

CASE NO. 26-338

IN THE
SUPREME COURT OF THE UNITED STATES

EVELYN MILLER, Individually and as Special Administrator for the Estate
of Elias Miller, Deceased
Respondent,

v.

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

**On Writ of Certiorari to the United States
Court of Appeals for the Second District**

BRIEF FOR PETITIONERS

Beyond a Reasonable Diagnosis
Counsel for Petitioners

October 2, 2026

QUESTIONS PRESENTED

- I. Under the apparent-agency doctrine, is Metropolitan Health System, Inc. (MHS) shielded from liability for Cyber MD's diagnostic errors when MHS required Mr. Miller to accept written notice of Cyber MD's independent, non-provider status before each of his four sessions?
- II. Under Shawnee Revised Statutes § 12-404 and § 12-410, are Respondent's claims barred by a four-year statute of repose when Cyber MD's annual diagnostic evaluations did not constitute continuous treatment and its injury-causing aspect was discoverable within four years repose period?

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
STANDARD OF REVIEW	2
PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Statement of the Facts	2
II. Procedural History	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	3
I. No apparent agency relationship arose between MHS and Cyber MD, because MHS conspicuously disclaimed the relationship, and Mr. Miller could not reasonably have believed otherwise.....	3
A. MHS’s mandatory pre-session warning defeated “holding out” and justifiable reliance because Mr. Miller affirmatively accepted it before every session.	3
1. MHS’s disclosure was clear and unambiguous, defeating “holding out” as a matter of law.....	4

2. The same repeated acceptance likewise forecloses justifiable reliance.	6
B. MHS’s sign-in wrap satisfies both elements of an enforceable digital agreement, binding Mr. Miller to its Terms and Conditions notwithstanding one clause’s placement within the document.	7
1. MHS provided reasonably conspicuous notice of its Terms and Conditions.....	7
2. Mr. Miller’s act of entering the portal unambiguously manifested his assent, binding him to the Terms and Conditions regardless of one clause’s placement within them.	8
C. Cyber MD lacked the legal capacity to be MHS’s agent, and its continuous ownership and control by CCS confirm it was never functionally absorbed into MHS’s operations.	9
1. Cyber MD, as software, is not a legal person capable of manifesting assent or serving as an agent.	9
2. Even treating Cyber MD as MHS’s own tool, CCS’s continuous, independent control confirms it was never functionally absorbed into MHS’s operations.	11
II. Respondent's claims are barred by Shawnee's four-year statutes of repose. 13	
A. Cyber MD's discrete annual diagnostic application did not constitute a continuous course of treatment under § 12-404.....	13

1. Continuous treatment requires an ongoing course of affirmative treatment for the same condition.	14
2. Periodic diagnostic examinations remain separate acts when each examination is discrete and complete.	16
3. A recommendation for future diagnostic examinations does not create continuous treatment, absent an identified condition requiring ongoing monitoring.....	17
B. Respondent's product-liability claim is barred because Cyber MD's reduced diagnostic accuracy was discoverable within § 12-410's four- year repose period.....	18
1. Whether an injury-causing aspect is "discoverable" depends on whether an ordinary reasonably prudent person had a reasonable means of detecting the product's danger within the repose period.	19
2. The "injury-causing aspect" is the product's dangerous condition, not merely the technical defect that caused it.	20
CONCLUSION	22

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	2
<i>CTS Corp. v. Waldburger</i> , 573 U.S. 1 (2014)	18,19
<i>Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.</i> , 582 U.S. 497 (2017)	19

United States Court of Appeals

<i>Berman v. Freedom Fin. Network, LLC</i> , 30 F.4th 849 (9th Cir. 2022)	11
<i>Cornish-Adebiyi v. Caesars Ent., Inc.</i> , 184 F.4th 172 (3d Cir. 2026)	15
<i>Keebaugh v. Warner Bros. Ent. Inc.</i> , 100 F.4th 1005 (9th Cir. 2024)	12, 13
<i>Oberstein v. Live Nation Ent., Inc.</i> , 60 F.4th 505 (9th Cir. 2023)	11
<i>Thaler v. Perlmutter</i> , 130 F.4th 1039 (D.C. Cir. 2025), cert. denied, 146 S. Ct. 1777, 224 L. Ed. 2d 161 (2026)	15, 16

Federal District Court Cases

<i>EpicRealm, Licensing, LLC v. Autoflex Leasing, Inc.</i> , 492 F. Supp. 2d 608 (E.D. Tex. 2007)	17, 18
--	--------

<i>Netfuel, Inc. v. F5 Networks, Inc.</i> , No. 13 C 7895, 2017 WL 2834538 (N.D. Ill. June 29, 2017)	15, 16
<i>Zacharias v. Bucyrus-Erie Co.</i> , No. 92-0843-CV-W-6, 1996 WL 75581 (W.D. Mo. Feb. 21, 1996)	28, 29

State Supreme Court Cases

<i>Anderson v. M.W. Kellogg Co.</i> , 766 P.2d 637 (Colo. 1988)	28
<i>Burless v. W. Va. Univ. Hosps.</i> , 215 W. Va. 765, 601 S.E.2d 85 (2004)	7, 8, 9
<i>Fletcher v. S. Peninsula Hosp.</i> , 71 P.3d 833 (Alaska 2003)	8, 9
<i>Gilbert v. Sycamore Mun. Hosp.</i> , 156 Ill. 2d 511, 622 N.E.2d 788 (1993)	9, 10
<i>Kerns ex rel. Kerns v. G.A.C., Inc.</i> , 255 Kan. 264, 875 P.2d 949 (1994)	26, 27
<i>McDermott v. Torre</i> , 56 N.Y.2d 399, 437 N.E.2d 1108 (1982)	20, 21, 22
<i>Sword v. NKC Hosps., Inc.</i> , 714 N.E.2d 142 (Ind. 1999)	8

State Court of Appeals Cases

<i>Baker v. Radiology Associates, P.A.</i> , 72 Ark. App. 193, 35 S.W.3d 354 (2000)	23
<i>Beard v. Branson</i> ,	

No. M2014-01770-COA-R3-CV, 2017 WL 11650187 (Tenn. Ct. App. Nov. 8, 2017)	13
<i>Fadely v. Encompass Health Valley of Sun Rehab. Hosp.</i> ,	
253 Ariz. 515 (Ct. App. 2022)	7
<i>First Midwest Bank v. Ottawa Reg’l Hosp. & Healthcare Ctr.</i> ,	
2023 IL App (3d) 220008, 242 N.E.3d 934	7
<i>Goldschmidt v. Cortland Regional Medical Center, Inc.</i> ,	
190 A.D.3d 1212, 141 N.Y.S.3d 522 (2021)	24
<i>Gomez v. Katz</i> ,	
61 A.D.3d 108, 874 N.Y.S.2d 161 (2009)	22
<i>Kimbrell v. Mem’l Hermann Hosp. Sys.</i> ,	
407 S.W.3d 871 (Tex. App. 2013)	8, 9
<i>Mandel v. Herrmann</i> ,	
271 A.D.2d 661, 706 N.Y.S.2d 195 (2000)	24
<i>Mizyed v. Palos Cmty. Hosp.</i> ,	
2016 IL App (1st) 142790, 58 N.E.3d 102 (2016)	7
<i>Niemet v. General Electric Co.</i> ,	
843 P.2d 87 (Colo. App. 1992)	29
<i>Noack v. Symenow</i> ,	
132 A.D.2d 965, 518 N.Y.S.2d 495 (1987)	22, 23
<i>Scardina v. Alexian Bros. Med. Ctr.</i> ,	
308 Ill. App. 3d 359, 719 N.E.2d 1150 (1999)	7
<i>Wilkins v. Cruise LLC</i> ,	
121 Cal. App. 5th 927 (Cal. Ct. App.)	10

Statutes

Shawnee Revised Statute § 12-404	2, 19, 20, 25
Shawnee Revised Statute § 12-410	2, 25, 26, 27, 30
Utah Code Ann. § 63G-32-102	15

Other Authorities / Secondary Sources

Restatement (Third) of Agency § 1.01 (2006).....	14, 17
AI for Health Care Providers: Overview, Practical Law Practice Note Overview w-025-7755.....	16
Key AI Contracting Issues for Health Care Providers, Practical Law Practice Note w-026-1072.....	17
The Agentic AI: Greater Capabilities and Enhanced Risks.....	14

OPINIONS BELOW

The order of the Circuit Court of Simmons County granting summary judgement in favor of Petitioners Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC, and dismissing Respondent's complaint with prejudice, is contained in the Transcript of Record. R. at 1–13.

The opinion and judgement of the Shawnee Court of Appeals for the Second District, reversing the Circuit Court's grant of summary judgement, and remanding for further proceedings is contained in the Transcript of Record. R. at 15–28.

STANDARD OF REVIEW

This Court should review the questions of law under de novo, including a trial court's grant of summary judgment. Because issues on appeal arise from the reversal of summary judgment, this Court applies the same standard as the trial court and determines independently whether Petitioners are entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

PROVISIONS INVOLVED

The following statutes are relevant to this proceeding: Shawnee Revised Statute § 12-404; and Shawnee Revised Statute § 12-410.

STATEMENT OF THE CASE

I. Statement of the Facts

Cyber-Care Solutions, LLC (CCS) received FDA clearance for Cyber MD, an artificial intelligence diagnostic system in February 2017. Record. at 5. Metropolitan Health System, Inc. (MHS) integrated Cyber MD into its telehealth platform On March 1. Id. Before beginning a Cyber MD session, users were required to affirmatively click “Accept” to a notice stating in red, 16-point font that “Cyber MD is not a licensed healthcare professional” and “is an artificial intelligence software program.” Id. MHS’s Terms and Conditions were located by hyperlink directly below the login page with text stating, “By entering the portal, I accept the MHS Terms and Conditions”. Id. Within the Terms and Conditions “three-quarters down the page”, it stated that the automated software applications were developed

by another company and were not employees or agents of MHS. Id. Mr. Miller accessed the Terms and Conditions hyperlink on April 9, 2018, and remained on the page for four seconds before closing it. Id.

Mr. Miller first used Cyber MD on April 9, 2018. R. at 6. After reviewing his chest scans, Cyber MD reported “zero evidence” of malignancy, diagnosed adult-onset asthma, and referred him to a local practitioner for treatment of asthma. Id. Mr. Miller returned for annual evaluations in May 2019, May 2020, and June 2021, each involving new scans and the same finding of “zero evidence” of disease. Id. Following the 2021 evaluation, Cyber MD advised that further annual imaging was unnecessary. Id.

In October 2022, CCS discovered that Cyber MD’s diagnostic accuracy dropped when evaluating images of patients with prior occupational asbestos exposure. R. at 5–6. On October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax and was airlifted to MHS, where scans revealed a malignant mass in his left lung. R. at 6. Retrospective expert review established that a seven-millimeter lesion was visible on Miller’s 2018 scans that were partially obscured by pleural changes and had grown through 2021. Id. Mr. Miller died on April 14, 2024, and Respondent filed this action in July 2024. R. at 7.

II. Procedural History

On March 5, 2025, following discovery, the Circuit Court of Simmons County granted summary judgment in favor of Defendants MHS and CCS and dismissed

the Plaintiff's complaints with prejudice. R. at 12. Plaintiff appealed the judgement, and on February 24, 2026, the Shawnee Court of Appeals reversed and remanded for further proceedings. R. at 25. MHS and CCS then petitioned the Shawnee Supreme Court for leave to appeal. The Supreme Court granted their petition pursuant to Shawnee Supreme Court Rule 315. R. at 26.

SUMMARY OF THE ARGUMENT

No apparent agency relationship arose between MHS and Cyber MD as a matter of law. MHS's mandatory pre-session warning defeated the "holding out" element as it was clear and unambiguous and Mr. Miller could not justifiably rely on an apparent-agency relationship he affirmatively rejected four separate times. MHS's sign-in wrap bound Mr. Miller to the Terms and Conditions as it was reasonably conspicuous and Millers assent was unambiguous. Mr. Miller's action to affirmatively enter the portal accepted its Terms and Conditions in their entirety. Additionally, Cyber MD lacked the legal capacity to consent to be MHS's agent, and its continuous ownership by CCS confirms it was never absorbed by MHS. Therefore, the undisputed record forecloses any claim of apparent agency between MHS and Cyber MD as a matter of law, and the Court of Appeals erred in finding a triable issue of fact.

Respondent's claims are barred by Shawnee's four-year statutes of repose because neither statutory exception applies. First, Cyber MD's annual diagnostic

evaluations were discrete screenings, not continuous treatment under § 12-404. Each scan involved new scans and a completed diagnostic conclusion, and Cyber MD never identified a condition requiring ongoing monitoring. Second, § 12-410's latent-defect exception does not apply because Cyber MD's injury-causing aspect was discoverable within the repose period. Evidence of its dangerous diagnostic performance existed outside its proprietary source code, even though the precise coding flaw was identified later. Accordingly, the Court of Appeals erred in holding that the Respondent's claims were not barred by the statutes of repose.

ARGUMENT

I. No apparent agency relationship arose between MHS and Cyber MD, because MHS conspicuously disclaimed the relationship, and Mr. Miller could not reasonably have believed otherwise.

Several undisputed facts independently foreclose apparent agency between MHS and Cyber MD as a matter of law. First, MHS's mandatory, four-times-accepted pre-session warning defeated both the "holding out" element and any claim of justifiable reliance. Second, MHS's sign-in wrap independently bound Mr. Miller to Terms and Conditions that expressly disclaimed any agency relationship. Third, Cyber MD's lack of legal capacity to serve as an agent and CCS's continuous, independent control over its operation confirms it was never functionally absorbed into MHS's operations. Each ground independently supports reversal.

A. MHS's mandatory pre-session warning defeated "holding out" and justifiable reliance because Mr. Miller affirmatively accepted it before every session.

MHS's mandatory pre-session warning defeats apparent agency on two independent grounds. An agency relationship is established where (1) the hospital, or its agent, acted in a manner or is "holding out" itself in a manner that would lead a reasonable person to conclude that the individual or entity alleged to be negligent was an employee or agent of the hospital; (2) where the hospitals actions create the appearance of authority and had knowledge of this appearance; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993). First, the disclosure was clear and unambiguous, defeating the "holding out"

element. Second, the same disclosure forecloses Mr. Miller's justifiable reliance on any apparent authority.

1. MHS's disclosure was clear and unambiguous, defeating “holding out” as a matter of law.

The “holding out” element is defeated when a hospital gives a patient clear, unambiguous notice that a provider is independent of the hospital. *Burless v. W. Va. Univ. Hosps.*, 215 W. Va. 765, 776, 601 S.E.2d 85, 96 (2004). A disclosure is “clear and unambiguous” where it repeatedly and plainly identifies the provider as independent, even without using the word “agent”. *Fadely v. Encompass Health Valley of Sun Rehab. Hosp.*, 253 Ariz. 515, 520—21, 515 P.3d 701, 706—07 (Ct. App. 2022). Thus, a patient “cannot reasonably believe” a provider is the hospital’s agent when a clear and unambiguous notice is present. *Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790, ¶ 40, 58 N.E.3d 102, 111-12. Although disclaimer language is “not always dispositive,” it defeats apparent agency where the patient received clear notice of independent status. *First Midwest Bank v. Ottawa Reg’l Hosp. & Healthcare Ctr.*, 2023 IL App (3d) 220008, ¶ 34, 242 N.E.3d 934, 946. An agency relationship will not emerge where the patient knows or reasonably should have known the provider was independent. *Scardina v. Alexian Bros. Med. Ctr.*, 308 Ill. App. 3d 359, 364, 719 N.E.2d 1150, 1154 (1999).

Courts have upheld disclosures under materially less favorable facts than those presented here. In *Fletcher* the Alaska Supreme Court affirmed summary judgment for the hospital based on a signed consent form containing independent contractor language because the holding-out element turns on “the hospital’s

actions,” not the patient’s subjective comprehension. *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 840—41 (Alaska 2003).

Twice-presented, unambiguous independent contractor language was held sufficient by Texas Appellate court. *Kimbrell v. Mem’l Hermann Hosp. Sys.*, 407 S.W.3d 871, 877 (Tex. App. 2013). Meaningful written notice acknowledged by the patient likewise defeats an apparent-agency claim. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999). By contrast, disclaimers have failed when vague or generic language is used, poor visuals, or coercive circumstances are present. See *Burless*, 215 W. Va. at 777, 601 S.E.2d at 97.

MHS did not hold itself out as Cyber MD’s principal because it gave clear, unambiguous notice of Cyber MD’s independent status before every session. As noted in *Fletcher* the test turns on MHS’s actions, not on any question of Mr. Miller’s comprehension. The notices use of the red, 16-point-font pop-up occurring before every session, stating Cyber MD “is not a licensed healthcare professional” and “is an artificial intelligence software program,” and a required affirmative “Accept” click before the session can proceed shows clear and unambiguous notice. R. at 4. The text plainly identifies Cyber MD’s non-provider status, even without the use of the word “agent”. Mr. Miller affirmed that clear and unambiguous notice on four separate occasions, twice the notice *Kimbrell* upheld.

Unlike the failed disclaimers in *Burless*, MHS’s notice was not vague or buried. Its striking appearance in red, 16-point font on a separate screen, with plain language, requiring no advanced knowledge to understand its meaning and a

required affirmative click of acceptance rather than a passive skip to the next page surpasses the notice these courts have already deemed sufficient. MHS's repeated, unambiguous, and affirmatively acknowledged notice therefore forecloses the "holding out" element of apparent agency as a matter of law.

2. The same repeated acceptance likewise forecloses justifiable reliance.

Mr. Miller could not have justifiably relied on an agency relationship between Cyber MD and MHS, as he affirmatively accepted the terms on four separate occasions. The Illinois Supreme Court established the apparent-agency test from *Gilbert*, which requires that the plaintiff justifiably relied on the appearance of agency "consistent with ordinary care and prudence." *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 622 N.E.2d 788, 795 (1993). However, reliance is not justifiable where the patient had actual, repeated notice contradicting the appearance of agency. *Id.*

Mr. Miller repeatedly affirmed the same notice through an affirmative click of "Accept" across all four sessions, spanning multiple years, without objection until now. After the second session, Mr. Miller forfeited his ability to reasonably rely on an agency relationship given the identical disclosure was already shown to be clear and repeatedly accepted. Any argument that Cyber MD's use of personal language created a provider relationship Mr. Miller could rely on does not override an express disclaimer Mr. Miller accepted moments before in the same session. Therefore, Mr. Miller cannot establish justifiable reliance any more than he can establish that MHS held Cyber MD out as its agent.

B. MHS's sign-in wrap satisfies both elements of an enforceable digital agreement, binding Mr. Miller to its Terms and Conditions notwithstanding one clause's placement within the document.

A sign-in wrap agreement is enforceable where (1) the website provides "reasonably conspicuous notice" of its terms, and (2) the consumer takes some action that "unambiguously manifests" assent to those terms. *Wilkins v. Cruise LLC*, 121 Cal. App. 5th 927, 931 (Cal. Ct. App.). MHS's sign-in wrap satisfies both elements independently: first, through conspicuous placement of the Terms and Conditions hyperlink, and second, through Mr. Miller's unambiguous manifestation of assent by entering the portal.

1. MHS provided reasonably conspicuous notice of its Terms and Conditions.

MHS's sign-in wrap Terms and Conditions satisfy the conspicuous notice standard for enforceable digital agreements. An enforceable sign-in wrap agreement requires that the hyperlink to the terms is reasonably conspicuous. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856—58 (9th Cir. 2022). Courts assess conspicuousness by evaluating the placement of the hyperlink, the website's general design, and other notices given to users in determining if a reasonably prudent user would have inquiry notice of the agreement. *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 515 (9th Cir. 2023).

Here, the placement of MHS's Terms and Conditions hyperlink is located directly below the login page in plain view. R. at 3. The text states that, "By entering the portal, I accept the MHS Terms and Conditions". *Id.* This placement provided clear, conspicuous notice of the agreement where a reasonably prudent

acquires notice of a sign-in wrap agreement. Beyond the hyperlink itself, MHS provided Mr. Miller additional, independent notice through the mandatory pre-session pop-up disclosing Cyber MD's non-provider status. The location of the hyperlink below the required login page is clear, noticeable, and prominent for any reasonably prudent user to take notice of and is supported by the other adequate notices of MHS.

2. Mr. Miller's act of entering the portal unambiguously manifested his assent, binding him to the Terms and Conditions regardless of one clause's placement within them.

Once a consumer takes the qualifying action, the consumer is bound to all terms incorporated, regardless of the specific location of any single provision within those terms. *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024). In *Keebaugh*, the U.S. Court of Appeals for the Ninth Circuit defined a sign-in wrap as binding where "the consumer takes some action . . . that unambiguously manifests his or her assent to those terms," such as when "users are required to advance through a sign-in screen which states 'By tapping 'Play,' I agree to the Terms of Service.'" *Id.* By contrast, a disclosure is unenforceable only where it is the consumer's sole source of notice and is never independently reinforced, such as when it is buried in fine print within a lengthy document and never separately called to the reader's attention. *Beard v. Branson*, No. M2014-01770-COA-R3-CV, 2017 WL 11650187 (Tenn. Ct. App. Nov. 8, 2017).

Mr. Miller's act of entering the portal was the action that bound him to MHS's Terms and Conditions, exactly like the action asserted in *Keebaugh*, where

one advances through the log-in screen which displays a hyperlink to the Terms and Conditions. Miller's actions show manifestation of assent of the Terms and Conditions in their entirety despite the lower courts finding that the disclaimer clause, specifically denying MHS's liability, was buried "three-quarters down the page", that calls one specific clause conspicuousness into question, not the entire Terms & Conditions which were assented to. R. at 3. Unlike *Beard*, where the buried disclosures was the patient's only notice, Mr. Miller received independent, more prominent notice of Cyber MD's non-provider status through the pre-session pop-up. Therefore, Mr. Miller entered into a valid sign-in wrap agreement and became bound by the Terms and Conditions in full, whether or not he read every line.

C. Cyber MD lacked the legal capacity to be MHS's agent, and its continuous ownership and control by CCS confirm it was never functionally absorbed into MHS's operations.

Cyber MD's status confirms it was never MHS's agent on two independent grounds. First, Cyber MD lacks the legal capacity to be an agent at all. Second, even treating Cyber MD as MHS's own tool, CCS's continuous and exclusive control over its operation confirms it was never functionally absorbed into MHS's operations.

1. Cyber MD, as software, is not a legal person capable of manifesting assent or serving as an agent.

An agency relationship is arising when a "person" manifests assent to another "person" to act on the principle's behalf. Restatement (Third) of Agency § 1.01 (2006). An agent must be capable of manifesting assent, make autonomous moral decisions, exercising fiduciary judgement, and bearing legal accountability

capacities that are impossible for software. The Agentic AI: Greater Capabilities and Enhanced Risks. Similarly to a minor or an incompetent person, a software algorithm lacks capacity to serve as an agent categorically as it is a “tool to assist, not replace human judgement.” *Id.*

The D.C. Circuit’s decision in *Thaler* illustrates the application of current law to AI-Diagnostic software’s. *Thaler v. Perlmutter*, 130 F.4th 1039, 1046 (D.C. Cir. 2025), *cert. denied*, 146 S. Ct. 1777, 224 L. Ed. 2d 161 (2026). In *Thaler* the court held in a copyright dispute that an artificial intelligence system “was not a human being” and therefore could not hold legal rights, reasoning that the law presupposes human attributes as a machine cannot possess. *Id.* This reasoning is directly applicable to agency’s “person” requirements finding that an entity unable to hold rights as it is not a person cannot bear the duties necessary of an agency relationship.

Courts have reached similar conclusions in distinguishing “software agents” from legal agents. A software agent may “perform its task without human input” as a mechanical matter, but it does not consent or act in the traditional sense agency law requires. *Netfuel, Inc. v. F5 Networks, Inc.*, No. 13 C 7895, 2017 WL 2834538, at *1 (N.D. Ill. June 29, 2017). Additionally state legislatures have codified the same principal by statute, such as Utah code § 63G-32-102 which bars recognition of “legal personhood” to all artificial intelligence or any nonhuman entity. Utah Code Ann. § 63G-32-102. The U.S. Court of Appeals for the Third Circuit this year classified AI as a machine-based system used by software programs to make

predictions based on uploaded data. *Cornish-Adebiyi v. Caesars Ent., Inc.*, 184 F.4th 172, 178 (3d Cir. 2026).

Cyber MD was, a fact undisputed by the lower court, labeled “an interactive conversational AI diagnostic system . . .”, not a person capable of independent consent or manifestation of assent, like a legal person. R. at 4. Logically, the Plaintiff’s claim that apparent agency is an applicable remedy here is incorrect as Cyber MD is not a “person” capable of manifesting assent under agency standards, and no more a legal person than the AI system in *Thaler*. Similarly to the software agents in *Netfuel*, Cyber MD performs its diagnostic tasks without human input and relies solely on stored data previously inputted. It does not consent, exercise fiduciary judgment, or bear legal accountability in the sense agency law demands. Nor does Cyber MD’s classification as a medical device software change the distinction. It confirms that Cyber MD is a regulated device, a tool, not an agent capable of assenting to a complex fiduciary relationship. AI for Health Care Providers: Overview, Practical Law Practice Note Overview w-025-7755. Because Cyber MD is incapable of manifesting the assent the Restatement requires, it cannot, as a matter of law, serve as MHS’s agent.

2. Even treating Cyber MD as MHS’s own tool, CCS’s continuous, independent control confirms it was never functionally absorbed into MHS’s operations.

Agency requires that the principal have the right to control the agents’ conduct in the manner of performance. Restatement (Third) of Agency § 1.01 (2006). Where a healthcare provider integrates a third-party AI solution, the provider and

the AI developer remain distinct legal entities with separate and allocated responsibilities. Key AI Contracting Issues for Health Care Providers, Practical Law Practice Note w-026-1072. An arms-length purchaser of a service does not become liable for the vendor's method of performance where the vendor, not the purchaser, selects in what way the service is provided. *epicRealm, Licensing, LLC v. Autoflex Leasing, Inc.*, 492 F. Supp. 2d 608, 637 (E.D. Tex. 2007).

Even if Cyber MD is found to function as MHS's own tool, CCS never fully relinquished control. MHS did integrate Cyber MD in 2017. R. at 4. In 2022, CCS independently discovered that Cyber MD's diagnostic accuracy had dropped for patients with prior asbestos exposure. *Id.* Without consulting MHS, CCS retrained the software and released an updated version in 2023. *Id.* CCS did not consult MHS for permission, funding, or assistance when reprogramming the software, displaying complete executive control over Cyber MD. Similarly to the purchaser in *epicRealm*, MHS purchased access to Cyber MD while CCS selected and controlled how it operated. If CCS maintains sole executive control, then MHS possesses no real authoritative power over Cyber MD, eliminating the ability to enter into a binding apparent agency relationship. Despite MHS's branding governing the platform's patient-facing interface, interface branding is not the same as the clinical and operational control that defines functional absorption. CCS alone retained authority over Cyber MD's diagnostic algorithm, training data, and accuracy; all aspects of the software that actually determine whether it functions independently of the hospital that displays it. Cyber MD's continuous, independent operation under CCS

confirms that Cyber MD was never functionally absorbed into MHS's operations, transferring liability.

II. Respondent's claims are barred by Shawnee's four-year statutes of repose.

A statute of repose imposes an "outer limit on the right to bring a civil action," measured from the defendant's last culpable act or omission rather than the accrual of the plaintiff's claim. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014).

Unlike a statute of limitations, a statute of repose generally may not be tolled because it reflects a legislative judgement that defendants should be free from liability after a legislatively determined period. *Id.* at 9–10. Tolling is permissible only where the legislature indicates that it anticipated extension of the repose period under specified circumstances. *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017).

Here, § 12-404 establishes a four-year bar and permits extension only when a healthcare provider engages in continuous treatment for the same illness, injury, or condition. Because Mr. Miller brought his claim outside the four-year repose period, § 12-404 bars his claim unless he satisfies the statutory continuous-treatment exception. As discussed below, he did not.

A. Cyber MD's discrete annual diagnostic application did not constitute a continuous course of treatment under § 12-404.

Section 12-404's continuous-treatment exception does not apply because Cyber MD never provided an ongoing course of treatment for the same condition. Its annual evaluations were discrete and complete diagnostic examinations, and its

recommendation for future imaging did not transform those exceptions into continuous treatment because Cyber MD never identified a condition requiring ongoing monitoring.

3. Continuous treatment requires an ongoing course of affirmative treatment for the same condition.

Because Cyber MD's annual scans were separate, complete, diagnostic screenings rather than an ongoing course of treatment for an already identified condition, they do not satisfy § 12-404(b)'s requirement of a continuous course of treatment for the same illness, injury, or condition. The continuous treatment doctrine applies when "the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." *McDermott v. Torre*, 56 N.Y.2d 399, 405, 437 N.E.2d 1108 (1982). The doctrine calls for continuity in the treatment itself, requiring an ongoing course of treatment for the same condition, not merely an ongoing relationship between the provider and the patient. *Id.* at 405. Continuous treatment does not include return visits initiated to check a patient's condition, and "the continuing nature of the diagnosis does not itself amount to continuous treatment." *Id.* at 406.

McDermott demonstrates that continuity depends on continued treatment of the original condition, not merely repeated examinations of a continuing diagnosis. For example, in *McDermott*, the patient returned to her dermatologist several times after he removed a mole and informed her that nothing further needed to be done. *Id.* 56 N.Y.2d at 404. Although many of the other visits concerned other ailments, the patient also complained of continued pain at the site of the removed mole, and

the dermatologist repeatedly examined the area. *Id.* The court held these later visits could support continuous treatment because the patient returned seeking treatment for the same area involved in the original care, creating a factual question as to whether continuous treatment occurred. *Id.* at 406. The court emphasized that continuing diagnosis alone was insufficient, as continuity depended on whether the later visits involved treatment related to the original condition. *Id.*

Unlike the later visits in *McDermott*, Mr. Miller's annual encounters with Cyber MD did not involve continued treatment of the condition identified during his original care. Here, in 2018, Cyber MD reviewed Mr. Miller's scans, reported "zero evidence" of malignancy, diagnosed adult-onset asthma, and referred him to a local practitioner for inhaler management. R. at 6. Cyber MD did not undertake treatment of the asthma itself but instead recommended that Mr. Miller return for annual follow-up imaging. R. at 6. When Mr. Miller returned in 2019, 2020, and 2021, each encounter consisted of Cyber MD reviewing new mobile scans and again reporting "zero evidence" of disease. R. at 6.

The Court of Appeals instead characterized Miller's asbestos-related respiratory risk as the relevant condition and the annual imaging as the ongoing care for that risk. R. at 25. Even under that broader view, Cyber MD did not provide affirmative treatment for an asbestos-related condition. It screened Miller each year to determine whether malignancy was present. Unlike *McDermott*, where the patient returned seeking further care for the same area previously treated, Miller

returned for diagnostic examinations in which Cyber MD repeatedly concluded that no malignancy was present. R. at 6. Therefore, whether the relevant condition is Miller's diagnosed asthma or his broader respiratory risk, Cyber MD did not provide an ongoing course of affirmative treatment.

4. Periodic diagnostic examinations remain separate acts when each examination is discrete and complete.

Where a provider's involvement consists of intermittent diagnostic examinations rather than affirmative, ongoing treatment, those examinations may constitute "complete and discrete" services rather than continuous course of treatment. *Noack v. Symenow*, 132 A.D.2d 965, 966, 518 N.Y.S.2d 495 (1987). A "course of treatment" instead involves "affirmative and ongoing conduct by the physician," rather than merely a continuing physician-patient relationship or continuing efforts to arrive at a diagnosis. *Gomez v. Katz*, 61 A.D.3d 108, 112, 874 N.Y.S.2d 161 (2009).

For example, in *Noack v. Symenow*, four bone scans performed over approximately two years remained "complete and discrete," even though each new scan was compared with the patient's prior scan. 132 A.D.2d 965, 966, 518 N.Y.S.2d 495 (1987). Likewise, regularly recurring screening examinations remained "separate and distinct" where the provider did not participate in ongoing treatment for a specific condition. *Baker v. Radiology Associates, P.A.*, 72 Ark. App. 193, 199–200, 35 S.W.3d 354, 356 (2000).

Here, Cyber MD's annual evaluations fall on the discrete side of that distinction. Like Noack, each evaluation required new scans, an independent

review, and a new diagnostic conclusion that there was "zero evidence" of disease. R. at 6. Like Baker, the examinations recurred regularly but were not part of ongoing treatment for a specific condition. Cyber MD referred Miller elsewhere for treatment of the only condition it diagnosed, adult-onset of asthma. R. at 6. Accordingly, Cyber MD's annual scans were complete and discrete diagnostic examinations, not affirmative steps in an ongoing course of treatment.

5. A recommendation for future diagnostic examinations does not create continuous treatment, absent an identified condition requiring ongoing monitoring.

The distinction turns on whether the examinations are merely repeated diagnostics or instead part of ongoing care for an already identified condition. *Mandel v. Herrmann*, 271 A.D.2d 661, 662, 706 N.Y.S.2d 195 (2000). *Goldschmidt v. Cortland Regional Medical Center, Inc.* illustrates the latter. There, the radiologist identified a lung mass, repeatedly characterized that same mass as likely benign, and prescribed successive CT scans to continue monitoring it. 190 A.D.3d 1212, 141 N.Y.S.3d 522, 527–28 (2021). The court therefore found a factual issue as to continuous treatment because the repeated examinations were part of anticipated monitoring of an already identified condition.

Here, the Court of Appeals treated Cyber MD's recommendation for annual imaging as establishing a "single, continuous course of diagnostic surveillance." R. at 25. However, recommending future screening does not make each later screening part of one continuous course of treatment. Unlike *Goldschmidt*, where the provider identified a lung mass and ordered successive scans to continue monitoring the

same mass, Cyber MD never identified an abnormality to follow from year to year. Instead, each annual examination independently asked whether disease was present and ended with the same conclusion of "zero evidence" of disease. R. at 6. After the 2021 examination, Cyber MD concluded that further annual imaging was no longer necessary. R. at 6.

Cyber MD's annual evaluations do not satisfy § 12-404's continuous treatment exception. Each evaluation was a separate diagnostic screening, not affirmative treatment for an ongoing condition. Cyber MD never identified an abnormality requiring continued monitoring, and its recommendation for annual imaging did not transform separate examinations into a continuous course of treatment. Accordingly, § 12-404's four-year statute of repose bars Respondent's claim.

B. Respondent's product-liability claim is barred because Cyber MD's reduced diagnostic accuracy was discoverable within § 12-410's four-year repose period.

Section 12-410's latent-defect exception does not apply because Cyber MD's injury-causing aspect was discoverable within the repose period. An ordinarily reasonably prudent person had a reasonable means of detecting Cyber MD's dangerous diagnostic performance, and discoverability does not require identification of the precise technical defect that caused the danger.

1. Whether an injury-causing aspect is "discoverable" depends on whether an ordinary reasonably prudent person had a reasonable means of detecting the product's danger within the repose period.

A product's injury-causing aspect is discoverable when a careful person, under the circumstances, could comprehend the danger and determine how to avoid it. *Baumann v. Excel Industries, Inc.*, 17 Kan. App. 2d 807, 819, 845 P.2d 65 (1993). Interpreting statutory language nearly identical to § 12-410(b)(3), the *Baumann* court explained that the exception is reserved for "the unusual situation" in which a product contains a hidden defect that a reasonably prudent product user cannot discover within the repose period. *Id.* at 818. Accordingly, "discoverable" requires a reasonable means by which the user can "detect the hidden danger and guard against it." *Id.* at 819.

The Kansas Supreme Court applied this objective standard in *Kerns ex rel. Kerns v. G.A.C., Inc.*, 255 Kan. 264, 274, 875 P.2d 949, 957 (1994). There, a child injured at a swimming pool alleged that the surrounding fence was defective because its mesh openings were too large. *Id.* Although the alleged defect existed when the fence was installed, the court held that the statute of repose barred the claim because the large mesh was discoverable by a reasonably prudent person and the resulting danger was open or obvious to a reasonable product user. *Id.* Thus, an injury-causing aspect does not need to actually be discovered within the repose period; the relevant inquiry is whether a reasonably prudent person was capable of discovery.

Here, the Court of Appeals treated the date Cyber MD's defect was discovered as the date it became discoverable. R. at 26–27. However, § 12-410(b)(3) asks whether a reasonably prudent person had a reasonable way to detect the product's danger within the repose period. Evidence of Cyber MD's dangerous performance existed well before its defect was actually identified. Cyber MD knew Miller had worked around asbestos for thirty-five years and reported "zero evidence" of malignancy in 2018 even though experts later determined that a seven-millimeter lesion was clearly visible on the scan. R. at 6. Cyber MD repeated the "zero-evidence" conclusion in 2019, 2020, and 2021, as the lesion grew. R. at 6. Therefore, the fact that Cyber MD's defect was not actually identified until later does not establish that its dangerous performance was undiscoverable before the repose period.

2. The "injury-causing aspect" is the product's dangerous condition, not merely the technical defect that caused it.

Whether a product's injury-causing aspect is hidden turns on whether the product's danger was readily apparent or discoverable by a reasonably prudent user. *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 643 (Colo. 1988). In *Anderson*, a worker was injured when his arm was pulled into the unguarded nip-point of a conveyor. *Id.* at 639. Although the worker argued that the absence of guards and warnings constituted a hidden defect, the court held that the dangerous condition was readily apparent or discoverable by a reasonably prudent user and therefore did not fall within the hidden-defect exception. *Id.* at 643–44.

Similarly, in *Zacharias v. Bucyrus-Erie Co.*, the court focused on the observable danger created by a crane operation rather than the underlying design defect. No. 92-0843-CV-W-6, 1996 WL 75581, at *7 (W.D. Mo. Feb. 21, 1996). Although the crane operated as designed, its dangerous condition was discoverable by a reasonably prudent person because the danger surrounding the moving crane was immediately noticeable. *Id.* Thus, a product in dangerous condition may be discoverable through its observable performance without identifying the precise defect responsible for the danger. *Id.*

By contrast, a defect remains hidden when the danger itself cannot be discovered through ordinary observation or use. In *Niemet v. General Electric Co.*, the defect inside an electrical transformer could not be discovered until the transformer was cut in half. 843 P.2d 87, 91 (Colo. App. 1992). Because ordinary use or inspection provided no means of discovering the internal defect, the court treated it as hidden. *Id.*

Here, the Court of Appeals defined Cyber MD's injury-causing aspect too narrowly. It focused on the "foundational coding defect" in Cyber MD's proprietary source code and reasoned that Miller and his providers could not inspect that code. R. at 26–27. However, the relevant danger was Cyber MD's reduced ability to identify malignant lesions in asbestos-exposed patients, not the coding flaw that caused the failure. Like the observable operating danger in *Zacharias*, Cyber MD's diagnostic performance could be evaluated without identifying its internal design flaw. Cyber MD repeatedly reported zero evidence of malignancy from 2018 through

2021, while Miller's lesion remained visible on his scans and continued to grow. R. at 6. Unlike Niemet, where the defect could not be discovered without physically cutting apart the product, evidence of Cyber MD's dangerous diagnostic performance existed outside its source code. Therefore, § 12-410's latent defect exception does not apply because Cyber MD's injury-causing aspect was discoverable within the repose period. Specifically, Cyber MD's dangerous diagnostic performance was discoverable by an ordinarily reasonably prudent person without identifying the precise technical defect that caused it.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' decision and reinstate the trial court's grant of summary judgment in favor of Petitioners MHS and CCS.