

DOCKET NO. 26-338

IN THE

Shawnee Supreme Court

NOVEMBER TERM 2026

**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**

Respondent

On Writ of Certiorari to the
Shawnee Court of Appeals
for the Second District

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

- I. 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.
- II. Whether 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 Revised Statute § 12-404; or
 - b. The latent, un-discoverable nature of the algorithmic flaw and subsequent retraining under the exceptions in Shawnee Revised Statute § 12-410.

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OPINIONS BELOW

The unreported opinion of the State of Shawnee Circuit Court of Simmons County in *Evelyn Miller, Individually and as Special Administrator for the Estate of Elias Miller, Deceased v. Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC*, No. 25-L-24601 (Mar. 6, 2025), is contained in the Record of Appeal at pages 2–13. The Circuit Court GRANTED Defendant Metropolitan Health System, Inc.’s Motion for Summary Judgment pursuant to Sn. R. Civ. P. 56 and Defendant Cyber-Care Solutions, LLC’s Motion for Summary Judgment pursuant to Sn. R. Civ. P. 56. The Court also DISMISSED WITH PREJUDICE Plaintiff’s Complaint in its entirety. The unreported opinion of the Shawnee Court of Appeals for the Second District in *Evelyn Miller, Individually and as Special Administrator for the Estate of Elias Miller, Deceased v. Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC*, No. 25-123 (Feb. 24, 2026), is contained in the Record of Appeal at pages 16–28. The Court REVERSED the Circuit Court’s grant of summary judgment in favor of Defendants Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC and REMANDED for further proceedings consistent with the appellate court’s opinion.

STATUTORY PROVISIONS INVOLVED

The following provisions are relevant to this proceeding: Shawnee Revised Statutes §§ 12–402, 12–404, 12–410; Sn. R. Civ. P. 56, and Shawnee Supreme Court Rule 56.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Elias Miller worked in the maintenance department of Shawnee Steel Company's primary steel mill in Cartersville, Shawnee for forty-six years until he retired in 2016 at sixty-six years old. R. at 3. Over the course of decades, he regularly handled asbestos-insulated machinery, often without any respiratory protection. *Id.* Miller never smoked and had no documented personal or family history of respiratory disease. *Id.*

Following the steel mill's closure in 2016, Simmons County's population drastically declined to roughly 7,500 residents, and the county lost more than three-quarters of its healthcare professionals between 2016 and 2025. R. at 4. In 2015, bankruptcy forced two local hospitals to foreclose their operations, leaving the county with no urgent care or diagnostic imaging centers, and only a few primary care practices. *Id.* State and federal authorities designated Simmons County as both a Medically Underserved Area and a Health Professional Shortage Area. *Id.* The nearest facility offering any form of diagnostic imaging services, including radiology consultations and CT scans, was Metropolitan Health System's ("MHS") flagship hospital in Goshen, 190 miles away from Cartersville. *Id.*

In 2012, MHS, a "large regional healthcare network", contracted with Cyber-Care Solutions, LLC ("CCS"), a "digital health infrastructure provider," to design and host a proprietary telehealth platform that MHS would develop, brand, and ultimately control. *Id.* MHS's branding was emblazoned throughout the telehealth

platform, and CCS's own marks were strictly prohibited on all patient-facing pages. *Id.* Patients reached the platform through MHS's own domain, which contained a line beneath the login page reading, "By entering the portal, I accept the MHS Terms and Conditions," with "Terms and Conditions" hyperlinked. *Id.* Upon clicking the link, a separate page appeared, containing thirty-four lines of single-spaced, unformatted text in a noticeably smaller font than the rest of the site, containing an agency disclaimer buried three-quarters of the way down the page. R. at 4–5. The undisputed digital audit logs show that Mr. Miller clicked the link once in April 2018 and never opened it again. R. at 5.

In February 2017, the Food and Drug Administration ("FDA") cleared CCS to publicly implement Cyber MD, an interactive diagnostic system powered by artificial intelligence ("AI"). *Id.* In addition to allowing patients to enter symptoms via text or voice, Cyber MD's conversational diagnostic system "asks follow-up questions, compiles clinical history, generates differential diagnoses, and orders/interprets diagnostic tests." *Id.* Before each session, users saw a red, sixteen-point pop-up stating that Cyber MD was "not a licensed healthcare professional" and was "an artificial intelligence software program," and required them to click "Accept" to proceed. *Id.*

MHS integrated Cyber MD into its portal one month after CCS received FDA clearance. *Id.* The pop-up gave no notice that MHS considered itself legally detached from Cyber MD's diagnostic conclusions. *Id.* In 2022, CCS discovered that Cyber MD's accuracy had declined from a baseline of 97% to 85% when evaluating patients

exposed to asbestos. R. at 5–6. Even more devastating, CCS did not release an updated version to clients until 2023 and never disclosed this catastrophic error to the public. *Id.*

As the timeline demonstrates, Elias Miller unknowingly fell victim to this blind spot. In April 2018, while experiencing shortness of breath, he logged in to the MHS portal and reported his decades-long asbestos exposure directly to the Cyber MD platform. R. at 6. Cyber MD subsequently ordered a chest X-ray and a CT scan and stated, “Once I have your scans, I will analyze them closely, and go over the results with you.” *Id.* Two weeks later, Cyber MD evaluated Mr. Miller’s scans and reported “zero evidence” of malignancy. *Id.* Further, it diagnosed him with adult-onset asthma, referred him for inhaler treatment, and recommended annual imaging. *Id.* Each year, from 2019 until 2021, Mr. Miller returned for the annual evaluations Cyber MD prescribed. *Id.* Each year, Cyber MD analyzed the new scans and reaffirmed “zero evidence” of disease. *Id.* Cyber MD told Mr. Miller that annual imaging was no longer necessary in 2021. *Id.*

Ultimately, Cyber MD’s analyses, prescriptions, and recommendations all proved fatal. A retrospective expert review later established that a seven-millimeter lesion was clearly visible on Mr. Miller’s original 2018 scans, though partially obscured by pleural changes. *Id.* That lesion grew continuously and undetected, reaching forty-seven millimeters in size by 2021. *Id.* This malignant growth occurred within the same window in which Cyber MD repeatedly cleared Mr. Miller with “zero evidence” of disease. *Id.* In October 2023, Mr. Miller experienced a spontaneous

pneumothorax, ultimately sending him 190 miles by medical airlift to the nearest MHS flagship hospital in Goshen. *Id.* There, scans revealed a 6.4-centimeter cancerous mass with extensive metastasis to the pleura and spine. *Id.* Cyber MD's initial diagnostic algorithm had consistently failed to identify the malignant mass. *Id.* He died on April 14, 2024. R. at 7. Mr. Miller's wife, Evelyn Miller ("Respondent"), filed this action in July 2024 against both MHS and CCS ("Petitioners") *Id.*

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County. In July 2024, Respondent, Individually and as Special Administrator for the Estate of Elias Miller, filed an initial action against Petitioners. R. at 7. Respondent lodged a vicarious liability claim against MHS under the doctrine of apparent agency for Cyber MD's diagnostic errors. R. at 2. Respondent additionally asserted a strict liability claim against CCS for design defects and failure to warn regarding Cyber MD's flawed diagnostic algorithm. *Id.* Following the close of discovery, Petitioners jointly moved for summary judgment pursuant to Shawnee Rule of Civil Procedure 56. *Id.* Specifically, MHS stipulated it could not be held vicariously liable under an apparent agency doctrine because Cyber MD was never its employee or agent, and because its hyperlinked "Terms and Conditions" disclaimed any agency relationship. *Id.* Further, Petitioners contended that Respondent's claims were barred by Shawnee's statutes of repose, pursuant to Shawnee Revised Statutes §§ 12–404 and 12–410. R. at 2–3. On March 6, 2025, the Circuit Court of Simmons County granted summary judgment to both Petitioners on all claims and dismissed the entirety of Respondent's claims with

prejudice. R. at 13. The Circuit Court held that the undisputed digital audit logs and “clickwrap” disclaimer defeated the “holding out” element of apparent agency, and that the agreement was not procedurally unconscionable despite Simmons County’s glaring healthcare shortage. R. at 9–10. Further, the Circuit Court held that Shawnee statutes of repose bar Respondent’s claims because express exceptions did not apply, and determined Respondent could not maintain an independent action as to either claim. R. at 10–13.

Shawnee Court of Appeals for the Second District. Following the Circuit Court’s decision, Respondent appealed to the Shawnee Court of Appeals for the Second District. R. at 16. On February 24, 2026, a three-judge panel reversed the Circuit Court’s summary judgment order for five reasons. *Id.* First, the court characterized MHS’s disclaimer as a “sign-in wrap” agreement whose conspicuousness presented a triable issue of fact. R. at 23. Second, the Circuit Court erred in resolving Respondent’s unconscionability arguments as a matter of law. *Id.* Third, Cyber MD’s annual follow-up evaluations could constitute a “continuous course of treatment” sufficient to toll the malpractice repose period under section 12–404(b), making the claim timely. R. at 25. Finally, the latent nature of Cyber MD’s algorithmic flaw fell within the statutory exception for the product liability repose bar under section 12–410(a). R. at 27. The Court of Appeals reversed both summary judgment orders and remanded for further proceedings consistent with its opinion. R. at 28.

Shawnee Supreme Court. Petitioners subsequently appealed pursuant to Shawnee Supreme Court Rule 315. R. at 29. This Court granted review on two fundamental issues: (1) whether a healthcare system may be vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI tool integrated into its telehealth platform; and (2) whether Respondent's claims are barred by Shawnee's four-year statutes of repose under sections 12-404 and 12-410. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

At the heart of this case is the death of a hardworking individual who sought care for a known medical risk and the failure of both a healthcare network and artificial intelligence software company to properly identify and treat him. In a dawning age of AI incorporation into fundamentally every realm of an individual's life, the collision between healthcare and AI cannot be addressed lightly. The Court of Appeals recognized this and determined a summary judgment ruling was wildly improper. This Court has the significant opportunity to ensure that accountability is properly apportioned to each party at fault and to justly interpret Shawnee statutory framework where the Legislature intended to protect cases just like Respondent's.

Two paramount questions are before the Court. First, 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. Second, whether 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 Revised Statute §12–404; or (b) the latent, undiscoverable nature of the algorithmic flaw and subsequent retraining under exceptions in Shawnee Revised Statute §12–410. Both questions and their outcomes have significant implications on the extent a healthcare network and product manufacturer can insulate themselves from their own mistakes, and how Shawnee stands to protect future vulnerable patients who entrust their lives to the hands of those networks and the tools that help treat them.

I.

The Circuit Court of Simmons County erred in resolving apparent agency against Respondent as a matter of law. Apparent agency requires evidence of three elements: (1) holding out by the principal; (2) the principal’s knowledge and acquiescence of such hold out; and (3) reasonable reliance on the part of the plaintiff. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 795 (Ill. 1993); *Webster v. CDI Ind.*, 917 F.3d 574, 577 (7th Cir. 2019). The record in this case is clear: Each element presents a genuine issue of material fact that can only be resolved by a jury of a fair-minded factfinder.

Addressing the first element, MHS held itself out as Elias Miller’s integrated healthcare provider. MHS developed a telehealth platform emblazoned with its own exclusive branding, prohibited CCS’s name from appearing on any patient-facing pages, and buried its only disclosure of CCS’s involvement toward the bottom of an

unformatted, thirty-four-line page. R. at 22–23. Further, this disclosure is best characterized as a “sign-in wrap agreement,” and not a “clickwrap agreement” as incorrectly held by the Circuit Court. R. at 9, 23. Its conspicuousness is a question of fact, not law. R. at 23. The Circuit Court additionally erred in dismissing Petitioner’s unconscionability arguments as a matter of law. *Id.* Procedural unconscionability examines whether gross disparities in age, intelligence, education, and bargaining power deprived a party of meaningful choice in the contract formation process. *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025); *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023). “Coupling essential medical intake with an obscure, hyperlinked agency disclaimer in a non-negotiable digital format raises significant unconscionability questions.” R. at 24.

Regarding the second element, MHS had actual knowledge of, and created, the very contractual arrangement that produced the appearance of apparent authority to any reasonable individual. MHS contracted with CCS to develop its telehealth platform, selected its branding, integrated Cyber MD directly into its own portal, and kept that arrangement in place for four years while Mr. Miller relied on its prescriptions and proscriptions to his detriment. R. at 18–20.

Finally, Mr. Miller’s reliance based on MHS’s conduct was reasonable. He never sought out Cyber MD individually. R. at 22. Instead, he logged in to MHS’s single domain under its own branding and returned each year to the undisclosed diagnostic relationship that MHS had established with Cyber MD and CCS. R. at 18–20. Mr. Miller’s conduct mirrors exactly what a patient with no independent

foundation to distinguish the hospital from its undisclosed vendor would reasonably do.

Critically, and as a matter of sound public policy, disputed issues of material fact must be resolved by a jury. As AI-infused diagnostic tools rapidly expand into rural and underserved communities such as Simmons County, a rule permitting a hospital to reap the branding benefits of integrated care while disclaiming any and all responsibility through an inconspicuous disclosure would invite similar institutions to engage in the same predatory conduct as MHS. Platforming such conduct not only encourages copycat behavior, but it also negatively affects elderly, chronically ill, and otherwise medically vulnerable patients who live in healthcare deserts across the country. Respondent asks this Court to apply the same three-part apparent agency test already tried and tested by several juries in jurisdictions across the nation, and to affirm the Shawnee Court of Appeals' decision.

II.

The repose periods in Shawnee Revised Statutes §§ 12–404 and 12–410 do not bar either the healthcare malpractice claim against MHS or the product liability claim against CCS because express exceptions apply to facts in this case. The Shawnee Legislature clearly and explicitly laid out exceptions that are meant to toll or extend the four-year repose periods for each claim. *See* Sn. Rev. Stat. §§ 12–404, 12–410.

First, Mr. Miller's interactions with MHS constituted a "continuous course of treatment." In section 12–404, a claimant cannot bring a healthcare malpractice

claim against a healthcare provider more than four years after the provider's act or omission which is alleged to be the cause of injury or death. Sn. Rev. Stat. §12–404. However, the statute expressly states the repose period “shall not apply” where the healthcare provider and patient engaged in a “continuous course of treatment” relating to the same illness, injury, or condition that gives rise to the claim. *Id.*

A court's role is to apply statutory exception where the state's legislature has clearly intended. *California Pub. Employees' Ret. System v. ANZ Securities, Inc.*, 582 U.S. 497, 507 (2017). The Shawnee Legislature clearly intended for the continuous course of treatment doctrine to toll repose where a healthcare provider is treating or monitoring an ongoing condition and that provider establishes a relationship with the patient where they provide such treatment. *See* Sn. Rev. Stat. § 12–404; *Cefaratti v. Aranow*, 138 A.3d 837, 842 (Conn. 2016) (listing elements of doctrine). Respondent presented evidence of an ongoing condition, his shortness of breath and high-risk respiratory status from dangerous exposure to asbestos, and Mr. Miller had reason to believe that MHS was continuously monitoring this condition through repeated diagnoses and annual “follow-up” scans. R. at 6. The Court of Appeals found as much and held there is genuine issue as to whether this doctrine should toll the claim. R. at 25.

The Shawnee Legislature considered policy reasons for creating the statutes of repose and for creating express exceptions to those periods. It satisfies public policy to impose repose to protect defendants; however, the Court cannot bypass policy support regarding claimant's protections when their claims fit squarely

within an exception. Thus, this Court should affirm that decision and remand for proceedings that align with clear legislative intent.

Second, the four-year repose period for Respondent’s product liability claim against CCS is also tolled or extended because the latent, un-discoverable nature of the defect in Cyber MD’s algorithm falls under statutory exception in section 12–410. Shawnee Legislature declared that a product liability claim based on strict liability must be commenced within four years from the date of “first sale, lease, or delivery” of the product to the initial user. Sn. Rev. Stat. § 12–410. However, the statute also outlines three express exceptions where the repose period “shall not apply.” *Id.* at § 12–410(b).

In contest in this case is the third exception, particularly the language stating that if the injury-causing aspect of the product was “not discoverable by an ordinary reasonably prudent person” within the repose window, the claim should still survive. *Id.* at § 12–410(b)(3). Both Kansas and Idaho have strikingly similar repose exceptions for product liability claims, and those courts mandate the exception apply in cases with defective products. *See Kerns By & Through Kerns v. G.A.C., Inc.*, 875 P.2d 949, 957 (1994); *Koch v. Shell Oil Co.*, 52 F.3d 878, 883 (10th Cir. 1995). Whether Mr. Miller or MHS staff are the “users” for the product does not change the outcome: There is genuine issue as to whether Cyber MD’s algorithmic flaw could have been discovered by anyone within four years other than CCS, its own manufacturer and distributor. The Circuit Court misinterpreted Shawnee statutes, attempting to apply the healthcare repose bar to the product liability claim

and refused to properly weigh issues of fact per the correct exception. R. at 27.

Thus, this Court should affirm the Court of Appeals' decision and remand this issue to go before a court using the proper statutory guidelines and pertinent facts in the record.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same legal standards as the Circuit Court. Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018). 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. Further, the Court must view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party, in this case, Respondent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment must be denied wherever fair-minded individuals could differ as to the inferences to be drawn from the undisputed facts. *Id.* Since this is a *de novo* review, this Court owes no deference to the lower court's resolution underlying apparent agency and the relevant statutes of repose. Critically, the threshold inquiry is not whether the Circuit Court's factual findings were reasonable, but whether factual issues were and currently are in dispute and, therefore, should have been and must still be resolved by a factfinder.

ARGUMENT

I. HEALTHCARE SYSTEMS CAN BE HELD VICARIOUSLY LIABLE FOR THE DIAGNOSTIC ERRORS OF AN AUTONOMOUS AI TOOL INTEGRATED INTO THEIR EXCLUSIVELY BRANDED PLATFORM.

This Court should affirm the Court of Appeals’ reversal of the Circuit Court’s summary judgment grant. Under Shawnee law, apparent agency requires proof that: (1) the principal acts in a manner that would lead a reasonable individual to conclude that the allegedly negligent entity or practitioner was an employee or agent of the hospital; (2) the principal had knowledge of and acquiesced in the conduct creating the appearance of authority; and (3) the victim reasonably relied on the principal’s conduct as consistent with ordinary care and prudence. *Gilbert*, 622 N.E.2d at 795; *Webster*, 917 F.3d at 577. “The first two elements of apparent authority are often grouped together and referred to as the holding out element, while the third element is often referred to as the justifiable reliance or the reliance element.” *First Midwest Bank v. Ottawa Regional Hospital and Healthcare Center*, 242 N.E.3d 934, 945–46 (3d Dist. 2023). However, the argument below will discuss each element separately. The Circuit Court incorrectly resolved each element against Respondent as a matter of law based on a hyperlinked disclaimer. However, the record contains compelling evidence of the following: (1) MHS held itself out as Miller’s integrated healthcare provider through a predominant branding strategy and an inconspicuous disclaimer; (2) MHS had actual knowledge of, and acquiesced in, the contractual arrangement that produced the appearance of authority; and (3) Miller reasonably relied on MHS’s conduct. Further, sound public policy underscores that a jury, not summary judgment,

should resolve genuine issues of material fact. Ultimately, if a jury of fair-minded individuals could find for Respondent on each element of apparent agency, then this Court should affirm the Court of Appeals' decision and remand to the appropriate factfinder.

A. MHS held itself out as Mr. Miller's integrated care provider, and whether its hyperlinked disclaimer defeated that impression is a question of fact.

"Holding out" is the primary element in dispute in this case. R. at 22. To satisfy this element's evidentiary burden, a hospital or entity must present itself as a complete or integrated care provider without adequately informing the patient that the care is delivered by an independent contractor or third-party system. *Gilbert*, 622 N.E.2d. at 795. It does not require an express representation that a provider is a hospital employee. *Id.*; *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 151 (1999). Instead, it requires that the patient knows, or should have known, that an independent entity (i.e., independent contractor or third-party automated system), under the "totality of circumstances," delivered the care. *Gilbert*, 622 N.E.2d. at 795; *Webster*, 917 F.3d at 575. Even in circumstances where a patient may know that the healthcare provider was an independent entity, courts have reasoned that a "patient may not have had reason to know of the contractual arrangements between the physician and the hospital." *Kashishian v. Port*, 481 N.W.2d 277, 284 (1992). Applying the law to the facts on the record and considering those facts under the totality of the circumstances, a reasonable jury could conclude that MHS held itself out as Mr.

Miller's integrated healthcare provider. MHS's hyperlinked disclaimer failed to meaningfully and reasonably dispel that impression.

1. The telehealth platform's branding, design, domain, and hyperlink point directly to MHS's authority.

MHS's branding control satisfies *Gilbert's* "holding out" standard. MHS contracted with CCS to build a telehealth platform and made the deliberate choice to maintain its own branding throughout the platform, consequently stripping any indication that CCS was involved in the platform's development. R. at 4, 18. In addition, the platform could only be accessed through MHS's primary web domain. R. at 4, 21. MHS's remote telehealth platform did not include an independent CCS portal that reflected CCS's participation in the platform's design. R. at 4, 18. In other words, MHS engineered the appearance of a singular, integrated system with a singular, uniform brand. This conduct is precisely what the "holding out" element is intended to capture.

MHS attempts to characterize itself as a passive conduit that licensed autonomous software and is unfairly taking the blame for that third-party's error. Such framing is incompatible with the record. MHS's conduct went far beyond licensure; it selected the branding, controlled the interface, and integrated the tool directly into its own patient-facing platform. R. at 4, 18. Further, courts evaluating similar defenses reject the argument that mere licensure forecloses liability for functionally decisive determinations from automated systems. *See Mobley v. Workday, Inc.*, 740 F.Supp.3d 796, 807–08 (N.D. Cal. 2024) (rejecting the argument that a software vendor's role was too passive for liability to attach where its tool made

functionally decisive determinations). Cyber MD, as an integrated tool in MHS's exclusively branded platform, ordered Mr. Miller's imaging, interpreted his results, delivered a diagnosis, provided prognostic recommendations, and informed him when follow-up care was no longer necessary. R. at 6, 20. MHS's conduct is not demonstrative of a passive conduit; it is the face of the care Mr. Miller received.

2. MHS's disclaimer is a sign-in wrap agreement, and its conspicuousness is a disputed question of fact.

Whether MHS's disclaimer was conspicuous enough to defeat the "holding out" element is a question to be resolved by a factfinder, not summary judgment. The categorical framework of disclaimers and agreements determines whether a court may resolve their sufficiency or remand the case to an appropriate factfinder. "Clickwrap agreements" require an affirmative click on an "I Agree" box positioned next to contractual terms and are routinely enforced. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853 (9th Cir. 2022). "Browsewrap agreements" contain hyperlinked terms posted at the tail end of a webpage with no required interaction from an end user. *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). These agreements are typically unenforceable for inconspicuous notice. *Id.*

MHS's interface falls in between these categorical extremes and is, therefore, likely characterized as a "sign-in wrap agreement." See *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024) (finding that these agreements bind a user to hyperlinked terms merely by clicking "Sign In" or "Enter Portal"). "Sign-in wrap agreements" are only enforceable with reasonably conspicuous notice and must

unambiguously warn the user of the binding legal consequences of proceeding. *Cullinane v. Uber Techs. Inc.*, 893 F.3d 53, 55 (1st Cir. 2018).

The undisputed facts regarding how MHS presented its disclaimer are incriminating. The Circuit Court completely mischaracterizes Petitioner's disclaimer as a "clickwrap agreement." R. at 9. Unlike a "clickwrap agreement" that would compel Mr. Miller to click an independent pop-up box to accept the terms, MHS and CCS designed the platform to couple Mr. Miller's access to integrated healthcare with passive assent to a separate legal document. R. at 23. The agency disclaimer was buried toward the bottom of a standalone page with thirty-four lines of single-spaced, unformatted, and noticeably smaller font as compared to the rest of the website. R. at 23. Under *Cullinane* and *Keebaugh*, whether the character of the disclaimer gave Mr. Miller reasonably conspicuous notice is an inquiry of which fair-minded individuals could differ, thus defeating summary judgment.

3. The pop-up warning informed Mr. Miller about Cyber MD's artificial nature, but that is not synonymous with a disclaimer of responsibility.

The pop-up warning does not resolve apparent authority as a matter of law because it only informed Mr. Miller of the artificial nature of Cyber MD: The pop-up did not disclaim MHS's responsibility for Cyber MD's AI algorithm. In a recent federal district court decision, the court held that where a consent form did not clearly identify the treating physicians or clearly convey their independent contractor status relative to the patient's treatment, there remained an issue of genuine material fact. *See generally Soule v. Blessing Hosp.*, No. 20-CV-1398, 2025 WL 2625337, at *4 (C.D.

Ill. Sept. 11, 2025) (holding that the consent form did not provide clear notices of the treating surgeon's independent contractor status, the court held there was a factual dispute on the issue which precluded the entry of summary judgment). Here, the pop-up does not identify Cyber MD as an independent entity, does not state that MHS is not responsible for the tool's generative output, and does not inform patients like Mr. Miller to look elsewhere for legal recourse.

The Circuit Court leaned heavily on the pop-up's content, which stated that Cyber MD was “an artificial intelligence software program” and “not a licensed healthcare professional.” R. at 5. This notice only informs the end user of *what* Cyber MD is evaluating; it does not answer *whose responsibility* it is if the evaluation is flawed. Nothing in the sixteen-word pop-up told Mr. Miller that MHS considered itself legally detached from Cyber MD's diagnoses, or that responsibility for any diagnostic error by would fall solely on a company whose name and branding never once appeared to him. R. at 5. Knowledge that a diagnostic tool is artificial intelligence is not synonymous with knowledge that the tool is legally independent of another entity. Ultimately, “whether a reasonable patient in Mr. Miller's position would understand that MHS was disclaiming vicarious liability remains a material factual dispute that must be resolved by a jury.” R. at 24.

4. MHS's reliance on an inconspicuous disclaimer is inappropriate under a totality of the circumstances, thus raising a triable fact question regarding unconscionability.

Even if this Court agreed with Petitioners' characterization of the disclaimer as a “clickwrap agreement” sufficient for enforcement, the circumstances surrounding

Mr. Miller’s contextual use of the platform bar summary judgment as a matter of law. Procedural unconscionability inquires as to whether gross disparities in age, education, relative bargaining power, and intelligence deprive an individual of meaningful choice in the contract formation process. *Hines*, 140 F.4th at 328; *Payne*, 81 F.4th at 1194. Around the time Mr. Miller needed care, Simmons County lost both of its hospitals and more than three-quarters of its healthcare workforce. R. at 3–4. Additionally, the county was unable to retain any urgent care facilities or permanent imaging centers, leaving only three primary care practices in the entire county. R. at 4. The nearest in-person care option was 190 miles (3.5-hour drive) away in Goshen. R. at 4. Finally, both state and federal authorities had formally designated Simmons County as both a Health Professional Shortage Area and a Medically Underserved Area. R. at 4.

The Circuit Court raised driving to Goshen as a reasonable alternative to remote telehealth care. R. at 10. Nevertheless, procedural unconscionability does not require *zero* alternatives; only that a meaningful choice was illusory given the gross disparity. *See Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 353 (Cal. App. 1st Dist. 2007)(finding “the existence of consumer choice decreases the extent of procedural unconscionability but does not negate the oppression”); *See also Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (finding the meaningfulness of choice is negated where a “gross inequality of bargaining power” exists between the parties). In Mr. Miller’s case, an ailing, aging patient in a county facing a healthcare infrastructure collapse left MHS’s own flagship system as one of

the few remaining points of meaningful access to integrated care. R. at 18. Although Mr. Miller had the option to drive 190 miles to Goshen to receive care from MHS, this fact alone does not defeat unconscionability as a matter of law. *Gatton*, 61 Cal. Rptr. 3d at 353. Ultimately, a jury should weigh whether a “hyperlinked agency disclaimer in a non-negotiable digital format” was enough to offset the gross disparity between an ailing patient in a healthcare desert and a widely recognized regional healthcare network wielding a poorly formatted disclaimer. R. at 24.

B. MHS had actual knowledge of and affirmatively created the contractual arrangement that produced the appearance of authority.

“Knowledge and acquiescence” typically arise as a contested issue when a hospital’s relationship to the negligent actor is indirect. *See generally Malanowski v. Jabamoni*, 688 N.E.2d 732, 737-38 (Ill. App. 1st Dist. 1997) (where the issue was whether a hospital was vicariously liable for the acts of a non-employee physician at an outpatient facility); *Gilbert*, 622 N.E.2d at 794 (where the court addressed whether a hospital was vicariously liable for the negligence of an independent contractor physician who was not an employee of the subject hospital). To satisfy this element, there must be sufficient evidence to demonstrate that the hospital had knowledge and acquiesced in acts of the agent that created the appearance of authority. *Malanowski*, 688 N.E.2d at 737. Courts recognize that an entity’s continued deployment of an algorithmic tool, particularly one making critically decisive judgments about patient care, is itself evidence of what the entity knew and tolerated. *See generally Allamon v. Acuity Specialty Prods., Inc.*, 877 F. Supp. 2d 498 (E.D. Tex.

2012); *Est. of Lokken v. United Health Grp., Inc.*, 766 F. Supp. 3d 835 (D. Minn. 2025). Ultimately, an institution that builds an algorithmic tool into the core of its patient-facing operations cannot later characterize its role as merely a passive conduit. *Est. of Lokken*, 766 F. Supp. 3d at 848.

MHS did not just flip a switch and blindly walk away; it kept Cyber MD running on its platform through Mr. Miller's initial diagnosis in 2018 and subsequent follow-ups through 2021. R. at 20. In this four-year span, MHS continued to present the autonomous AI tool to its patients under its own branding, with no branding or attribution to CCS anywhere in the patient experience. R. at 18. No one forced MHS to contract with CCS. No one forced MHS to prohibit CCS from adding its branding to the telehealth platform. No one forced MHS to select Cyber MD as the generative diagnostic telehealth tool. MHS strategically and affirmatively engaged in conduct that demonstrated their desire to be seen as the sole operator of their remote telehealth platform. Mr. Miller was not party to the contract between MHS and CCS. R. At 4. There is no evidence on the record that Mr. Miller ever saw affirmative evidence of CCS's involvement in the development of the telehealth platform. R. at 4. To any reasonable individual in Mr. Miller's shoes, it appeared that he logged into a website with its own domain, its own branding, and its own disclaimer agreements. Without being party to the contract, Mr. Miller did not know, and could not have known, that there was another party that could be vicariously liable for Cyber MD's diagnostic errors. On these facts, there is at least a genuine dispute regarding Mr. Miller's knowledge and MHS's communication of their treatment and liability

structure, thus underscoring that summary judgment is inappropriate to resolve this issue.

C. Mr. Miller reasonably relied on MHS, not CCS or Cyber MD, for his care.

The final element of apparent agency asks whether the plaintiff acted in reliance on the principal's conduct. *Gilbert*, 622 N.E.2d at 795. The threshold inquiry is whether the patient was "looking to the hospital for treatment" and not merely using the hospital as the site where a chosen physician happened to practice. *Markel v. William Beaumont Hosp.*, 982 N.W.2d 151, 152 (2022). Further, a patient's lack of any independent, pre-existing relationship with the actual treating entity supports reliance on the hospital, not against it. *Id.* at 153.

That inquiry is clearly met in this case. Mr. Miller did not seek out Cyber MD or CCS by name. He logged into MHS's own portal, under its own domain, under its own branding, with no prior relationship to any specific provider. R. at 18. He returned to that same MHS-controlled and MHS-branded platform every year for four years, and not once did he explicitly see or interact with CCS. R. at 20. Mr. Miller's consistent and repeated reliance on the platform highlights a pattern of trust in what he reasonably believed was an MHS-led diagnostic relationship. Nothing in the record demonstrates that Mr. Miller had a reason to distinguish Cyber MD (independent software designed by CCS) from MHS (patient network). At minimum, the reasonableness of Mr. Miller's belief is a question of fact.

D. As a matter of policy, let a factfinder determine what a reasonable patient would have understood and relied on.

Respondent is asking this Court to let a jury decide what a reasonable patient, in a rural community facing a collapse in its healthcare infrastructure, would have understood and relied on when interacting with MHS's telehealth platform under the totality of the circumstances.

AI-mediated care is expanding rapidly into communities that can least afford to litigate catastrophic diagnostic errors, and the well-established doctrine of apparent agency exists precisely to prevent institutions from engaging in dishonest practices that impact the most vulnerable patients. As of 2025, the FDA has authorized over 1,500 AI-enabled diagnostic services, a drastic increase from half a dozen in 2015. Elise Reuter & Jasmine Ye Han, *The Number of AI Medical Devices Has Spiked in the Past Decade*, MEDTECH DIVE (Oct. 9, 2024), <https://www.medtechdive.com/news/fda-ai-medical-devices-growth/728975/> [https://perma.cc/9KC7-LTP2]; *List of Artificial Intelligence-Enabled Medical Devices*, U.S. FOOD & DRUG ADMIN. (last updated May 13, 2025), <https://www.fda.gov/medical-devices/artificial-intelligence-enabled-medical-devices/list-artificial-intelligence-enabled-medical-devices> [https://perma.cc/JP5U-LP89]. Communities like Simmons County, which have already lost most of their healthcare workforce and local hospitals, are exactly where this growth would be targeted. R. at 4. MHS did not implement the Cyber MD platform in Goshen where patients were in close physical proximity to a second opinion. *Id.* It deployed the algorithmic platform in Cartersville,

190 miles away from the nearest alternative to patients with no real opportunity to determine its veracity or efficacy. *Id.*

In addition, if this Court upholds a rule that permits hospitals to brand, control, and host an AI diagnostic tool while escaping liability through a thirty-four-line unformatted hyperlink no one reads, perverse conduct becomes incentivized. MHS boldly displayed its exclusive branding on every page while quietly burying the agency disclaimer three-quarters down an unformatted page. R. at 4–5. If such conduct is enough to succeed on a motion for summary judgment, every hospital in Shawnee and similar towns encapsulated in healthcare deserts have a novel and dangerous blueprint: Keep the branding benefits, bury the liability consequences, and funnel the risk and associated costs onto vulnerable patients least able to bear it. Sound public policy would require an agency disclaimer to be easily visible, prominent, and properly formatted because the stakes are high, not because the brand is more profitable.

This Court does not need to create new law to rule in favor of the Respondent. Respondent recognizes there is little to no binding precedent that has decided whether an AI diagnostic tool can fulfill the role of an agent of a hospital. All this Court must do is apply the same tests in *Gilbert* and *Webster* that it already trusts juries to apply to human independent contractors. What matters is MHS's own conduct in terms of what it displayed and concealed, and what a reasonable patient would have taken from this conduct.

MHS developed a telehealth platform designed to look like MHS was the sole provider of integrated medical care. MHS maintained this appearance for four years while Mr. Miller’s cancer went undetected. The only question before this Court is whether a factfinder should be permitted to decide whether that appearance was reasonable. Respondent asks this Court to answer that critical question the same way *Gilbert* and subsequent decisions already answer it; by sending disputed facts regarding each element of apparent agency to a factfinder.

II. RESPONDENT’S HEALTHCARE MALPRACTICE CLAIM AND PRODUCT LIABILITY CLAIM ARE NOT BARRED BY FOUR-YEAR REPOSE PERIODS BECAUSE EXPRESS EXCEPTIONS APPLY.

A statute of repose, distinguished from a statute of limitations, is an “outer limit” on the time frame one can bring a civil action that is unrelated to the accrual of a cause of action. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). “The injury need not have occurred, much less have been discovered.” *Id.* (quoting 54 C.J.S. Limitations of Actions § 7, p. 24 (2010)). Statutes of repose encourage plaintiffs to bring timely actions against defendants and in turn protect defendants from liability after a determined amount of time. *Id.* at 9.

Statutes of repose must be altered where there is “particular indication” of legislative intent within a statute. *ANZ*, 582 U.S. at 507. Thus, if a legislature intentionally drafts a statute that contains “express exception” to repose periods, a court’s role is to “ascertain and give effect to the truest intent and meaning of the legislature” by considering statutory language and applying repose exceptions. *See Cunningham v. Huffman*, 609 N.E.2d 321, 405 (Ill. 1993).

Shawnee Legislature enacted a general two-year statute of limitations for personal injury claims after the cause of action accrues and for wrongful death actions after the decedent's death. Sn. Rev. Stat. § 12–402(a)–(b). The Legislature further sets out specific repose periods for health care malpractice and product liability claims in separate statutes, stating both claims must be brought within a four-year repose window. *See* Sn. Rev. Stat. §§12–404, 12–410.

It is clear the Shawnee Legislature intended these exceptions to toll, extend, or bypass repose periods where the facts of a case fall within the language of an exception. The Court's role is to interpret what the Shawnee Legislature intended in writing the statutes, and the Court of Appeals properly held that the Circuit Court erred in finding the exceptions did not apply to this case. At the very least, facts within the record warrant the case to go before a factfinder.

A. Cyber MD's annual diagnostic evaluations with Mr. Miller constitute a "continuous course of treatment" under section 12–404, bypassing the four-year repose period.

Shawnee Legislature writes that the four-year repose period for healthcare malpractice claims "shall not" bar an action where a healthcare provider was engaged in a "continuous course of treatment" with the patient for the "same illness, injury, or condition" that gives rise to the claim. Sn. Rev. Stat. § 12–410(b). The Circuit Court argued that Mr. Miller's relationship with MHS was not continuous treatment of a "known disease," but that the interactions were "separate, discrete, and independent" annual screenings that amounted to isolated "check-ups." R. at 12. The court also argued extending the doctrine in such a way would destroy the purpose of repose,

which is to provide economic certainty to healthcare systems and device manufacturers. *Id.*

To apply the continuous course of treatment doctrine, the Supreme Court of Connecticut requires (1) the patient had an identified medical condition that required ongoing treatment or monitoring; (2) the defendant provided that ongoing treatment or monitoring after the allegedly negligent conduct; and (3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated. *Cefaratti*, 138 A.3d at 842. The Court of Appeals found the Circuit Court adopted an “improperly restrictive interpretation of the continuous treatment doctrine,” and held that there are facts in the record which may implicate the exception. R. at 25. This Court must affirm that decision.

1. Mr. Miller’s shortness of breath and high-risk respiratory status was an ongoing condition.

Continuous course of treatment first requires a patient to undergo continuous and “substantially uninterrupted course of examination and treatment for a particular ailment.” *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648 (4th Cir. 2004). According to the plain language in section 12–404, this must be the condition that gives rise to the claim of negligence. Sn Rev. Stat. § 12–404(b). The Supreme Court of Connecticut held that the condition need not be so exact that negligent treatment or failure to identify a certain medical condition precludes use of the doctrine if the symptoms are “ultimately traced” to the condition that gives rise to the claim. *Cefaratti*, 138 A.3d at 847. The Supreme Court of Virginia held that the medical condition or injury connected to the cause of action can be general problems

or symptoms related to the ultimate injury when there is a continued misdiagnosis. *Farley v. Goode*, 252 S.E.2d 594, 596 (1979) (finding continuous negligent treatment and misdiagnosis of periodontal disease was continuous course of treatment because patient kept returning with dental problems and symptoms related to disease). It would be unreasonable to expect a patient under a provider's care to discover that the provider's actions are the cause of his injuries. *Grey v. Stamford Health System, Inc.*, 924 A.2d 831, 840 (Conn. 2007). Thus, to establish a genuine issue of material fact as to whether the doctrine applies, a plaintiff is "required only" to present evidence that their motivation in seeking medical care were symptoms or concern connected to the ailment that ended up resulting in the cause of action. *Cefaratti*, 138 A.3d at 842 (affirming a decision overturning summary judgment because plaintiff presented evidence of continuous symptoms that were misinterpreted and mistreated at each surgical follow-up appointment).

It is clear that the ongoing condition, injury, or illness that Mr. Miller battled was his high-risk respiratory status and the danger that his history with asbestos posed to him. First, Mr. Miller initially sought care from MHS on April 9, 2018, after experiencing shortness of breath and detailed his history of asbestos exposure in his virtual intake form. R. at 6. He presented with specific symptoms regarding a specific medical concern and only sought care in regard to those concerns. In response to his symptoms and history, MHS, through Cyber MD, ordered chest X-ray and CT scans, promising to analyze and discuss the results with Mr. Miller. *Id.* MHS evaluated the scans and determined there was "zero evidence of malignancy," diagnosed Mr. Miller

with asthma, and recommended treatment in the form of annual follow-up imaging. R. at 6. Mr. Miller returned annually until 2021 where the same symptoms and medical history were monitored in the form of additional chest-focused scans, review, diagnosis, and continued scheduling of follow-up appointments. *Id.* Each year, MHS had the same protocol in mind, geared toward the same medical condition that Mr. Miller initially presented with—his unusual exposure to a dangerous chemical that is likely to cause cancer. As *Cefaratti* requires, Mr. Miller has presented evidence that his motivation in seeking care from MHS, and further that every annual appointment, was related to his ultimate, untimely death and the negligence surrounding it.

It is likely Petitioner will argue, like the defendants in *Cefaratti* attempted to argue, that Respondent has not presented evidence that these follow-up appointments were related to the cause of action because Mr. Miller was unaware of the cancer that led to his injury. However, the Supreme Courts of Connecticut and Virginia who routinely apply this doctrine both hold that is not a valid argument. It is irrelevant, especially at the stage determining summary judgment, that Mr. Miller did not ever know of his cancer. How could he have? He entrusted his care to MHS and relied on that care to continuously monitor his high-risk status. All he needs to escape summary judgment is mere evidence of that.

The Shawnee Legislature was clear in section 12–404 that where the facts fit, the continuous course of treatment exception should apply. Simply, the Court must determine if there is any evidence in the record that gives rise to an inference that the doctrine *could* apply. Thus, the Court must affirm the Court of Appeals’ holding.

2. Mr. Miller’s annual “follow-up” appointments established a continuous physician-patient relationship with MHS.

Application of the continuous course of treatment doctrine also requires a continuous physician-patient relationship, and this relationship can be established between a healthcare corporation and individual patient. *Castillo*, 372 F.3d at 648–49; *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1081 (2d Cir. 1988) (finding treatment from different departments for same condition established a relationship with the hospital defendant). This portion of the doctrine embraces a plaintiff’s “reasonable expectation” that their treatment will be ongoing. *Martinelli v. Fusi*, 963 A.2d 640, 644 (Conn. 2009). The relationship can be established where a plaintiff shows affirmative action from the provider in treating, monitoring, or providing ongoing care for a patient in relation to the ultimate injury, or where the plaintiff could have reasonably expected the provider to do so. *See Martinelli*, 963 A.2d at 751–52; *Stallings v. Gunter*, 394 S.E.2d 212, 216 (N.C. App. 1990). Further, purely diagnostic services can establish an ongoing physician-patient relationship if there is evidence of something *more* than just scan interpretation. *Grey*, 924 A.2d at 840–41 (finding the doctrine did not apply to a radiologist who interpreted scans but had no role in treating or providing further care).

The *Grey* court explains that where a plaintiff presents with “suspicious symptoms,” there may be justification in applying the doctrine even in cases of routine, periodic “medical checkups.” *Id.* at 842. Further, Premiere General Medicine in Illinois distinguishes a “follow-up” appointment that “checks the status of a chronic or ongoing condition” from a routine “check-up” which addresses the “overall health”

of a patient. *Physicals and Health Maintenance*, PREMIERE GEN. MED., <https://www.premieregeneralmedicine.com/physicals-health-maintenance> (last visited Oct. 2, 2026) [<https://perma.cc/6MXK-7FGY>]. Where a provider is employed to cure a malady and the provider continues to “attend and examine” the patient regarding that malady, treatment has not ceased. *Cefaratti*, 138 A.3d at 843. A formal discharge can signify termination of treatment, or if there is nothing else to be done to effectuate a cure or monitor, the treatment ceases without formality. *Martinelli*, 963 A.2d at 651.

The Circuit Court seriously erred in finding the annual follow-ups with MHS were “separate, discrete, and independent” diagnostic screenings that did not establish a physician-patient relationship. The converse is true: There is ample evidence in the record establishing this relationship between Mr. Miller and MHS. MHS was not simply a diagnostic service, unlike in *Grey*, because the provider interpreted Mr. Miller’s scans, diagnosed him, recommended treatment, and established an ongoing connection through annual “follow-ups.” R. at 6. Mr. Miller undoubtedly had reason to anticipate that each year, MHS was continuing to screen for cancer related to his established high-risk status and original symptoms. Mr. Miller did not return each year on his own accord; he came back because his provider told him to. R. at 6. In *Grey*, a routine breast examination was considered isolated, but this case is different. Mr. Miller presented with actual symptoms and only sought care because of those symptoms. *Id.* MHS even called these “follow-up” visits, which

a medical provider is apt to know is different than a routine check-up or periodic scan.
Id.

Perhaps the most determinative evidence that this relationship implicates the doctrine is the fact that MHS discharged Mr. Miller in 2021. *Id.* That year, after reviewing new scans and again determining there was “zero evidence of disease,” MHS informed Mr. Miller annual imaging was “no longer necessary.” *Id.* This evidence of formal discharge is enough to preclude summary judgment and send the issue to a factfinder. If these were just isolated scans, amounting to independent, routine screenings as the Circuit Court held, Cyber MD would not have needed to discharge Mr. Miller.

There is obvious genuine issue of material fact that, in line with Shawnee statutory language, the continuous course of treatment terminated in 2021, making the suit in 2024 timely. Using other courts’ interpretations of the same doctrine in addition with the plain language in section 12–404(b), it is clear a factfinder could, and likely would, find that the physician-patient relationship was continuous between MHS and Mr. Miller. This issue cannot be decided on summary judgment, and this Court must affirm the appellate holding.

3. Applying the continuous course of treatment doctrine furthers policy purposes of repose statutes instead of inhibiting them.

The Circuit Court attempted to argue that “expanding” the continuous course of treatment doctrine to apply to the facts of this case would destroy the purpose of repose statutes in providing “absolute economic certainty to healthcare systems and device manufacturers.” R. at 12. While it is true that repose statutes hold significant

policy purposes, where a legislature has written an explicit exception, they intend it to apply.

Though a statute of repose is intended to protect a defendant from an “interminable threat of liability” and is not generally tolled, the Supreme Court holds otherwise if there is clear intent from a legislature. *ANZ*, 582 U.S. at 504. In *ANZ*, the Supreme Court argued that express legislative exception within a specific repose statute is “requisite intent” to alter the repose period. *Id.* at 507. The court in *Cunningham v. Huffman* refused to apply the doctrine because the general assembly obviously had not intended it to apply or they would have “specifically provided so,” as other state legislatures had done. *Cunningham*, 609 N.E.2d at 324 (Ill. 1993). A Massachusetts Court acknowledged policy purposes behind repose statutes, but their decision not to apply an exception solely hinged on the fact the legislature did not include it in the language of the statute. *Rudenauer v. Zafiropoulos*, 837 N.E.2d 278, 282–83 (Mass. 2005).

Because courts in other jurisdictions first look to the language of their statutes and then determine whether a repose period can be tolled, this Court should do the same. Section 12–404 clearly names and sets out the continuous course of treatment exception, stating repose “shall not bar an action” if the exception applies. Sn. Rev. Stat. §12–404(b). Under *Rudenauer*, a policy argument alone cannot preclude application of the continuous course of treatment exception when the Shawnee Legislature clearly intended it apply to healthcare malpractice claims in this state. The Shawnee Legislature obviously values protection for healthcare networks

because they drafted a finite statute of repose. However, the statute also shows the Legislature values those networks' patients because they allow claims to proceed in special circumstances. A patient should not be punished for relying on their provider in treatment, especially when that provider has committed significant error.

There is ample evidence in the record that establishes a continuous course of treatment between MHS and Mr. Miller. As the Shawnee Legislature intended, this exception should toll the repose period pertaining to the healthcare malpractice claim against MHS. If the exception applies, the repose deadline of April 2022 was tolled until Mr. Miller's treatment ceased in 2021. The proper repose deadline would then be June 2025, four years from his discharge date, making the 2024 suit timely. There was presence of a continued medical condition and an established physician-patient relationship, and the Circuit Court erred by applying a too-narrow interpretation of section 12-404.

B. The latent, un-discoverable nature of the algorithmic flaw and subsequent retraining of Cyber MD by CCS renders the four-year product liability repose period inapplicable.

1. The Circuit Court erred in applying the healthcare malpractice repose statute to the product liability claim.

The Circuit Court committed obvious error in attempting to apply the healthcare malpractice repose statute to the product liability claim against CCS. The court claimed that "because the underlying diagnostic injuries stem from patient care evaluations," that the malpractice repose should apply, and that the claim still must fall within the limitations set out in section 12-402. R. at 12-13. However, this maneuver would hazardously grate against Shawnee's legislative intent.

Product liability actions based on strict liability and healthcare malpractice claims are distinct despite the fact they may share an injury-causing incident or product. A product liability claim based on strict liability focuses specifically on a defective product and the ideal defendant of this claim is one who is “engaged in the business of selling such a product.” *Pate v. Columbia Mach., Inc.*, 930 F. Supp. 451, 459 (D. Idaho 1996). Healthcare malpractice claims, on the other hand, are usually set out in statutes and pursued against physicians, hospitals, or healthcare providers where negligence arises out of patient care. *See* Sn. Rev. Stat. § 12–404. Neither claim is dependent on the other, and where a legislature has expressly detailed statutes specific to each cause of action, a court should follow the rule that “unambiguous terms” are “given their plain and ordinary meaning.” *Elke v. Zimmer, Inc.*, 596 N.E.2d 661, 663 (Ill. App. 1st Dist. 1992). There is a significant lack of case law which supports pasting a healthcare malpractice repose statute onto a product liability claim where the defendant is not a healthcare provider and there are separate repose statutes for each claim. *Id.* (finding where the legislature did not include statutory language specific to product liability actions, the medical repose took over product liability claim against the same healthcare defendant); *Hayes v. Mercy Hosp. & Med. Ctr.*, 557 N.E.2d 873, 875–76 (Ill. 1990) (finding plaintiff could not bring a related claim in addition to medical malpractice action against the same physician after a reading of the healthcare malpractice statute).

In looking at the plain text of both sections 12–410 and 12–404, it is obvious that the healthcare malpractice repose statute should not apply to Respondent’s

product liability claim against CCS. *See* Sn. Rev. Stat. §§ 12–404, 12–410. Respondent initiated the original action with two claims: a healthcare malpractice claim against MHS through vicarious liability for the diagnostic errors of Cyber MD and a strict product liability claim against CCS based on design defect and failure to warn inherent in Cyber MD software. R. at 2. As *Pate* sets out, Respondent has properly brought the product liability claim solely against CCS, the manufacturer and distributor of Cyber MD. *Id.* When reading the plain language of Shawnee’s healthcare malpractice statute, the repose period only concerns actions “against any physician, hospital, or healthcare provider” which arises out of patient care. Sn. Rev. Stat. § 12–404(a). Because a product liability claim is different than healthcare malpractice and the industry or setting where the injury arises is not determinative of the claim, section 12–404 does not bar the claim against CCS.

The Circuit Court also attempted to argue that even if a section 12–410 exception applied to the product liability claim, it was still barred by the limitations statute in section 12–402. R. at 12–13. As the Court of Appeals reasoned, this analysis is misplaced and incorrectly interprets Shawnee statutes. R. at 26–27. Most importantly, it is critical that the Court recognize that statutes of limitations are not in contest in this case. The relevant issues are the statutes of repose for both claims. R. at 29. These are two different legal concepts and impact a case in different ways. *See Waldburger*, 573 U.S. at 8 (distinguishing statutes of limitations and repose). The Circuit Court made striking error in applying the facts of the case to the incorrect statutes. This Court must affirm the appellate ruling simply to correct this error and

remand for proceedings aligned with the proper statute. Section 12–410 is the only statute that governs repose for product liability claims.

2. As the Circuit Court admitted, the latent, un-discoverable nature of the defective algorithm could—and likely does—fall within a statutory exception in section 12–410(b)(3).

Shawnee Legislature wrote that the four-year products liability repose period shall not apply “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 years after the time of delivery.” Sn. Rev. Stat. § 12–410(b)(3). If a lower court fails to properly apply the correct statutory exceptions to a claim, a higher court must remand that ruling so the case can be tried congruent with correct legislative intent. *See Koch*, 52 F.3d at 884 (remanding a claim where the lower court refused to consider an identical exception to the facts of the case).

In interpreting identical statutory repose exceptions, the Kansas Supreme Court and courts in Idaho hold a “reasonably prudent person” to be a “reasonable user of the product.” *Kerns*, 875 P.2d at 957; *Pate*, 930 F. Supp. at 459. To determine if the injury-causing aspect of the alleged defective product was in fact not discoverable, the court in *Kerns* weighed whether the danger or hazard was “open or obvious.” *Kerns*, 875 P.2d at 957. The court ultimately decided that a reasonable user of a mesh fence to enclose a swimming pool should have noticed the large size was defective. *Id.* A Kansas Court of Appeals held “discoverable” to be how a user can “without danger to himself reasonably detect the hidden danger and guard against it.” *Baumann v. Excel Industries, Inc.*, 845 P.2d 65, 73 (Kan. App. 1993). The *Baumann* court defines

“prudent” as “careful or sensible.” *Id.* In that case, the court asked whether a careful person would have been able to comprehend the danger and determine how to avoid it. *Id.* at 74–73. The court found that a careful user of a lawnmower would have read its manual before operating and hence known that he could suffer injury. *Id.*

The Circuit Court failed to even consider if this exception might apply because of their misinterpretation and misapplication of Shawnee statutes. R. at 12–13. Considering Mr. Miller was a reasonable user of the Cyber MD platform, there is no conceivable way he could have discovered the “foundational coding defect” hidden within its algorithm. R. at 26. Unlike in *Baumann*, there is no evidence there was a manual available to Mr. Miller when he sought care from MHS and encountered Cyber MD’s platform. R. at 3–6. Unlike in *Kerns*, Cyber MD’s inability to properly identify malignant tumors in asbestos-exposed lungs was not open or obvious like a tangible, defective fence. It required “retrospective expert review” to discover the error and only CCS had access to its baseline algorithm. R. at 5–6. This claim on Mr. Miller’s behalf cannot be barred because he could not have inspected Cyber MD’s source code or analyze the baseline algorithm himself. Mr. Miller spent over 45 years working in a steel mill for his livelihood. R. at 3–4. He likely was not versed in modern artificial intelligence programs, how they worked, or where they could go wrong.

Even if Petitioner argues that the “reasonably prudent user” would be MHS staff or physicians, the exception still applies because the defect was not discoverable to them either, as reasonable or prudent as they could have been. Experts had to retrospectively examine the initial scans to uncover the tumor hidden on Mr. Miller’s

lungs, but MHS staff still would have been unable to identify the flaw buried the Cyber MD algorithm. R. at 5–6. CCS, the product manufacturer, discovered the defect in October 2022 and told no one. *Id.* CCS restored the program and released the updated version in December 2023. *Id.* Thus, there is no way MHS staff or physicians could have discovered the error within four years of its delivery.

In a plain reading of the Shawnee statute, it is clear the Legislature intended this exception to apply where the facts are right; in this case, they are. Section 12–410 solely governs the product liability claim against CCS, and because the defect was not discoverable within four years by either Mr. Miller or MHS staff, the repose period should not apply. MHS implemented a defective product into their healthcare regimen, a mistake that they will be held accountable for. But both “users” of the product were in the dark about its flaws until, at the very least, October 2023 when Mr. Miller suffered a collapsed lung. R. at 6. Thus, as the Court of Appeals found, this exception clearly at least boasts enough issue of material fact to preclude summary judgment. R. at 26–27. This decision is critical in holding both healthcare providers and product manufacturers liable when a system like Cyber MD costs a hardworking, unsuspecting man his life. It is critical Respondent’s claim receives due justice and its own day in court. The Court should affirm the Court of Appeals’ decision and remand the case to a trier of fact.

CONCLUSION

This litigation underscores the necessity for courts to enforce apparent agency laws to protect medically vulnerable individuals from the commercially predatory practices of hospitals and the AI diagnostic tools they deploy. Further, this case offers critical opportunity for this Court to interpret the plain text of the Shawnee Revised Statutes to effectuate the intent of the Legislature. There is a clear path forward for this Court to affirm the Shawnee Court of Appeals for the Second District's judgment. This Court does not need to, nor should they, reinvent the wheel or seek to draft novel interpretation. Extensive case law and the state's own statutes provide a clear answer: When there are genuine issues of material fact regarding the conduct of a principal, and such conduct leads a fair-minded individual to conclude that the victim justifiably relied on their authority, a jury of fair-minded individuals must determine the reasonableness of each party's conduct. Further, when a legislature has carved clear statutory exception, summary judgment is improper where facts of the case give rise to an inference a claim should escape the statutory repose period. Ultimately, we ask this Court to affirm both issues.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT