

NO. 26- 338

IN THE
SHAWNEE SUPREME COURT

METROPOLITAN HEALTH SYSTEM, INC. AND CYBER-CARE SOLUTIONS, LLC
Petitioners,

– *versus* –

EVELYN MILLER, individually and as special administrator for the estate of Elias Miller, deceased
Respondents

BRIEF FOR RESPONDENT

Team AI Annihilators
Attorney for Respondent

Questions Presented

(1) Whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI software tool integrated into its branded telehealth platform; and

(2) Whether the Respondent's claims are barred by Shawnee's four-year statutes of repose or whether the repose periods were tolled/extended by:

(a) Cyber MD's annual diagnostic evaluations constituting a "continuous course of treatment" under Shawnee Statute § 12-404; or

(b) the latent, un-discoverable nature of the algorithmic flaw and subsequent retraining under the exception in Shawnee Revised Statute § 12-404. R at 26.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
TABLE OF CONTENTS.	3
TABLE OF AUTHORITIES	4
FACTUAL AND PROCEDURAL BACKGROUND	6
NATURE OF THE PROCEEDING.....	9
STANDARD OF REVIEW.....	10
ARGUMENT SUMMARY.....	10
LEGAL ANALYSIS.....	11
A. MHS' Liability for Cyber MD's Care through Vicarious Liability.....	11
I. MHS held out Cyber MD as their agent, and Mr. Miller reasonably relied on that representation, therefore MHS is vicariously liable for the inadequate care provided by Cyber MD.....	11
II. MHS' liability disclaimers were not sufficiently conspicuous, and even if they were conspicuous, the terms of the contract would be unconscionable.....	15
III. Apparent agency should apply to AI models.....	17
B. Statute of Repose and Statutory Exceptions.....	19
1. The Shawnee Statute of Repose does not bar Mr. Miller's claim for Medical Malpractice because of the continuous course of treatment exception.....	19
2. The Hidden and Latent Defect of Cyber MD's Code Falls Square Within the Exceptions of Product Liability Statute of Repose Under Section 12-410.	23
IV. Conclusion.....	28

TABLE OF AUTHORITIES

	Page(s)
UNITED STATES SUPREME COURT CASES:	
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	15,17
<i>CTS Corp. v. Waldburger</i> , 573 U.S. 1 (2014).....	24
UNITED STATES COURT OF APPEALS CASES:	
<i>Amazon.com Services, LLC v. Perplexity AI, Inc.</i> , 2026 WL 2237587 (9th Cir. 2026).....	11, 17
<i>Connor v. St. Luke’s Hospital</i> , 996 F.2d 65 (4th Cir. 1993).....	20
<i>Cullinane v. Uber Techs., Inc.</i> , 893 F.3d 53 (1st Cir. 2018).....	16
<i>Franza v. Royal Caribbean Cruises, Ltd.</i> , 772 F.3d 1225 (11th Cir. 2014).....	11, 12, 13, 14
<i>Hobbs v. Naples</i> , 993 F.2d 173 (8th Cir. 1993).....	22
<i>Koch v. Shell Oil Co.</i> , 52 F.3d 878 (10th Cir. 1995).....	24, 25, 26
<i>Kollross v. Goldstein</i> , 191 N.E.3d 39 (1st Cir. 2021).....	22
<i>Nguyen v. Barnes & Noble Inc.</i> , 763 F.3d 1171 (9th Cir. 2014).....	15
<i>Webster v. CDI Indiana, LLC</i> , 917 F.3d 574 (7th Cir. 2019).....	17, 18
UNITED STATES DISTRICT COURT CASES:	
<i>Brooks v. HSHS Med. Group, Inc.</i> , 513 F. Supp. 3d 1069 (S.D. Ill. 2021).....	12, 13, 14

Pate v. Columbia Mach.,
930 F. Supp. 451 (D. Idaho 1996)..... 24

State Farm Mut. Auto. Ins. Co. v. W.R. Grace & Co.,
834 F. Supp. 1046 (C.D. Ill. 1992)..... 24, 26

STATE SUPREME COURT CASES:

Gilbert v. Sycamore Mun. Hosp.,
156 Ill. 2d 511 (1993)..... 11, 12

McDermott v. Torre,
56 N.Y.2d 399 (1982)..... 20, 21, 22

Vance v. Oakridge Health Sys., Inc.,
142 Sn.2d 88, 94 (2018)).....10

STATE INTERMEDIATE APPELLATE COURT CASES:

Mizyed v. Palos Cmty. Hosp.,
58 N.E.3d 102 (1st Dis.2016).....12

Printz-Schwartz v. Levitan,
17 A.D.3d 175, 796 N.Y.S.2d (App. Div. 2005)..... 2

Williams v. Tissier,
165 N.E.3d 885 (2019)..... 11, 15, 16, 17

I. FACTUAL AND PROCEDURAL BACKGROUND

Elias Miller, was employed in the maintenance department at the Shawnee Steel Company's primary steel mill in Cartersville, Shawnee, from 1970 until his retirement in 2016. Record of Appeal at page 2. In this role, Mr. Miller regularly handled asbestos-insulated machinery. *Id.* Safety protocols were loosely enforced, and Mr. Miller frequently worked without respiratory protective equipment. *Id.* Mr. Miller was a lifelong non-smoker, was not asthmatic, and had no family history or prior documented history of respiratory disease. *Id.* Mr. Miller received employee sponsored chest x-rays in 2012 which were read by a radiologist as "unremarkable." *Id.*

Following major economic contractions, Simmons County experienced severe population decline. The county's population dropped approximately 7,500 residents. R at 3. This drop in population resulted in the county losing over 75% of its healthcare professionals. Both local hospitals closed in 2015 following bankruptcy. *Id.* This left the county with no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices. *Id.*

Metropolitan Health System's flagship hospital in Goshen became the closest facility that could provide in person radiology consultation and CT scans. *Id.* The hospital in Goshen is a 190-mile and 3.5-hour drive from where Mr. Miller lived in Cartersville. *Id.* As a result of Simmons County losing the majority of its health care system, state and federal authorities officially designated the County as a Health Professional Shortage Area and a Medically Underserved Area. *Id.*

MHS, is a large regional healthcare network based in Goshen. *Id.* In 2012, MHS contracted with CCS, a digital health infrastructure provider, to design and host a proprietary remote telehealth platform. *Id.* Under their agreement, the platform's patient-facing interface was

controlled exclusively by MHS, displaying MHS branding throughout, while CCS marks were strictly prohibited on all patient-facing pages. *Id.*

To access the platform, patients navigated through MHS's primary domain. *Id.* On the user login, the webpage stated: "By entering the portal, I accept the MHS Terms and Conditions." *Id.* The webpage also hyperlinked "Terms and Conditions." *Id.* The hyperlink brought users to a standalone webpage displaying 34 lines of single-spaced, unformatted black text on a white background in a font size smaller than the rest of the website. *Id.* Around three-quarters down the page, the terms included a clause that read:

All clinical evaluations, imaging reviews, and diagnostic interpretations provided through this digital portal are performed by independent contractor physicians or automated software applications developed by another company. The physicians and software are not employees or agents of Metropolitan Health System. MHS exercises no operational control over the clinical judgment or diagnostic methods used by the independent contractor physicians or any automated software applications. R at 4.

Digital audit logs confirm that Mr. Miller clicked this hyperlink only once in April 2018. *Id.* He remained on the page for only four seconds before closing it. *Id.* Mr. Miller never accessed the link again. *Id.*

CCS received a FDA clearance for the Cyber MD diagnostic system in 2017. *Id.* This system allowed patients to input symptoms while Cyber MD would ask to follow up questions, compile clinical history, generate diagnoses, and order/interpret diagnostic tests. *Id.* This system was marketed by CCS as "Cyber MD: Care Everywhere." *Id.* Before initiating a chat session a user must navigate a pop-up box that states in red font: "Cyber MD is not a licensed health care professional. It is an artificial intelligence software program." *Id.* MHS decided to integrate Cyber MD into its telehealth portal in 2017. *Id.* The system integrated by MHS initially had a 97% overall accuracy rate in classifying lung lesions. *Id.* In 2022, CCS discovered that Cyber

MD diagnostic accuracy dropped to 85% when evaluating images of patients with prior asbestos exposure. R at 4-5. The system had to be retrained by CCS to restore high accuracy and the released update was made available to clients in 2023. R at 5.

In April 2018, Mr. Miller logged into the MHS portal and initiated a virtual intake session with Cyber MD after experiencing shortness of breath. *Id.* During his intake, Mr. Miller informed Cyber MD about his 35-year occupational history working with asbestos. *Id.* Cyber MD ordered a CT scan and chest x-rays for Mr. Miller through a mobile radiology service. *Id.* Cyber MD informed Mr. Miller that once it had his scans it would go over the results with him. *Id.* Mr. Miller's scans were uploaded to Cyber MD, and the scans were then evaluated using Cyber MD's algorithm. *Id.* Cyber MD found zero evidence of disease. *Id.* Instead, Cyber MD diagnosed Mr. Miller with early asthma and referred him to a physician for an inhaler. *Id.* Cyber MD also recommended annual check-ups for Mr. Miller's lungs. *Id.*

Per Cyber MD's orders, Mr. Miller conducted annual virtual follow-up evaluations until 2021. *Id.* During each subsequent visit, Cyber MD viewed new scans of Mr. Miller's lungs and reiterated that there was zero evidence of disease. *Id.* In 2021, after receiving a clear report from Cyber MD, Mr. Miller was advised that annual imaging and evaluations of his lungs were no longer necessary. *Id.* In October 2023, Mr. Miller suffered a spontaneous pneumothorax and was sent to MHS flagship hospital. *Id.* During his care at MHS, scans revealed a 6.4 cm malignant mass in his left lung and extensive metastases to the pleura and spine. *Id.*

In 2022, prior to the discovery of the mass in Mr. Miller's lung, CCS discovered a severe defect in Cyber MD's diagnostic capabilities. *Id.* Cyber MD's diagnostic accuracy dropped to 85% when evaluating scans of patients who were exposed to asbestos, like Mr. Miller. Neither MHS nor CCS contacted Mr. Miller to inform him of the error and review his scans.

Retrospective reviews of Mr. Miller's scans by experts established that the first scans that Cyber MD reviewed in 2018 clearly show a 7mm lesion on Mr. Miller's lungs. *Id.* There was slight obstruction of the lesion because of pleural changes, but the lesion was present in the scans. *Id.* This lesion had grown to 47 mm by 2022, and during each scan Cyber MD's algorithm failed to identify the lesion. Mr. Miller died on April 14, 2024. *Id.*

II. NATURE OF THE PROCEEDINGS

Circuit Court of Simmons County. In July 2024, Plaintiff filed suit in the United States Circuit Court of Simmons County seeking to hold MHS vicariously liable for the diagnostic errors of CCS's Cyber MD errors and strict product liability based on design defects and failure to warn. R at 1. Defendants sought summary judgement, MHS arguing that Cyber MD was not an employer or agent of MHS and that the Shawnee statute of repose foreclosed plaintiff's claims as a matter of law. *Id.* The District court for the District of Shawnee GRANTED respondent's motion for summary judgement holding that there was no genuine issue of material fact on both claims.

Shawnee Court of Appeals for the Second District. Plaintiff-Appellant filed a timely order to the Circuit Court of Simmons County contesting the finding of the District Court. R at 14. The Plaintiff-Appellant argued that the lower court erred in finding that there existed no apparent agency relationship between MHS and CCS. *Id.* Additionally, plaintiff argues that Shawnee Statute of Repose does not bar the claims. *Id.* The Shawnee Court of Appeals for the Second District REVERSED and REMANDED for further proceedings, finding genuine issues of material fact as to whether the MHS patient agreement was unconscionable and whether there exists an agency relationship between MHS and CCS. *Id.*

Shawnee Supreme Court. Petitioners move to appeal the decision of the Court of Appeals pursuant to Shawnee Supreme Court 315. R at 26. The Shawnee Supreme Court grants the leave to appeal to review two questions: (1) Whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI software tool integrated into its branded telehealth platform; and (2) Whether the Respondent's claims are barred by Shawnee's four-year statutes of repose or whether the repose periods were tolled/extended by: (a) Cyber MD's annual diagnostic evaluations constituting a "continuous course of treatment" under Shawnee Statute § 12-404; or (b) the latent, un-discoverable nature of the algorithmic flaw and subsequent retraining under the exception in Shawnee Revised Statute § 12-404. *Id.*

III. STANDARD OF REVIEW

The Shawnee Supreme Court will review this matter de novo, applying the same legal standards as the trial court. Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018).

On appeal, The Shawnee Supreme Court must view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. Summary judgment must be denied if fair-minded individuals could differ on the inferences drawn from the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

IV. ARGUMENT SUMMARY

MHS is vicariously liable for Cyber MD's negligent care through the doctrine of apparent agency because MHS held out Cyber MD as a provider, and Mr. Miller justifiably relied on that representation to his detriment. The terms and conditions displayed on the website do not form

an enforceable contract or defeat apparent agency because the terms and conditions were not conspicuous enough to put users on notice. Corporations should not be able to use AI agents to provide negligent care and shield themselves from liability.

Shawnee's four-year statute of repose tolls under the continuous course of treatment doctrine. Mr. Miller received care continuously from MHS and Cyber MD through yearly follow ups, imaging scans and evaluations. These visits constituted a physician-patient relationship. Because Cyber MD and MHS continuously negligently treated Mr. Miller's lung condition, the statute of repose is tolled, and the claim against CCS is timely.

IV. LEGAL ANALYSIS

A. MHS' liability for Cyber MD's care through vicarious liability.

MHS is liable for the negligent treatment provided by Cyber MD through the doctrine of apparent agency. Under the doctrine of apparent agency, hospitals are vicariously liable for the tortious conduct of medical providers who are not technically employees of the principal hospital. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 523 (1993). Apparent agency is a distinct legal theory from actual agency and does not require an employee-employer relationship. *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1249 (11th Cir. 2014).

Plaintiffs can waive apparent agency through contracts, though these contracts are not dispositive, and the circumstances of the contract and the surrounding medical care determine whether the Plaintiff knew the provider was an independent contractor. *Williams v. Tissier*, 165 N.E.3d 885, 895 (2019). Federal courts have yet to determine whether defendants can be liable for the actions of their AI agents, making this an issue of first impression. *Amazon.com Services, LLC v. Perplexity AI, Inc.*, 2026 WL 2237587, at *6 (9th Cir. Aug. 4, 2026).

I. MHS held out Cyber MD as its agent, and Mr. Miller justifiably relied on that representation, making MHS vicariously liable for the inadequate care provided by Cyber MD.

Hospitals are liable for the actions of agents who are not employees when:

“(1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.” *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d at 622.

The first two elements of the Gilbert test are grouped together and analyzed as the “holding out;” these combined elements do not require an express representation that the provider is an employer of the principal. *Id.*; *Mizyed v. Palos Cmty. Hosp.*, 58 N.E.3d 102, 111 (2026). Instead, hospitals are liable under apparent agency when a reasonable person would believe that the provider was an independent contractor. *Brooks v. HSHS Med. Group, Inc.*, 513 F. Supp. 3d 1069, 1081 (S.D. Ill. 2021). The third and final prong of the Gilbert test, justifiable reliance, requires the plaintiff to rely on the defendant’s false representation to the plaintiff’s detriment. *Franza*, 772 F.3d at 1252 (11th Cir. 2014).

Here, MHS held out Cyber MD as a provider by integrating Cyber MD into its website and operations, fulfilling the first two prongs of the Gilbert Test. Mr. Miller justifiably relied on this representation because he sought out MHS, not Cyber MD, for care and because he didn’t pursue further testing as a result of Cyber MD’s diagnostic error, fulfilling the third prong of the Gilbert test.

When a corporation integrates providers into its operations, the corporation holds them out and satisfies the first two elements of the Gilbert Test. In *Franza*, a cruise ship contracted healthcare providers that provided inadequate care to a plaintiff passenger. 772 F.3d at 1252. The

cruise ship used proprietary language to describe the medical providers, branded the medical providers with the cruise's logos, and presented the medical providers as members of the crew. *Id.* The cruise ship also billed the plaintiffs for the providers' services. *Id.* 1253. The cruise ship held out the healthcare staff as members of the ship, fulfilling the first two prongs of the Gilbert test. *Id.*

Plaintiffs who seek out care from a hospital system, as opposed to the negligent independent contractor, justifiably rely on the defendant and fulfill the third prong of the Gilbert test. 23. In *Brooks*, a plaintiff was admitted to the defendant hospital to address stomach pains, as opposed to see any "particular" provider. 513 F. Supp. 3d ¶¶23-26. The defendant was vicariously liable because the plaintiff sought care from the Defendant hospital and not the specific contractor. *Id.*

When patients rely solely on the medical advice of a falsely represented agent to their detriment, they fulfill the justifiable reliance prong of the Gilbert test. In *Franza*, the plaintiff followed the advice of the contracted provider, who did not recommend further care or follow ups. 772 F.3d at 1252-1254. The plaintiff fulfilled the justifiable reliance prong of the Gilbert test. Had the cruise line not held out the providers, the plaintiff would have pursued further care instead. *Id.*

MHS fully integrated Cyber MD into its online portal, holding out Cyber MD as a provider of care and fulfilling the first two elements of the Gilbert test. MHS incorporated Cyber MD directly into its web portal. Like the defendant In *Franza*, who branded their contracted medical providers with their logo, MHS branded Cyber MD with their own logo. MHS went so far as to prohibit CCS, Cyber MD's creator, from using its own logo and branding when it was integrated into MHS' website. In *Franza*, the cruise ship billed for the services provided by the

independent contractor; here MHS assumedly billed for Cyber MD's services, as that would have been the sole point of integrating the service into their website and care. By incorporating Cyber MD on its website, covering Cyber MD in MHS branding, and billing patients for Cyber MD's services, MHS held out Cyber MD as a medical provider to the public and to Mr. Miller.

After MHS held out Cyber MD as a provider of healthcare, Miller justifiably relied on the faulty AI provider. Mr. Miller sought out care from the nearest hospital system in the rural area that he lived, a rural area classified as a Health Professional Shortage Area and a Medically Underserved Area. In *Brooks*, a plaintiff justifiably relied on a hospital system because they sought care from a hospital and not the contractor themselves; here Mr. Miller sought out care from MHS because he had no other options, not because he sought out care from Cyber MD specifically. There were quite literally no other options that Mr. Miller could pursue for healthcare treatment, and as Cyber MD was marked with MHS branding, Mr. Miller would not even have known that MHS was not the organization that was providing him treatment.

Mr. Miller relied on Cyber MD to his detriment. In *Franza*, a plaintiff followed the advice of the defendant's providers to not receive further care, causing him injury and fulfilling the third prong of the Gilbert test. Here too Mr. Miller relied on the faulty advice of a medical provider, causing him to not conduct follow up scans or pursue cancer treatment.

Mr. Miller sought care from MHS, the only medical provider in his rural area. MHS acted in a manner that led Mr. Miller to believe that MHS was a part of the MHS health system by integrating Cyber MD into its website and branding Cyber MD with its logo. Mr. Miller passed away after he relied on the faulty medical advice provided by Cyber MD.

II. MHS' liability disclaimers were not sufficiently conspicuous, and even if they were conspicuous, the terms of the contract would be unconscionable.

Hospitals can use waivers to defeat the holding out element of vicarious liability, though they are not dispositive. *Williams*, 165 N.E.3d, 895. A consent form can only defeat liability if it puts the patient on notice that the provider is an independent contractor; the physical format of the waiver as well as how it is written determine whether the contract puts a patient on notice. *Id.* 39. Terms and condition contracts on websites are only enforceable if the user has actual or constructive knowledge of the website's terms and conditions. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014). Here, MHS' notice that Cyber MD is not an agent of MHS is not sufficiently conspicuous to put users on notice because the text is hidden, unformatted, and unusually small.

Contracts are not enforceable if they are unconscionable. Unconscionability has a procedural and a substantive element. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340-343(2011). Procedural unconscionability involves unfair contract formation and the plaintiff being subject to "oppression" and "surprise," while the substantive element involves "overly harsh" and "one sided" results. *Id.* Here, Mr. Miller had no choice but to use MHS and was not sufficiently notified of the contract, making it procedurally unconscionable. The contract also purely benefits MHS and bars Miller from recovering from any negligence of Cyber MD, its AI agent, making the terms of the contract overly harsh and only benefiting one side.

A contract informing a plaintiff that a provider is a contractor will not shield a provider from liability unless it sufficiently puts a plaintiff on notice. In *Williams*, a plaintiff signed a physical contract disclosing their provider was an independent contractor. 165 N.E.3d, 896. The text disclosing the contract was not bolded, was in a font difficult to read, and was placed where it could be easily missed. *Id.* The language of the contract was also confusing and unclear. *Id.* at 896-898.

Web terms and conditions are only enforceable if they put users on notice. In *Cullinane v. Uber Techs., Inc.*, A defendant corporation attempted to use the terms and conditions on their website to shield itself from liability. 893 F.3d 53, 62 (1st Cir. 2018). A small hyperlink to the terms and conditions page was displayed when users created their account, but users did not have to open to the page or agree to the terms of the website. *Id.* at 56-57. The terms and conditions link was not marked or made to stand out specifically. *Id.* Terms and conditions must be displayed in such a way that a reasonable person would notice them. *Id.* at 62. The size of the font, the extent to which the terms and conditions differ from surrounding text, and how prominently the link is displayed are all common factors analyzed in determining whether liability has been waived. *Id.* 62-23.

Here, MHS's notice that Cyber MD is not a physician is not conspicuous enough to put users like Mr. Miller on notice and therefore does not defeat liability. During a patient's first use of Cyber MD, MHS briefly displayed a message informing the user of the site's terms and conditions. Just like the agreement in *Cullinane*, which was not formatted in a way to make it conspicuous to a reasonable person, the terms and conditions page here was not marked to stand out on the page. Clicking the "terms and conditions" page on MHS's site revealed a page of unformatted text that is notably smaller than the text used on the rest of the website. It isn't until three quarters of the way down this page that it is disclosed that Cyber MD isn't an agent of MHS. In *Williams*, a contract denying agency was not conspicuous enough because it was in a font difficult to read and was placed where it could be easily missed. Here, the contract informing users of MHS' relationship with Cyber MD is unformatted and in text smaller than the rest of the website, making it difficult to read. This notice waiving liability is even less likely to give notice than the contract in *Williams*; in that case the contract was presented directly to the

plaintiff to sign, while here the terms and conditions are hidden behind a hyperlink and not signed by the user. The terms and conditions do not put Mr. Miller on notice of MHS' relationship with Cyber MD and do not shield MHS from liability.

Even if the terms and conditions were conspicuous, the terms of the contract would be unconscionable and therefore unenforceable. In most states, unconscionability has a procedural and a substantive element; procedural unconscionability involves “‘oppression’ or ‘surprise’ due to unequal bargaining power,” and substantive unconscionability involves ‘overly harsh’ or ‘one-sided’ results.” *AT&T Mobility LLC* 563 U.S. 333, 340. Here, the terms and conditions on MHS' website were procedurally unconscionable because of the unequal bargaining power between Mr. Miller and MHS; Mr. Miller had no other option but to receive healthcare and was only briefly presented with these terms and conditions while accessing essential healthcare services. The contract is also substantively unconscionable because it only benefits MHS and deprives Miller of his right to sue MHS for the actions of an AI agent it profits from.

III. Apparent Agency should apply to AI models.

Courts have not yet addressed whether agents can be held liable for torts committed by non-human AI agents acting on their behalf. *Amazon.com Services, LLC*, 2026 WL 2237587. However, non-human entities, like corporations, are already subject to liability under vicarious liability. *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 577 (7th Cir. 2019).

Liability is not applied to AI agents when the law specifies personhood. In *Amzon.com Servs*, the defendant used an AI agent to scrape information from the plaintiff's website. WL 2237587. The plaintiff sued for violations under the Computer Fraud and Abuse Act (CFAA) for unlawfully accessing their servers. *Id.* The relevant section of the CFAA specified “whoever” may not intentionally access a protected computer. The defendant was not liable. *Id.* In the

language of “whoever” the legislature intended the law to apply to persons, and an AI agent isn’t a person. *Id.* The court specifically notes that this case ruling neither addresses nor forecloses AI liability for torts. *Id.*

Corporations should be liable for the actions of AI models acting on their behalf because the case law doesn’t specify personhood. Unlike the CFAA, which specifies personhood and did not give way to liability for the actions of an AI agent in *Amazon*, the case law regarding apparent agency doesn’t specify personhood. Moreover, AI models like Cyber MD are often called agents because they complete tasks for users; apparent agency is applied to principals for the actions of agents acting on their behalf. Because none of the case law specifies that apparent agency applies exclusively to humans, apparent agency should apply to corporations for the tortious conduct of their AI agents.

Giving corporations immunity for the actions of AI agents acting on their behalf would enable corporations to shield themselves from liability for an increasingly common type of harm. In *Webster*, the seventh circuit court of appeals articulated the purpose of vicarious liability when a provider attempted to use corporate arrangements to shield themselves from liability. 917 F.3d 574, 575-577. The court reasoned that “a medical center cannot hold itself out to the public as offering health care services—and profit from providing those health care services—yet escape liability by creating a complex corporate arrangement of interrelated companies.” *Id.* Just as a provider attempted to shield themselves from liability through complex corporate structures in *Webster*, here MHS is attempting to shield themselves from liability through their usage of an AI agent. As AI continues to play a larger role in the healthcare field, failing to apply vicarious liability to AI agents will result in corporations providing substandard and dangerous medical care while escaping liability.

MHS held out Cyber MD as a provider, integrating it into its website and covering it with MHS branding. Mr. Miller justifiably relied on Cyber MD's faulty medical advice and did not pursue further care, leading to his death. During his usage of Cyber MD, Mr. Miller was not notified of Cyber MD and MHS' relationship because the terms and conditions were not sufficiently conspicuous to put users like Mr. Miller on notice. While courts have yet to address whether corporations can be liable for AI agents' misconduct, corporations should not be able to shield themselves from liability through the usage of AI agents.

B. Statute of Repose and Statutory Exceptions

The Shawnee statutory provisions § 12-404 and § 12-410 establish a four-year statute of repose which the trial court concluded barred Mr. Miller's claim against MHS. The Court of Appeals later overruled this choice citing the 'continuous course of treatment' exception enumerated in 12-404(b). In the present case, Mr. Miller's course of treatment fits squarely within the continuous course of treatment doctrine and therefore is timely.

I. The Shawnee Statute of Repose does not bar Mr. Miller's claim for medical malpractice because of the continuous course of treatment exception.

Shawnee Revised Statute § 12-404 establishes an absolute repose cap for medical malpractice claims. Under this rule, such claims are measured by a two-year discovery limitation period and a four-year absolute repose cap after the date the negligent act or omission that caused the alleged injury or death. The statute does, however, provide a statutory exception when a defendant's healthcare provider engaged in a continuous course of treatment with the patient for the same illness, injury, or condition which gave rise to the negligence claim. § 12-404(b). The continuous course of treatment doctrine effectively tolls the Shawnee absolute repose until the end of the patient's course of treatment.

Before applying a continuous course of treatment doctrine, it is essential to establish the physician-patient relationship the doctrine aims to protect. In *Connor v. St. Luke's Hospital*, the plaintiff visited the defendant medical facility with the primary complaint of asthma in May 1986. 996 F.2d 65, 652 (4th Cir. 1993). In subsequent visits for a year, the defendant hospital failed to inform the plaintiff of cancerous lesions on the plaintiff's lungs. *Id.* The court reasoned that to establish a continuous course of treatment there must be an ongoing physician-patient relationship in which the patient receives continuous treatment for the initial injury or condition that gave rise to the action. *Id.* at 654. The plaintiff only received x-rays from the hospital at the request of his primary care doctor and only received follow up care from that physician. *Id.* The court held that the patient and physician relationship was not present because there was a lack of persistent negligent treatment by the hospital. *Id.* at 655.

Negligent continuous treatment by a physician cannot toll the statute of repose for a negligent diagnosis by a third-party laboratory. In *McDermott v. Torre*, a plaintiff brought suit against a physician imputing a misdiagnosis for a cancerous lesion and continuing care by a physician to the initial negligent diagnosis by the laboratory. 56 N.Y.2d 399, 403 (1982). The court reasoned that a physician-patient relationship is required for the continuing course of treatment doctrine to toll a statute of repose. The laboratory which initially misdiagnosed the plaintiff's cancer only examined the samples from the patient one time, submitted the results to her treating physician, and did not continue to examine any samples from the plaintiff during the rest of her treatment. *Id.* at 404. The court ultimately held that the negligent course of treatment could not be imputed against the third-party lab because they were not responsible for the patients continued care and had no continuing relationship with the patient. *Id.* at 408.

The three years of ongoing care that Mr. Miller received from Cyber MD established a continuous physician-patient relationship. After the original visit in 2018, Cyber MD conducted annual follow-up imaging and evaluations with Mr. Miller for three years. Each follow up visit was recommended as a course of treatment by Cyber MD. During each visit, Cyber MD gathered new chest x-rays and reviewed the results with Mr. Miller. For three years Mr. Miller repeatedly entrusted Cyber MD with his care, and Cyber MD continuously provided Mr. Miller with coordinated and continuous treatment until his discharge in 2021. The ongoing nature of the care by Cyber MD establishes the kind of physician-patient relationship required by the continuous course of treatment doctrine.

Cyber MD served as Mr. Miller's primary care provider during his course of treatment, distinguishing it from a third-party laboratory for which liability shall not apply. Unlike the relationship in *McDermott*, Cyber MD is not a third-party laboratory that failed to catch a cancerous lesion and never saw the patient again. Instead, Cyber MD directly recommended a course of treatment for Mr. Miller. Cyber MD reviewed annual x-rays of Mr. Miller's lungs and continued to fail to catch his cancer. The ongoing relationship with Mr. Miller is closer to the relationship between the Plaintiff and their primary care doctor in *McDermott*. Like the Plaintiff in *McDermott*, Mr. Miller followed up with Cyber MD. He trusted Cyber MD to review his x-rays and recommend a course of treatment. These facts do not show a singular isolated incident of a failed diagnosis by a third-party lab, instead this shows the ongoing physician-patient relationship the doctrine recognizes.

For the continuous course of treatment doctrine to toll a statute of repose there needs to be an unbroken course of negligent care that is related to the original complaint in such a matter as to constitute a continuing wrong. *Kollross v. Goldstein*, 191 N.E.3d 39, 31 (1st Cir. 2021). The

continuous course of treatment is not applicable when a single act of medical malpractice is alleged, instead it concerns a continuous and unbroken course of treatment. *Kollross*, 191 N.E.3d 39, 30 (1st Cir. 2021); see also *Hobbs v. Naples*, 993 F.2d 173, 175 (8th Cir. 1993). In *Printz-Schwartz v. Levitan*, the court concluded that the continuous treatment doctrine could not be ruled out when the plaintiff received annual follow up visits to monitor breast tissue abnormalities. 17 A.D.3d 175, 796 N.Y.S.2d 36, 178 (App. Div. 2005). The court reasoned that such continuing efforts and monitoring could be enough to establish that the patient and physician were engaged in a continuous course of treatment to treat a particular condition. *Printz*, 17 A.D.3d 175, 796 N.Y.S.2d 36 178-179 (App. Div. 2005).

When a patient receives ongoing care for the same condition or complaint, the statute of repose should not run until the end of that patient treatment. When a patient is actively receiving medical treatment from a physician it is not reasonable to believe that a patient would initiate a suit against their physician while receiving treatment for their condition. *McDermott*, 56 N.Y.2d 399, 407 (1982). The continuous course of treatment is not concerned with the negligence of the ongoing treatment; it concerns the original act of negligence and simply tolls the statute of repose time because the patient is receiving ongoing treatment for that initial complaint. *Id.* Therefore, a statute of repose should not begin until after the continuous course of treatment following the initial negligent act or omission ends. *Id.*

The ongoing care and negligent treatment that Mr. Miller received by Cyber MD all occurred as one course of treatment for the same condition. Mr. Miller saw Cyber MD in 2018 after experiencing chest pain. Cyber MD ordered chest x-rays to evaluate Mr. Miller's lungs given his background working with asbestos. In 2018 Cyber MD failed to diagnose Mr. Miller with lung cancer, but this was not the final negligent omission. Cyber MD recommended that

Mr. Miller return on an annual basis to monitor his lungs. Mr. Miller followed this recommendation and followed up annually for new lung x-rays and evaluations with Cyber MD. During each of these subsequent appointments in which Cyber MD reviewed the condition of Mr. Miller's lungs, the system failed to identify the growing cancerous lesions. Each of these visits were not isolated check-ins with Cyber MD, they were a coordinated and continuous course of evaluation and treatment. It is clear from this pattern of care that Cyber MD and Mr. Miller were in a physician-patient relationship where Cyber MD planned and executed a negligent and continuous course of treatment.

Given the ongoing care that Mr. Miller received from Cyber MD, the continuous course of treatment doctrine should toll the statute of repose. The negligent care that Mr. Miller received is sufficiently related to Mr. Miller's original complaint of chest pain to support the finding of a continuous course of treatment. Following this course of treatment, Mr. Miller's care ended in 2021 when Cyber MD failed to diagnose his lung lesion for the third time and discharged him. It was the final negligent diagnosis in 2021 that ended the physician-patient relationship with Cyber MD. Given both the four-year statute of repose in Shawnee § 12-404 and the fact that the final omission occurred in 2021, the claim from Mr. Miller's estate is timely and should not be dismissed.

II. The hidden and latent defect of Cyber MD's code falls squarely within the exceptions of Statute of Repose for product liability Under Section 12-410.

Under Shawnee Revised Statutes § 12-410(a), product liability claims in strict liability are generally subject to a four-year statute of repose running from the date of first sale, lease, or delivery. The Appellate Court presented an analysis with an understanding that the mechanical application ignored the express statutory exceptions created by the Shawnee legislature. Section 12-410(b)(3) explicitly states:

The four (4) year period of repose established in subsection (a) hereof shall not apply **if the harm was caused by prolonged exposure to a defective product**, or if the injury-causing aspect of the product that existed at the time of delivery **was not discoverable by an ordinary reasonably prudent person** until more than four (4) years after the time of delivery, or if the harm, caused within four (4) years after the time of delivery, did not manifest itself until after that time. Sn. Rev. Stat. § 12-410(b)(3) (emphasis added).

Statutes of repose reflect legislative policy choices, and courts must apply the express exceptions provided in the statutory text. *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014). Federal courts interpreting analogous product liability repose provisions hold that hidden, latent defects existing at delivery fall squarely within these statutory exceptions. See *Koch v. Shell Oil Co.*, 52 F.3d 878, 884 (10th Cir. 1995); *Pate v. Columbia Mach.*, 930 F. Supp. 451, 465 (D. Idaho 1996). Other jurisdictions have adopted integrations of exceptions for product liability repose provisions such as “useful safe life” and “fraudulent concealment” exceptions (See conn. gen. stat. ann. § 52-577a(c), (d)). Fraudulent concealment provides a tolling exception to statutes of repose and is a question of fact. *State Farm Mut. Auto. Ins. Co. v. W.R. Grace & Co.*, 834 F. Supp. 1046 (C.D. Ill. 1992). Cyber MD’s algorithm defect was hidden and latent, falling within the statutory exception of Shawnee Revised Statutes § 12-410(b)(3).

Defects that are not discoverable at the time of a product’s delivery fall under the exception of the statute of repose. In *Koch v. Shell Oil Co.*, Mr. Koch fed his dairy cows Rabon, a product containing an oral pesticide, which was manufactured by Shell and distributed by Feed Specialties, Inc. He purchased his last batch of Rabon in September 1981, but he ceased using the product at the end of October because he suspected it was involved in the death of a number of his cows. Additionally, during the 1980s Mr. Koch experienced "continuing health problems" himself. *Id.* at 2-3. It was not until approximately nine years and seven months after Mr. Koch's last purchase of Rabon that experts were able to develop a test from frozen tissue of his dead

cows that was conclusive in determining that the death of his cow was caused by Rabon. *Id.* at 3. Almost seven months later, on November 25, 1991, Mr. Koch brought a product liability suit against Shell and Feed Specialties, alleging that Rabon caused the death of a substantial portion of his dairy herd, his loss of business, and injuries to himself. Thus, this suit commenced more than ten years after Mr. Koch last purchased and used Rabon, but the alleged injuries occurred, at least in large part, within ten years of such purchase and use. *Id.* at 3-4. The appellate court in *Koch* found these facts sufficient enough to create a genuine issue of material fact, remanding the case to the lower court to analyze the exception under Kan. Stat. Ann. § 60-3303(b)(2)(D). *Koch v. Shell Oil Co.*, 52 F.3d 878, 884 (10th Cir. 1995).

Similar to the Rabon product's undiscoverable poisonous nature in *Koch v. Shell Oil Co.*, the design defect alleged here by Cyber MD's algorithm was not a discoverable, obvious, or notorious software flaw. The coding defect embedded in Cyber MD's 2017 baseline algorithm failed to properly differentiate pleural shadowing from malignant tumors in asbestos-exposed lungs. Just as the oral pesticide Rabon caused the ailment and death of Mr. Koch's cows, the coding defect manifested itself - failing to identify a malignant mass attached to Mr. Miller's left lung. The software operated entirely within CCS's proprietary cloud infrastructure, unavailable for the average person to inspect, let alone have the software engineering knowledge to identify and understand the defect in the code. Similar to how the testing done by the experts in *Koch*, it was the specialized knowledge and years of laboratory forensics that allowed the experts to identify the cause of death of the cows, the same knowledge and investigation could not have been expected of Mr. Koch; nor Mr. Miller here. More importantly, because the defect only became discoverable after Mr. Miller suffered a collapsed lung in October 2023, this abrupt disaster is what triggered the expert oncologists to then perform retrospective reviews of his prior

imaging. This is when it was found Cyber MD continuously failed to properly diagnose Mr. Miller. This is when the toll began, making this claim timely as a hidden and latent danger, squarely within the statutory exception of Shawnee Revised Statutes § 12-410(b)(3).

The omission of CCS and Cyber MD to report to Mr. Miller the findings in 2022 of the imaging defects constitute fraudulent concealment, tolling the statute of repose. In *State Farm Mut. Auto. Ins. Co. v. W.R. Grace & Co.*, The manufacturer provided asbestos-containing fireproofing for the construction of the owner's buildings. The manufacturer knew of the product's health-related concerns and cracking problems when it visited the buildings and assured the owner of no future problems with dusting *Id.* at 7. The owner was not aware until at least 13 years after the building was constructed that it contained asbestos. Two years later, test results indicated asbestos contamination. The owner then filed an action asserting products liability and fraud claims against the manufacturer. *Id.* at 6. Strong evidence existed that *Grace* adopted a policy of intentionally withholding information about whether their fireproofing products contained asbestos in 1972. *Grace* also sent information to *State Farm* in 1986 which was found by a Federal Court to be misleading or incomplete at best. The Court found that this evidence, taken as a whole, presents a question of material fact from which a jury could find fraudulent concealment. *Id.* at 7-8.

Similar to the misrepresentation of fireproofing products containing asbestos in *State Farm*, CCS and Cyber MD neglected to mention their findings in 2022 of Cyber MD's diagnostic accuracy dropping to 85% when evaluating images of patients with prior occupational asbestos exposure due to pleural shadowing masking underlying tumors. CCS knew, or should've known, that Mr. Miller was a subject class of which their program sought to diagnose by doing scans of lungs - especially with his line of work and asbestos exposure. CCS and Cyber

MD had a duty to contact Mr. Miller upon their revelation in the drop of accuracy due to the pleural shadowing masking underlying tumors and warn him of the potential dangers of the misdiagnosis. *See. McAlpin v. Leeds & Northrup, Co.*, 912 F. Supp. 207 (W.D. Va. 1996) A negligent omission of a known scan defect is fraudulent concealment and therefore presents a question of material for a jury.

Under Shawnee Revised Statutes Section 12-402(c)(1), when an injury or its causal connection to another's conduct is not immediately discoverable, the two-year personal injury limitation period does not begin to run until the claimant knows, or through reasonable diligence should have known, of the injury and the tortfeasor's identity. Furthermore, § 12-402(b) provides that a wrongful death action must be commenced within two years of death. Because Mr. Miller died in April 2024 and Plaintiff filed suit in July 2024, Plaintiff's claims are fully timely under § 12-402.

The prevention of tolling the latent defect which plagued the code of Cyber MD would ultimately construe a narrow road for which AI will develop within the medical field - relieving all programmers of potential liability when they fail to properly develop their product. Furthermore, this case presents facts which demonstrate a deliberate omission of CCS and Cyber MD to inform Mr. Miller of a known defect within their own code. Several exceptions to the statute of repose exist which Mr. Miller satisfies. The suit was timely under Shawnee Revised Statutes Section 12-402(c)(1), and Section 12-410(b)(3) with the exception of tolling under fraudulent concealment, and the fact the failure to identify the malignant mass on the lung of Mr. Miller serves as a hidden and latent defect within Cyber MD's code, reinforcing a fulfillment of exception, square within the statutory language of Section 12-410(b)(3).

VI.. Conclusion

Mr. Miller's death was a direct cause of Cyber MD's failure to recognize the malignant mass which had grown in his left lung. This mass was visible as far back as 2018, 5 years before Mr. Miller suffered his spontaneous pneumothorax - ultimately leading to his death on April 14, 2024. 5 Years this mass was identifiable, yet left untreated properly due to the fatal flaw which plagued the code of Cyber MD. Although Cyber MD had great hopes to remedy a healthcare desert - a lack of healthcare providers in rural areas of Shawnee - it was flawed and unfortunately caused fatal harm due to the imaging defects embedded in its code.