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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

Appellate Case No.: 4D22-2637
LT Case No.: 562020CA000082 (ME)

LAWNWOOD MEDICAL CENTER, INC. D/B/A LAWNWOOD REGIONAL MEDICAL CENTER AND HEART INSTITUTE, and PATRICK REGAN, D.O.,

Appellants,

v.

GWENDOLYN ROUSE, as Personal Representative of the ESTATE of MARLEANA ROUSE, Deceased, et al.,

Appellees.

ANSWER BRIEF OF APPELLEE

On Appeal of a Partial Final Judgment of the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County, Florida

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INTRODUCTION

The legal doctrines of strict construction and waiver require this Court's affirmance of the partial final judgment. Consistent with this Court's binding precedent, section 44.103(5), Florida Statutes (2022) and Florida Rule of Civil Procedure 1.820(h) mandate affirmance because Appellants, Lawnwood Medical Center, Inc., and Dr. Patrick Regan (collectively, "Appellants," or "Lawnwood" for Lawnwood Medical Center, Inc.) indisputably failed to timely request trial de novo within twenty days of the arbitration award. Appellants' failure to *timely* comply with the rule and statute render the arbitration award final and binding.

Both below and on appeal, Appellants present zero evidence of compliance (neither strict, substantial, nor partial) with Rule 1.820(h) by the June 13, 2022, deadline. Appellants can point to no document demonstrating that they filed something, anything, seeking trial de novo before the deadline; rather, they filed nothing. Appellants' inherent request for this Court to judicially rewrite the Florida Supreme Court approved Rule of Civil Procedure and Florida Statute must be rejected.

Likewise, Appellants' "estoppel" argument is misplaced because nothing Ms. Rouse did lulled Appellants into believing they need not seek trial de novo or timely comply with Rule 1.820(h). To the contrary, Ms. Rouse provided a deadline heads-up with her early motions for trial de novo against other defendants determined to be not liable in the arbitration. Likewise, nothing about Ms. Rouse's counsel's discussions regarding possible mediation, and providing the minor survivor's medical records relating to her attempted suicide, said, "no need to comply with Rule 1.820(h)." Rather, Ms. Rouse's restrained dealings with counsel in the 20-day window comported with her ethical duty to continue prosecuting her case and seeking expedient resolution.

Appellants' second and third issues are either unpreserved for appeal or waived. Undeniably, Appellants never cited section 44.103(5)'s "orders and judgments" language below or asked the trial court to enter any orders short of judgment. Therefore, Appellants are precluded from raising this argument for the first time on appeal when the trial court's only invited path was entry of the Partial Final Judgment. To the extent that Appellants challenged the judgment's "execution" language, the trial court correctly followed the

straightforward mandate in section 44.103(5), Florida Statutes that the Judgment provide for execution upon Ms. Rouse's request.

For their final issue claiming potentially inconsistent results, this issue was waived when all parties agreed to the arbitration form. Never once did Appellants object to the form before or after arbitration, or before entry of the judgment upon the award. Further, Appellants misapprehend section 768.81, setoffs, and vicarious liability. Appellants had the opportunity to evaluate the award and decide to cap their exposure or roll the dice with a jury. Nothing is inconsistent with the hospital's capping of its liability with the award, and Dr. Tamar electing to seek a jury verdict for less, or if more, seeking a setoff for the amount paid on his behalf by the hospital. Nothing remotely supports an argument that Ms. Rouse would (or could) seek prohibited double damages for the negligence of any physician. Ms. Rouse's pursuit of her remaining separate claims is consistent with her rights under section 768.81(3), Florida Statutes (2017). This shotgun approach fails, and the judgment should be affirmed.

PREFACE

The Record on Appeal is cited as "R.[page number]." The second Supplemental Record as allowed by this Court's Order dated October 5, 2023, is cited as "S.R.[page number]," and Appellants' Initial Brief as "I.B.[page number]."

STATEMENT OF THE CASE AND FACTS

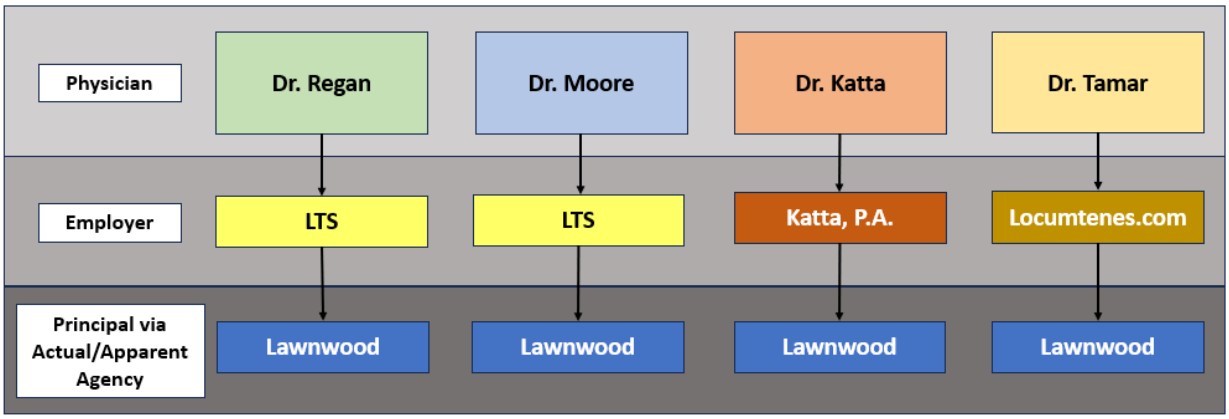
A. Nature of the Case.

Ms. Rouse, as personal representative of Marleana Rouse's estate, and grandmother to the surviving pre-teen daughter, sued Lawnwood, general surgeons Dr. Patrick Regan and Dr. Jason Moore, their employer Lawnwood Trauma Surgeons ("LTS"), gastroenterologists Dr. Kyron Tamar and Dr. Joseph Katta, and their respective principals Locumtenens.com and Joseph J. Katta, M.D., P.A., for medical negligence that led to the preventable death of her daughter, Marleana. Marleana passed away on August 20, 2017, after being hospitalized at Lawnwood since August 8, 2017, because of an undiagnosed bowel obstruction notwithstanding persistent, telltale gastrointestinal symptoms. (R.32-80). Marleana's surviving daughter is now twelve-year-old A.R. (R.33).

Ms. Rouse alleged medical negligence against Dr. Regan, Dr. Moore, Dr. Tamar and Dr. Katta (Counts I, II, IV and VI). For each physician's negligence, Ms. Rouse carefully alleged three separate counts against Lawnwood for its principal (vicarious) liability—actual agency, apparent agency and non-delegable duty. (Count VIII through Count XIX—three counts per physician). (R.49-73). Ms. Rouse also sued LTS for vicarious liability as employer of Dr. Regan

and Dr. Moore (Count III), and Locumtenens.com for vicarious liability as Dr. Tamar's employer (Count V). (R.44-47).

For visual clarity, Ms. Rouse depicts the four negligent physicians and their allegedly vicarious liable principals here:



B. Arbitration: Agreed Form.

The trial court ordered the parties to complete non-binding arbitration "pursuant to section 44.103, Florida Statutes and Fla. R. Civ. P. 1.820" by July 15, 2022. (R.82). "All issues, including attorney's fees and costs shall be referred" unless a proposal for settlement was previously served in which case the issue of fees and costs would be determined by the court. (R.82). On May 12, 2022, the parties completed non-binding arbitration before The Honorable F. Shields McManus (ret.). (R.89).

The unrebutted record evidence regarding the parties' agreement to the *form* of the non-binding arbitration award exists in

the Declaration of Ms. Rouse's counsel, Michael Baxter, Esq. (R.194-97). Mr. Baxter explained that the form submitted to and completed by the arbitrator was *agreed* to by the parties, including Lawnwood and LTS. (R.195). No evidence exists to the contrary. Also consistent with Mr. Baxter's Declaration, Lawnwood's papers reflect that Amanda Ritucci, Esq., represented four parties—Dr. Regan, Dr. Moore, LTS and Lawnwood. (R.107, 109, 195). In advance of the non-binding arbitration, Mr. Baxter circulated a proposed form of Non-Binding Arbitration Decision to Ms. Ritucci. (R.195).

Mr. Baxter explained that the agreed form did not include any lines for the arbitrator to adjudicate LTS's liability because it was undisputed that LTS, as their employer, would be held vicariously liable for any negligence found by Dr. Regan or Dr. Moore. (R.195). Similarly, the form did not include a line for the alleged vicarious liability of Locumtenens.com for Dr. Tamar because their employer-employee relationship was also undisputed. (R.195). *See also* R.44-47 (Count III and Count V). After Mr. Baxter circulated the proposed form, neither Ms. Ritucci nor counsel for <u>any</u> defendant contacted

him to request that LTS be included. Ms. Ritucci affirmatively *agreed* to the form.[1] (R.195-96).

C. Arbitrator's Determination of Negligence by Dr. Regan, Dr. Tamar and their Principal, Lawnwood.

On May 23, 2022, the arbitrator served his decision. (R.87, 289-91). The arbitrator found that Dr. Regan and Dr. Tamar had been negligent, but Dr. Moore and Dr. Katta had not. He determined that 30% of Dr. Regan's negligence and 70% of Dr. Tamar's negligence contributed to Marleana's death. (R.289-90). Next, the arbitrator found both Dr. Regan and Dr. Tamar were agents of Lawnwood. (R.290). The arbitrator found Marleana's estate sustained $34,700.00 in damages, and that A.R. sustained $6,500,000 for the loss of Marleana's services, parental companionship, instruction and guidance, and for her pain and suffering because of Marleana's death. (R.290-91).

Upon service of the arbitrator's decision on May 23, 2022, the 20-day clock started, and the deadline for *any* party who wished to

[1] Counsel's only discussion about the form concerned whether Ms. Rouse's damages should be capped pursuant to a statute that is not relevant to this appeal. Also, pursuant to counsel's agreement, that discrete issue was not included in the form. (R.195-96).

reject the arbitrator's findings and request trial de novo was June 13, 2022. *See* Fla. R. Civ. P. 1.820(h).

D. No Estoppel Activity, Repeated Notice of Looming 20-Day Trial De Novo Deadline.

Upon learning of Appellants' argument that her counsel's conduct relieved Appellants from complying with Rule 1.820(h)'s 20-day deadline, Ms. Rouse's counsel promptly filed a Declaration averring to the specific counsel discussions between May 23, 2022, and June 13, 2022. Undeniably, the only matters counsel discussed during that time pertained to (1) the possibility of settlement through mediation; and (2) Appellants' counsel's request for an authorization of medical records from A.R.[2] The medical records pertained to the fact that, on the morning of the arbitration award, A.R. attempted suicide.

[2] The Initial Brief states that Ms. Rouse's counsel contacted opposing counsel to follow up on the status of the authorizations. (I.B.7). But the authorizations and follow-up correspondence were sent by Appellants' trial counsel. (R.114, 156). Similarly, they mistakenly write that Ms. Rouse's counsel notified opposing counsel they were reserving August 2 for mediation. (I.B.8). However, again, the reservation of August 2 was written by Appellants' counsel's staff. (R.157).

In his Declaration, Mr. Baxter averred to these facts, also explaining that Appellants' counsel never communicated a plan or intent to request trial de novo in that period:

> 8. On the morning of May 23, 2022, A.R., the minor surviving daughter of decedent, attempted suicide.
>
> 9. As a result, on May 23, 2022, I contacted Ms. Ritucci for the sole purpose of ascertaining whether Ms. Ritucci's clients would be interested in mediation before the arbitration award was rendered, particularly in light of the decedent's daughter's suicide attempt. At that time, Ms. Ritucci was not averse to scheduling mediation, but questioned the feasibility of setting mediation on a short schedule.
>
> 10. The arbitrator returned his non-binding arbitration award later that same day, on May 23, 2022.
>
> 11. After the arbitrator rendered his award, I had a second telephone conversation with Ms. Ritucci where she requested an authorization for [A.R.'s] medical records from Lawnwood (where [A.R.] was treated …). I agreed to provide those records to Ms. Ritucci. At no time during this conversation did Ms. Ritucci state to me that any of her clients intended to request trial de novo.
>
> 12. Subsequently, I had a third telephone conversation with Ms. Ritucci where she advised me that her clients were amenable to mediation. However, Ms. Ritucci was not specific as to whether this statement applied to Dr. Regan, Dr. Moore, [LTS], and/or Lawnwood …. Ms. Ritucci

> did not state whether any of these defendants intended to request trial de novo.

(R.196-97).[3]

Mr. Baxter's averments *are consistent* with Ms. Ritucci's affidavit appended to Appellants' Response to Ms. Rouse's Motion for Entry of Judgment. (R.130-31). Ms. Ritucci similarly averred that she and Mr. Baxter discussed "potential settlement," "settlement issues," and Lawnwood's request for medical authorizations for A.R. on the telephone (albeit four times rather than three) after receipt of the arbitration award on May 23, then again on May 27, and May 31, 2022. (R.131).

On June 1, 2022, Ms. Rouse moved to compel mediation, asserting that no defendants' counsel had provided available dates for mediation, which Ms. Rouse had unsuccessfully attempted to set as early as April 28—*weeks before* both the non-binding arbitration and service of the award. (R.134-36, 145, 147-49, 151-55). Ms. Rouse's counsel's office began circulating dates for a motion calendar hearing on the Motion to Compel Mediation on June 3, 2022.[4] (R.157-

[3] Ms. Ritucci represented Dr. Moore, who was found *not* negligent, but also represented Dr. Regan and Lawnwood, who *were* found to be negligent.

[4] On June 15, 2022, the mediator filed a Notice of Mediation for August 2, 2022, mooting the Motion to Compel Mediation. (R.175).

65). No communication waived the 20-day deadline for Ms. Ritucci's clients to seek trial de novo.

Meanwhile, on May 26, 2022 (three days after the arbitration award), Dr. Tamar and his employer, Locumtenens.com, filed a request for trial de novo. (R.34-35, 89-90). After the *first* notification of deadline through receipt of the Non-Binding Arbitration Decision, Appellants' receipt of this request rejecting the arbitration award was Appellants' *second* notification of a looming deadline.

Next, as the *third* and *fourth* notifications to Appellants in advance (three days) of the impending deadline, Ms. Rouse requested trial de novo on June 10, 2022, for specific counts relating to physicians found not to be negligent, and for their agents/employers. Guided by this Court's binding precedent, *Johnson v. Levine*, 736 So. 2d 1235 (Fla. 4th DCA 1999), Ms. Rouse filed two separate requests to be precise and ensure clarity that she was only requesting trial de novo as to the defendants the arbitrator determined were not liable (Dr. Moore and Dr. Katta). (R.91-97).

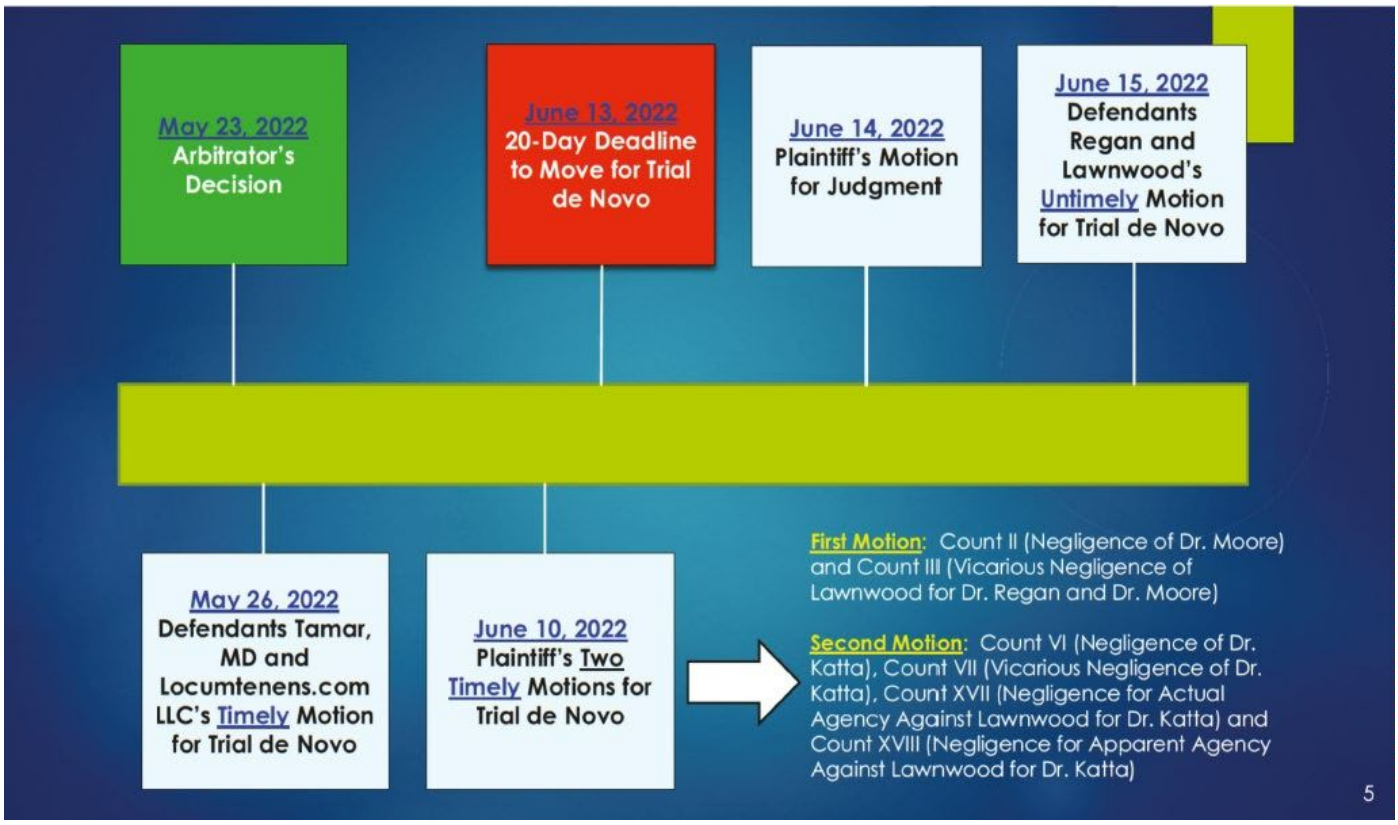
E. The 20-Day Deadline Passed.

Undeniably, Appellants' counsel would have received and been on notice of the award itself, plus *three* subsequent written requests for trial de novo filed *before* the June 13, 2022, deadline. Despite this,

11:59 p.m. on June 13, 2022, passed without Appellants timely requesting trial de novo.

As a result, on June 14, 2022, Ms. Rouse moved for entry of judgment against the Appellants. (R.98-105). Ms. Rouse directed the trial court to the legion of cases from this Court demonstrating that section 44.103(5) and Rule 1.820(h) mandate entry of judgment when a party fails to *timely* move for trial de novo, including *Johnson*, 736 So. 2d 1235; *Quaregna v. Strategic Performance Fund II, Inc.*, 943 So. 2d 265 (Fla. 4th DCA 2006); *Stowe v. Univ. Prop. & Cas. Ins. Co.*, 937 So. 2d 156 (Fla. 4th DCA 2006); *United Auto. Ins. Co. v. Ortiz*, 931 So. 2d 1025 (Fla. 4th DCA 2006); *Connell v. City of Plantation*, 901 So. 2d 317 (Fla. 4th DCA 2005); *Broward Yachts, Inc. v. Denison*, 871 So. 2d 954 (Fla. 4th DCA 2004); and *Klein v. J.L. Howard, Inc.*, 600 So. 2d 511 (Fla. 4th DCA 1992). (R.102-03).

The following day, on June 15, 2022, Dr. Regan, Lawnwood and LTS (all represented by the same counsel) filed an *untimely* Motion for Trial De Novo. (R.108-09). The below graphic summarizes the 20-day timeline and activity:



(R.244).

On June 17, 2022, Appellants opposed Ms. Rouse's Motion for Entry of Judgment and asked the trial court to accept their late motion as timely. (R.110-23). Relying on *Diaz v. Andy*, 987 So. 2d 698 (Fla. 3d DCA 2008), they first argued that the 20-day clock had not started running on May 23 because the arbitration award was premature. Specifically, they argued that the award did not "render a decision" as to LTS, Locumtenens.com and a party that had previously received summary judgment. (R.116). To remedy this, they requested a referral back to the arbitrator—relief not sought in this appeal. (R.116-17). Appellants complained that a judgment would

hold Lawnwood vicariously liable for Dr. Tamar's negligence when Dr. Tamar had requested trial de novo on Ms. Rouse's negligence claim against him. (R.119).

Second, Appellants argued that Ms. Rouse was estopped from insisting on their compliance with Rule 1.820(h) because after the arbitration award they engaged in discovery, sought medical authorizations, discussed settlement and were "engaged in setting pending motions for hearing in the future." (R.120, 122).

In response, Ms. Rouse opposed the untimely Motion to Accept Motion for Trial De Novo as Timely Filed. (R.180). Ms. Rouse asserted that Appellants' failure to timely move for trial de novo was dispositive (the rules do not recognize a late "Motion to Accept Motion for Trial De Novo as Timely Filed"), and that Appellants *agreed* to the form submitted to the arbitrator, in which the parties deliberately left off LTS, *inter alia*, by agreement. (R.181, 183, 186). There was no "mutual mistake." (R.186).

Ms. Rouse also argued that Florida law did not permit the trial court to decline to follow section 44.103(5) and Rule 1.820 based on a speculative claim of potentially "inconsistent judgments." (R.182). She submitted neither the statute nor rule "contain an exception that

relieves a party from timely moving for trial de novo when the basis for its liability is only vicarious." (R.188).

Finally, Ms. Rouse argued that Appellants' "estoppel" argument lacked merit because the limited conversations between counsel within the 20-day window were not record activity advising Ms. Rouse or the trial court of Appellants' (unknown to Ms. Rouse) purported intent to reject the arbitration award, and the discussions about mediation and A.R.'s medical authorizations were consistent with moving the case *if* trial de novo was timely requested. (R.188-90). Ms. Rouse pointed out that Ms. Ritucci had never told Mr. Baxter of Appellants' purported intention to timely seek trial de novo, nor did Ms. Rouse engage in a "gotcha" tactic by insisting on compliance. (R.190).

F. The Trial Court Entered Judgment upon Dr. Regan and Lawnwood's Failure to Timely Request Trial De Novo and Provided for Execution Based on Ms. Rouse's Request.

On June 24, 2022, Ms. Rouse filed a proposed Partial Final Judgment. (R.199-205). She prepared the following graphic to demonstrate the requested Partial Final Judgment's tracking of the arbitration award:

(R.251).

The trial court heard argument on Ms. Rouse's Motion for Entry of Judgment.[5] (R.298-321). Ms. Rouse submitted that the trial court's "hands [were] tied" given its mandatory, ministerial duty to enter Partial Final Judgment pursuant to section 44.103(5) and seven

[5] The record includes Ms. Rouse's demonstrative PowerPoint presentation used at the hearing. (R.240-52).

decisions of this Court confirming this duty because no motion for trial de novo was timely filed. (R.306-07).[6]

On September 1, 2022, the trial court entered Partial Final Judgment on the award. (R.254-55). The Judgment carefully tracked the arbitration award:

> ORDERED AND ADJUDGED that Plaintiffs Motion is granted and that Partial Final Judgment be and the same is hereby entered in favor of Plaintiff, GWENDOLYN ROUSE, as Personal Representative of the ESTATE OF MARLEANA ROUSE, deceased, in the amount of $1,960,410.00 against Defendants, Patrick Regan, D.O. and Lawnwood Regional Medical Center . . . jointly, and in the amount of $4,574,290.00 against Defendant, Lawnwood Regional Medical Center . . . as principal of defendant, Kyron Tamar, M.D. pursuant to the arbitrator's finding of vicarious agency liability. The foregoing amounts shall bear interest at the statutory rate of 4.25% a year, for which let execution issue. ....
>
> The above reflects the arbitration award amounts and percentages of liability as follows:
>
> PATRICK REGAN, D.O. 30%
>
> KYRON TAMAR, M.D. 70%

(R.254-55).

[6] In addressing Lawnwood's argument that it should not be held vicariously liable for Dr. Tamar who requested trial de novo, Ms. Rouse recognized that Dr. Tamar could receive a setoff for any amount paid on his behalf by Lawnwood. (R.318).

G. The Trial Court Denied Appellants' Request for Rehearing or to Alter the Judgment.

On September 13, 2022, Appellants moved to vacate the Partial Final Judgment based on a never-before-mentioned claim of excusable neglect. (R.261-72). After delaying this appeal for almost seven (7) months to obtain relinquishment for their new defense to the judgment, Appellants abandoned their excusable neglect argument in 2023 when faced with related discovery. *See* No. 4D22-2637: Appellant's Motion to Stay and Relinquish Jurisdiction (Oct. 6, 2022); Appellee's Mot. to End Relinquishment & Reinstate Appeal & Lift Appellate Stays (Apr. 11, 2023); 4DCA Order Lifting Stay and Relinquishment (May 1, 2023).

On September 15, 2022, Appellants filed a "Motion for Rehearing and/or to Alter Judgment." (R.279). Appellants only repeated their rejected arguments in opposition to Ms. Rouse's Motion for Entry of Judgment. (R.279-87). For example, they restated that LTS's omission from the arbitration award, and Lawnwood being held responsible for its principal liability for Dr. Tamar's negligence created potential windfalls for A.R. (R.281-84). They also requested that the Partial Final Judgment's language, "for which let execution

issue" be stricken (albeit acknowledging that judgment against Dr. Regan is final and should include the language). (R.285-86).

On September 20, 2022 (before Ms. Rouse could file a written response), the trial court denied the Motion. (R.323-24).

In Related Case 4D22-2630, this Court denied Appellants' Petition for Writ of Certiorari challenging the Judgment's inclusion of "for which let execution issue," determining that it had plenary jurisdiction in this appeal over the Partial Final Judgment. (R.325-26).

SUMMARY OF THE ARGUMENT

The trial court correctly rejected Appellants' "substantial compliance" contentions because there was no compliance – not substantial or otherwise. The *timing* component of Rule 1.820(h)'s 20-day rule is absolute and pursuant to *Johnson*, *Quaregna* and *Department of Transportation*, applies separately to each party. If the deadline is missed, as it was here, the award is "final and binding" and entry of judgment is mandatory.

Seeking a judicial rewrite of the Florida Supreme Court approved rule of civil procedure, Appellants erroneously urge this Court to obscure the Rule's *timing* component with the *form* aspect

that allows some flexibility. However, this Court's precedent allowing some flexibility for the form involved the party timely filing *something*. No court has rewritten Rule 1.820(h) to suggest 20-days really means 20 plus two extra days in the absence of an excusable neglect argument.

Next, estoppel is inapplicable on this record given the absence of *any* filing by Appellants between May 23, 2022 and June 13, 2022. In every case where this doctrine was applied—*Steinberg*, *de Acosta*, and *Beyond Billing*—the non-prevailing arbitration party filed *something* before day 20 that reflected the party's desire to proceed to trial.

Even if substantively reached, Ms. Rouse was not "estopped" from insisting on Appellants' compliance with Rule 1.820(h). Telephonically inquiring about settlement, moving to compel mediation, and providing medical records (all designed to expeditiously resolve and not proceed to trial) were actions consistent with Ms. Rouse's counsel's ethical duty to prosecute her case. As such, these narrow interactions between counsel are dissimilar to those in *Steinberg*, *de Acosta*, and *Beyond Billing* that plainly manifested their intentions to proceed with trial.

Issues II and III are either unpreserved or waived. No request for the trial court to enter any interim order before entering judgment was made below. Appellants only ever sought a full denial of Ms. Rouse's Motion that would give the award no effect, or a referral back to the arbitrator. To the extent Appellants challenged the Judgment's inclusion of "for which let execution issue," section 44.103(5) provides that "execution shall issue on request of a party" and the trial court followed this mandate.

Finally, Appellants waived any challenge to potential inconsistencies or inequities when all parties agreed to the arbitration form. Section 44.103(5)'s and Rule 1.820(h)'s requirements for entry of judgment treat direct and indirect (vicarious liability) claims the same. With respect to Lawnwood being held responsible as principal for Dr. Tamar's negligence, this is no different than if Ms. Rouse settled and released Lawnwood in exchange for payment on her principal liability claims against Lawnwood. The Partial Final Judgment benefits Lawnwood by capping its liability for Dr. Tamar's negligence regardless of how a jury may calculate and apportion his fault, and the remedy of setoff remains available to Dr. Tamar as he is jointly liable with Lawnwood.

Ms. Rouse's continued pursuit of her claims against Dr. Katta (and Lawnwood for Dr. Katta) and Dr. Moore is entirely consistent with her rights under section 768.81; she is not and has never sought a prohibited double recovery.

The Partial Final Judgment's award of $1,960,410.00 against Dr. Regan and Lawnwood must be separately analyzed and affirmed. Ms. Rouse sued Dr. Regan in a separate count for his negligence and the arbitrator found that he was Lawnwood's agent. Neither requested trial de novo. Entry of judgment in accordance with Dr. Regan's 30% fault is complete and his negligent treatment of Marleana will not be adjudicated by a second judgment. Whether a future trial may feature Dr. Regan's negligence in the context of *Fabre* defenses alleged by the remaining defendants is speculative and irrelevant for this appeal.

Florida law and the record requires affirmance of the Partial Final Judgment.

STANDARD OF REVIEW

Ms. Rouse agrees that review of the Partial Final Judgment is *de novo*. *Connell v. City of Plantation*, 901 So. 2d 317, 319 (Fla. 4th DCA 2005). Ms. Rouse also agrees that the Court should only review the denial of Appellants' Motion for Rehearing for an abuse of discretion. (I.B.14).

ARGUMENT

I. APPELLANTS INDISPUTABLY FAILED TO TIMELY COMPLY WITH RULE 1.820(h)'S CLEAR REQUIREMENT THAT A PARTY FILE A REQUEST FOR TRIAL DE NOVO PURSUANT TO SECTION 44.103(5) WITHIN 20 DAYS.

"The language is straightforward." *Smith v. Bright, et al.*, No. 1D22-1678, 2023 WL 6614001 (Fla. 1st DCA Oct. 11, 2023). In the most recent decision addressing Rule 1.820(h), the First District recognized the trial court's mandatory duty to enter "such orders and judgments" to "carry out the terms of the [arbitrator's] decision" if no motion for trial is filed within the 20-day period. *Id.* The only recognized exception to this strict 20-day deadline was excusable neglect – an unavailing argument long ago abandoned by Appellants. *See id.* (Bilbrey, J., concurring).

This Court has recognized that the purpose of a Rule 1.820(h) motion for trial "is to hasten the litigation along, make the parties

evaluate the award, and either accept it or complete the litigation through trial." *Stowe v. Universal Prop. & Cas. Ins. Co.*, 937 So. 2d 156, 158 (Fla. 4th DCA 2006). Further consistent with this purpose, *strict* compliance applies to Rule 1.820(h)'s *timing* requirement. *Id.*

Frustrating the rule's purpose, Appellants' actions have done nothing but delay Ms. Rouse's efforts to complete litigation and achieve relief for her preteen granddaughter. Here, Appellants delayed this appeal with relinquishment of jurisdiction to the trial court for almost seven (7) months only to entirely abandon their purpose for relinquishment (unsupported excusable neglect argument).

There is no dispute: the timeline after service of the arbitration award demonstrated no (strict, substantial, or otherwise) compliance by Appellants because *nothing* was filed within 20 days. No grounds exist to claim Ms. Rouse engaged in a "gotcha" tactic because neither she nor her counsel ever took any position inconsistent with enforcing Rule 1.820(h). This fact is plainly evident in Ms. Rouse's *early* requests for trial de novo as to other defendants.

A. The Plain Language of Section 44.103(5) and Rule 1.820(h), Combined with this Court's Precedent Mandated Entry of the Partial Final Judgment Upon Appellants' Failure to Timely Request Trial De Novo.

"[A] party's ability to contest an arbitration award is regulated by statute and court rule." *Friendly Homes of the South Inc. v. Fontice*, 932 So. 2d 634, 637 (Fla. 2d DCA 2006). Section 44.103(5), Florida Statutes (2022), provides:

> (5) The arbitration decision shall be presented to the parties in writing. **An arbitration decision shall be final if a request for trial de novo is not filed within the time provided by the rules promulgated by the Supreme Court.** The decision shall not be made known to the judge who may preside over the case unless no request for trial de novo is made as herein provided or unless otherwise provided by law. **If no request for trial de novo is made within the time provided, the decision shall** be referred to the presiding judge in the case who **shall enter such orders and judgments as are required to carry out the terms of the decision**, which orders shall be enforceable by the contempt powers of the court, **and for which judgments execution shall issue on request of a party**.

§ 44.103(5), Fla. Stat. (2022) (emphasis added).[7] The above bolded plain words of the statute compel affirmance.

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[7] The plain words of a statute control the Court's review. *Boyle v. Samotin,* 337 So. 3d 313, 317 (Fla. 2022) ("This Court adheres to the 'supremacy-of-text principle' that 'the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'"); *Furst v. DeFrances,* 332 So. 3d 952, 954

Rule 1.820(h) is the timing rule "promulgated by the Supreme Court" which provides:

> Any party may file a motion for trial. … If a motion for trial is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes.

Fla. R. Civ. P. 1.820(h). Article v, s. 2(a) of the Florida Constitution authorized the Supreme Court of Florida to adopt rules for the practice and procedure of Florida courts, including Rule 1.820(h)'s timing mechanism. The 20-day period established by Rule 1.820(h) is a "'window,' meaning that it opens when an arbitrator serves a decision on the parties and closes 20 days later." *Stowe*, 937 So. 2d at 158. As this Court recognized, the requirement that a party must seek trial de novo within twenty days, or face entry of judgment is a "bright-line rule." *Id.*

This Court has plentiful, consistent precedent holding that the failure to timely request trial de novo requires entry of judgment. In

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(Fla. 2021) ("[O]ur task is to discern the text's meaning as it would have been understood by a reasonable reader, fully competent in the language, at the time of its enactment."). The meaning of "final" in section 44.103(5) is not subject to debate.

Johnson, this Court described the trial court's *mandatory duty* to deem an arbitration award "final and binding" when a party fails to timely request trial de novo:

> Once a party involved in non-binding arbitration of a specific dispute under section 44.103 fails to request a trial de novo, by the express terms of statute the award becomes final and binding. A trial court has a mandatory duty to enforce final and binding awards by, among other things, entering such judgments as may be necessary and proper to enforce a final award made by the arbitrator.
>
> . . . .
>
> As we have already indicated, [the provisions of section 44.103(5)] are not merely precatory provisions. They create the right to enforce an arbitration award that has become final and binding as a result of a failure to request a trial.

736 So.2d at 1238. *See also Broward Yachts, Inc.*, 871 So. 2d at 955 ("If a motion for trial is not filed the trial court 'shall' enter a judgment. This is a 'non-discretionary, mandatory duty.'") (citation omitted); *United Auto. Ins. Co.*, 931 So. 2d at 1026 ("[E]ntry of a judgment in accordance with an arbitrator's decision is a ministerial act. The trial court has no discretion to deny such a request.") (citation omitted); *Klein*, 600 So. 2d at 512 ("[U]pon the failure to move for a trial de novo within 20 days of the service of an arbitration

award rendered pursuant to section 44.303 … the trial court is required to enforce the award and lacks discretion to do otherwise.").

Significantly, "in a multi-party case, 'each party seeking a trial de novo must file an individual timely request for trial de novo.'" *Quaregna*, 943 So. 2d at 267 (quoting *Dep't of Transp. v. Bellsouth Telecomms.*, 859 So. 2d 1278, 1281 (Fla. 4th DCA 2003) (clarifying *Johnson*)). Thus, Florida law does not permit one party who did not timely request trial de novo to rely on a co-defendant's timely request even when sued for the same injuries. *Quaregna*, 943 So. 2d at 267.

The arbitrator rendered his award on May 23, 2022, creating a window that closed June 13, 2022, for any party to timely move for trial de novo *or* face a "final and binding" award. *See Johnson*, 736 So. 2d at 1238. Appellants did not move for trial de novo (or file *anything*) on or before June 13, 2022. On June 14, 2022, Ms. Rouse promptly moved for entry of judgment. After the deadline, on June 15, 2022, Appellants requested trial de novo. That was too late and mandated entry of judgment on this record.

Indeed, this Court's most recent pronouncement regarding the effect of a failure to timely move for trial de novo required this result. "*The only mandatory requirement applied to the procedure of rule*

1.820 involves the time within which to provide the notice." *Vitesse v. MAPL Assocs., LLC*, 358 So. 3d 437, 439 (Fla. 4th DCA 2023) (e.s.) (citing *Stowe*, 937 So. 2d at 158); *see also Gambrel v. Sampson*, 330 So. 3d 114, 117-18 (Fla. 2d DCA 2021) ("[T]he circuit court below had no discretion to refuse to enter a judgment when neither the plaintiff nor the defendants had requested a trial by December 28. … If a litigant fails to request a trial within twenty days of service of the arbitration award, the court 'shall' enter a judgment on that award."); *Alexander v. Quail Pointe II Condo.*, 170 So. 3d 817, 820 (Fla. 5th DCA 2015) ("A request for trial de novo that is served when the 'window' is closed, whether too early or too late, is ineffective and will be denied."); *Bacon Fam. Partners, L.P. v. Apollo Condo. Ass'n, Inc.*, 852 So. 2d 882, 888 (Fla. 2d DCA 2003).

B. The Arbitration Award was Complete, Starting Appellants' 20-Day Clock.

To begin, Appellants submit that their 20-day clock had not started because the arbitrator did not address "all issues." (I.B.18-19). This point is ungrounded in the language of section 44.103(5) or Rule 1.820(h) and is without merit as the arbitration award adjudicated the four physicians' liability for Marleana's death,

apportioned the negligence of those found responsible and the amount of the estate's and A.R.'s damages.

As Ms. Rouse asserted below, Appellants' only "issues" raised below to this point were waived when Appellants agreed to the arbitration form. Although Appellants claimed the arbitrator did not address the vicarious liability of LTS for Dr. Regan and Dr. Moore, and Locumtenens.com's vicarious liability for Dr. Tamar, this was waived when all parties agreed to the form submitted to the arbitrator. (R.116, 303, 309). Undisputed in the record, Mr. Baxter's Declaration averred that "Ms. Ritucci [Appellants' trial counsel] agreed with Plaintiff's proposed form of the non-binding arbitration award." (R.196). *Cf. Alexander*, 170 So. 3d at 822 ("Alexander's counsel was provided with the proposed Agreed Order before it was submitted to the trial court for execution, and he raised no objections."); *see also Handel v. Nevel*, 147 So. 3d 649, 652-53 (Fla. 3d DCA 2014) (party was not entitled to relief where his counsel failed to read a proposed order sent by opposing counsel and at best a unilateral mistake occurred).

Thus, by their agreement, Appellants and LTS "dispense[d] with the performance of something [they were] entitled to exact … with full

knowledge of the material facts." *Mourning v. Ballast Nedam Constr.*, 964 So. 2d 889, 894 n.3 (Fla. 4th DCA 2007). Inclusion of LTS and Locumtenens.com on the form was waived and unnecessary. Ms. Rouse did not seek LTS's inclusion as a party to the Partial Final Judgment and it is not a party to this appeal.

Mr. Baxter explained that lines for adjudication of LTS's vicarious liability for Dr. Regan and Dr. Moore, and Locumtenens.com's vicarious liability for Dr. Tamar were not included because these entities' employment of their respective employee-physicians was undisputed. (R.195). Simply, the parties did not ask the arbitrator to adjudicate ministerial points of employment because no disagreement existed thereon. As Ms. Rouse argued below, there was no mistake, and she has "no issue with the defendants who were not on the form." (R.310).

Lawnwood's reference to the award as missing questions pertaining to Lawnwood's nondelegable duty—which Appellants, again, waived—is not preserved for appellate review. *See Hollywood Park Apts. S., LLC v. City of Hollywood*, 361 So. 3d 356, 360 (Fla. 4th DCA 2023) (argument unpreserved where "[a]ppellant … never argued this particular point to the trial court."). Albeit unpreserved,

Lawnwood's nondelegable duties were logically encompassed by the form's simplified and streamlined interrogatories inquiring whether each of the four physicians was "an agent" of Lawnwood, the purpose of which was to adjudicate Lawnwood's vicarious liability. (R.290).

Appellants also complain for the first time on appeal that the arbitrator did not "address attorneys' fees and costs." (I.B.16, 19, 30). However, this is also unpreserved. *See id.* In their Combined Response or Motion for Rehearing, they never complained that "attorneys' fees and costs" remained outstanding. (R.110-*et seq.*). Substantively, Appellants are wrong because fees and costs were not part of the arbitration referral. "Attorneys' fees and costs" were only referred to arbitration if there had *not* "been a proposal for settlement previously served, in which case the issue of attorney's fees and costs shall be determined by the court, if necessary." (R.82). Ms. Rouse served a proposal for settlement on Lawnwood on May 11, 2021, thereby removing attorneys' fees and costs from the referral. (S.R.6-11).

Appellants cite *Diaz*, 987 So. 2d 698. (I.B.19). But *Diaz* rests on exceptionally unique facts and does not support the proposition that an incomplete arbitration award (which *does not* characterize the

award here) relieves a party from timely moving for trial de novo. *Diaz* involved a civil theft claim where the plaintiff demanded the return of his sailboat or payment of $24,000. *Id.* at 699-700. The defendant had previously paid $5,000 as restitution for the same sailboat, and during litigation, served a motion for attorneys' fees pursuant to section 57.105, Florida Statutes. *Id.*

An arbitration decision awarded attorneys' fees to the plaintiff, but did not address the defendant's claim for section 57.105 fees or the defendant's right to a setoff. *Id.* at 700. Twelve days after the award, the aggrieved defendant filed a "Motion for Rehearing of Arbitration Ruling," identifying legal deficiencies in the fee award to the plaintiff under the civil theft statute and claiming his own fee entitlement under section 57.105. *Id.* at 701. The trial court ignored the Motion for Rehearing, did not address the defendant's entitlement to fees or a setoff, and instead entered judgment. *Id.*

The Third District determined that "the trial court should have referred the matter back to the arbitrator." *Id.* at 702. It stated, "[a]s there was further labor for the arbitrator to complete and the Defendant notified the trial court that it was seeking a rehearing to allow the arbitrator to address his request for section 57.105(1)(b)

attorney's fees, the Defendant's failure to file a request for trial de novo within twenty days of the arbitrator's incomplete decision did not render the arbitrator's decision final." *Id.* (e.s.).

Accordingly, the defendant's notification to the trial court of its disagreement with the award within 20 days was critical to the Third District's decision. Unlike that defendant, Appellants filed nothing at all between May 23 and June 13, 2022. As such, *Diaz* is unavailing. Further unlike *Diaz*, Ms. Rouse's arbitration award was complete in that it resolved all material, disputed issues of liability and damages in the case between Ms. Rouse and the defendants.

Finally, Appellants' claim that the "clock had not started to run" is undermined by the fact that not only Ms. Rouse, but Lawnwood's co-defendants, Dr. Tamar and Locumtenens.com, understood it to have begun on May 23, 2022, and timely filed their requests for trial de novo accordingly.

C. *Appellants Failed to Comply with the Rule's Timing Requirement—Substantially or Otherwise.*

As a matter of law, Appellants did not substantially comply with section 44.103 and Rule 1.820(h) by discussing mediation and requesting authorization to access A.R.'s medical records after her suicide attempt (which occurred hours before the arbitration award

was served). This Court has never held comparable actions to constitute compliance with Rule 1.820(h)'s requirement to *timely file* a request for trial de novo. Unlike in cases where a non-prevailing arbitration participant timely filed *something* that could be construed as a request for trial de novo,[8] Appellants filed nothing in the 20 days following the award.

As such, this Court's *Vitesse* opinion *supports* affirmance. *Vitesse* involved a party that *timely* moved for trial de novo three times both before and after a second arbitration hearing. Yet, the trial court entered judgment because of "scrivener's error." 358 So.3d at 438, 440. This Court reversed because "[n]othing in rule 1.820 required strict compliance *regarding the form of the notice* [seeking trial de novo]." *Id.* at 439 (e.s.). Squarely controlling, this Court recognized, "[t]he only mandatory requirement applied to the procedure of rule 1.820 involves the time within which to provide the notice." *Id.* (e.s.).

[8] Even so, filing anything during the 20-day period after service of an award does not necessarily qualify. In *Johnson*, this Court refused to interpret "Exceptions to Arbitration Order" as requesting a trial de novo. *Steinberg,* 932 So. 2d at 324; *see also Am. Platinum Prop. & Cas. Ins. Co. v. Swank*, 357 So. 3d 174 (Fla. 5th DCA 2022) (Traver, J., concurring) (party not entitled to trial de novo when its counsel timely filed a motion naming the wrong party).

Similarly, in *Nicholson-Kenny Capital Mgmt., Inc. v. Steinberg*, 932 So. 2d 321, 323 (Fla. 4th DCA 2006), the non-prevailing party in the arbitration filed a "Notice of Conference of Parties & Attorneys" on the prevailing party four days after the award, which this Court found "clearly indicated a desire to proceed to trial in the case." *Id.* at 324. This Court observed, "*the motion for trial* under rule 1.820 puts the other side on notice that it should be prepared for trial." *Id.* at 325 (e.s.).

This case does not involve a scrivener's error in a *timely* filed form that set forth Appellants' intent to proceed to trial. There was no issue with the *form* of Appellants' request – only that it was untimely. (R.108-09). Thus, the issue is not whether Appellants knew *how* to request trial de novo. Rather, they either missed or elected to let the deadline pass which then mandated entry of the Partial Final Judgment. *Johnson*, 736 So. 2d at 1238; *Stowe*, 937 So. 2d at 158; *Quaregna*, 943 So. 2d at 267.

D. Ms. Rouse's Actions Were Consistent with Requesting the Partial Final Judgment.

On the coin's flip side, Appellants submit that Ms. Rouse was "estopped" from insisting that they timely request trial de novo. The Court need not reach this issue since there was no *timely* filing at all.

Even if reached, the argument that Ms. Rouse's counsel acted inconsistently with requesting entry of judgment by discussing *mediation* with opposing counsel is unsupported by precedent or logic. Accepting Appellants' position would require a prevailing party to an arbitration to take an unbridled hiatus from working on a case while it waited, without knowledge, to see if its opponent would comply with Rule 1.820(h). Florida law does not support such a stilted view of forcing counsel into a standstill.

The authorities in which a party was held "estopped" from moving for entry of judgment are not analogous. First, Appellants inaccurately assert that *Steinberg*, 932 So. 2d 321, involved "similar circumstances." (I.B.25). That is belied by material distinctions with *Steinberg*. Four days after the arbitration decision, the losing party to the arbitration, Nicholson, (relative to Steinberg, whom the arbitrator deemed not liable) served a "Notice of Conference of Parties & Attorneys" on Steinberg. *Id.* at 323. The in-person meeting between counsel took place. *Id.* Then, still within the 20-day period, "[d]iscovery proceeded in accordance with the terms of the order setting trial, and Steinberg took a deposition … the day before docket call." *Id.* During the deposition, Steinberg discussed the pretrial

statement with Nicholson. *Id.* Next, at the scheduled calendar call (on the 20th day after service of the award), Nicholson requested a trial date, and Steinberg's counsel voiced no objection. *Id.* And the following week, both counsel appeared at a hearing that concerned the filing of the joint pretrial stipulation, told the trial court they expected to complete it soon, and signed it later that day. *Id.* Only ten days later did Steinberg move for entry of judgment. *Id.*

On these profuse facts, this Court decided that Steinberg should be "precluded from raising the issue of non-compliance with rule 1.820":

> [Steinberg] did not object when its attorneys were noticed to attend the pretrial conference, it worked with Nicholson's attorney to develop the pretrial statement; and it did not object to setting the trial at the docket call. All of these events occurred within the time in which Nicholson could have filed a "motion for trial de novo" had it known that Steinberg was insisting that it file a document so styled. Steinberg continued preparing for trial and never revealed its argument that the notice of setting the pretrial conference in accordance with the order setting trial was insufficient to put it on notice that Nicholson intended to proceed with a trial.
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> * * * *
>
> .... [I]n this case the appellees' attorneys' words, actions, and conduct led Nicholson's attorney to believe that that they assented to its request for a trial de novo, as reflected in its filed notice to set

> the pretrial conference in accordance with the order setting trial.

Id. at 324-25, 326 (e.s.).

Steinberg with its vast facts of trial advancement stands in stark contrast to the record before this Court. Undeniably, Steinberg's counsel *timely* noticed a conference in accordance with a trial order that satisfied the purpose of rule 1.820. *See Stowe*, 937 So. 2d at 159 (distinguishing *Steinberg* because "Stowe filed no similar notice *after* the rendition of the arbitration decision"). But for the timely conference notice, affirmance of the judgment would have been required in *Steinberg*.

In addition, Steinberg engaged in repeated conduct manifesting its expectation that the parties would proceed to trial before (and after) the 20-day deadline ran. Steinberg's counsel attended the *pretrial* conference (dispositively timely noticed and considered as pursuant to Rule 1.820), attended a deposition, worked on and signed the *pretrial* statement, attended *calendar call* and agreed to a *trial date*, and attended a hearing about the pretrial statement. *Steinberg* cried out for this Court's application of estoppel when Steinberg inconsistently asked for trial de novo approximately two

weeks after the 20th day following the arbitration award. Ms. Rouse's post-arbitration actions are simply not comparable to Steinberg's.

After the arbitrator served his award on May 23, 2022, three or four telephone calls transpired between Appellants' counsel and Ms. Rouse's counsel. (R.130-31, 194-97). On the morning of the same day the arbitration award was issued and *before* the award was rendered, A.R. attempted suicide, so Ms. Rouse's counsel called Appellants' counsel to discuss their possible interest in mediation. (R.196). After the award was issued, the additional two or three phone calls encompassed "settlement issues," "setting a mediation" and "sending a medical authorization to obtain records for" A.R., which Ms. Rouse's counsel agreed to provide. (R.131, 196). There is no record evidence – because none exists – that during these telephone calls Appellants' counsel indicated that her clients intended to request trial de novo, or that Ms. Rouse's counsel excused Appellant's non-performance with the strict timing requirement of Rule 1.820(h).

Other than Dr. Tamar's and Ms. Rouse's requests for trial de novo, the only record activity during the 20-day period was Ms. Rouse's Motion to Compel Mediation. (R.134-36). This motion simply continued Ms. Rouse's efforts to schedule mediation (to resolve the

case) based on all defendants' failures to have cleared dates of availability. The goal of that motion—attendance at a mediation to explore settlement—does not reveal a concerted plan or expectation of proceeding to trial akin to attending a pretrial conference, filing a pretrial statement that lists disputed issues, or attending a calendar call.

Mediation is an informal, non-adversarial process intended to facilitate settlement. *See* § 44.1011(2), Fla. Stat. (2022). Ms. Rouse was not seeking mediation pursuant to the Case Management Order, which did not require it (in addition to non-binding arbitration). (R.82-85). Moreover, that Ms. Rouse had been attempting to coordinate mediation *well before* the arbitration proceeding demonstrates consistency and the mediation's lack of connection to the arbitration award. Ms. Rouse was continuing her *pre-arbitration* efforts to set this event—which *included* defendants found not liable and who *had* requested trial de novo.

Similarly, that Ms. Rouse's counsel professionally informed Appellants' counsel of A.R.'s suicide attempt (that happened to occur on the same day that the arbitration award was served) and cooperatively agreed to furnish A.R.'s medical records was fully

compatible with Ms. Rouse's insistence that Appellants comply with Rule 1.820(h). Informing Appellants about the tragic event comported with Ms. Rouse's duty to continue moving the case. In fact, allowing Appellants to investigate A.R.'s suicide attempt was intended to increase their willingness to accept the award and expeditiously resolve this case and obtain medical care for A.R. Discussing a release of A.R.'s medical records did not embody a reference to a pending or anticipated trial or render Ms. Rouse's later motion for entry of judgment a "gotcha" tactic.[9]

Appellants' other cases where "estoppel" applied to prevent a prevailing party to an arbitration from insisting on its opponent's compliance with Rule 1.820(h) also support affirmance. In *Beyond Billing, Inc. v. Spine & Orthopedic Center, P.C.*, 362 So. 3d 256 (Fla. 2d DCA 2023), the Second District declined to compel entry of judgment on an arbitration award where within twenty days, "the parties indicated a mutual intention to proceed to trial by executing

[9] Further, Lawnwood's complaint about its access to A.R.'s medical records is not well-taken when it remains entitled to contest A.R.'s wrongful death damages in the context of defending its alleged vicarious agency liability for the negligence of Dr. Katta (on which Ms. Rouse requested trial de novo)).

a joint stipulated motion to amend the case management order." *Id.* at 257-58. The joint motion:

> ... stipulated that the parties required additional time to conduct discovery and to add new claims to the case. It also stated that the case would be 'ready for trial' at the projected trial date previously set by the court.

Id. *See also* *de Acosta v. Naples Cmty. Hosp.*, 300 So. 3d 264 (Fla. 2d DCA 2019) (non-prevailing party filed a "statement of facts, identification of disputed facts, and identification of issues of law" nine days after the arbitration award, and the prevailing party filed its own statement of facts and identification of issues of law, still within the 20-day period).

Here, Appellants filed *nothing* that can even tenuously be construed as a request for trial de novo on or before June 13, 2022. Regardless of the post-award conduct of the prevailing parties in *Steinberg*, *de Acosta*, and *Beyond Billing*, their common thread is that the non-prevailing party to an arbitration timely filed *something* that *could* be construed as requesting trial de novo. The complete absence of record activity initiated by Appellants between May 23 and June 13, 2022, precludes applying those cases here. Even supplementing the equation with Ms. Rouse's counsel's actions, a handful of

telephone calls between counsel in furtherance of attempting to mediate the dispute and to discuss A.R.'s medical records flowing from a recent event impacting the damages are of a different caliber than the conduct of the parties in *Steinberg*, *Beyond Billing* and *de Acosta* which directly correlated with the trial process. Ms. Rouse's counsel's maintenance of an open line of communication with Appellants regarding mediation manifested no expectation that Ms. Rouse would proceed to trial against Appellants on the claims determined adversely to them in the absence of a request for trial de novo.

II. APPELLANTS' "NECESSARY ORDERS" ARGUMENT IS UNPRESERVED FOR APPELLATE REVIEW AND THE TRIAL COURT FOLLOWED THE PLAIN LANGUAGE OF SECTION 44.103(5) IN ORDERING EXECUTION.

A. Lack of Preservation.

Appellants' second issue is unpreserved for review. "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005).

On appeal, Appellants vaguely suggest that the Partial Final Judgment was premature because the trial court should have entered "such orders and judgments as may be required to carry out the terms of the decision." Fla. R. Civ. P. 1.820(h). Below, Appellants argued that entering judgment would be premature, but did not cite or rely on section 44.103(5)'s "orders and judgments" language. Nor did they request *the trial court* to take any action before entering judgment.[10] The only relief they requested in connection with the argument that entering judgment was premature was a referral back to the arbitrator—now abandoned and which lacked merit by comparison to *Diaz* as discussed *supra*, Part I.

B. Substantively, No Relief is Available.

And while there is thus no basis to reach the merits, the Initial Brief offers no clarity as to what "orders" Appellants suggest the trial court enter short of judgment or *how* it could or should have addressed the alleged outstanding issues of LTS's and Locumtenens.com's vicarious liability. *See generally Mech v.*

[10] It is not surprising that Appellants did not rely on section 44.103(5)'s "orders and judgments" language in the trial court as this language supports the trial court's mandatory duty to enter judgment upon a failure to timely move for trial de novo.

Brazilian Waxing By Sisters, Inc., 349 So. 3d 453, 454 (Fla. 4th DCA 2022). The Court cannot afford relief based on guesswork.

More importantly, Appellants' counsel (who also represented LTS) agreed to the form of the arbitration award, causing them to waive these arguments. By entering Partial Final Judgment, the trial court correctly agreed with Ms. Rouse that the issue was waived and there was no reason to include line items for these entities on the arbitration award where their vicarious liability for Dr. Regan and Dr. Tamar, respectively, is not disputed by any party.

C. For Which Let Execution Issue was Required by Law.

To the extent Appellants here challenge the Partial Final Judgment's ordering of execution, the trial court correctly *followed* the plain language and mandatory directive of the statute in doing so.

Initially, this Court may find Appellants' challenge to the Partial Final Judgment's execution language moot. Their challenge below was tethered to the possibility that this Court lacked jurisdiction to review the Partial Final Judgment. (R.285-86). As a result, they insisted that the Partial Final Judgment "is not final." (Reply to Response to Pet. For Writ of Cert., No. 4D22-2630, at 15). However, the Court has determined it has jurisdiction.

The Initial Brief identifies no discrete error in the Judgment's execution language except the fact that Lawnwood will continue to defend Ms. Rouse's vicarious liability claims against it for Dr. Katta's negligence. This fails to explain why execution cannot lawfully issue as to the now final claims (i.e., paths of vicarious liability for Dr. Regan's and Dr. Tamar's negligence) on which Lawnwood failed to timely request trial de novo. *Irvin v. LJ's Package & Lounge, Inc.*, 321 So. 3d 300 (Fla. 2d DCA 2021), involved a setoff before crafting of judgment, not execution. The Initial Brief cites no authority establishing the Judgment's "execution" language needs correction.

Section 44.103(5) expressly provides for execution to issue on the class of judgments, *if requested by a party*. It unambiguously states that on such judgments, "*execution shall issue on request of a party*." § 44.103(5), Fla. Stat. (2022) (e.s.). As noted, "'the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" *Boyle*, 337 So. 3d at 317 (citation omitted). The Court "is without power to rewrite a plainly written statute[.]" *Roldan v. City of Hallandale Beach*, 361 So. 3d 348, 353 (Fla. 4th DCA 2023) (citation omitted); *Fla. Dep't of Revenue v. Fla. Mun. Pwr. Agency*, 789 So. 2d 320, 324 (Fla. 2001) ("[C]ourts

cannot judicially alter the wording of statutes where the Legislature clearly has not done so.").

Specific to section 44.103(5), this Court has emphasized the statute's frequent and deliberate use of "shall" throughout. *Johnson*, 736 So. 2d at 1238 (stating "these are not merely precatory provisions. They create a right to enforce an arbitration award that has become final and binding as a result of a failure to request a trial."). The word "shall" is a directive to the trial court in mandatory terms. *Gambrel*, 330 So. 3d at 117 ("Both the deadline and the directive to trial courts are cast in mandatory terms."). The way courts must interpret the word "shall" as it relates to requiring execution is no different.

Aware of and referencing this part of the statute, Ms. Rouse specifically "requested" execution when asking for entry of judgment. She wrote, "[p]ursuant to section 44.103(5), Plaintiff requests that execution issue on the judgment." (R105). At the hearing, Ms. Rouse's counsel pointed out that the statute says "shall" five times," and paraphrased its execution requirement, stating "[t]he order shall be enforceable and execution shall issue." (R.306). As a further request,

Ms. Rouse's proposed judgment included the language. (R.204). In abiding by Ms. Rouse's requests, the trial court followed Florida law.

The statute makes logical sense. Ms. Rouse is entitled to receive the money owed to her pursuant to the now binding arbitration award. Simply because she has continued claims against separate defendants should not delay her receipt of monetary benefits determined. The remaining defendants have no "claw back" rights to the arbitration award (nor have they claimed any). Thus, the execution issue language makes sense for finality and enforcement.

Finally, Appellants' challenge to the judgment's "execution" language overlooks that, in the trial court, they conceded that execution is proper as to the part of the Partial Final Judgment against Dr. Regan and Lawnwood jointly, for Dr. Regan's negligence, in the amount of $1,960,410.00. (R.286). Therefore, while no part of the Judgment should be disturbed, Appellants specifically waived any challenge to the execution language associated with that part of the Judgment.

The trial court correctly included "for which let execution issue" in the Partial Final Judgment when the Legislature expressly

commanded that judgments entered pursuant to section 44.103 and Rule 1.820 include that language on request of a party.

III. SPECULATIVE CLAIM OF FUTURE INCONSISTENT RESULTS DID NOT AUTHORIZE DEPARTURE FROM THE TRIAL COURT'S MANDATORY DUTY TO ENTER THE PARTIAL FINAL JUDGMENT.

Lastly, Appellants challenge the Partial Final Judgment by asserting that the claims on which they failed to timely request trial de novo are not "discrete" from Ms. Rouse's remaining claims and there is a parade of possible inconsistent results. These speculative concerns for a future event that may or may not occur yielded no authority to deny Ms. Rouse's right to judgment and are factually misplaced.

There is nothing in section 44.103(5), Rule 1.820(h) or binding precedent that recognizes unjust or inconsistent results as a legal basis authorizing the trial court to depart from its mandatory, ministerial duty to enter judgment on a nonbinding arbitration award when request for trial de novo is not timely made. Appellants' argument boils down to asking this Court to vacate an arbitration result in this regulated area of law without any statutory or rule-based grounding. *Cf. Friendly*, 932 So. 2d at 637.

Johnson governs this issue. There, an arbitrator in a multi-party, medical malpractice action "found some defendants liable in damages and others not liable." 736 So. 2d at 1237. The liable defendants filed "exceptions" (which were insufficient to constitute requests for trial de novo). *Id.* As here, "the plaintiff did timely request for a trial de novo, but *only* as against the defendants found not liable." *Id.* The plaintiff also moved for entry of judgment against the defendants found liable. The trial court—wrongly—reasoned that the plaintiff's request for a trial de novo constituted a request for a trial of all several and distinct claims submitted to arbitration. *Id.*

On appeal, this Court addressed "whether *plaintiff*'s particularized request for a trial against *only* the exonerated defendants allow[ed] the trial judge to ignore the finality of the arbitration award as to some of the parties in a multi-party case and instead order a trial of all claims against all defendants." *Id.* at 1239. This Court answered that question negatively:

> …. In our opinion however the statutory locution, "a request," refers to one of the sets of disputants to any particular claim in suit, not necessarily to an entire multi-issue, multi-party case.
>
> Plainly the text of the statute itself does not require, in so many words, that any request by a party to a separate claim operate to require a trial

> on a claim as to which no party has requested a trial. Nothing in the structure and purpose of the statute purports to mandate an omnibus trial in a multi-issue, multi-party case where the adverse parties to discrete claims have failed to request a trial after non-binding arbitration. Causes of action are, after all, claims by someone against someone. Each claim by this plaintiff against each separate defendant stands alone and can be treated—as, indeed, the arbitrator here did—entirely separate from and alternative to the other claims.
>
> .... We read section 44.103 to operate on discrete claims, so that the request of any one of two adverse parties to a discrete claim would be sufficient to require a trial de novo on that claim; but that the failure of all adverse parties to a separate and discrete claim within a multi-claim, multi-party lawsuit to request trial de novo would not end up requiring an omnibus trial on all other claims against all parties.

Id. at 1239-40. This Court also declined to permit the non-prevailing, non-requesting parties to rely on the plaintiff's requests for trials against the exonerated parties:

> Moreover, there is no reason to believe that plaintiff's request allowed the liable defendants to believe that they would obtain a trial solely on the basis of plaintiff's highly specific request. That request very carefully and specifically requested a trial de novo *only* against identified defendants, namely those who had been exonerated by the arbitrator's decision. The defendants found liable could have been under no illusion that plaintiff's request sought a trial against them as well. These defendants could thus hardly claim surprise by

> plaintiff's argument that the trial should be limited to her claims against only those who had been found by the arbitrator not liable.

Id. at 1240. *See also Dep't of Transp.*, 859 So. 2d at 1281 ("[W]e undertake to clarify our interpretation of that rule and statute in *Johnson*. In a multi-party case, each party seeking a trial de novo must file an individual timely request for trial de novo.").

Using *Johnson* as a controlling roadmap, Ms. Rouse both 1) insisted upon Appellants timely requesting trial de novo, if sought, as to her claims on which they were found liable, and 2) ensured that her own requests for trial de novo were highly specific and carefully tailored to those physicians who the arbitrator exonerated (and those entities with alleged, potential vicarious liability for their conduct). Her claims against each physician and whether Lawnwood has principal liability for each of them are indeed "separate" under *Johnson*.

Appellants ask this Court to hold that because Ms. Rouse has sued several physicians, their employers, and the hospital where they treated her, there was "collective negligence" and none of her claims are "discrete." This overreaching claim is directly contrary to *Johnson* and its progeny. Ms. Rouse has not attempted to split hairs and

request trial de novo on individual *elements* of a single cause of action. *Cf. Dungarani v. Benoit*, 312 So. 3d 126 (Fla. 5th DCA 2020) (defendant arguably requested trial de novo on one of two *theories of* a physician's negligence)[11]; *Morgan v. Se. Serv. Corp.*, 861 So. 2d 1224 (Fla. 2d DCA 2003). Only *that* is disfavored. Appellants' claim that Ms. Rouse has made unauthorized "partial trial de novo" requests fails to appreciate the distinction and this Court's binding precedent in *Johnson*.

In *Department of Transportation*, this Court rejected a party's attempt to ally with its opponent's request for trial de novo that assertedly "encompassed [that party] because any claims against [it] were actually claims against" third-party defendants. 859 So. 2d at 1280. Similarly, Appellants cannot find solace in Ms. Rouse having requested trial de novo as to her claims against Dr. Katta and Dr. Moore—and Lawnwood which also has vicarious agency liability for those defendants.

Lawnwood's primary concern is that the Partial Final Judgment holds it vicariously liable for Dr. Tamar's negligence, but Dr. Tamar

[11] *Dungarani* is also unavailing for Appellants because there, the non-prevailing arbitrant's request for trial de novo—which alternatively requested trial on all issues—was *timely* made. 312 So. 3d at 128, 131.

has requested trial de novo such that a jury will apportion, anew, the amount of his negligence that contributed to Marleana's death. However, the fact that Lawnwood's liability for Dr. Tamar's negligence is based on an agency relationship does not mean that Ms. Rouse's negligence claim against Dr. Tamar (Count IV) and her claims against Lawnwood for Dr. Tamar's negligence (Counts XIV, XV, and XVI) are not "discrete."

Illustratively, at any time prior to the arbitration (or after, with a request for trial de novo), Lawnwood could have resolved Ms. Rouse's agency claims against it for Dr. Tamar's negligence via release, even if Dr. Tamar chose not to resolve Ms. Rouse's direct negligence claim against him. That's because those parties (who are represented by separate counsel) are entitled to evaluate the seriousness of Dr. Tamar's medical errors in his treatment of Marleana, and their causal relationship to her death, differently. *Cf. MHM Servs., Inc. v. Perry*, 958 So. 2d at 535 ("There was enough difference in the two separate claims that it could not be said that a decision on one of them ipso facto disposed of the other."). Ms. Rouse's agency counts asserted Lawnwood's right to control Dr. Tamar's actions and that its actions created the appearance of an

agency relationship. (R.60-64). Lawnwood and Dr. Tamar could also have different interpretations of the relevant facts on those issues.

In both that hypothetical event, and here, a jury will determine whether Dr. Tamar was negligent and, if so, the percentage of his negligence apportionable to Marleana's death. In practice, this means that, if he is found negligent and the damages Ms. Rouse is awarded against Dr. Tamar exceed $4,574,290.00, Dr. Tamar will be entitled to a setoff. *See* § 768.31(5), Fla. Stat. (2022) (resolution against some tortfeasors liable for the same wrongful death does not discharge other tortfeasors but "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant"); *Coopersmith v. McCormick*, 988 So. 2d 49 (Fla. 4th DCA 2008) (physicians entitled to setoff based on amounts paid by derivatively liable HMO); *Nationsbank, N.A. v. KPMG Peat Marwick LLP*, 813 So. 2d 964, 969 (Fla. 4th DCA 2002) (payments made by persons jointly liable with a non-settling defendant qualify for a setoff); *Am. Prime Title Servs., LLC v. Wang*, 317 So. 3d 1183, 1186 (Fla. 3d DCA 2021) ("The setoff statutes are designed to 'prevent an award of double damages.'") (citation omitted). Meanwhile, Lawnwood will have capped its maximum liability to Ms. Rouse for Dr. Tamar. *See* R.318.

On the other hand, if Ms. Rouse receives a damage award against Dr. Tamar of less than $4,574,290.00, Dr. Tamar will owe Ms. Rouse $0. Ms. Rouse is *not* seeking to recover more than she is entitled, and in either event, the Partial Final Judgment is consistent with a damage award based on Dr. Tamar's percentage of fault. *See* § 768.81(3), Fla. Stat. (2017); *Gouty v. Schnepel*, 795 So. 2d 959, 961-66 (Fla. 2001). In either event, Lawnwood is protected with the capped arbitration award for its liability on behalf of Dr. Tamar.

Indeed, if Appellants were correct, Lawnwood would not be permitted to *accept* the award and resolve Ms. Rouse's agency claims against it without Dr. Tamar's consent. That is not how the Legislature intended section 44.103(5), the Florida Supreme Court drafted Rule 1.820(h), or this Court has applied either source of law.

To claim inconsistency based on the future possibility of a jury finding Dr. Tamar responsible for Marleana's death in an amount other than 70%, Appellants rely on cases involving defaulted defendants. But entry of a judgment pursuant to section 44.103(5) is not a default. These cases rest upon a trial court's exercise of *discretion* to wait to enter final judgment on a default to avoid an unjust result. *See Days Inns Acquisition Corp. v. Hutchinson*, 707 So.

2d 747, 751 (Fla. 4th DCA 1997). However, the trial court here had "no discretion." *Connell*, 901 So. 2d at 319 (citing *Johnson*, 736 So. 2d 1235). This explains Appellants' inability to cite authority approving an "inconsistent results" exception to the trial court's mandatory duty under section 44.103(5).

Appellants argue that inconsistent results will ensue if the jury finds that Dr. Moore and Dr. Katta were negligent, and that Dr. Regan and Dr. Tamar were not, and in this circumstance, Ms. Rouse would be doubling her recovery. (I.B.40). This is inaccurate. Since the complete abolition of joint and several liability in 2006, Florida law provides that if Ms. Rouse proves Dr. Moore's and Dr. Katta's negligence, she is entitled to judgments against them in accordance with their percentages of fault. *See West v. Zacharzewski*, Nos. 2:18-CV-14155, 2:18-CV-14156-ROSENBERG/MAYNARD, 2019 WL 3426321 (S.D. Fla. Apr. 18, 2019); *Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187, 190-91 (Fla. 2d DCA 2016); *see also Gouty*, 795 So. 2d at 965-66; *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 313-18 (Fla. 2003) (involving former statutory versions in which joint and several liability still applied to economic damages). This is *exactly* the point of section 768.81(3) and *Fabre v. Marin*, 623 So. 2d 1182 (Fla.

1993)—the inclusion of *nonparties* on the verdict form to reduce damages that can be collected from the remaining, named defendants.

Appellants' attempt to lump the part of the Partial Final Judgment entered jointly against Lawnwood and Dr. Regan for the latter's negligence into its "collective negligence" complaint is also without merit. (I.B.35). The Partial Final Judgment correctly tracks the arbitration award on Ms. Rouse's counts against Dr. Regan (Count I), and against Lawnwood for its principal liability for his negligence (Counts VIII, IX and X), consistent with Dr. Regan's 30% fault.

Appellants rely on Ms. Rouse's request for trial de novo on Count III. Although the parties agreed not to include a line item for LTS on the arbitration award, Ms. Rouse included Count III in her request for trial de novo in an abundance of caution, as she did not wish to risk losing her claim against LTS for all time. Nonetheless, Ms. Rouse does not intend to add LTS as a jointly liable party for the $1,960,410.00 part of the Judgment and understands she cannot collect anything more from LTS than this sum awarded jointly against Lawnwood and Dr. Regan. Even if, hypothetically, trial of that

count was to proceed (notwithstanding LTS's agreement that it employs Dr. Regan), at most the evidence should be limited to confirming LTS's employment of Dr. Regan—not an adjudication of Dr. Regan's liability to Ms. Rouse because Dr. Regan did not request trial de novo.

Similarly, Appellants' claim that Dr. Tamar and Dr. Katta can reasonably be expected to assert that Dr. Regan's negligence contributed to Marleana's death is of no moment. As noted, pursuant to section 768.81(3) and *Fabre*, the remaining *parties* will receive "judgment … on the basis of [each] party's percentage of fault." But *Dr. Regan* is not entitled to a *new* judgment; his "percentage of fault" (30%) was determined by the arbitrator and is fixed by the award's finality.

Even Appellants below recognized the finality of the Partial Final Judgment as to Dr. Regan. (R.285). In fact, Dr. Regan's status as a party to the Partial Final Judgment, and its conclusion of the case as to him, is what furnishes this Court's jurisdiction in this appeal. Fla. R. App. P. 9.110(k).

Without a future verdict and resolution of any setoff requests, Appellants' Issue III is foreclosed on arrival and premised entirely on

speculation regarding future events. What exists in reality—the Partial Final Judgment before this Court—is free from error and should be affirmed.

CONCLUSION

Appellants did not comply with Rule 1.820(h) because they filed *nothing* between May 23, 2022, and June 13, 2022, that could remotely be construed as a request for trial de novo. For this reason—and because brief telephone conversations between counsel to discuss possible mediation and A.R.'s medical records evinced no expectation of trial—the trial court properly entered judgment on June 14, 2022.

Appellants did not ask the trial court to enter any "orders" short of entering judgment on the arbitration award, and the trial court followed the plain language of section 44.103(5) in permitting the Partial Final Judgment to provide for execution.

Finally, speculative future inconsistencies or unjust results yield no legal basis for the trial court to depart from its mandatory, non-discretionary duty to enter the Partial Final Judgment. Appellants' concerns are factually unfounded as Ms. Rouse is seeking no windfalls nor prohibited double recoveries. The Partial Final

Judgment caps Lawnwood's liability for Dr. Regan's and Dr. Tamar's negligence, is consistent with Ms. Rouse's rights under the Comparative Fault Act and does not prevent lawful setoffs from being requested by the remaining defendants before any additional judgment is entered. Ms. Rouse requests this Court affirm the Partial Final Judgment.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Florida Courts e-Filing Portal and thereby served in compliance with Florida Rule of General Practice and Judicial Administration 2.516(b)(1) on October 19, 2023, upon the service list below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief is prepared in Bookman Old Style 14-point font and, excluding the parts exempted by Fla. R. App. P. 9.045(e), complies with the word count requirement of Rule 9.100(j).

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