

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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ALVAREZ & GILBERT, PLLC, an Arizona professional LLC,  
*Plaintiff/Appellee,*

*v.*

BENJAMIN MEYERS and ELSIE MEYERS, husband and wife,  
*Defendants/Appellants.*

No. 1 CA-CV 15-0454  
FILED 6-9-2016

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Appeal from the Superior Court in Maricopa County  
No. CV2012-054821  
The Honorable Michael D. Gordon, Judge

**AFFIRMED**

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APPEARANCES

Benjamin Meyers & Elsie Meyers  
*Appellants*

Alvarez & Gilbert, PLLC, Scottsdale  
By Steven G. Ford  
*Counsel for Appellee*

**MEMORANDUM DECISION**

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Maurice Portley joined.

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**G E M M I L L**, Judge:

¶1 Benjamin and Elsie Meyers (“the Meyers”) appeal the superior court’s entry of judgment in favor of Alvarez and Gilbert, PLLC (“the Firm”). For the following reasons, we affirm.

**BACKGROUND**

¶2 The Meyers hired the Firm in 2011 to defend them, individually and their related corporate entities, in a commercial dispute (the “underlying matter”). The parties signed a written agreement in which the Firm agreed to provide, and Meyers agreed to pay for, legal representation (the “engagement letter”). At the Meyers’ request, the Firm prepared and filed a motion to dismiss the underlying matter, which was later denied.

¶3 The Meyers incurred and were invoiced approximately \$15,000 in legal fees, but only paid \$4,158.79. After they refused to pay the outstanding balance, the Firm filed a complaint in superior court against the Meyers, seeking damages for breach of the contract represented by the engagement letter. The Firm also filed a certificate on compulsory arbitration stating that, given the amount in controversy, the complaint was subject to compulsory arbitration under Arizona Rules of Civil Procedure (“Rules”) 72–76.

¶4 The Meyers filed an answer and counterclaim. As amended, the counterclaim alleged breach of contract by overbilling and by deficient, unethical representation. After the Firm failed to respond to the Meyers’ counterclaim, the Meyers’ filed an application for entry of default against the Firm. The Firm then filed a motion to dismiss the Meyers’ counterclaim, and default was not entered against the Firm.

¶5 The Firm successfully moved for summary judgment on its claims against the Meyers. The superior court then referred the Meyers’ counterclaim, which was subject to compulsory arbitration, to an arbitrator.

ALVAREZ & GILBERT, PLLC v. MEYERS  
Decision of the Court

After a hearing, the arbitrator found the Meyers had not presented evidence to support their counterclaim. The arbitrator also incorporated into his decision the superior court's ruling that, to the extent the Meyers' arguments were based on the quality of the Firm's legal services, such claims were professional malpractice claims and not cognizable as claims for breach of contract. The arbitrator filed a notice of decision in favor of the Firm in February 2015.

¶6 One day later, the Meyers filed in superior court a motion to reconsider the arbitrator's decision, which the court denied. The arbitrator entered a final award in March 2015, but the Meyers did not appeal from that award. The Firm moved for entry of judgment on the award in April 2015. The court entered judgment in the Firm's favor, awarding it \$11,001.70 in unpaid legal fees and \$694.70 in taxable costs. The Meyers timely appeal the superior court's judgment, and this court has jurisdiction under Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) and 12-2101.01(A)(6).

### ANALYSIS

¶7 The Meyers (1) challenge the superior court's refusal to enter default judgment against the Firm, (2) contend the superior court should have treated their motion for reconsideration of the arbitrator's notice of decision as an appeal from the arbitration award, and (3) allege the arbitrator was biased and applied incorrect legal standards.<sup>1</sup>

#### A. The Superior Court's Denial of Application for Entry of Default

¶8 On December 4, 2012, more than six weeks after the Meyers filed their answer and counterclaim, the Meyers filed an application for entry of default against the Firm because it had yet to file a response to the

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<sup>1</sup> The Firm argues, with some force, the Meyers' opening brief failed to comply with Arizona Rule of Civil Appellate Procedure 13(a)(7), which requires an argument containing "supporting reasons for each contention, and with citations of legal authorities and appropriate references" to the record. Consistent with this court's preference to resolve appeals on the merits, we decline in our discretion to declare the Meyers' opening brief deficient as a matter of law. And because we resolve all issues presented herein in favor of the Firm, we deny its request that additional briefing be allowed regarding issues it did not specifically address in its answering brief.

ALVAREZ & GILBERT, PLLC v. MEYERS  
Decision of the Court

Meyers' counterclaim. On December 18, 2012, the Firm filed a motion to dismiss the counterclaim, and the Meyers filed a motion requesting entry of default against the Firm. The Meyers also filed motions seeking to strike the Firm's opposition to the Meyers' motion for entry of default. The court declined to enter default, denied the Meyer's motions to strike the Firm's opposition to default, and granted the Firm's motion to dismiss the Meyers' counterclaim as unopposed. On appeal, the Meyers argue that the court erred by not entering default against the Firm on their counterclaim.

¶9 The denial of an application for entry of default is interlocutory and does not settle with finality any substantial rights of the parties; therefore, it is not an issue appropriate for review on appeal. *See Musa v. Adrian*, 130 Ariz. 326, 331 (App. 1980) (explaining that if a ruling "does not settle finally a substantial issue, it is not appealable"); *cf. Borg-Warner Acceptance Corp. v. Globe Elec., Inc.*, 20 Ariz. App. 147, 147 (1973) (explaining that absent a final judgment, a court's entry of default is not appealable).

¶10 Even if this court were to address the substance of the Meyers' argument, the Firm's motion to dismiss was filed within ten days, excluding weekends, of the Meyers' application for entry of default. *See Ariz. R. Civ. P. 55(a)(4)*. The motion was filed on the last day possible to prevent the entry of default and was therefore timely. Accordingly, the filing of the motion to dismiss prevented, as a matter of law, the entry of default against the Firm. The superior court did not err.

**B. The Superior Court's Treatment of Meyers' Motion to Reconsider the Arbitrator's Award**

¶11 After the arbitrator filed his notice of decision, but before he filed his final award, the Meyers filed in the superior court a "motion to reconsider" the arbitrator's notice of decision, alleging "errors and inefficiencies" by the arbitrator. Because the arbitrator's notice of decision was not "a ruling of the court" and because the Rules governing compulsory arbitration do not authorize the superior court to resolve a motion to reconsider a ruling by the arbitrator, the motion was not procedurally proper. *See Ariz. R. Civ. P. 7.1(e)* ("A party seeking reconsideration of a ruling of the court may file a motion for reconsideration." (emphasis added)); *Ariz. R. Civ. P. 72-76*. Accordingly, the superior court did not err by denying the motion.

ALVAREZ & GILBERT, PLLC v. MEYERS  
Decision of the Court

¶12 The Meyers also argue the superior court should have treated their motion to reconsider as a timely appeal of the arbitrator’s award, even though it was not titled as an appeal. Rule 77(a) outlines specific requirements for appealing from an arbitration award, which include:

The notice of appeal *shall* be entitled “Appeal from Arbitration and Motion to Set for Trial” and *shall* request that the case be set for trial in the Superior Court and state whether a jury trial is requested and the estimated length of trial.

(Emphasis added.) The Meyers’ motion for reconsideration was not so titled, nor did it ask that a trial be set in superior court. Instead, the motion asked, without supporting authority, that the superior court “RE-Write a Wrong Ruling by the Arbitrator, which is within the power and authority of this Court.” Such a motion does not comply with the procedure or content of an appeal required by Rule 77(a). Accordingly, the court did not err by declining, *sua sponte*, to treat the motion for reconsideration as an appeal of the arbitrator’s award.

**C. Arbitrator’s Bias or Partiality**

¶13 The Meyers also argue that the arbitrator was biased against them and “out of touch” with the rules of professional conduct and ethics that the Meyers assert govern their claims. Under the compulsory arbitration rules, the available remedy is an appeal of the award. But, as explained above, the Meyers did not appeal the arbitrator’s award in accordance with Rule 77(a). Moreover, even if the Meyers had appealed the award, such an appeal would result in a de novo trial in the superior court. Ariz. R. Civ. P. 77(c) (“All appeals shall be de novo on law and facts.”); *see also Costper v. Rea ex rel. Cnty. of Maricopa*, 226 Ariz. 438, 441 n.1 (App. 2011) (explaining that an appeal from a compulsory arbitration award involves “no review of the arbitration proceeding,” but is “a separate, traditional civil trial at which neither the conduct of the arbitration nor its results are at issue.”), vacated on other grounds by *Cosper v. Rea ex rel. Cnty. of Maricopa*, 228 Ariz. 555 (2012).<sup>2</sup> For this additional reason, the Meyers have shown no error in the court’s entry of judgment on the arbitrator’s award.

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<sup>2</sup> The Meyers also argue the superior court erred when it held they could not sustain a breach of contract claim based on allegations of professional negligence. The Meyers did not connect the breach of contract to any specific acts by the Firm, and thus, they did not appropriately change the

CONCLUSION

¶14 The superior court's entry of judgment on the arbitration award is affirmed.



Ruth A. Willingham · Clerk of the Court  
FILED : AA

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“gravamen of the action from tort to contract.” *Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 395 (App. 1996); see also *Barmat v. John & Jane Doe Partners A-D*, 155. Ariz. 519 (1987) (explaining that an ordinary professional negligence claim arises out of tort rather than contract). Furthermore, after the superior court's ruling, it granted the Meyers a third opportunity to file an amended counterclaim based on its findings. The Meyers did file a third amended counterclaim, but continued to connect their breach of contract claims to their allegations that Appellants' legal representation fell below the applicable professional standard.