
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 Supreme Court*

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

- I. Whether Metropolitan Health System, Inc. (“MHS”) can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of Cyber Care Solutions, LLC’s (“CCS”) autonomous AI software tool Cyber MD, which was integrated into MHS’s branded telehealth platform, when MHS held the platform out as its agent through exclusive MHS branding, and failed to provide patients with conspicuous notice of the tool’s independent status.
- II. Whether Respondent’s claims are barred by Shawnee’s four-year statutes of repose, or whether they fall within the statutory exceptions given that Cyber MD’s annual diagnostic evaluations constituted a continuous course of treatment under Shawnee Revised Statute § 12-404(b), and because the latent algorithmic defect responsible for Respondent’s claim was not reasonably discoverable within four years of delivery under Shawnee Revised Statute § 12-410(b)(3).

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OPINIONS BELOW

The unreported Opinion and order of the Circuit Court of Simmons County, State of Shawnee, *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*, Case No. 25-L-24601 (Shawnee Cir. Ct. Mar. 6, 2025), is contained in the Record of Appeal at Pages 1-12. The Circuit Court GRANTED Defendant's Motion for Summary Judgment, holding that MHS was not vicariously liable under the doctrine of apparent agency and that Shawnee's four-year statute of repose barred Respondent's claims. 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*, Docket No. 25-123 (Shawnee App. Ct. Feb. 24, 2026), is contained in the Record of Appeal at Pages 13-25. The Court of Appeals REVERSED the Circuit Court's judgment, holding that the agreement underlying MHS's care to Respondent was unconscionable, that Mr. Miller did not manifest assent to the agency disclaimer, and that the statute of repose does not bar Respondent's claims.

STATUTORY PROVISIONS INVOLVED

The following provisions of the Shawnee Revised Statutes are relevant in this proceeding: § 12-402, § 12-404, and § 12-410. Also relevant are § 12-404(b), which provides a statutory exception to the four-year healthcare malpractice statute of repose when there is a continuous course of treatment, and § 12-410(b)(3), which provides a statutory exception to the four-year product liability statute of repose for latent defects that were not discoverable by an ordinary reasonably prudent person

within four years of delivery. The statutes at issue, Shawnee Revised Statute § 12-402, § 12-404, and § 12-410, are located in Appendix B.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The case before this court arises following the death of Elias Miller (Respondent) after a delayed diagnosis of stage IV adenocarcinoma by Cyber MD, an artificial intelligence diagnostic system integrated into Metropolitan Health Systems' ("MHS") (Petitioner) telehealth platform and designed by Cyber Care Solutions, LLC ("CCS") (Petitioner). (R. at 2.) Mr. Miller's Estate now seeks to hold MHS vicariously liable for Cyber MD's diagnostic errors under the doctrine of apparent agency, and CCS for strict product liability for the design defects in Cyber MD's algorithm, and its failure to warn of such defects. (R. at 2.)

Elias Miller's Long-Term Asbestos Exposure. Elias Miller, born January 12, 1950, began working in the Shawnee Steel Company's maintenance department in Cartersville, Shawnee, at the age of twenty. (R. at 3.) Mr. Miller worked at the steel mill from 1970 until he retired in 2016. (R. at 3.) Within his role in the maintenance department, Mr. Miller regularly handled machinery heavily insulated with asbestos and frequently worked without respiratory protective equipment. (R. at 3.) After the Occupational Safety and Health Administration adopted safety standards in 1970, many steel mills stopped using asbestos to insulate machinery; however, the Cartersville plant retained its original asbestos insulation. (R. at 3.) Mr. Miller was a lifelong non-smoker and had no history of asthma or respiratory

disease. (R. at 3.) In 2012, Mr. Miller received an “unremarkable” reading on a chest screening. (R. at 3.)

Elias Miller’s Limited Access to Local Healthcare. Mr. Miller lived in Cartersville, a rural community in Simmons County, Shawnee. (R. at 3-4.) The Shawnee Steel Mill closed in 2016 because of significant economic contractions and population declines in Cartersville. (R. at 4.) Cartersville lost over 75% of its healthcare professionals between 2016 and 2025, with the closure of both local hospitals. (R. at 4.) After the closures, the county had no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices. (R. at 4.) The nearest facility providing in-person radiology consultations and CT scans was MHS’s flagship hospital in Goshen, 190 miles from Cartersville. (R. at 4.) State and Federal authorities designated Simmons County as a Medically Underserved and Health Professional Shortage Area. (R. at 4.)

MHS’s Integration of Cyber MD Into Its Telehealth Platform. In 2012, MHS, a regional healthcare network, contracted with CCS, a digital health infrastructure provider, to design and host a proprietary remote telehealth platform. (R. at 4.) MHS exclusively controlled the platform, displayed MHS branding, and strictly prohibited CCS branding on any patient-facing pages. (R. at 4.) Patients accessed the platform through MHS’s primary domain, upon which the login page stated, “*By entering the portal, I accept the MHS Terms and Conditions.*” (R. at 4.) The words “Terms and Conditions” were a clickable blue underlined hyperlink that opened to a separate webpage. (R. at 4.) This standalone webpage displayed thirty-

four lines of single-spaced, unformatted black text on a plain white background. (R. at 4.) The terms were written in a font size noticeably smaller than the rest of the site. (R. at 4.) Approximately three-quarters down the page, the terms stated that clinical evaluation, imaging reviews, and diagnostic interpretation were performed by independent contractor physicians or automated software applications, and that neither were considered employees or agents of MHS. (R. at 4-5.) The terms also stated that MHS had no operational control over the software's clinical judgment or the diagnostic measures of independent contractors. (R. at 5.) On April 9, 2018, Mr. Miller navigated to the website through the MHS domain, clicked on the “Terms and Conditions” hyperlink, but remained on the page for only four seconds. (R. at 5.) This was the only time Mr. Miller ever navigated this page; he did not access it during any subsequent logins. (R. at 5.)

Cyber MD’s Algorithmic and Diagnostic Flaws. In February 2017, CCS received FDA clearance for Cyber MD, an interactive AI diagnostic system that compiled clinical histories, ordered and interpreted diagnostic tests, generated differential diagnoses, and allowed patients to enter symptoms. (R. at 5.) The verification studies and data used to train Cyber MD were provided to the FDA, but not to the public. (R. at 5.) Before beginning a session with Cyber MD, patients had to accept a pop-up warning stating that Cyber MD was an artificial intelligence software program, not a licensed healthcare professional. (R. at 5.) On March 1, 2017, MHS integrated Cyber MD into its telehealth platform. (R. at 5.)

April 2018, The Start of Elias Miller’s Annual Monitoring by Cyber MD.

On April 9, 2018, Mr. Miller experienced shortness of breath, logged into the MHS portal, and initiated a virtual intake session with Cyber MD. (R. at 6.) During the session, Mr. Miller disclosed his history of occupational asbestos exposure. (R. at 6.) Cyber MD ordered a chest X-ray and CT scan to be performed through a mobile radiology service visiting Cartersville and stated that, upon receipt of the scans, Cyber MD would analyze them closely. (R. at 6.) Two weeks later, the raw images were uploaded, Cyber MD evaluated the materials, reported “zero evidence” of malignancy, diagnosed Mr. Miller with adult-onset asthma, and recommended annual follow-up imaging. (R. at 6.)

The Diagnostic Failures and Subsequent Death of Elias Miller. Mr. Miller returned to Cyber MD for annual virtual follow-up evaluations in May 2019, May 2020, and June 2021. (R. at 6.) During each evaluation, Cyber MD reiterated that there was “zero evidence” of disease. (R. at 6.) Following the 2021 evaluation, Cyber MD advised Mr. Miller that annual imaging was no longer necessary. (R. at 6.)

October 2022, CCS Discovers Cyber MD’s Latent Defect Following the Closure of the Statutory Period of Repose. Cyber MD was trained on 40,000 images from three hospitals and achieved a 97% accuracy rate in classifying lung lesions. (R. at 5.) However, in October 2022, CCS discovered that Cyber MD’s accuracy in classifying lung lesions dropped to 85% when evaluating patients with prior occupational asbestos exposure. (R. at 5-6.) CCS retrained Cyber MD using

10,000 asbestos-exposed image sets and released the retrained version to patients on December 13, 2023. (R. at 6.) Information regarding the inaccuracy of Cyber MD in diagnosing patients with occupational asbestos exposure was never released or reported to the public by CCS. (R. at 5.)

The Death of Elias Miller Subsequent to Cyber MD's Diagnostic Failure. On October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax and was airlifted to MHS's flagship hospital in Goshen. (R. at 6.) Scans taken at the hospital revealed a 6.4 cm malignant mass in his left lung, with extensive metastases to the pleura and spine. (R. at 6.) Retrospective expert review established that a 7 mm lesion was clearly visible on Mr. Miller's 2018 scan and had grown continuously to 47 mm by 2021. (R. at 6.) These findings revealed that Cyber MD had failed to detect and diagnose the lesion while operating under the algorithm designed in 2017. (R. at 5.) Mr. Miller died on April 14, 2024, at the age of 74 from stage IV lung adenocarcinoma. (R. at 2, 7.)

II. NATURE OF PROCEEDINGS

The Trial Court. In July 2024, Evelyn Miller, individually and as special administrator of Elias Miller's estate, filed this action against MHS and CCS, following the death of Elias Miller from stage IV adenocarcinoma. (R. at 2.) Respondent asserts a claim against MHS for vicarious liability for Cyber MD's diagnostic errors under the doctrine of apparent agency. (R. at 2.) Respondent also asserts a claim against CCS for strict product liability for the design defects in Cyber MD's algorithm and its failure to warn of such defects. (R. at 2.) Following the close of discovery, both Petitioners moved for summary judgment. (R. at 2.) MHS

contended it could not be held vicariously liable under apparent agency as Cyber MD was not an employee or agent of MHS, and MHS's hyperlinked Terms and Conditions explicitly disclaimed an agency relationship. (R. at 2.) Further, MHS and CCS jointly asserted that Shawnee Revised Statutes § 12-404 and § 12-410 barred Respondent's claims under the applicable four-year statute of repose. (R. at 2-3.) On March 6, 2025, the Circuit Court of Simmons County GRANTED Petitioner's Motion for Summary Judgment and dismissed Respondent's complaint with prejudice. (R. at 12.) The court concluded that no genuine issue of material fact existed as to whether MHS could be vicariously liable under apparent agency, and that the applicable statute of repose barred Respondent's claims. (R. at 12.)

The Court of Appeals. Ms. Miller timely appealed to the Shawnee Court of Appeals for the Second District. (R. at 17.) The Court of Appeals held that the Circuit Court erred in concluding that MHS's digital Terms and Conditions conclusively barred apparent agency and applied the four-year statute of repose to bar the claim without considering express statutory exceptions. (R. at 17.) The Court of Appeals found the Terms and Conditions hyperlink and the Cyber MD pop-up window did not conclusively resolve whether MHS could be held vicariously liable, leaving genuine issues of material fact concerning the conspicuousness of MHS's agency disclaimer and whether the disclaimers were unconscionable. (R. at 23-24.) The court also held that the four-year statute of repose did not bar the claims because the Circuit Court applied an improperly restrictive interpretation of the continuous treatment doctrine, and the latent defect exception applies. (R. at 24-25.) On February 24, 2026, the

Shawnee Court of Appeals for the Second District REVERSED the Circuit Court's grant of summary judgment and REMANDED the case for further proceedings. (R. at 28.)

The Supreme Court of Shawnee. MHS and CCS petitioned the Shawnee Supreme Court for leave to appeal pursuant to Shawnee Supreme Court Rule 315. (R. at 29.) The Shawnee Supreme Court GRANTED the petition but limited the appeal to: (1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic error of an autonomous AI software tool; and (2) whether Ms. Miller's claims are barred by the four-year statute of repose or fall within the statutory exceptions concerning continuous treatment and latent defects. (R. at 29.)

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Shawnee Court of Appeals for the Second District because there are genuine issues of material fact regarding: whether MHS authorized Cyber MD to act; whether Mr. Miller had reasonable notice of Cyber MD's independent contractor designation; and whether the terms are enforceable. Further, this Court should affirm the appellate court's holding, as Respondent's claims are not temporally barred by the four-year repose period. Respondent's claims qualify for the statutory exceptions in Shawnee Rev. Stat. § 12-404(b) for a continuous course of treatment, and § 12-410(b)(3) for latent and undiscoverable defects.

I.

Apparent Agency. When negligently treating Mr. Miller, Cyber MD acted as MHS's apparent agent, and MHS should be held vicariously liable for its errors.

First, MHS held out Cyber MD such that a reasonable person may conclude Cyber MD was its agent by failing to provide reasonable notice that Cyber MD was an independent contractor, not an employee. Further, the patient-facing webpages at issue featured MHS branding exclusively, with no allusion to CCS or Cyber MD. There would be no reason for an ordinary user of the MHS platform to know that Cyber MD was an independent contractor. Second, MHS knew of and acquiesced in all the actions that gave Cyber MD an appearance of authority because MHS controlled Cyber MD's presentation. Third, Mr. Miller relied on MHS's platform and reputation to provide his medical care, not Cyber MD.

Enforceability. As the issue of reasonably conspicuous notice is unresolvable with the current record, it is also unclear whether Mr. Miller offered unambiguous manifestation of his assent to the terms. Mr. Miller could not have assented in that manner without reasonable notice of the terms. However, regardless of whether there was reasonably conspicuous notice, the terms were both procedurally and substantively unconscionable. Procedural unconscionability is supported because Mr. Miller was not a sophisticated purchaser or reasonably notified of the terms. Additionally, Mr. Miller lived in a medically underserved area and lacked other meaningful options for care. Finally, the terms reflected an adhesion contract, which further supports a finding of procedural unconscionability. The terms were substantively unconscionable because MHS attempted to disclaim liability while maintaining control over the program, showing a one-sided allocation of risk.

II.

Continuous Course of Treatment. The Shawnee Court of Appeals for the Second District correctly reversed the Circuit Court's summary judgment and dismissal of Respondent's claims. The court found that Respondent's claims were not barred by the four-year statute of repose as they qualified for the continuous treatment exception outlined in Shawnee Rev. Stat. § 12-404(b). Additionally, the circuit court was improperly restrictive in its interpretation of the statute. Mr. Miller's treatment by Cyber MD was continuous between 2018 and 2021 as he was instructed to attend return visits with Cyber MD. Thus, the repose period does not begin to run until the final date of Mr. Miller's treatment with Cyber MD, such that Respondent's claims are not temporally barred.

Latent and Undiscoverable Defect. The Shawnee Court of Appeals for the Second District correctly reversed the Circuit Court's summary judgment and dismissal of Respondent's claims, on the grounds that the claims are not barred by the four-year statute of repose. The latent and undiscoverable defect exception in Shawnee Rev. Stat. § 12-410(b)(3) applies here, as the defect in Cyber MD's algorithm was not discoverable by an ordinary reasonably prudent person, or even by CCS, until more than four years after the product's delivery in 2018.

STANDARD OF REVIEW

This appeal raises two issues that warrant *de novo* review as a question of law: Vicarious Liability and Digital Apparent Agency, and Statutes of Repose and Statutory Exceptions. Summary judgment is appropriate only if "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, all reasonable inferences must be drawn in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment must be denied if fair-minded individuals could differ as to the inferences to be drawn from the undisputed facts. *Id.* at 248.

ARGUMENT

I. CYBER MD WAS AN APPARENT AGENT OF MHS BECAUSE MHS HELD OUT CYBER MD AS ITS AGENT, AND MR. MILLER RELIED ON THAT AUTHORITY.

This Court should affirm the holding of the Shawnee Court of Appeals for the Second District on this matter on the basis that: (1) MHS held out Cyber MD as an agent of its facility; (2) Mr. Miller relied on that appearance of authority; and (3) whether Cyber MD was authorized to act as MHS's agent presents a genuine issue of material fact. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 795 (Ill. 1993).

The Second Restatement of Torts § 429 emphasizes a plaintiff's right to bring a civil suit against a principal for the negligent acts of independent contractors. Restatement (Second) of Torts § 429 (1965). A principal can be held liable not only for the acts of agents with explicit authorization to act on their behalf, but also the acts of agents who appear to have been given such authority. *Gilbert*, 622 N.E.2d at 795.

For a hospital to be liable under apparent agency, a plaintiff must show that: (1) the agent was held out such that a reasonable person would conclude they are an agent of the hospital; (2) the principal had knowledge of and acquiesced in the acts that led to the appearance of authority; and (3) the plaintiff relied upon the hospital.

Gilbert, 622 N.E.2d at 795. Courts assess the appearance of authority by considering whether a patient had a reasonable basis to believe an independent contractor was acting on behalf of the healthcare facility. *Id.*; *Pamperin v. Trinity Memorial Hosp.*, 423 N.W.2d 848, 854 (Wis. 1988). “Whether an agent is authorized to act is a question of fact.” *Gilbert*, 622 N.E.2d at 795. While typically applied to hospitals, these apparent agency standards have been applied “beyond the hospital setting, including in the context of a health care center or clinic,” *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 577 (7th Cir. 2019), and are therefore applicable in this case.

A. MHS Held Out Cyber MD Such That a Reasonable Person Would Conclude It Was Agent of the Facility.

MHS and Cyber MD appeared as a single entity to a reasonably prudent consumer. Mr. Miller should not be expected to recognize the two companies as separate entities because: (1) the term labeling Cyber MD an independent contractor did not provide reasonably conspicuous notice to a reasonably prudent consumer; (2) Cyber MD’s access point was presented as part of MHS’s main website; and (3) all patient-facing webpages had MHS branding.

The first element courts utilize to determine whether a healthcare facility can be held liable for the acts of independent contractors is whether the principal “holds itself out as the provider of care.” *Pamperin*, 423 N.W.2d at 854. The fact that a patient was unknowingly treated by an independent contractor, rather than an employee of the healthcare facility, should not bar recovery of compensation from the healthcare facility for negligent or tortious acts. *Id.* at 855. This element is satisfied “unless the patient knows, or should have known, that the provider of health care is

an independent contractor.” *Id.* The hospital need not expressly represent that the negligent actor is an employee. *Id.* at 856; *Gilbert*, 622 N.E.2d at 796. “Whether a person has notice of the lack of an agent’s authority, or is put on notice by circumstances, is likewise a question of fact.” *Gilbert*, 622 N.E.2d at 795; *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2nd Cir. 2017).

1. There was Not Reasonably Conspicuous Notice Regarding Cyber MD’s Status as an Independent Contractor.

The MHS Terms & Conditions did not provide Mr. Miller with reasonably conspicuous notice of the terms to which he was going to be bound, and therefore, he had no reason to know that Cyber MD was considered an independent contractor.

The terms at issue were a web agreement. (R. at 4.) The main forms of web agreements are clickwrap, browsewrap, and sign-in wrap. *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022). A clickwrap agreement “presents users with specified contractual terms on a pop-up screen and users must check a box explicitly stating, ‘I agree’ in order to proceed.” *Id.* In a browsewrap agreement, “a website offers terms that are disclosed only through a hyperlink, and the user supposedly manifests assent to those terms simply by continuing to use the website.” *Id.* A sign-in wrap agreement requires users to agree to a hyperlinked set of terms by completing a separate action, such as pressing a “Play” or “Continue” button, and does not require the user to access or read through the terms before manifesting assent through that action. *Keebaugh v. Warner Bros. Entertainment Inc.*, 100 F.4th 1005 (9th Cir. 2024).

MHS's terms were available via hyperlink, on a standalone webpage, and Mr. Miller was not required to access them to proceed, mirroring a browsewrap or sign-in wrap agreement. (R. at 4.) Further, Mr. Miller's assent was not explicit. (R. at 4.) His passive assent resulted from his urgent need to access the healthcare platform. (R. at 4.) Mr. Miller was not required to check a box, scroll through the terms, or even access them to indicate his assent. (R. at 4.) Instead, entering the portal was taken as assent to the terms available through a separate webpage. (R. at 4.) This passive assent marks the agreement as a browsewrap or sign-in wrap agreement.

For a browsewrap or sign-in wrap agreement, unless the user has actual knowledge of the terms to which they are bound, to render the contract enforceable based on inquiry notice, the website must provide reasonably conspicuous notice of the terms and the consumer must unambiguously manifest assent to those terms. *Berman*, 30 F.4th at 856.

2. Reasonable Notice is Judged by the Entirety of the Webpage, and This Record Does Not Contain Details About MHS's Website Design and Content.

To determine whether a user had enough notice to inquire further about the terms of a website's use, it is essential for courts to consider the website's overall structure and design rather than relying on the hyperlink itself. *Foster v. Walmart, Inc.*, 15 F.4th 860 (8th Cir. 2021). In *Berman*, the United States Court of Appeals for the Ninth Circuit held that the website at issue did not provide reasonably conspicuous notice of the Terms & Conditions when the hyperlink was compared to the rest of the webpage. *Berman*, 30 F.4th at 856. The court reasoned that, on a brightly colored website, the small gray font depicting the hyperlink did not provide

sufficient notice of the Terms & Conditions. *Id.* Part of that consideration included the court's finding that a comparatively large box displaying the user's personal information and a large green "continue" button also present on the webpage impacted the notification's conspicuousness. *Id.* at 854. Because the *Berman* court knew the content, design, and style of the entire webpage, it was able to assess whether the hyperlink was reasonably conspicuous when compared to the rest of that page. *Id.* Alternatively, in the case before this Court, the record does not contain details about the content, design, or style of MHS's sign-in page surrounding the hyperlink. (R. at 4.) It would be improper for the Court to rule on the conspicuousness of the hyperlink without comparing its visibility to the rest of the webpage. *Berman*, 30 F.4th at 856.

If the court record does not include design-specific elements, such as the general design of the webpage, the sufficiency of the notice presents a genuine issue of material fact. *Foster*, 15 F.4th at 864. For example, in *Foster*, the United States Court of Appeals for the Eighth Circuit found that it could not make a ruling on whether an arbitration provision was binding because there were multiple factual disputes left unsettled in the case, including, most notably, clear specifics regarding the structure and design of the website and its hyperlinks. *Id.* The district court record included a copy of the online terms and conditions but did not include specific details about the overall website content. *Id.* The court noted that, without those specific details, it would be difficult to determine whether the plaintiffs had constructive notice of the terms. *Id.*

As in *Foster*, the facts here do not show the full content of the webpage where the hyperlink appeared. *Id.* Because the webpage contents are unavailable in the record, this Court does not have enough information on the issue to decide that the notice provided by the hyperlink was reasonably conspicuous. *Id.* This lack of details presents this Court with a genuine issue of material fact, as in *Foster*, and the defendant's motion for summary judgment should be denied. *Id.*

3. Cyber MD Appeared to be an Agent of MHS Because All Patient-Facing Webpages Presented the User with Exclusively MHS Branding.

MHS is a large regional healthcare network with which Mr. Miller was familiar. (R. at 4.) He logged onto the MHS primary domain and platform when accessing Cyber MD. (R. at 6.) As he logged on and navigated the portal, every webpage displayed MHS branding. (R. at 4.) CCS branding was not only invisible to users but strictly prohibited by MHS on all patient-facing pages. (R. at 4.)

A reasonably prudent consumer would log onto the MHS portal, see the MHS branding, and infer that the platform they are using is controlled or operated by MHS. That is exactly what occurred in Mr. Miller's case. (R. at 4.) He navigated through the portal and inferred, based on the website's presentation, that he was using MHS's resources. Circumstances such as these would not put Mr. Miller on notice of Cyber MD's status as an independent contractor.

Because Mr. Miller was not put on notice of Cyber MD's independence from MHS by reasonably conspicuous notice of the terms or presentation, this Court should find that MHS held out Cyber MD as an agent of their platform.

B. Whether MHS Knew of or Acquiesced in Cyber MD's Apparent Agency is Not at Issue Because MHS, as the Principal Actor, Created the Appearance of Cyber MD's Authority.

The critical determination in element two is whether the principal knew that the independent contractor was acting in a way that gave them the appearance of authority. *Pamperin*, 423 N.W.2d at 854. In this case, much like in *Pamperin*, this element is not at issue because, “it is not the acts of the agent of the principal which created the appearance of authority. It is the acts of [the principal] which allegedly justified [Mr. Miller’s] belief that an agency relationship existed.” *Id.* at 857.

MHS created and enforced a policy requiring all patient-facing webpages to display MHS branding and had exclusive control over the interface. (R. at 4.) Further, Cyber MD was accessible through MHS’s website, and MHS integrated Cyber MD into its telehealth portal. (R. at 5.) MHS knew that CCS and Cyber MD had the appearance of authority because MHS controlled that appearance. Therefore, as in *Pamperin*, the principal, MHS, controlled the belief that the agency relationship existed, and element two is not at issue. *Pamperin*, 423 N.W.2d at 857.

C. Mr. Miller Relied on MHS to Provide Medical Treatment, Not on Cyber MD.

The third element courts utilize to determine whether a healthcare facility can be held liable for the negligent acts of independent contractors is the patient’s reliance on the principal. *Pamperin*, 423 N.W.2d at 854. The critical consideration is whether the patient relied on the healthcare facility as a whole or sought the assistance of a particular physician. *Id.* at 857. If the plaintiff accepts care from the hospital itself, they do so with the expectation that the hospital and its staff will

provide the medical services. *Gilbert*, 622 N.E.2d at 796. “Absent a situation where the patient is directed by his own physician or where the patient makes an independent selection as to which physicians he will use while there, it is the reputation of the hospital itself upon which he would rely.” *Pamperin*, 423 N.W.2d at 854.

For example, in *Gilbert*, the Supreme Court of Illinois found that a genuine issue of material fact existed as to whether Jack Gilbert (“Gilbert”) justifiably relied on a particular physician or Sycamore Municipal Hospital (“Sycamore”). *Id.* at 796. Gilbert came into the emergency room with chest pain and requested to be treated by a specific physician who was unavailable, so Dr. Frank responded to treat Gilbert. *Id.* at 791. Dr. Frank was not the physician Gilbert requested, and Gilbert was entirely unfamiliar with Dr. Frank. *Id.* Because of that unfamiliarity and because Gilbert did not request the treating physician, the court found it unclear whether Sycamore itself or Dr. Frank provided the care. *Id.* at 796.

Cyber MD is accessible through the MHS primary domain and integrated into MHS’s telehealth platform. (R. at 19-20.) Mr. Miller did not log onto a separate website to specifically utilize Cyber MD’s services. As in *Gilbert*, where Gilbert was treated by an unfamiliar, unrequested physician, Mr. Miller was unfamiliar with Cyber MD and did not log onto MHS specifically for the AI diagnostic platform. Instead, Mr. Miller turned to MHS for diagnostic care. (R. at 4-5.) Because Mr. Miller did not seek out Cyber MD as an independent provider of care and instead turned to

MHS, the third element is satisfied, and Cyber MD operated as an apparent agent of MHS.

II. THE MHS TERMS AND CONDITIONS PRESENTED TO MR. MILLER VIA HYPERLINK ARE UNENFORCEABLE BECAUSE IT IS UNCLEAR WHETHER NOTICE WAS REASONABLY CONSPICUOUS AND THE TERMS AND CONDITIONS WERE UNCONSCIONABLE.

This Court should affirm the holding of the Shawnee Court of Appeals for the Second District on this matter on the basis that: (1) there is a genuine issue of fact as to whether the hyperlink on MHS's sign-in page was reasonably conspicuous; and (2) the terms themselves were unconscionable.

As previously noted, unless the website operator can prove that the user had actual notice of the terms to which they will be bound, a browsewrap or sign-in wrap contract is only enforceable if: (1) the website provides reasonably conspicuous notice of the terms; and (2) the user acts in a manner that represents their unambiguous assent to those terms. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007); *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 61 (1st Cir. 2018). Traditionally, parties "manifest assent by written or spoken word, but they can also do so through conduct" if it is clear and intended that their assent will be inferred from their conduct. *Berman*, 30 F.4th at 855. Web agreements follow the same basic rules of mutual assent. *Id.* at 855-56. "[I]f a website offers contractual terms to those who use the site, and a user engages in conduct that manifests her acceptance of those terms, an enforceable agreement can be formed." *Id.* at 856.

As aforementioned, the reasonably conspicuous nature of MHS's hyperlink is unresolvable without further detail of the contents of the surrounding webpage.

However, even if the Court finds that notice was reasonably conspicuous, to create an enforceable agreement, Mr. Miller must have taken some action that manifested his unambiguous assent to the terms to be bound by them. *Id.* at 857. Merely clicking a button unrelated to the terms, or continuing access on a website, without knowledge that the access indicates assent, does not signify Mr. Miller's assent to be bound by the terms. *Id.*

A. Mr. Miller Could Not Have Unambiguously Manifested His Assent Unless the Terms Were Reasonably Conspicuous.

Unambiguous manifestation of assent is impeded unless the terms are reasonably conspicuous. *Cullinane*, 893 F.3d at 64. In *Cullinane*, the United States Court of Appeals for the First Circuit found that the plaintiffs' agreements with Uber were unenforceable because the plaintiffs were not reasonably notified of the agreement's terms. *Id.* The lack of reasonably conspicuous notice as to the terms of the agreement impeded the plaintiffs' ability to provide unambiguous manifestation of their assent. *Id.*

In the case at hand, as noted above, it is unclear whether the hyperlink on MHS's sign-in page reasonably notified Mr. Miller about the terms of the agreement. As the *Cullinane* court found, Mr. Miller could not unambiguously manifest assent to terms that were unknown to him. *Id.* Mr. Miller's unambiguous assent remains a genuine issue of material fact until the issue of reasonably conspicuous notice is decided.

B. The Terms and Conditions are Unconscionable.

Regardless of whether mutual assent was manifested so that contractual acceptance is satisfied, a court may void a contract if it is deemed to be unconscionable. *Feldman*, 513 F. Supp. 2d at 239. Unconscionability falls into two main categories: procedural and substantive. *Fagerstrom v. Amazon.com*, 141 F. Supp. 3d 1051, 1067 (S.D. Cal. 2015).

Some jurisdictions, such as Washington and Utah, adopt the rule that, if egregious enough, the movant need only prove either substantive or procedural unconscionability to prevail. *Fagerstrom*, 141 F. Supp. 3d at 1064; *Anderson v. Amazon.com, Inc.*, 478 F. Supp. 3d 683, 697 (M.D. Tenn. 2020). In this case, the term at issue is egregiously procedurally unconscionable, and, if this Court decides to adopt this perspective, then it is unnecessary to consider substantive unconscionability.

Other jurisdictions require both procedural and substantive unconscionability, but they need not appear to the same degree. *Keebaugh*, 100 F.4th at 1022. These “[c]ourts evaluate unconscionability along a sliding scale under which the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.* (internal quotations omitted). Because the terms at issue are so egregiously procedurally unconscionable, according to the sliding scale test, the required threshold for substantive unconscionability is comparatively low.

1. MHS’s Terms Were Procedurally Unconscionable.

To determine whether a contract is procedurally unconscionable, courts consider the circumstances surrounding the formation of the contract including but

not limited to: “(1) the manner in which the contract was entered, (2) whether the party had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms [were] hidden in a maze of fine print.” *Fagerstrom*, 141 F. Supp. 3d at 1067 (internal quotations omitted). Courts also consider facts such as, “the buyer’s sophistication, the use of high-pressure tactics or external pressure to induce acceptance, and the availability of alternative sources of supply.” *Feldman*, 513 F. Supp. 2d at 240. “[T]he key inquiry for finding procedural unconscionability is whether the party challenging the contract lacked meaningful choice.” *Fagerstrom*, 141 F. Supp. 3d at 1068. In *Feldman*, Lawrence Feldman (“Feldman”) entered into an advertising contract with Google through its AdWords program and claimed he was overbilled because of fraudulent advertising interactions. *Feldman*, 513 F. Supp. 2d at 231-33. The court held that the web agreement that led to the activation of Feldman’s account was enforceable and not unconscionable. *Id.* at 238-39.

In addressing procedural unconscionability, the court considered that Feldman, as an attorney, was “a sophisticated purchaser who had full notice of the terms, who was capable of understanding them, and who had assented to them.” *Id.* at 240. Additionally, Feldman did not allege “high-pressure tactics or external pressure to accept the agreement.” *Id.* Feldman also had other similar advertising options, and he did not need to accept Google’s contract if he did not like the terms; he had other ways to get the same results. *Id.*

Ability to Understand the Terms. Mr. Miller’s circumstances were vastly different than those present in *Feldman*. First, the *Feldman* court found that,

because Feldman was a sophisticated purchaser and an attorney, it was more likely that he would be able to understand the terms to which he was assenting. *Id.* at 240. By contrast, Mr. Miller worked in the maintenance department of a steel mill from age twenty until he retired at sixty-six. (R. at 3.) While he was presumably well-versed in his industry, his occupation did not require him to read contracts or parse information-heavy documents as Feldman would have had to as an attorney. *Feldman*, 513 F. Supp. 2d at 240. The reasoning that Feldman was a sophisticated purchaser, who would likely understand the terms of the agreement, does not apply to Mr. Miller.

Reasonable Notification. Further, the record does not allow resolution of whether MHS's hyperlink to the terms at issue reasonably notified patients that the terms existed. However, whether the notice was reasonable or not, Mr. Miller was not reasonably notified of the clause at issue because it was buried in an unformatted text block. *Id.*

Even if the hyperlink is reasonably conspicuous, a consumer is not on inquiry notice if a particular clause is buried in a maze of fine print. *Fagerstrom*, 141 F. Supp. 3d at 1070. "Website users are entitled to assume that important provisions [sic] will be prominently displayed, not buried in fine print." *Berman*, 30 F.4th at 857. It is a website operator's responsibility to ensure that consumers are on notice of the existence of the important terms to which they will be bound. *Id.*

In this case, clicking the hyperlink brought Mr. Miller to a standalone webpage displaying 34 lines of single-spaced, unformatted black text on a plain white

background, rendered in a font size noticeably smaller than the rest of the website. (R. at 4.) The clause labeling physicians as independent contractors was not immediately visible; it was located about three-quarters of the way down the page. (R. at 4.) The clause was not set apart by capitalization, bolding, underlining, or other formatting. (R. at 4.) That is not in keeping with MHS's duty, as a website operator, to ensure that Mr. Miller was on notice of the term labeling Cyber MD as an independent contractor. *Berman*, 30 F.4th at 857. Because MHS did not fulfill its duty, Mr. Miller was not reasonably notified of the term at issue, and enforcing it against him would be unfair.

Additionally, the pre-session pop-up box notifying Mr. Miller that Cyber MD was not a licensed healthcare professional was insufficient to put Mr. Miller on notice that MHS disclaimed liability for Cyber MD's negligence. The pop-up informed Mr. Miller that Cyber MD was an unlicensed healthcare professional but did not notify him that it was an independent software system and MHS did not take responsibility for its negligence. (R. at 5.) A reasonable patient, like Mr. Miller, would not read that pop-up box and assume that because Cyber MD was unlicensed, MHS did not take responsibility for the software's errors. Therefore, because the pop-up would not have put a reasonable user on notice of the liability disclaimer in the terms, it does not establish reasonably conspicuous notice.

Medically Underserved Area and Lack of Other Options. Moreover, Mr. Miller lived in Simmons County, which state and federal authorities had deemed a Health Professional Shortage Area and a Medically Underserved Area. (R. at 4.) If

Mr. Miller did not wish to assent to MHS's terms and enter the portal, he would have had a glaring lack of other reasonable options for diagnostic care. (R. at 4.) Whereas Feldman did not allege external pressure and had other similar advertising options available to him, Mr. Miller did not have that luxury. *Feldman*, 513 F. Supp. 2d at 240. Multiple Simmons County local hospitals closed in 2015, leaving no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices in the entire county. (R. at 4.) The nearest facility for Mr. Miller to receive in-person radiology consultations and diagnostic care was MHS's flagship hospital, 190 miles from where Mr. Miller lived. (R. at 4.) It is unreasonable and unfair to expect an elderly man to drive 190 miles every time he needs medical care; that is not a meaningful medical care alternative to the online diagnostic system. While Feldman could have gotten the same advertising options through another website and did not have to accept Google's contract, Mr. Miller did not have a meaningful choice to turn down MHS's terms. *Feldman*, 513 F. Supp. 2d at 240.

Adhesion Contract. Additionally, MHS's terms were representative of an adhesion contract. An adhesion contract is a standard form contract, prepared by a party of superior bargaining power and offered to the weaker party on a "take it or leave it basis," granting the weaker party no bargaining power or option for negotiation of the terms. *Hennessey v. Kohl's Corp.*, 571 F. Supp. 3d 1060, 1072 (E.D. Mo. 2021); *Fagerstrom*, 141 F. Supp. 3d at 1068. Mr. Miller had no way to bargain other than to avoid using MHS's online portal. The sign-in page itself stated, "By entering the portal, I accept the MHS Terms and Conditions." (R. at 4.) If Mr. Miller

did not want to accept the terms, then he could not enter the portal. While the existence of an adhesion contract may not be dispositive when determining procedural unconscionability, it is a relevant consideration in the inquiry and weighs in favor of the terms' unconscionability. *Fagerstrom*, 141 F. Supp. 3d at 1068.

This substantial disparity between the facts of *Feldman* and the circumstances present in Mr. Miller's case plainly exhibits how unconscionable MHS's terms were. *Feldman*, 513 F. Supp. 2d at 240. The document in *Feldman* was fair and reasonable because Feldman was a sophisticated purchaser and attorney with full notice of the terms, did not allege external, high-pressure tactics, and had other meaningful options for the same service. *Id.* The document in the present case stands in direct opposition to Feldman's circumstances. Mr. Miller was a maintenance worker at a steel mill, did not have full notice of the terms, faced extreme external pressure to accept the agreement, and had no other meaningful options for care in the medically underserved community. (R. at 3.) Because of the factors pointing to a finding of procedural unconscionability when compared to *Feldman*, and the document's classification as an adhesion contract, Mr. Miller's case should be decided diametrically differently from how *Feldman* was decided. *Feldman*, 513 F. Supp. 2d at 240. For these reasons, Mr. Miller's agreement with MHS is procedurally unconscionable.

2. The Terms Were Substantively Unconscionable Because MHS Attempted to Shield Themselves from Liability While Still Maintaining Control of the Cyber MD System.

Substantive unconscionability is satisfied by overly harsh or one-sided terms. *Feldman*, 513 F. Supp. 2d at 239. The terms at issue clearly reflect a one-sided

allocation of risk. Through its website terms, MHS attempts to shield itself from liability by claiming its physicians are independent contractors. (R. at 4.) This method of escaping liability may be reasonable; however, MHS treats Cyber MD as an agent under their authority and maintains control of programming. (R. at 4.) MHS's authority is clear from its exclusive control over the platform's patient-facing interface. (R. at 4.) MHS's attempt to escape liability this way limits consumer rights while retaining all its authority and control and constitutes a one-sided risk allocation. *Hennessey*, 571 F. Supp. 3d at 1073.

Because MHS's terms are both procedurally and substantively unconscionable, regardless of the conspicuousness of the notice, this Court should void the agreement.

III. RESPONDENT'S CLAIMS ARE NOT BARRED BY THE SHAWNEE REVISED STATUTE'S FOUR-YEAR STATUTES OF REPOSE BECAUSE THE EXPRESS STATUTORY EXCEPTIONS FOR CONTINUOUS TREATMENT AND LATENT DEFECTS APPLY.

This Court should affirm the holding of the Shawnee Court of Appeals for the Second District on the basis that Cyber MD's annual diagnostic evaluation of Mr. Miller constituted a continuous course of treatment as the ongoing care continually related to the same underlying condition. *Lane v. Lane*, 752 S.W.2d 25, 27-28 (Ark. 1988); *Comstock v. Collier*, 737 P.2d 845, 849-50 (Colo. 1987); Shawnee Rev. Stat. § 12-404(b). Additionally, the algorithmic defect was latent and not discoverable by an ordinary reasonably prudent person within four years of delivery. *Kerns ex rel. Kerns v. G.A.C., Inc.*, 875 P.2d 949, 956 (Kan. 1994); Shawnee Rev. Stat. § 12-410(b)(3).

Petitioners' reliance on Shawnee's four-year statute of repose ignores the express statutory exceptions the legislature created. While statutes of repose

generally establish a fixed time limit for liability claims, the Shawnee Legislature created express exceptions to the repose period for healthcare in circumstances where a provider engages in a continuous course of treatment for the same illness, injury, or condition. Shawnee Rev. Stat. § 12-404(b). Similarly, product liability claims hold an exception to the repose period when the injury-causing aspect of a product existed at delivery but was not discoverable by an ordinary reasonably prudent person until more than four years after delivery. Shawnee Rev. Stat. § 12-410(b)(3). In Mr. Miller's case, the undisputed facts, as stated in the record, satisfy the requirements for both statutory exceptions.

Mr. Miller received his initial diagnostic evaluation from Cyber MD in April 2018, after which Cyber MD instructed him to complete annual diagnostic evaluations. (R. at 19-20.) Mr. Miller diligently completed the prescribed visits in May 2019, May 2020, and June 2021. (R. at 19-20.) Each evaluation Mr. Miller had with Cyber MD addressed the same underlying condition and was under the same course of treatment as the initial visit. (R. at 20.) At each visit, Mr. Miller was told there was "zero evidence" of malignancy. (R. at 20.) Cyber MD did not perform four unrelated screenings but established and executed a continuous course of diagnostic monitoring from 2018 through 2021. (R. at 20.)

Cyber MD's algorithm contained a latent defect that existed at the time of delivery and throughout the course of Mr. Miller's treatment, and such defect was not reasonably discoverable within four years of Cyber MD's delivery. Even CCS, the manufacturer of Cyber MD, was not aware of the defect in Cyber MD's algorithm

until October 2022, over five and a half years after Cyber MD's integration into MHS's telehealth platform, and over four years after delivery. (R. at 4-5.) The defect in Cyber MD's algorithm was embedded in its software, such that it was not discoverable by an ordinary reasonably prudent person, qualifying Mr. Miller's product liability claim for the statutory exception to the four-year period of repose under Shawnee Rev. Stat. § 12-410(b)(3).

A. Cyber MD's Annual Diagnostic Evaluation of Mr. Miller Constituted a Continuous Course of Treatment Under Shawnee Revised Statute § 12-404(b).

Shawnee's statute expressly states that the four-year repose period for medical malpractice claims "shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence." Shawnee Rev. Stat. § 12-404(b). Courts have historically applied a similar continuous treatment doctrine when evaluating exceptions to statutory periods of repose, focusing on whether the provider's care constituted an ongoing course of treatment directed toward the same condition, rather than assessing whether each encounter was substantively identical. *Lane*, 752 S.W.2d at 27-28; *Comstock*, 737 P.2d at 849-50. To determine whether a patient's treatment constitutes a continuous course of treatment, courts have also considered the nature and continuity of the provider-patient relationship. *Grubbs v. Rawls*, 369 S.E.2d 683, 686-87 (Va. 1988); *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988). Additionally, when treatment targets the same underlying condition within ongoing care, periodic evaluations do not sever the treatment's continuity. *Lane*, 752 S.W.2d at 27-28; *Comstock*, 737 P.2d at 849-50.

1. Cyber MD's Repeated Diagnostic Evaluation Addressed the Same Underlying Condition.

The continuous treatment doctrine looks to the substance and continuity of a patient's care. *Grubbs*, 369 S.E.2d at 686-87. Cyber MD's treatment of Mr. Miller was both substantively similar and in a continuous and scheduled manner, satisfying both elements of the continuous treatment doctrine. *Lane*, 752 S.W.2d at 27-28; *Comstock*, 737 P.2d at 849-50; *Grubbs*, 369 S.E.2d at 687; *Ulrich*, 853 F.2d at 1079-81.

Cyber MD's treatment of Mr. Miller was continuous in nature. *Lane*, 752 S.W.2d at 26-27. In *Lane v. Lane*, a physician treated the plaintiff for headaches continuously from 1966 through 1984, including regular narcotic injections throughout the eighteen-year treatment period. *Id.* The Arkansas Supreme Court recognized the traditional continuous treatment doctrine, wherein a continuous course of treatment exists when a healthcare provider's treatment constitutes an ongoing course of care directed toward the same illness, injury, or condition, rather than a series of unrelated medical encounters. *Id.* at 28.

Mr. Miller experienced a continuing course of improper treatment by Cyber MD, when the software misdiagnosed the lesions on his lungs. (R. at 6.) Mr. Miller meets the criteria of the continuous treatment doctrine because Cyber MD treated him for the same respiratory condition throughout the four years of treatment. (R. at 25.) The issue is that Mr. Miller was unaware of a malignant mass left to grow during the treatment period, which grew substantially over his course of treatment. (R. at 20.) Mr. Miller did not return to Cyber MD year after year for recurrences of

an illness or for new symptoms but merely followed up for the initial condition. (R. at 6.)

Long-Term Exposure to Harm-Causing Treatment. The *Lane* court distinguishes a continuous course of treatment in circumstances where no single treatment caused absolute harm to the patient, but instead long-term exposure to and reliance on the treatment is the harm-causing aspect. *Lane*, 752 S.W.2d at 29. Under these circumstances, courts tend to favor plaintiffs who were unaware of the deficits in their care at the time of treatment, as it is inequitable to expect patients to identify undiscoverable injuries resulting from long-term reliance on care. *Id.* at 29-30. The court in *Lane* emphasized that the doctrine is particularly appropriate where repeated treatments contribute cumulatively to the plaintiff's injury or where a physician should have an opportunity to correct an earlier mistake before the patient is required to sue. *Id.* at 30.

In Mr. Miller's case, the severity of his illness was increased by the four-year diagnostic delay. (R. at 6.) The lesions on Mr. Miller's lungs were left untreated and, despite Mr. Miller diligently completing his annual diagnostic imaging as directed by Cyber MD, abhorrently left to grow 40 mm. (R. at 6.) As determined by the *Lane* court, it would be unreasonable to expect Mr. Miller to be aware of the algorithmic defect in Cyber MD's software considering its latent nature. *Lane*, 752 S.W.2d at 29-30. And it would be unjust to place that burden on Mr. Miller, as a patient, to seek out the existence of latent defects in his medical care beyond the prudence of a reasonable person. *Id.*

Patient Reliance and Public Policy Protections. Further, as distinguished by the *Lane* court, a patient's reliance on the treatment can serve as a consideration in evaluating the equitable relief due to a plaintiff's claim. *Id.* Mr. Miller resided in an area that was not only medically underserved but experiencing a physician shortage in the years leading up to his provider-patient relationship with Cyber MD. (R. at 4.) The nearest hospital to Mr. Miller was 190 miles away, which is approximately a three-and-a-half-hour drive from his home. (R. at 4.) Considering the glaring lack of reasonable alternatives and the geographic barriers to accessing medical care, Mr. Miller had substantially increased reliance on the care he received from Cyber MD. *Lane*, 752 S.W.2d at 29-30. From a policy perspective, the continuous treatment doctrine is set in place as a protective measure for individuals undergoing medical care, as a method of instilling institutional trust.

Treating the Same Condition. Further, the Colorado Supreme Court, in *Comstock v. Collier*, held that where a patient receives continuous treatment for the same condition, the statute of repose does not begin to run until the final act of treatment. *Comstock*, 737 P.2d at 849-50. In *Comstock*, a physician treated the plaintiff from 1961 through August 1982 for chronic phlebitis and prescribed an opioid injection from 1967 through 1982, which the plaintiff injected into her legs five times each day. *Id.* at 846. The *Comstock* court held the plaintiff's care was continuous through August 1982. *Id.*

Similar to the plaintiff in *Comstock*, Mr. Miller received repeated monitoring from Cyber MD for the same respiratory condition, and treatment continued after the

initial diagnostic error in 2018. (R. at 6.) Mr. Miller's treatment with Cyber MD during the four-year period for the same condition is similar to the facts in *Comstock*, as the *Comstock* court recognized that the end of a continuous course of treatment is when the statute of repose begins to run. *Comstock*, 737 P.2d at 849-50. Mr. Miller's evaluations by Cyber MD occurred annually, but that does not make them separate or unrelated. *Lane*, 752 S.W.2d at 28; *Comstock*, 737 P.2d at 849-50. Cyber MD provided Mr. Miller annual care between 2018 and 2021, following the treatment plan Cyber MD established in a diagnostic plan during the 2018 visit. (R. at 6.) As in *Comstock*, where the final act of treatment was at the end of the entire treatment plan in August 1982, Mr. Miller's final act of treatment did not occur until the end of his treatment plan in June 2021. *Comstock*, 737 P.2d at 846; (R. at 5.) Therefore, the annual evaluations constituted a continuous course of treatment under the same plan of care established at the initial visit, such that the repose period begins running in 2021 following the termination of his treatment by Cyber MD. *Lane*, 752 S.W.2d at 28-29; *Comstock*, 737 P.2d at 849-50.

In the case before this court, Cyber MD's treatment of Mr. Miller was ongoing and continuous, as the treatment targeted the same underlying condition, the periodic annual evaluations did not sever the treatment's continuity. *Lane*, 752 S.W.2d at 27-28; *Comstock*, 737 P.2d at 849-50. In April 2018, Cyber MD evaluated Mr. Miller after he reported shortness of breath. (R. at 20.) Cyber MD then ordered diagnostic imaging and promised to monitor his condition, closely analyze the scans, and provide Mr. Miller with a diagnosis. (R. at 25.) Cyber MD then reviewed the

images, reporting “zero evidence” of disease, and recommended annual follow-up imaging. (R. at 5.) Cyber MD then conducted the same diagnostic monitoring through May 2019, May 2020, and June 2021, reviewing updated scans during each evaluation and repeatedly reporting “zero evidence” of disease. (R. at 5.) The encounters between Mr. Miller and Cyber MD were not isolated screenings unrelated to one another, but instead successive evaluations performed in alignment with the annual monitoring plan created by Cyber MD during the initial treatment in 2018. (R. at 5.) Similar to the continuing treatment recognized in *Lane*, *Comstock*, *Grubbs*, and *Ulrich*, Cyber MD’s repeated evaluations concerned the same underlying pulmonary condition and reflected an ongoing provider-patient relationship. *Lane*, 752 S.W.2d at 28; *Comstock*, 737 P.2d at 849–50; *Grubbs*, 369 S.E.2d at 687; *Ulrich*, 853 F.2d at 1081.

Treatment from Different Diagnosticians. The Supreme Court of Virginia held in *Grubbs v. Rawls* that continuous treatment does not require the same physician to provide every treatment so long as the patient receives treatment for the same or related ailment over a continuous and substantially uninterrupted course. *Grubbs*, 369 S.E.2d at 686-87. In *Grubbs*, the plaintiff was treated jointly by two physicians for a stomach ailment beginning in June 1982, with one physician performing surgery and postoperative care and the other continuing postoperative treatment through November 1982. *Id.* at 686. The *Grubbs* court allowed the plaintiff to wait until the physician’s terminated treatment before being required to bring suit. *Id.* at 687.

Applying this to Mr. Miller's case, not only was Cyber MD the sole diagnostician treating Mr. Miller between 2018 and 2021, which further solidifies the continuous treatment argument, but Cyber MD was also treating him for the same underlying condition with identical methods at each annual evaluation. (R. at 6.) Like in *Grubbs*, Mr. Miller's treatment by Cyber MD was for the same injury over a continuous course of time, as he received treatment for the same ailment over a continuous and substantially uninterrupted course. *Grubbs*, 369 S.E.2d at 687. The precedent outlined in *Grubbs* should direct this Court's holding that Mr. Miller's course of treatment can firmly be qualified as continuous in nature. *Id.*

Broad Interpretations of the Continuous Treatment Doctrine. The Second Circuit in *Ulrich v. Veterans Admin. Hosp.* recognized that continuous treatment principles duly function to protect patients and their reliance on the provider-patient relationship, such that it is unreasonable to expect a patient in the continuing care of a doctor to discover that the doctor's acts may be injurious. *Ulrich*, 853 F.2d at 1081. In *Ulrich*, the plaintiff was hospitalized at a VA hospital following emergency surgery due to serious injuries from a fall. *Id.* at 1079-81. The defendant in *Ulrich* argued that the continuous treatment doctrine should not apply because the plaintiff was transferred between the hospital's psychiatric and surgical divisions. *Id.* at 1081. The Second Circuit held that applying the continuous treatment doctrine was proper despite the patient transfers, reasoning that the continuous treatment doctrine does not require a narrow interpretation of its requirements, particularly when the same doctor or hospital provided treatment for the required period. *Id.* The

Second Circuit reasoned that the doctrine rests in part on the patient's trust in the provider and the impracticality of requiring a patient to interrupt corrective treatment to file suit. *Id.*

Reasonable Reliance. Mr. Miller reasonably relied on Cyber MD's care, and that reliance extended to the interpretation of his diagnostic imaging. (R. at 5.) Mr. Miller trusted Cyber MD when it told him he needed annual care for his lung condition, and as such was in a state of dependence on the provider-patient relationship. Cyber MD expressly promised Mr. Miller that it would analyze his scans, conduct annual reviews, and repeatedly reassured him there was "zero evidence" of malignancy. (R. at 5.) Especially because the defect was undiscoverable in Cyber MD's algorithm, the *Ulrich* court would consider it unreasonable for Mr. Miller to be aware of the defect, let alone halt his treatment. *Ulrich*, 853 F.2d at 1081. The precedent set in *Ulrich* would be entirely undermined if the expectation were that Mr. Miller discover the injurious nature of Cyber MD while relying on the care he was promised. *Id.*

Mr. Miller's encounters with Cyber MD constituted a continuous course of treatment because they were part of an ongoing course of care, not discrete independent encounters. A continuous course of treatment is not established when a patient receives isolated medical care or subsequent evaluations independent from the original treatment. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 646-47 (4th Cir. 2004); *Miller v. United States*, 932 F.2d 301, 303-04 (4th Cir. 1991). Petitioners may rely on cases that decline to extend continuous treatment principles

to discrete encounters; however, such cases are materially different than Mr. Miller's circumstances. The cases involving discrete medical encounters are distinguishable as they lack the continuing course of care present here. *Castillo*, 372 F.3d at 646-47; *Miller*, 932 F.2d at 303-04.

Substantially Uninterrupted Treatment. The Fourth Circuit held in *Castillo v. Emergency Med. Assocs.*, that Virginia's continuous treatment doctrine requires a continuous and substantially uninterrupted course of examination and treatment for a particular ailment and a continuing physician-patient relationship. *Castillo*, 372 F.3d at 648. In *Castillo*, the plaintiff sought treatment in an emergency department after suffering an intestinal perforation, and she later argued that subsequent treatment by physicians employed by the same emergency-medicine association constituted continuous treatment. *Id.* at 646-47. The Fourth Circuit ultimately rejected the doctrine as the relevant encounters involved separate emergency-room physicians and did not establish the required continuing relationship. *Id.* at 648-49. Unlike *Castillo*, the case before this Court does not involve an emergency room visit, multiple providers, or separate illnesses. (R. at 19-20.) In contrast, Cyber MD itself performed the initial evaluation and each subsequent annual diagnostic evaluation of Mr. Miller, with each encounter following the same annual imaging plan established at the initial visit, thereby maintaining the required continuing relationship. (R. at 5.)

Mr. Miller's subsequent encounters with Cyber MD were part of a continuous course of treatment as they followed the treatment plan established during his initial

evaluation in 2018. A continuous course of treatment does not exist where subsequent medical care consists of separate or independent evaluations, rather than treatment continuing on from the original course of care. *Miller*, 932 F.2d at 303-04. In *Miller v. United States*, the plaintiff argued that treatment by multiple physicians should be treated as continuous treatment of the plaintiff's cancer. *Id.* at 302-03. The Fourth Circuit rejected that argument as the subsequent physicians were not acting on the advice or under the direction of the physician whose earlier failure to diagnose the cancer formed the basis of the claim. *Id.* at 305-06. The Fourth Circuit reasoned that later treatment must address the same problem underlying the alleged negligence, and that unrelated later medical treatment does not extend the continuous treatment period. *Id.* at 306. Unlike in *Miller*, Cyber MD's subsequent evaluations of Mr. Miller were planned and expressly stated during the initial treatment in April 2018, meaning every subsequent visit Mr. Miller had with Cyber MD was connected to the initial diagnostic plan. (R. at 5.) Thus, unlike the isolated or independent treatment in *Castillo* or *Miller*, Cyber MD's evaluations formed a continuous sequence of care by the same provider and for the same condition. (R. at 5.)

2. Mr. Miller Does Not Seek to Ask This Court to Create a Judicial Exception but Asks This Court to Apply the Expressly Stated Exceptions in Shawnee Rev. Stat. § 12-404(b).

Courts may not create a judicial exception to a statute of repose where the legislature has not provided one, but where the legislature expressly provides a continuous treatment exception, applying that exception cannot be construed as

adopting a new law, as it is simply deference to the legislature's statutory scheme. *Cunningham v. Huffman*, 609 N.E.2d 321, 324 (Ill. 1993); *Harrison v. Bevilacqua*, 580 S.E.2d 109, 113 (S.C. 2003). In *Cunningham v. Huffman*, the Illinois Supreme Court rejected a proposed continuous treatment exception because the plaintiff sought the court to create a judicial exception that had not been legitimized by a legislative statute by the Illinois Legislature. *Cunningham*, 609 N.E.2d at 324. Similarly, in *Harrison v. Bevilacqua*, the South Carolina Supreme Court refused to judicially create a continuous treatment exception that the South Carolina Legislature had not enacted. *Harrison*, 580 S.E.2d at 113-14.

Respondent does not seek for this Court to judicially create an exception to Shawnee's statute of repose. The Shawnee Legislature expressly enacted the continuous course of treatment exception in Shawnee Rev. Stat. § 12-404(b), providing that the four-year repose period "shall not bar" an action when the healthcare provider engaged in a continuous course of treatment for the same illness, injury, or condition. Shawnee Rev. Stat. § 12-404(b). Respondent seeks the application of this express statutory exception with deference to the language and intent of the Legislature. *Cunningham* and *Harrison* rejected the request for a judicially created exception where the Legislature had not enacted one, whereas the Shawnee Legislature expressly wrote the Shawnee Rev. Stat. § 12-404(b)'s continuous course of treatment exception. *Cunningham*, 609 N.E.2d at 324; *Harrison*, 580 S.E.2d at 113-14. Applying § 12-404(b) to Respondent's claims would be an enforcement, not expansion, of the statutory exception provided by the Shawnee

Legislature. Shawnee Rev. Stat. § 12-404 (b). Therefore, the exception should apply per the statutory language and intent of the Shawnee Legislature.

B. The Algorithmic Defect in Cyber MD Was Not Discoverable by an Ordinary Reasonably Prudent Person Within Four Years of Delivery Under Shawnee Revised Statute § 12-410(b)(3).

Shawnee Rev. Stat. § 12-410(a) establishes a four-year repose period for product liability claims that runs starting at the product's first date of delivery. Shawnee Rev. Stat. § 12-410(a). The Shawnee Legislature expressly created an exception to the four-year period of repose in circumstances where "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". Shawnee Rev. Stat. § 12-410(b)(3).

A statute of repose generally sets an outer limit on liability measured from the defendant's last culpable act rather than from the plaintiff's discovery of injury and thus operates independently of when the injury is discovered. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8-10 (2014); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505-06 (2017). Although statutes of repose generally operate as absolute temporal bars, courts have historically given deference to the exceptions expressly enacted by the legislature. *Cal. Pub. Emps.' Ret. Sys.*, 582 U.S. at 505-06; *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 968 (Kan. 1992); *Kerns*, 875 P.2d at 956; *Koch v. Shell Oil Co.*, 52 F.3d 878, 883-84 (10th Cir. 1995). The application of the statutory exception stated in § 12-410(b)(3) for latent defects is not an issue of judicial tolling but instead the implementation of a legislative exception. Additionally, the repose period for a product liability claim does not bar a claim when the injury-causing

aspect of the product existed at the time of delivery but was not reasonably discoverable by a prudent person within the repose period. *Pate v. Columbia Mach., Inc.*, 930 F. Supp. 451, 465-66 (Idaho 1996).

1. Cyber MD's Algorithmic Defect Was Latent Because Its Failure to Detect Lesions in Patients with Prior Occupational Asbestos Exposure Was Not Reasonably Discoverable Until October 2022.

Statutes of repose generally set a temporal limit on liability measured from the defendant's last culpable act rather than from the plaintiff's discovery of injury and thus operate independently of when the injury is discovered. *CTS Corp.*, 573 U.S. at 8-10; *Cal. Pub. Emps.' Ret. Sys.*, 582 U.S. at 505-06. The United States Supreme Court has recognized that statutes establish an outer limit to the liability of a defendant's conduct. *CTS Corp.*, 573 U.S. at 8-10; *Cal. Pub. Emps.' Ret. Sys.*, 582 U.S. at 505-06.

Framework for the Qualification of Latent Defects. *Kerns* provides the clearest framework for applying the latent defect exception. *Kerns*, 875 P.2d at 956. First, what the injury-causing aspect of the product is; second, whether the defect existed at delivery; and finally, whether the injury-causing aspect of the product was reasonably discoverable by a reasonably prudent person during the repose period. *Id.* In Mr. Miller's case, the injury-causing aspect of Cyber MD is the defect precluding Cyber MD from diagnosing malignant lesions in patients with occupational asbestos exposure. (R. at 5-6.) Specifically, Cyber MD was stated to be 97% accurate in classifying lung lesions but was later discovered to have only an 85% accuracy rate for patients with occupational asbestos exposure. (R. at 5-6.) Second, the defect

existed in the baseline algorithm when Cyber MD was launched on MHS's telehealth platform in 2017. (R. at 6.) Yet CCS itself did not discover the problem until October 2022, after the four-year period of repose would originally have expired in April 2022. (R. at 12.) The source code and underlying training data were also proprietary and unavailable to ordinary users. (R. at 26-27.) Finally, evaluating the reasonable discoverability of the injury-causing aspect by a reasonably prudent person, a very similar standard to that stated in § 12-410(b)(3). *Kerns*, 875 P.2d at 949; Shawnee Rev. Stat. § 12-410(b)(3).

Not only did CCS fail to disclose information regarding the defects they discovered in Cyber MD's algorithm in October 2022, but even the most prudent person would be unaware of the defect, as it was in the code of the AI's software. (R. at 26-27.) Further, Cyber MD represented itself to be able to diagnose and treat patients in their entirety, not disclosing any deficits in its capabilities. (R. at 6.) The concealment of the defect in Cyber MD's algorithm by CCS following their discovery of the defect defines the hidden nature of the defect, such that a reasonable person would not be under the impression that a hidden defect existed. (R. at 26-27.)

The defect in Cyber MD's algorithm satisfies the framework for latent defects distinguished in *Kerns*, and under the verbiage of Shawnee Rev. Stat. § 12-410(b)(3). *Kerns*, 875 P.2d at 956; Shawnee Rev. Stat. § 12-410(b)(3). The defect was not an observable or mechanical defect that an ordinary, or even highly prudent, consumer would be able to observe. It was an algorithmic failure embedded in Cyber MD's software that revealed itself only within the diagnosis of a particular medical

condition for patients with a specific occupational exposure to a specific carcinogen. (R. at 4-5.) In fact, even CCS, the developer of Cyber MD, was unaware of the problem for more than four years after Cyber MD was delivered to Mr. Miller. (R. at 4.) If the developer was unable to identify the defect until over four years after delivery, it is unreasonable to expect that an ordinary reasonably prudent person could discover the defect before the four-year period expired.

The United States Supreme Court has distinguished statutes of limitations from statutes of repose and holds that a statute of repose establishes an outer temporal limit measured from the defendant's culpable act rather than from the plaintiff's discovery of the injury. *CTS Corp.*, 573 U.S. at 8-10. In *CTS Corp. v. Waldburger*, landowners brought state-law nuisance claims against an electronics manufacturer based on environmental contamination from the manufacturer's former plant. *Id.* at 4-5. The Supreme Court also held in *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, that a statute of repose cannot be judicially extended without legislative authorization. *Cal. Pub. Emps.' Ret. Sys.*, 582 U.S. at 505-06. Mr. Miller is not asking this Court to create a judicial exception to Shawnee Rev. Stat. § 12-410(a) but instead is seeking enforcement of the statutory exception the Shawnee Legislature expressly wrote to exclude product liability claims with latent defects from the four-year period of repose. Shawnee Rev. Stat. § 12-410(b)(3).

Specifically Stated Exceptions for Latent Defects. The Kansas Supreme Court held in *Harding v. K.C. Wall Products, Inc.* that specific statutory provisions regarding latent diseases and products liability govern general temporal limitations

provisions and that general provisions in a statute of repose do not nullify specific exceptions for latent defects. *Harding*, 831 P.2d at 968. In *Harding*, the plaintiff brought negligence and strict liability claims against the defendant, K.C. Wall Products, based on design defects and failure to warn of drywall products containing asbestos. *Id.* at 961-62. Reading Shawnee Rev. Stat. § 12-410(a) as an absolute bar in every product liability case would similarly render § 12-410(b)(3) meaningless whenever four years had passed. CCS cannot choose portions of the statute they deem favorable when interpreting the period of repose and the applicable exceptions. *Id.* at 968. The exception in Shawnee Rev. Stat. § 12-410(b)(3), regarding latent defects, supersedes the general statute as stated in Shawnee Rev. Stat. § 12-410(a). *Id.* If Petitioner looked solely at Shawnee Rev. Stat. § 12-410(a) to assert the applicability of the four-year repose bar, it would effectively nullify Shawnee Rev. Stat. § 12-410(b)(3), which contravenes the legislative intent of the statute. Shawnee Rev. Stat. § 12-410(b)(3). This Court should reject an interpretation that the general verbiage of the statute nullifies an express statutory exception.

Not Discoverable by an Ordinary Reasonably Prudent Person. The algorithmic defect in Cyber MD was not discoverable by a reasonably prudent person, such that the statutory exception for latent defects should apply to Respondent's claims. A product liability repose period does not bar a claim when the injury-causing aspect of the product existed at the time of delivery but was not discoverable by a reasonably prudent person within the statutory repose period. *Kerns*, 875 P.2d at 956; *Koch*, 52 F.3d at 884; *Pate*, 930 F. Supp. at 465-66. In *Kerns v. G.A.C.*, the

plaintiff brought a product liability claim regarding a defective swimming pool fence, arguing that the Products Liability Act's specific provisions and exceptions governed over the general statute of repose. *Kerns*, 875 P.2d at 949-50. The Kansas Supreme Court held that the general statute regarding the repose period did not nullify the specific product liability provisions. *Id.* at 956. The court reasoned that within the context of product liability, where the injury-causing aspect of the product was not reasonably discoverable by a reasonably prudent person, the claim qualifies for the statutory exception. *Id.*

Retrospective Identification of an Injury Does Not Disqualify a Claim from the Latent Defect Exception. The exception to the four-year statute of repose under Shawnee Rev. Stat. § 12-410(b)(3) concerns whether the injury-causing aspect of the product was discoverable by an ordinary reasonably prudent person, with no consideration of whether the injury could be identified in hindsight. Shawnee Rev. Stat. § 12-410(b)(3); *Koch*, 52 F.3d at 884.

Petitioners may make the argument that the defect was discoverable when the retrospective medical review of Mr. Miller's 2018 imaging noted the visibility of a 7mm lesion. (R. at 5.) However, the existence of those lesions does not make Cyber MD's software defect inherently discoverable. The point at issue is whether an ordinary reasonably prudent person could discover the defect in Cyber MD's diagnostic algorithm that caused it to systematically fail in the identification of lesions in the lungs of patients with occupational asbestos exposure. (R. at 14-15.) The record does not support the assumption that any ordinary reasonably prudent

person could have discovered the latent defect in Cyber MD's algorithm. (R. at 12.) Because the defect was embedded in CCS's proprietary software and information about the defect was not available to the public even after CCS discovered it, means that the defect was not reasonably discoverable through ordinary prudence prior to the closure of the repose period. (R. at 4.); *Kerns*, 875 P.2d at 949.

Nature and Discoverability of a Defect. *Pate v. Columbia Machine, Inc.* illustrates the importance of focusing on the defect's nature and discoverability. *Pate*, 930 F. Supp. at 465-66. In *Pate*, the plaintiff asserted a product liability claim and attempted to bypass the applicable repose period based on an alleged hidden defect in the physical product. *Id.* at 465. While the court in *Pate* held that the evidence presented did not satisfy the hidden defect exception, the analysis conducted focused on whether the defect was concealed or undiscoverable. *Id.* at 465-66. In Mr. Miller's case, the defect in Cyber MD was embedded in CCS's proprietary code, and its presence was dependent on situational interactions between Cyber MD and a patient with occupational asbestos exposure. (R. at 4-5.) In *Pate*, the plaintiff's own actions contributed heavily to his injury even though the product's injurious nature was overt. *Pate*, 930 F. Supp. at 465-66. In contrast, Cyber MD's defect was far more concealed and undiscoverable because it was embedded in the proprietary code, which further distinguishes the defect's latent nature.

Koch v. Shell Oil Co. supports Respondent's position regarding the undiscoverable nature of Cyber MD's algorithmic defect. *Koch*, 52 F.3d at 883-84. In *Koch*, the plaintiff brought product liability claims against the defendant concerning

harm caused by an additive chemical. *Id.* at 879-80. The defendant argued that the governing statute of repose applied, despite the statutory exceptions for prolonged exposure and latent defects. *Id.* at 883-84. On appeal, the Tenth Circuit rejected the defendant's argument, relying on *Harding* and *Kerns*, and reasoning that the general statute could not nullify the statutory exceptions. *Id.* at 884. The court held that a claim only qualifies for an exception to the statute of repose when the injury-causing aspect of the product is not discoverable at delivery. *Id.* The Shawnee Legislature has written an exception into the statute of repose in § 12-410(b)(3) for a defect that existed at delivery and was undiscoverable far past the four-year period, which should be applied here. Shawnee Rev. Stat. § 12-410(b)(3).

Mr. Miller's Claims Decisively Qualify for the Latent Defect Exception.

In the case before this Court, the timing of the defect's discovery is pertinent in establishing that the claims qualify for the statutory exception in Shawnee Rev. Stat. § 12-410(b)(3). *Kerns*, 875 P.2d at 956; *Koch*, 52 F.3d at 884; *Pate*, 930 F. Supp. at 465-66. Cyber MD was integrated into MHS's telehealth platform in March 2017, and the product was delivered to Mr. Miller in April 2018, meaning the statute of repose would ordinarily run in April 2022. (R. at 4.) However, CCS itself did not discover the defect in the algorithm until October 2022, after the period of repose would originally have closed. (R. at 4.) Establishing that the defect remained undiscoverable until beyond the four-year period.

The medical and social circumstances in this case also exemplify the defect's undiscoverable nature. Living in a medically underserved area, Mr. Miller has

disadvantages in his access to medical care. (R. at 4.) As both local hospitals closed prior to the start of Mr. Miller's treatment with Cyber MD and there were no permanent diagnostic imaging centers, with the nearest facility for in-person diagnostic radiology being 190 miles from Mr. Miller, he turned to MHS and its telehealth platform as his reasonable access to care given the geographical limitations. (R. at 3-5.) From a public policy perspective, it would be unreasonable to expect patients in medically underserved areas to investigate the credentials of their only reasonable option for medical care beyond what an ordinary and reasonably prudent person would.

Significantly, Mr. Miller reasonably relied on Cyber MD as a provider that could interpret his scans and provide the appropriate care, rather than attempting to read the diagnostic images himself. The retroactive identification of a 7 mm lesion on Mr. Miller's April 2018 imaging is insufficient to support the claim that the algorithmic defect was reasonably discoverable at the time of the initial encounter, as it is not within the scope of an ordinary patient to interpret and diagnose radiological imaging. Because the injury-causing aspect of Cyber MD, the algorithmic defect, was present at the time of delivery but was not discoverable by an ordinary reasonably prudent person until more than four years following delivery Shawnee Rev. Stat. § 12-410(b)(3) exempts Respondent's claims from the four-year statute of repose for the product liability claim. Shawnee Rev. Stat. § 12-410(b)(3).

For these reasons, neither Shawnee Rev. Stat. § 12-404 nor § 12-410 bar Respondent's claims. The express exceptions in Shawnee Rev. Stat. § 12-404(b) for

continuous courses of treatment, and Shawnee Rev. Stat. § 12-410(b)(3) for latent and undiscoverable defects apply here and protect Respondent's claims from the general statutory period of repose. Therefore, this Court should affirm the ruling of the Shawnee Court of Appeals for the Second District and remand the case for further proceedings.

CONCLUSION

This Court should AFFIRM the Shawnee Court of Appeals for the Second District's holding on the basis that MHS may be held vicariously liable for the actions of agents with apparent authority, such as Cyber MD, and as Respondent's acceptance of MHS's Terms and Conditions disclaiming liability was procedurally and substantively unconscionable. Additionally, Respondent's claims are not barred by the four-year statute of repose as they qualify for the exceptions outlined for continuous courses of treatment and undiscoverable latent defects. Because there are remaining genuine issues of material fact regarding MHS's apparent agency and the enforceability of its Terms and Conditions, and because Respondent's claims fall within the express statutory exceptions to the four-year statute of repose, this Court should affirm the holding of the Shawnee Court of Appeals for the Second District.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT

APPENDIX A: Rules Provisions

Fed. R. Civ. P. 56(a) Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if 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. The court should state on the record the reasons for granting or denying the motion

APPENDIX B: Statutory Provisions

Shawnee Rev. Stat. § 12-402. Limitations of Actions: Personal Injury and Wrongful Death; Discovery Rule.

(a) *Personal Injury.* Except as otherwise provided in this section, and except as provided in section 12-404 of this chapter, an action for damages for personal injury caused by the wrongful act, neglect, or default of another shall be commenced within two (2) years after the cause of action accrues.

(b) *Wrongful Death.* An action for wrongful death shall be commenced within two (2) years from the date of the decedent's death.

(c) *Discovery Rule Exception.* If the injury or its causal relationship to the conduct of another is not immediately discoverable through the exercise of reasonable diligence, the limitation period shall not begin to run until the claimant knows, or reasonably should have known, of the injury and the tortfeasor's identity.

Shawnee Rev. Stat. § 12-404. Limitations – Health Care Malpractice.

(a) *Limitations Period.* No action for damages for injury or death against any physician, hospital, or healthcare provider arising out of patient care shall be brought more than two (2) years after the date on which the claimant knew, or through reasonable diligence should have known, of the injury or death.

(b) *Repose Period.* In no event shall such action be brought more than four (4) years after the date on which occurred the act or omission or occurrence alleged to have been the cause of such injury or death. However, such period shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence.

Shawnee Rev. Stat. § 12-410. Statute of Repose – Product Liability.

(a) *Repose Period.* No product liability action based on strict liability in tort shall be commenced except within the applicable limitations period in Section 12-402, and in any event, within four (4) years from the date of first sale, lease, or delivery of possession to its initial user or consumer.

(b) *Exceptions to Statute of Repose.* The four (4) year period of repose shall not apply if:

1. The product seller expressly warrants that its product can be utilized safely for a period longer than four (4) years;
2. The product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it; or
3. 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.