NO. COA14-831
NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2015

CAROL S. MACMILLAN,
Plaintiff,

v.

Forsyth County
No. 13 CVD 7597

MARY L. MACMILLAN,
Defendant.

Appeal by defendant from order entered 4 April 2014 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 4 December 2014.

Craige Brawley Liipfert & Walker LLP, by William W. Walker, for plaintiff.

Jones Law PLLC, by Brian E. Jones, for defendant.

STEPHENS, Judge.

Defendant Mary L. MacMillan ("Mary") appeals from the trial court's interlocutory order denying her Rule 12 motion to dismiss the complaint filed against her by Plaintiff Carol S. MacMillan ("Carol") for unjust enrichment and a constructive trust. Mary also appeals from the trial court's decision to grant Carol's Rule 12 motion to dismiss Mary's counterclaims. In response, Carol has

filed a motion with this Court to dismiss Mary's interlocutory appeal and impose Rule 34 sanctions for the frivolous prosecution thereof. After careful review, we conclude that Mary has failed to show that the interlocutory order she seeks to appeal affected a substantial right, and we consequently grant Carol's motion to dismiss and to impose Rule 34 sanctions.

I. Facts and procedural history

This is the third time this case has reached this Court on appeal. The underlying facts and procedural history of the case are as follows:

> Jerrold MacMillan ("Jerrold") and Carol were married in 1955, entered into a separation agreement in 1974, and were divorced in 1985, all in the Commonwealth of Massachusetts. In March 1985, while Jerrold was living in Winston-Salem, North Carolina, Carol registered the parties' 1974 Massachusetts separation agreement——which awarded alimony, child support, and other support to Carol——as a foreign support order in Forsyth County. Then, in September 1985, after the parties "reached a settlement agreement on all disputed issues," presumably arising out of the 1974 separation agreement that had been registered as a foreign support order earlier that year, the district court in Forsyth County entered a consent judgment that both incorporated and modified the terms of the parties' separation agreement. Among the terms modified and brought forward into the consent judgment was one providing that Jerrold would "provide in his last will and testament, through insurance, or, if [Jerrold] dies intestate and without insurance, by hereby

recognizing that [Carol] has a valid claim against [Jerrold's] estate for the payment of $18,000.00 to [Carol] upon [Jerrold's] death." The consent judgment further provided that "[t]his obligation ... is intended, if necessary, to apply to any and all of [Jerrold's] property, however held," and that, "[u]pon reasonable request by [Carol], [Jerrold] will from time to time furnish [Carol] proof that he is in compliance with this obligation." In accordance with this consent judgment, Jerrold's will devised $18,000.00 to Carol "pursuant to that certain Consent Order of September 4, 1985 in the District Court of Forsyth County, North Carolina."

When Jerrold died in May 2010, he was survived by his second wife, Mary. At the time of his death, the only asset in Jerrold's estate was one-half of a bank account he jointly owned with Mary, which was valued at $7,551.74. Upon Mary's application, those funds were distributed to Mary as a portion of the $20,000.00 year's allowance to which she was entitled as Jerrold's surviving spouse pursuant to N.C.G.S. § 30-15; the remaining $12,448.26 of the year's allowance to which Mary was entitled was entered as a deficiency judgment against the estate. Mary also received $35,000.00 from four separate life insurance policies belonging to Jerrold at the time of his death, for which Mary was the beneficiary.

On 1 February 2011—almost twenty-six years since both the registration of Jerrold and Carol's 1974 separation agreement as a foreign support order in Forsyth County and the entry of the trial court's 1985 consent judgment—Carol filed a "Motion to Substitute Party; Motion in the Cause; and Motion for Joinder of Party" ("Motion in the Cause"). In this Motion in the Cause, Carol sought to substitute Bryan

C. Thompson ("Mr. Thompson"), Public Administrator of the Estate of Jerrold MacMillan, for Jerrold as a party defendant in the action that gave rise to both the separation agreement and the consent judgment, sought to join Mary as a defendant in the same action, and requested that the court impose a constructive trust upon Mary and order her to pay $18,000.00 to Carol from the proceeds of Jerrold's life insurance policies and other assets in accordance with the provisions directing Jerrold to do the same in the consent judgment and in Jerrold's will.

In May 2011, the trial court entered an order that substituted Mr. Thompson for Jerrold as a defendant "in this action," concluded that the court had personal jurisdiction over Mary and overruled Mary's motion challenging the same, and joined Mary as a defendant "in this action" and ordered that Carol should serve Mary with "a copy of the Notice of Registration of Foreign Support Order, the Massachusetts Divorce Judgment and the incorporated Separation Agreement, a copy of the 1985 Consent Judgment, and [Carol's Motion in the Cause.]" Mary then moved to dismiss Carol's Motion in the Cause on grounds enumerated in N.C.G.S. § 1A-1, Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6). In July 2011, the court allowed Mary's motion to dismiss Carol's Motion in the Cause with prejudice on the grounds that such motion failed to state a claim upon which relief could be granted. Carol gave notice of appeal to this Court from the trial court's July 2011 order.

In *MacMillan v. MacMillan* (*MacMillan I*), __ N.C. App. __, 723 S.E.2d 173 (2012) (unpublished), this Court considered whether the trial court erred by dismissing Carol's Motion in the Cause on the grounds that such motion failed to state a claim upon which

> relief could be granted. After analyzing the purpose of a constructive trust, this Court stated the following: "Here, [Carol's] pleading alleges 1) that pursuant to two court orders Jerrold was to provide the sum of $38,000.00 to [Carol] through his last will and testament,[1] 2) that according to those court orders any of Jerrold's assets, including insurance policies, could be used to pay the sum owed, 3) that at the time of his death, Jerrold's probate estate possessed insufficient funds to pay [Carol], 4) that also at the time of his death Jerrold owned three life insurance policies totaling $25,000.00, and an accidental death policy of unknown value, 5) that the proceeds of those policies were paid to Jerrold's widow, [Mary], and 6) that Jerrold willfully and intentionally violated two court orders by failing to designate his existing assets to [Carol] at the time of his death."
>
> This Court continued that it was "clear from her pleading" that Carol adequately alleged that the property at issue entered Mary's possession "because Jerrold breached his duty under the terms of the separation agreement and consent judgment," and, thus, "adequately state[d] a claim for unjust enrichment and the imposition of a constructive trust." Accordingly, this Court reversed the trial court's dismissal of Carol's Motion in the Cause.
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> The parties then both moved for summary judgment, which motions were denied on 10 December 2012. On 4 February 2013, the trial court entered an order granting Carol's Motion

[1] Carol's original claim against Jerrold's estate for $38,000.00 was the erroneous result of adding a $20,000.00 obligation in the Massachusetts separation agreement to the $18,000.00 obligation in the Consent Judgment. Carol now concedes that the $20,000.00 obligation was modified and subsumed by the $18,000.00 obligation.

> in the Cause. In its order, the trial court concluded that it had jurisdiction over the subject matter, as well as over the persons of Carol, Mary, and Mr. Thompson. The court also concluded that "Mary was aware of Jerrold's obligations" to Carol in the consent judgment, that Jerrold "willfully and intentionally violated" the consent judgment "by failing to designate $18,000.00 of his existing assets to Carol at the time of his death," and that Mary was "unjustly enriched" by Jerrold's failure to comply with the consent judgment. The court then imposed a constructive trust on the funds received by Mary as a result of Jerrold's death. Mary appealed.

MacMillan v. Thompson (*MacMillan II*), __ N.C. App. __, 753 S.E.2d 741 (2013) (unpublished), *available at* 2013 WL 6234655, *2-*7 (citations omitted).

In *MacMillan II*, we vacated the trial court's order granting Carol's Motion in the Cause based on Mary's argument that the court erred in concluding that it had subject matter jurisdiction over Carol's lawsuit. In so holding, we noted first that,

> our Supreme Court has fashioned a one-size fits all rule applicable to incorporated settlement agreements in the area of domestic law, which provides that all separation agreements approved by the court as judgments of the court will be treated . . . as court ordered judgments. As such, these court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case, and the parties to such judgments do not have an election to enforce such judgment by contempt or to proceed in an

> independent action in contract.

Id. at *9 (citations, internal quotation marks, and brackets omitted). We found that Carol's Motion in the Cause alleged the facts necessary to support a claim of civil contempt against Jerrold. However, as we emphasized in discussing the limitations of a court's contempt powers, in order to hold a defendant in civil contempt,

> the trial court must find facts in accordance with the elements identified in N.C.G.S. § 5A-21(a), including that the noncompliance by the person to whom the order is directed is willful, and that the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order. In other words, the court must find not only failure to comply but must also find that the defendant presently possesses the means to comply.

Id. at *10 (citations, internal quotation marks, and brackets omitted). Thus, in light of the fact that "one who is deceased has no present ability or means to satisfy a consent judgment and cannot be coerced to do the same," *id.* at *12, we concluded that the trial court lacked subject matter jurisdiction "to consider Carol's action for civil contempt against Jerrold, when such action was first brought after Jerrold was deceased and when he could no longer be coerced to comply with the court's 1985 consent judgment." *Id.* at *13. We consequently vacated the order. However,

we also noted that despite the general rule that a party must enforce a consent judgment entered upon a separation agreement in a domestic relations case only by a civil contempt action and not by an independent action, Carol might still have a remedy available against Mary through a separate, independent action for unjust enrichment and constructive trust because "Mary was not a party to Jerrold and Carol's divorce action in the foreign jurisdiction, was not a party to the 1974 separation agreement arising from Jerrold and Carol's divorce action, and was not the person against whom the 1985 consent judgment at issue was directed." *Id.* at *13-*14. We declined to further address the merits of such a claim, as it was not properly before us at that time, and in so doing set the stage for the present lawsuit.

On 19 December 2013, Carol filed a complaint against Mary in Forsyth County District Court seeking to impose a constructive trust, or equitable lien, for the $18,000.00 she was entitled to based on the consent judgment. Carol's complaint largely repeated the same allegations as her Motion in the Cause, but it also specifically alleged that Mary "knew, just prior to Jerrold's death, that Jerrold did not own probate assets sufficient to pay $18,000.00 to [Carol]; and [Mary] knew that she was the sole beneficiary of the life insurance policies, the IRA, the pension,

and the annuity" from which she received more than $35,000.00 after Jerrold's death; that Mary "came into possession or control of the funds as a result of a breach of a legal duty owed to [Carol];" and that Mary would be unjustly enriched if allowed to retain them.

On 13 January 2014, Mary filed an answer in which she: (1) moved to dismiss Carol's complaint under Rule 12 for failure to state a claim upon which relief can be granted, failure to join a necessary party, and lack of personal and subject matter jurisdiction based on Mary's argument that the claim should be barred by the doctrines of ***res judicata*** and collateral estoppel as a result of this Court's decision in ***MacMillan II***; (2) asserted the statute of limitations and the equitable doctrine of laches as affirmative defenses; (3) counterclaimed against Carol for compensatory and punitive damages in excess of $10,000.00 for abuse of process and intentional infliction of emotional distress; and (4) moved to transfer the case to Forsyth County Superior Court. On 21 February 2014, the trial court denied Mary's motion to transfer based on our Supreme Court's holding that "[d]emanding recovery of a jurisdictional sum upon allegations which are not sufficient to constitute a cause of action cannot in itself confer jurisdiction to proceed to judgment," ***Williams v. Williams***, 188 N.C. 728, 730, 125 S.E.2d 482, 483 (1924), and section 7A-243(2)

of our General Statutes, which provides that "[w]here monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages." N.C. Gen. Stat. § 7A-243(2) (2013). On 26 February 2014, Mary filed an amended answer that restated her affirmative defenses and motions to dismiss, demanded a jury trial, and added two new counterclaims against Carol for malicious prosecution and negligent infliction of emotional distress. On 12 March 2014, Carol filed a reply and moved to dismiss all four of Mary's counterclaims.

After a hearing held on 31 March 2014, the trial court entered an order on 4 April 2014 denying Mary's motion to dismiss Carol's complaint and granting Carol's motion to dismiss Mary's counterclaims. In its order, the trial court found as facts that: (1) Carol's complaint is not barred by the 10-year statute of limitations on constructive trusts because it could not have arisen until Jerrold died in 2010 and his assets were distributed; (2) Carol's complaint is not barred by the equitable doctrine of laches because there was no evidence she delayed in filing it; (3) Carol's complaint is not barred by *res judicata* because "[t]here has never been a final disposition on [the] merits of the present case or

the previous action," given that the dismissal of Mary's Motion in the Cause was reversed by this Court in ***MacMillan I*** and our opinion vacating the trial court's order in favor of Mary after a hearing on the merits in ***MacMillan II*** meant that "[i]t is as if that hearing never happened. The case remains pending in District Court awaiting another hearing on the merits"; (4) Carol's complaint is not barred by collateral estoppel because none of the issues presented therein have been judicially resolved; (5) the allegations of Carol's complaint are sufficient to state a claim for a constructive trust; (6) Carol's complaint should not be dismissed for failure to join Jerrold's estate as a necessary party because his estate can still be properly added as a party to this action, Carol does not oppose joining it, and dismissal of an action for failure to join a necessary party is only proper when the defect cannot be cured; (7) Carol's sole purpose in pursuing her complaint is to seek a legal remedy for not receiving the funds she believes she is entitled to and the process in this case has been confined to its regular and legitimate function; (8) Carol filed her complaint with probable cause, given that this Court's opinion in ***MacMillan II*** seemed to suggest she could properly pursue a constructive trust directly against Mary, who has not suffered any special damages as a result of Carol's actions and who cannot

state a claim for malicious prosecution because both the present action and Carol's Motion in the Cause are still pending; (9) Carol's conduct in prosecuting her complaint has not been extreme or outrageous and any stress Mary has suffered rises only to the level of stress normally experienced by parties to litigation; and (10) in light of this Court's holding in *MacMillan I* that Carol sufficiently stated a claim for a constructive trust, Carol's complaint is neither frivolous nor illegitimate, and that in any event, Mary cannot show that Carol has acted negligently toward her because Carol does not owe her any specific duty. Consequently, the trial court entered its conclusions of law that Carol's complaint sufficiently alleges a claim for a constructive trust and is not barred by *res judicata*, collateral estoppel, the statute of limitations, laches, or failure to join a necessary party, and that Mary failed to sufficiently state any claim for abuse of process, malicious prosecution, or intentional or negligent infliction of emotional distress.

Mary's counsel gave written notice of her intent to appeal the trial court's denial of her motion to dismiss Carol's complaint to this Court on 11 April 2014. On 19 August 2014, Carol filed motions with this Court to dismiss Mary's appeal and impose sanctions pursuant to Rule 34. On 13 October 2014, Mary responded

by filing a reciprocal motion for Rule 34 sanctions against Carol, as well as a motion to have Carol's counsel disqualified and removed from the case based on alleged violations of our State's Rules of Professional Conduct. All these motions were referred to this panel for resolution.

II. Analysis

A. This interlocutory order affects no substantial right

Mary contends that the trial court erred in denying her motion to dismiss Carol's complaint. Although Mary attempts to invoke this Court's jurisdiction to review every basis for the trial court's order, her primary argument is that Carol's claim for a constructive trust is barred by the doctrines of *res judicata* and collateral estoppel. While conceding that the trial court's order denying her motion to dismiss is an interlocutory order, Mary insists that it is immediately appealable to this Court because it affects a substantial right. We disagree.

An interlocutory order is "one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citation omitted). "There is generally no right to appeal an interlocutory order." *N.C. Dep't of Transp.*

v. Page, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995) (citation omitted). The rationale behind this rule is "to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (citation omitted), *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). Despite the general rule, immediate appeal of interlocutory orders is available in two instances: "when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. § 1-277(a) and 7A-27[(b)(3)]." *Hillsboro Partners, LLC v. City of Fayetteville*, __ N.C. App. __, __, 738 S.E.2d 819, 823 (citation omitted), *disc. review denied*, __ N.C. __, 748 S.E.2d 544 (2013). This Court has previously held that "when a trial court enters an order rejecting the affirmative defenses of *res judicata* and collateral estoppel, the order can affect a substantial right and may be appealed immediately." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (citation and internal quotation marks omitted). Nevertheless, we have also recognized that "[i]ncantation of the two doctrines does not, however,

automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007).

In the present case, Mary contends that the trial court's order affected a substantial right because her motion to dismiss was partially based on *res judicata* and collateral estoppel. According to Mary, Carol's claim has already been the subject of two final judgments on the merits: first, by virtue of the Forsyth County Clerk of Superior Court's deficiency judgment for the remainder of Mary's year's allowance as a surviving spouse during the estate proceeding, and second, by the trial court's order granting Carol's Motion in the Cause that this Court vacated in *MacMillan II*. This argument is wholly devoid of any merit whatsoever.

The doctrine of *res judicata* "precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005) (citation omitted). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating

previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994) (citation omitted). In order to successfully assert the doctrine of *res judicata*, a litigant must prove three essential elements: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 262. Under *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (citations omitted). "[S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*," *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993), because "the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding." *Fickley v. Greystone Enters., Inc.*, 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted).

"A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]" *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Strates Shows, Inc.*, 184 N.C. App. at 461, 646 S.E.2d at 423 (citation and internal quotation marks omitted). "Collateral estoppel bars the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* (citation and internal quotation marks omitted). Collateral estoppel, also known as issue preclusion, "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 353 N.C. 452,

548 S.E.2d 527 (2001). Collateral estoppel is distinct from *res judicata* in that the former focuses on specific issues while the latter focuses on specific claims. "Thus, while *res judicata* precludes a subsequent action between the same parties or their privies based on the same *claim*, collateral estoppel precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is premised upon a different claim." *Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994) (citation omitted; emphasis in original).

In the present case, Mary argues first that Carol's complaint is barred by *res judicata* because the Clerk of Court's deficiency judgment in favor of Mary for the remainder of her year's allowance as a surviving spouse constituted a final judgment on the merits between her and Carol over any claim Carol might have had against Jerrold's estate but failed to bring before the Clerk of Court issued the aforementioned deficiency judgment. In support of this argument, Mary relies heavily on this Court's holding that, "when a mortgagee or trustee elects to proceed under [section 45-21.1 *et seq.* of our General Statutes], issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated in an action for strict judicial

foreclosure." *Phil Mechanic Constr. Co., Inc. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985).

There are several reasons why Mary's reliance on *Phil Mechanic Constr. Co., Inc.* is entirely misplaced.[2] Perhaps most significantly, Mary's argument proceeds from the flawed premise that our holding in that case created something akin to an absolute rule, whereby any deficiency judgment by the Clerk of Court operates as a final judgment on the merits. While this may be true in the specific context of certain foreclosure proceedings, Mary offers no argument, and cites no legal authority, to explain why it should also apply in the context of an estate proceeding, which is an entirely different type of legal proceeding, governed by different sections of our General Statutes and a distinct body of caselaw. We therefore decline to accept Mary's bald assertion that the Clerk of Court's deficiency judgment for the remainder of her year's allowance constitutes a final judgment on the merits so as

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[2] Mary also supports her argument that an order entered by the Clerk of Court can constitute the basis of an estoppel by citation to this Court's unpublished decision in *Armstrong v. Hutchens*, __ N.C. App. __, 763 S.E.2d 17 (2014) (unpublished), *available at* 2014 WL 2980261. We note first that Rule 30(e)(3) of our Rules of Appellate Procedure provides that this Court's unpublished decisions do not constitute controlling legal authority. Moreover, we note that like our opinion in *Phil Mechanic Constr. Co., Inc.*, our opinion in *Armstrong* focused specifically on foreclosures. Thus, Mary's reliance on *Armstrong* fails for the same reasons as her reliance on *Phil Mechanic Constr. Co., Inc.* fails.

to preclude Carol's claims, and we consequently reject Mary's argument that *res judicata* applies here.

But even assuming *arguendo* that Mary could satisfy the first element necessary to invoke the doctrine's preclusive effect, we remain highly skeptical as to whether Mary could show there was any identity of causes between her pursuit of the surviving spouse's year's allowance and Carol's claim for a constructive trust. This is in part because Mary failed to include the estate file for our review in the record on appeal. Mary explains in her reply brief[3] that she did not include the estate file in the record out of a desire to reduce the costs of this litigation, but that does not excuse a failure to comply with the requirements of our longstanding Rule of Appellate Procedure that the record must include "so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal[.]" *See* N.C.R. App. P. 9(a)(1)(e). Given Mary's failure to comply with Rule 9, there is no way this Court can accurately analyze Mary's argument

[3] We note that Mary's reply brief was filed in violation of N.C.R. App. P. 28(h), which provides that an appellant may file a reply brief within 14 days after being served with the appellee's brief. In the present case, Carol filed and served her appellee brief on Mary on 23 October 2014, but Mary's reply brief was not filed with this Court until 26 November 2014. The typical sanction for a violation of this sort is to strike the reply brief and confine our decision to the materials properly before us. However, in the present case, because Mary's argument is otherwise so incomprehensible, we will consider her reply brief to the extent that it assists this Court's understanding of her arguments.

that Carol had the opportunity to assert her claim in the estate proceeding but failed to do so before the entry of the Clerk of Court's deficiency judgment.

We can infer, however, from the fragments of the estate proceeding that Mary evidently did think were worth the cost of reproducing in the record for our review, that Mary's argument is baseless. On the one hand, Mary claims that Carol could have brought her claim prior to the deficiency judgment's entry because Carol was clearly a party to the estate proceedings as a legatee under Jerrold's will. However, the record indicates that Mary did not ask the Clerk of Court to admit the will to probate until after the deficiency judgment was entered, and it is difficult to discern how Carol could have made any claim before that point, especially when she had not yet filed her motion to discover the estate's assets pursuant to section 28A-15-12 of our General Statutes. In her reply brief, Mary suggests that Carol could have secured her rights by seeking a declaratory judgment under section 28A-15-12(b1) (2013), but that provision did not exist until 2012, which means Carol could not have sought a declaratory judgment in 2010. Mary insists that the then-extant version of the statute was functionally equivalent and that Carol failed to take advantage of the remedy it provided.

While Mary is correct that the 2010 version of the statute provided that "[a]ny person aggrieved by the order of the clerk of superior court may, within five days, appeal to the judge holding the next session of superior court of the county after the order is made or to the resident judge of the district . . . ," N.C. Gen. Stat. § 28A-15-12(b) (2010), her argument ignores and distorts the broader statutory context. Namely, subsection (a) of the 2010 statute provided a detailed process by which a decedent's personal representative or collector could request that the Clerk of Court examine any person in the county who allegedly possessed assets belonging to the decedent's estate, and subsection (b), which Mary relies on, provided an avenue for any person who was adversely affected by the process authorized in subsection (a) to appeal. *See id.* The problem with Mary's argument is that, by the statute's explicit terms, subsection (b) does not apply until after a party exercises the rights provided in subsection (a), and in this case, Carol's motion for examination to discover estate assets was not filed until after the Clerk of Court's deficiency judgment in Mary's favor. Nothing in the statute contemplates Mary's pursuit of a deficiency judgment as the type of event that could trigger subsection (b)'s five-day window for appeals; indeed, if anything, it is not Carol but Mary to whom subsection (b) applies, since

Carol was the party who filed a motion to discover the estate's assets from Mary. Mary offers no further argument as to why, when, or how Carol could have filed her claim for a constructive trust before the deficiency judgment, and we are wholly unpersuaded by Mary's attempt to transform this narrow and specific provision into a general rule to support her broader argument, the ramifications of which would create a perverse incentive whereby parties seeking to defraud an estate's creditors could more easily do so——and with preclusive effect——by simply obtaining a deficiency judgment for a surviving spouse's year's allowance as quickly as possible. This argument is overruled.

Mary also argues that Carol's complaint is barred by both *res judicata* and collateral estoppel as a result of this Court's decision to vacate the trial court's order granting Carol's Motion in the Cause for a constructive trust in *MacMillan II*. Specifically, Mary contends that Carol's current complaint is between the same parties and deals with the same issue as her Motion in the Cause, which Mary insists reached final judgment on the merits because the trial court's order granting Carol a constructive trust constituted a final determination of the parties' rights. This argument ignores both our longstanding

precedents regarding the finality of judgments and the procedural history of this litigation.

As our Supreme Court has explained, "vacate means to annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment." *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990) (quoting *Black's Law Dictionary*) (internal quotation marks and brackets omitted). Thus, when an order or judgment by a trial court is vacated by this Court, it is rendered "null and void," and "no part of it [can] thereafter be the law of the case." *Id.* Furthermore, this Court has previously recognized that a dismissal based on a lack of subject matter jurisdiction "is not on the merits and thus is not given *res judicata* effect" because there has been no final judgment. *Foreman v. Foreman*, 144 N.C. App. 582, 586, 550 S.E.2d 792, 795 (citation omitted), *disc. review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001). The same is true regarding collateral estoppel. See *id.* at 587, 550 S.E.2d at 796 ("If there was a final judgment on the merits, then either [*res judicata* or collateral estoppel] might apply, depending on the other facts. If there was not a final judgment on the merits, then neither theory should apply regardless of the other facts. Again, in the case *sub judice*, the original action was dismissed for a lack of subject matter jurisdiction.

Therefore, there was never a judgment on the merits and the same parties should not be precluded from raising the same issue.").

Here, in ***MacMillan II***, this Court vacated the trial court's order granting Carol's motion in the cause for a constructive trust based on the rationale that the trial court lacked subject matter jurisdiction. In so holding, we rendered the trial court's order null and void. Consequently, as the trial court noted in its order denying Mary's motion to dismiss, there has not been a final judgment on the merits sufficient to trigger the application of either ***res judicata*** or collateral estoppel. Mary's argument to the contrary—that there is no authority under North Carolina law holding that a vacated judgment cannot be the basis for an estoppel—rests on her unpersuasive attempts to distinguish ***Alford*** and ***Foreman*** from the procedural posture of the present case and ignores the second-to-last paragraph of this Court's opinion in ***MacMillan II***, wherein we explicitly noted that despite our decision to vacate the trial court's order, it still appeared that Carol could pursue her claim for a constructive trust against Mary in a separate, independent action. This argument is also wholly lacking in merit and is overruled.

Notwithstanding her inability to identify a final judgment on the merits that could trigger the preclusive effects of ***res***

judicata or collateral estoppel, Mary insists that the trial court's interlocutory order denying her motion to dismiss Carol's complaint is immediately appealable because of our Supreme Court's holding that "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Indeed, in her response to Carol's motion to dismiss this appeal and impose sanctions pursuant to Rule 34, Mary asserts that in light of *Turner* and subsequent cases in which this Court found its logic persuasive, *see, e.g.*, *Hillsboro Partners, LLC*, *supra*, North Carolina has established something akin to an absolute rule that any interlocutory order rejecting the affirmative defenses of *res judicata* and collateral estoppel is immediately appealable in every case where the defenses are raised. Therefore, by Mary's logic, because our State's appellate courts have previously allowed immediate review of an interlocutory appeal of an order denying a motion to dismiss where that motion made a "colorable assertion" of preclusion, and because Mary's motion to dismiss made a "colorable assertion" that Carol's claims were barred by *res judicata* and collateral estoppel, Mary's claim is also immediately appealable.

But this argument is based on a fundamentally flawed understanding of what constitutes a "colorable" assertion. On the one hand, ***Black's Law Dictionary*** defines the term "colorable" as an adjective that, when modifying a claim or action, means "appearing to be true, valid, or right." ***Black's Law Dictionary*** 282 (8th ed. 2004). On the other hand, the litigants in ***Turner*** and ***Hillsboro Partners, LLC*** whose motions to dismiss made colorable assertions that collateral estoppel barred the claims against them were able to plausibly allege all of the ***prima facie*** elements necessary to trigger the doctrine's application, including the requirement of a final judgment on the merits. ***See, e.g.***, ***Turner***, 363 N.C. at 559, 681 S.E.2d at 774; ***Hillsboro Partners, LLC***, __ N.C. App. at __, 738 S.E.2d at 827. By contrast, in the present case, Mary's motion to dismiss Carol's complaint makes no plausible claim that there was ever a final judgment on the merits, and therefore cannot satisfy the ***prima facie*** requirements for either ***res judicata*** or collateral estoppel. We therefore conclude that Mary's argument is not a "colorable assertion" but instead a mere "incantation of the two doctrines" which does not "automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses." See ***Foster***, 181 N.C. App. at 162, 638 S.E.2d at 534.

Mary also seeks review of the trial court's denial of her motions to dismiss based on her affirmative defenses and her Rule 12 motions to dismiss for failure to join a necessary party and failure to state a claim upon which relief can be granted, as well as the trial court's decision to grant Carol's motion to dismiss her counterclaims. Mary concedes that all of these are interlocutory orders, but requests that this Court use its plenary power pursuant to N.C.R. App. P. 2 to grant immediate review in order to avoid the manifest injustice of exposing her to the risk of contradictory verdicts and further prolonging the duration and cost of this litigation. However, Mary's request presumes that her arguments regarding *res judicata* and collateral estoppel are meritorious. This presumption is incorrect because, as already demonstrated, there has not been a final judgment on the merits in this case, which means there is no danger of inconsistent verdicts due to the fact that there is no prior verdict for whatever verdict is eventually reached in these proceedings to be inconsistent with. While Mary offers no further arguments that any of these interlocutory orders affected a substantial right, "[i]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for [the]

appellant's right to appeal." *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (citation and internal quotation marks omitted). Accordingly, we dismiss Mary's interlocutory appeal.

B. Mary's motion to disqualify

Both parties have moved for sanctions against each other pursuant to Rule of Appellate Procedure 34. Before reviewing the merits of their arguments, we turn first to Mary's motion to disqualify Carol's counsel based on alleged violations of our State's Rules of Professional Conduct.

Rule 1.9 outlines the duties that lawyers owe to their former clients, and subsection (c) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client . . . or reveal information relating to the representation." N.C.R. Prof. Conduct 1.9(c)(1-2)(2014).

In the present case, Mary's counsel, Brian E. Jones, alleges that by filing a motion for sanctions against him with this Court, Carol's counsel, William W. Walker, has violated Rule 1.9(c). Specifically, Jones argues that Walker owes him the same duty he

would owe any present, prospective, or former client on account of the fact that one of Walker's former law partners did some estate planning work for Jones's parents. Apparently, before Jones ever appeared in this litigation, his parents visited Walker's former partner to help them execute their wills and set up a discretionary trust for the benefit of Jones, the terms of which give the partners of Walker's firm the authority to appoint a successor trustee and/or trust protector should the need arise. In light of Rule 1.10(b)(2)'s provision imputing the conflicts any attorney at a firm would have to all members of that firm, Jones now argues that Walker's Rule 34 motion for sanctions is incompatible with his professional responsibilities as an attorney, and also violates fiduciary duties he owes to Jones, because it exploits confidential financial information about Jones and his parents that Walker's firm possesses as a result of the earlier representation in a manner materially adverse to Jones's interests. Thus, Jones requests that this Court take the highly unprecedented step of disqualifying Walker from the case.

There are several reasons why this argument is totally baseless. Most significantly, Jones misapprehends the relevance of his purported conflict to this Court's determination of whether to impose sanctions under Rule 34. As we have repeatedly made clear,

our sole focus in evaluating a Rule 34 motion is on the issue of whether the appeal is frivolous. *See, e.g.*, *Yeager v. Yeager*, __ N.C. App. __, __, 753 S.E.2d 497, 504 (2014). The assets of both the litigant and her attorney are wholly irrelevant to our analysis. Thus, it is difficult to discern how Walker's imputed knowledge of Jones's finances has any impact whatsoever on Walker's Rule 34 motion, which focuses exclusively on the frivolous nature of this interlocutory appeal. Moreover, while it is true that Jones's parents obtained legal services from Walker's firm, it does not appear that Jones himself is or ever was a client there, while his conclusory insistence that he is owed fiduciary duties as a prospective client based on the terms of the discretionary trust is similarly unsupported. However, what this Court finds most troubling about Walker's purported conflict is the manner in which it arose. Namely, although Walker has been Carol's counsel since this litigation commenced in 2010, Jones did not first appear in this matter until February 2013 when he filed notice of appeal to this Court of the trial court's order granting Carol's Motion in the Cause. Despite the fact that Jones's parents were by then already clients of Walker's firm, Jones made no mention of this purported conflict until July 2014, when he sent Walker a letter threatening to file a motion for his disqualification if Walker

filed a motion for Rule 34 sanctions against him. Of course, this means that by failing to raise the issue in the trial court, Jones has not preserved his disqualification argument for our review. *See* N.C.R. App. P. 10. In any event, in light of the preceding discussion, we conclude that the purported conflict described in Jones's motion to disqualify looks less like a conflict of interest and more like the judicial equivalent of a European soccer player taking a dive and then writhing around on the ground feigning injury in an effort to trick the referee into disciplining his opponent. As such, Jones's motion to disqualify is denied.

C. Rule 34 Sanctions

Finally, both parties have filed motions for Rule 34 sanctions against each other and their attorneys. On the one hand, Carol's counsel argues that the imposition of sanctions against Mary and her counsel, Jones, is warranted because this interlocutory appeal is frivolous insofar as it is not well grounded in fact, not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and has been taken to cause unnecessary delay and needless increase in the cost of litigation. On the other hand, Mary's counsel argues that the imposition of sanctions against Carol and her counsel, Walker, is warranted because Carol's motion that the appeal be dismissed and

for sanctions is itself frivolous insofar as it is grossly lacking in propriety and grossly disregards the requirements of a fair presentation of the issues to this Court.

Rule 34(a) permits this Court to impose sanctions against a party, or her attorney, or both, where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[,]" or "the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[,]" or any paper filed in the appeal "was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues" to this Court. N.C.R. App. P. 34(a)(1-3).

In the present case, Jones supports his Rule 34 motion for sanctions against Carol and Walker with two arguments. First, he claims that their motion to dismiss and for Rule 34 sanctions is baseless because an attorney of Walker's skill and experience should have been aware of the precedents that Jones contends make the trial court's interlocutory order immediately appealable and that Walker's arguments to the contrary have misled this Court. Jones also argues that the very fact that Walker had to submit a

15-page motion complete with index and table of cases to refute the immediate appealability of this matter belies Walker's argument that this appeal is not well grounded in fact or warranted by existing law. As the preceding analysis makes clear, Jones's arguments have no merit. Second, Jones contends that Walker's motion for dismissal and sanctions was grossly lacking in propriety because it was filed over one month before Jones ever filed Mary's appellate brief, and thus unfairly subverts the time for filing requirements provided by N.C.R. App. P. 13(a)(1). While we agree with Jones that it is generally better practice for an appellee to wait until after the appellant has filed a frivolous brief before moving to impose Rule 34 sanctions, Jones cites no authority indicating that this is, in fact, sanctionable conduct. Moreover, Walker's technical violation did not impact this Court's deliberations in any way, as it has been clear from the outset that the trial court's interlocutory order denying Mary's motion to dismiss was not immediately appealable. We therefore deny Jones's Rule 34 motion for sanctions against Carol and Walker.

As for Walker's Rule 34 motion for sanctions against Mary and Jones, in light of the preceding analysis, we agree that sanctions are warranted for the undertaking of this frivolous interlocutory appeal. While Jones contends that even if his arguments were

erroneous they were still made in good faith and thus do not warrant Rule 34 sanctions, we believe that the caliber of legal reasoning displayed in the briefs he submitted to this Court is sufficiently facile, self-serving, and meritless as to raise serious questions of bad faith, incompetence, or both. We also note that by failing to timely file his reply brief and neglecting to include the estate file in the record to give this Court an adequate basis for assessing his argument that the Clerk of Court's deficiency judgment constituted a final judgment on the merits, Jones has willfully violated Rules 9 and 28 of our Rules of Appellate Procedure. Furthermore, we believe that Jones's motion to disqualify Walker was grossly lacking in propriety, insofar as it was entirely baseless. Therefore, because this frivolous interlocutory appeal has unnecessarily delayed and needlessly increased the costs of this litigation, we order that Mary's counsel, Brian E. Jones, personally pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by Carol on account of this appeal. *See* N.C.R. App. P. 34 (b)(2).

Conclusion

The appeal is DISMISSED and the case is REMANDED to the trial court for further proceedings, including determination of Carol's costs and expenses in defending this frivolous appeal.

DISMISSED.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).