial court has issued a stay. Again, without remarking on the merits, in the event discovery leads to evidence that would provide further support for the counts sounding in tort, a dismissal of the appeal now would allow the Hipskinds an opportunity to revive the dismissed counts. However, a possible affirmance by this court could preclude the Hipskinds from reviving their causes of action. Despite the Hipskinds' argument pertaining to the unique elements of a cause of action for contract and for tort, it is relatively clear that the relationship between the adjudicated claims and the unadjudicated claims are not independent of each other. See *Geier*, 226 Ill. App. 3d at 383.

¶ 32 Moreover, the Hipskinds have acknowledged the interdependence of the claims and causes of action. In their response to Adept Construction's August 2013 motion to sever, the Hipskinds emphasized the interconnection of all the claims relating to the construction of their

house, stating that the shared actions involved "one common issue of fact and law." We agree with the Hipskinds that the various claims share common questions and issues yet to be resolved. And therefore, any consideration of the merits of the instant appeal would be premature, because the possibility exists that, depending on the outcome of the outstanding contract claims, we might be obliged to consider the same issues for a second time. See *Geier*, 226 Ill. App. 3d at 383.

¶ 33 Chicago Title argues that our decision is controlled by *Davis v. Loftus*, 334 Ill. App. 3d 761 (2002). In *Davis*, the appellate court sought to determine whether the plaintiff's dismissed contract and damage counts were an appealable final judgment as separate and distinct claims within the meaning of Rule 304(a). *Id.* at 766. Despite the trial court expressly finding no just reason to delay appeal of the dismissals pursuant to Rule 304(a), the appellate court dismissed Davis' appeal for lack of jurisdiction. The plaintiff's claim brought two counts in negligence and two counts in breach of contract for failure to provide competent legal representation alleging that the defendant law firm committed legal malpractice associated with the plaintiff's real estate development. The trial court dismissed both contract counts as needless duplication of the malpractice counts and dismissed the damages request in count I of negligence. *Id.* at 763-65.

¶ 34 Holding that it lacked jurisdiction to decide the dismissal of the counts, the appellate court found that the dismissed the contract counts did not resolve a separate claim, but were merely a restatement of the remaining malpractice counts. *Id.* at 767. The appellate court reasoned that the facts supporting the dismissed contract issues were identical to the facts supporting the remaining malpractice tort count. Similarly, the relief sought in the dismissed damages portion was identical to the relief sought in the remaining counts, and receiving full compensation for the remaining malpractice count would make any decision on the contract

counts moot. *Id.* The appellate court held that the dismissal was not a final judgment and did not "dispose of a separate and distinct claim within the meaning of Rule 304(a)." *Id.*

¶ 35 The Hipskinds distinguish *Davis* by noting that the facts supporting the dismissed contract claim were *identical* to the facts supporting the legal malpractice claim, and the relief sought in the dismissed count was *identical* to the relief sought in the surviving counts. (Emphasis added.) *Davis*, 334 Ill. App. 3d at 767. The Hipskinds assert that the pleading and proof elements of each of the dismissed counts were different from those that the trial court did not dismiss, and their claimed relief under the dismissed counts is the type of relief that they cannot recover under the counts that still stand.

¶ 36 *Davis*, and the other cases cited therein, are instructive and support our decision. Here, the trial court's order dismissing the four tort counts lacks appealability because a judgment after trial on the merits of the remaining contract counts raises the possibility of rendering the tort claims moot. See *Davis*, 334 Ill. App. 3d at 766 (citing *Hawthorn-Mellody Farms Dairy, Inc. v Elgin, Joliet & Eastern Ry. Co.*, 18 Ill. App. 2d (1958). Without a doubt then, reviewing the merits of four counts of the six would be a waste of judicial resources under the present circumstances. See *Davis*, 334 Ill. App. 3d at 767.

¶ 37 We recognize that the movant, Chicago Title, bears the burden here to show that the trial court abused its discretion (see *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 254 (2008)) and that a trial court need not articulate its consideration of the *Geier* factors when determining under Rule 304(a) that there is no just reason for delaying an appeal. *AT&T*, 2014 IL App (2d) 130577, ¶ 27. That said, we determine that Chicago Title met its burden of showing an abuse of discretion in this case, and therefore, we allow its motion to dismiss this appeal.

¶ 38 Our determination that we lack jurisdiction obviates a discussion of the merits or an analysis of the trial court's decision to dismiss the tort counts.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we dismiss this appeal for lack of proper appellate jurisdiction.

¶ 41 Appeal dismissed.