

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 Appeal from the
Shawnee Court of Appeals
for the Second District*

BRIEF FOR PETITIONERS

TEAM CLM
Attorneys for Petitioners

QUESTIONS PRESENTED

- I. Whether Metropolitan Health System (“MHS”) may be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of Cyber MD, an autonomous artificial-intelligence software tool integrated into MHS’s branded telehealth platform, given MHS’s Terms and Conditions and Cyber MD’s mandatory pre-session warning.

- II. Whether Respondent’s claims are barred by Shawnee’s four-year statutes of repose or whether the repose periods were tolled or extended by Cyber MD’s annual diagnostic evaluations constituting a continuous course of treatment under Shawnee Revised Statute § 12-404 or by the latent, undiscoverable nature of Cyber MD’s algorithmic flaw under Shawnee Revised Statute § 12-410.

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OPINIONS BELOW

The opinion of the Circuit Court of Simmons County in *Evelyn Miller, Individually and as Special Administrator for the Estate of Elias Miller, Deceased v. Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC*, No. 25-L-24601 (Mar. 6, 2025), is contained in the Record at pages 2–13. The Circuit Court GRANTED Petitioners Metropolitan Health System, Inc.’s and Cyber-Care Solutions, LLC’s Motion for Summary Judgment and DISMISSED Respondent’s Complaint WITH PREJUDICE. The opinion of the Shawnee Court of Appeals for the Second District in *Miller v. Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC*, No. 25-123 (Feb. 24, 2026), is contained in the Record at pages 16–28. The Court of Appeals REVERSED the Circuit Court’s grant of summary judgment and REMANDED the case for further proceedings. The Shawnee Supreme Court GRANTED Petitioners’ petition for leave to appeal pursuant to Shawnee Supreme Court Rule 315.

STATUTORY PROVISIONS INVOLVED

The following provisions are relevant to this proceeding: Shawnee Revised Statutes §§ 12-402, 12-404, and 12-410; Shawnee Rule of Civil Procedure 56; and Shawnee Supreme Court Rule 315.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case arises from diagnostic evaluations performed through Metropolitan Health System, Inc.'s ("MHS") telehealth platform using Cyber MD, an artificial-intelligence diagnostic system developed by Cyber-Care Solutions, LLC ("CCS"). Elias Miller ("Mr. Miller") began using the platform in 2018 after experiencing shortness of breath. R. at 6. Mr. Miller had previously worked in the maintenance department at Shawnee Steel Company's Cartersville steel mill from 1970 until his retirement in 2016, where he regularly handled asbestos-insulated machinery. R. at 3. He was a lifelong non-smoker, had no prior documented history of respiratory disease, and his most recent employment-sponsored chest screening in 2012 was read as "unremarkable." *Id.*

Mr. Miller lived in Cartersville, a rural community in Simmons County, Shawnee. R. at 3. Following substantial population decline, Simmons County lost more than seventy-five percent of its healthcare professionals between 2016 and 2025. R. at 3-4. Both local hospitals closed in 2015, leaving the county without urgent-care facilities or permanent diagnostic-imaging centers and with 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, approximately 190 miles from Cartersville. *Id.*

MHS is a regional healthcare network headquartered in Goshen. R. at 4. In 2012, MHS contracted with CCS, a digital-health infrastructure provider, to design and host a remote telehealth platform. *Id.* MHS controlled the platform's patient-facing interface, which displayed MHS

branding and was accessed through MHS's primary web domain. *Id.* Below the platform's login, users were advised that by entering the portal they accepted the "MHS Terms and Conditions." *Id.* The hyperlinked Terms and Conditions expressly stated that clinical evaluations, imaging reviews, and diagnostic interpretations could be performed by independent contractor physicians or automated software applications developed by another company and that those physicians and software were not employees or agents of MHS. R. at 4-5. Digital audit logs establish that Mr. Miller accessed the Terms and Conditions in April 2018. R. at 5.

CCS received FDA clearance for Cyber MD in 2017. R. at 5. Cyber MD is an interactive conversational artificial-intelligence diagnostic system capable of receiving patient symptoms, asking follow-up questions, compiling clinical histories, generating differential diagnoses, and ordering and interpreting diagnostic tests. *Id.* Before beginning a Cyber MD session, users were required to proceed through a pop-up notice displayed in red, 16-point font stating: "Cyber MD is not a licensed health care professional. It is an artificial intelligence software program." *Id.* Users were required to click "Accept" before proceeding. *Id.* MHS integrated Cyber MD into its telehealth platform in 2017. *Id.*

Cyber MD's original software was trained using 40,000 images from three hospital systems and achieved a ninety-seven percent overall accuracy rate in classifying lung lesions. *Id.* In 2022, however, CCS discovered that Cyber MD's accuracy declined to approximately eighty-five percent when evaluating patients with prior occupational asbestos exposure because pleural shadowing could mask underlying tumors. R. at 5-6. CCS subsequently retrained Cyber MD using 10,000 image sets from asbestos-exposed patients and released an updated version in 2023. R. at 6.

In April 2018, Mr. Miller logged into the MHS platform and initiated a virtual intake session with Cyber MD. R. at 6. During that session, Mr. Miller disclosed his history of occupational asbestos exposure. *Id.* Cyber MD ordered a chest X-ray and CT scan through a mobile radiology service. *Id.* After reviewing the resulting scans, Cyber MD reported “zero evidence” of malignancy, diagnosed Mr. Miller with adult-onset asthma, referred him to a local practitioner for inhaler management, and recommended annual follow-up imaging. *Id.*

Mr. Miller returned for annual virtual evaluations in 2019, 2020, and 2021. *Id.* During each evaluation, Cyber MD reviewed newly obtained mobile scans and again reported “zero evidence” of disease. *Id.* Following the 2021 evaluation, Cyber MD advised Mr. Miller that annual imaging was no longer necessary. *Id.*

In October 2023, Mr. Miller suffered a spontaneous pneumothorax and was airlifted to MHS’s flagship hospital in Goshen. *Id.* Imaging revealed a 6.4-centimeter malignant mass in his left lung with extensive metastases to the pleura and spine. *Id.* A retrospective expert review determined that a seven-millimeter lesion had been visible on Mr. Miller’s 2018 scans, partially obscured by pleural changes, and had grown continuously thereafter. *Id.* Cyber MD’s original algorithm had failed to identify the lesion. *Id.* Mr. Miller died on April 14, 2024. R. at 7.

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County. In July 2024, Respondent Evelyn Miller, individually and as Special Administrator of the Estate of Elias Miller, commenced this action against MHS and CCS. R. at 7. Respondent sought to hold MHS vicariously liable under the doctrine of apparent agency for Cyber MD’s alleged diagnostic errors and asserted strict-products-

liability claims against CCS based on alleged design defects and failures to warn in the Cyber MD software algorithm. R. at 2.

Following discovery, MHS and CCS moved for summary judgment under Shawnee Rule of Civil Procedure 56. *Id.* MHS argued that it could not be held vicariously liable under apparent-agency principles because Cyber MD was not its employee or agent and because MHS expressly disclosed the absence of an agency relationship through its Terms and Conditions. *Id.* Petitioners further argued that Respondent's claims were barred by Shawnee's four-year statutes of repose under Shawnee Revised Statutes §§ 12-404 and 12-410. *Id.*

The Circuit Court of Simmons County GRANTED Petitioners' motion for summary judgment and dismissed Respondent's complaint with prejudice. R. at 13. On the apparent-agency claim, the trial court concluded that the undisputed evidence established that Mr. Miller had been advised of Cyber MD's nature and the absence of an agency relationship before receiving care and that the agreement was not procedurally unconscionable. R. at 10. The trial court therefore found no genuine issue of material fact concerning apparent agency. *Id.*

The trial court also concluded that Respondent's claims were barred by Shawnee's statutes of repose. R. at 10-13. The court determined that CCS received FDA clearance for Cyber MD in 2017, MHS integrated the software into its portal that same year, and the initial diagnostic act involving Mr. Miller occurred in April 2018. R. at 11. Because Respondent did not commence this action until July 2024, the court concluded that the applicable four-year repose periods had expired unless a statutory exception applied. *Id.* The court rejected Respondent's continuous-treatment argument, finding that Mr. Miller's annual interactions with Cyber MD constituted "separate, discrete, and independent diagnostic screenings spaced twelve months apart," rather than an active

and continuous treatment regimen for a known disease. R. at 12. The court further concluded that even if the alleged algorithmic defect satisfied the exception contained in § 12-410(b)(3), Respondent could not maintain an independent product-liability action because the underlying diagnostic claims had already been extinguished by § 12-404's four-year repose period. R. at 12-13.

The Shawnee Court of Appeals for the Second District. Respondent appealed. R. at 16. On February 24, 2026, the Shawnee Court of Appeals for the Second District REVERSED the grant of summary judgment and REMANDED the case for further proceedings. R. at 16, 28. The Court of Appeals concluded that genuine issues of material fact existed concerning whether MHS's digital interface provided reasonably conspicuous notice of the agency disclaimer and whether the agreement was procedurally unconscionable. R. at 22-24. The court also concluded that Cyber MD's annual evaluations could constitute a continuous course of treatment under § 12-404(b) and that the alleged latent algorithmic defect fell within § 12-410(b)(3)'s undiscoverability exception. R. at 24-27.

Petitioners sought review in the Supreme Court of Shawnee. This Court granted review limited to two questions: (1) whether MHS may be held vicariously liable under the doctrine of apparent agency for diagnostic errors committed by an autonomous artificial-intelligence software tool integrated into its branded telehealth platform; and (2) whether Respondent's claims are barred by Shawnee's four-year statutes of repose or fall within the statutory exceptions for continuous treatment or an undiscoverable product defect. R. at 29.

SUMMARY OF THE ARGUMENT

This case concerns the application of established principles of apparent agency and statutory repose to an artificial-intelligence diagnostic system. MHS expressly informed users that automated software applications providing clinical evaluations and diagnostic interpretations were not its employees or agents, and Cyber MD separately warned users that it was an artificial-intelligence software program rather than a licensed healthcare professional. Respondent nevertheless seeks to impose vicarious liability on MHS for Cyber MD's diagnostic errors and to pursue claims filed years after the acts giving rise to those claims.

Two questions frame this Court's review. First, whether MHS may be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of Cyber MD. Second, whether Respondent's claims are barred by Shawnee's four-year statutes of repose or fall within the statutory exceptions for continuous treatment under Shawnee Revised Statute § 12-404 and an undiscoverable product defect under Shawnee Revised Statute § 12-410. The Court should resolve both questions in Petitioners' favor.

I.

First, Metropolitan Health System ("MHS") cannot be held vicariously liable for Cyber MD's diagnostic errors under the doctrine of apparent agency. Apparent agency requires a plaintiff to establish that the hospital held the allegedly negligent provider out as its agent and that the plaintiff reasonably relied on that appearance. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 525 (1993). Here, neither requirement is satisfied. Although MHS controlled and branded the telehealth platform through which Mr. Miller accessed Cyber MD, MHS expressly informed him before he received diagnostic care that automated software applications providing diagnostic

services could be developed by another company and were not employees or agents of MHS. R. at 5. MHS reinforced that disclosure through a mandatory warning identifying Cyber MD as an artificial-intelligence software program rather than a licensed healthcare professional. R. at 5.

MHS's express disclosures defeat the holding-out element because a patient placed on notice of a provider's independent status cannot reasonably believe that provider is the hospital's agent. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1087–88 (2009). Mr. Miller accessed Terms specifically stating that automated diagnostic software could be developed by another company and was not an MHS employee or agent, and he separately accepted a conspicuous warning identifying Cyber MD as artificial-intelligence software before receiving its diagnostic services. R. at 5. Thus, whatever initial appearance MHS's branding may have created was dispelled before Cyber MD provided the allegedly negligent care.

Second, Respondent cannot establish the objectively reasonable reliance necessary for apparent agency. A patient's subjective assumption that a provider acts for a hospital cannot establish apparent authority where contrary information brought to the patient's attention would cause a person exercising ordinary prudence to reject that assumption. *Porter v. Sisters of St. Mary*, 756 F.2d 669, 673–74 (8th Cir. 1985). Although hospital branding may contribute to an appearance of agency, branding must be considered together with information supplied to the patient concerning the provider's actual relationship with the hospital. *Solorzano v. Magnani*, 243 N.E.3d 263, 272–74 (Ill. App. Ct. 2024). Unlike *Solorzano*, where the hospital never expressly informed the patient that the physician was independent, MHS directly disclosed that automated diagnostic software was developed by another company and was not its employee or agent. R. at 4–5.

Finally, Simmons County's severe shortage of healthcare alternatives may explain why Mr. Miller sought care through MHS's telehealth platform, but it cannot substitute for proof that he actually and reasonably relied on an apparent agency relationship. See *Wallace*, 389 Ill. App. 3d at 1092–93. Mr. Miller was not an unconscious emergency patient incapable of evaluating the provider presented to him; he personally entered the platform, accessed MHS's Terms, and accepted Cyber MD's mandatory warning before proceeding. R. at 5. Because MHS expressly disclosed Cyber MD's independent status and Respondent cannot establish objectively reasonable reliance on a contrary appearance of agency, MHS cannot be held vicariously liable for Cyber MD's diagnostic errors.

II.

Second, Respondent's claims are barred by Shawnee's four-year statutes of repose. Cyber MD's annual diagnostic screenings do not constitute a continuous course of treatment under § 12-404(b) because continuous treatment requires affirmative and ongoing medical care, rather than periodic diagnostic examinations. *Gomez v. Katz*, 61 A.D.3d 108, 112 (App. Div. 2009); *Grey v. Stamford Health Sys., Inc.*, 282 Conn. 745, 764 (2007). Respondent also cannot avoid § 12-410(a)'s four-year product-liability statute of repose merely because Cyber MD's alleged defect was not actually discovered within four years. Section 12-410(b)(3) requires the injury-causing aspect of the product to be objectively undiscoverable by an ordinarily reasonably prudent person. *Kerns ex rel. Kerns v. G.A.C., Inc.*, 255 Kan. 264, 273 (1994); *Baumann v. Excel Indus.*, 17 Kan. App. 2d 807, 818–19 (1993). Finally, even if Respondent satisfies § 12-410(b)(3), § 12-402 cannot revive an underlying claim already extinguished by § 12-404's statute of repose. See *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1363–64 (Fla. 1992); *Lawler v. Univ. of Chi. Med. Ctr.*, 2017 IL 120745, ¶¶ 20–27. Because neither the continuous-treatment exception nor the

alleged undiscoverability of Cyber MD's defect preserves Respondent's claims, the statutes of repose bar this action.

ARGUMENT

Standard of Review. This appeal raises two issues arising from the Circuit Court's grant of summary judgment: one concerning apparent agency and one concerning the application of Shawnee's statutes of repose. A court reviews an order granting summary judgment *de novo*, applying the same standard employed by the trial court. *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 16. Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

For the apparent-agency issue, the Court must determine whether MHS may be held vicariously liable for Cyber MD's diagnostic errors where MHS disclosed the independent status of the physicians and automated software providing services through its telehealth platform. Although the existence of an agency relationship may involve questions of fact, summary judgment is appropriate where the undisputed facts demonstrate that the plaintiff cannot establish the elements necessary for apparent agency. *See First Midwest Bank*, 2018 IL 123038, ¶ 16. Because the Circuit Court resolved MHS's apparent-agency claim on summary judgment, this Court reviews that determination *de novo*.

The statute-of-repose issue likewise presents questions of law subject to *de novo* review. The Court must determine whether Cyber MD's annual diagnostic screenings constitute a "continuous course of treatment" under Sn. Rev. Stat. § 12-404(b), whether the alleged algorithmic defect satisfies § 12-410(b)(3)'s undiscoverability exception, and whether § 12-402 can preserve

a claim after the applicable repose period has expired. These questions require interpretation and application of Shawnee’s statutory provisions to the undisputed facts. Accordingly, the appropriate standard of review for both issues before this Court is *de novo*.

I. METROPOLITAN HEALTH SYSTEM CANNOT BE HELD VICARIOUSLY LIABLE FOR CYBER MD’S DIAGNOSTIC ERRORS UNDER THE DOCTRINE OF APPARENT AGENCY.

This Court should reverse the appellate court because Respondent cannot establish the elements necessary to impose apparent-agency liability on Metropolitan Health System (“MHS”) for Cyber MD’s diagnostic errors. Under *Gilbert v. Sycamore Municipal Hospital*, a plaintiff seeking to impose liability on a hospital under the doctrine of apparent agency must establish that: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the allegedly negligent individual or entity was an employee or agent of the hospital; (2) where those acts create the appearance of authority, the hospital had knowledge of and acquiesced in them; and (3) the plaintiff relied on the hospital’s conduct consistent with ordinary care and prudence. 156 Ill. 2d 511, 525 (1993). The first two requirements constitute the “holding out” element and focus on whether the hospital held itself out as a provider of care without informing the patient that the care was actually provided by an independent entity. *Id.*

Respondent cannot satisfy these requirements. Although MHS controlled the patient-facing interface and displayed its branding throughout the telehealth portal, MHS expressly informed Mr. Miller before he received diagnostic care that automated software applications providing services through the portal were developed by another company and were not MHS employees or agents. R. at 4-5. Before every Cyber MD session, Mr. Miller also encountered a mandatory warning

identifying Cyber MD as an artificial-intelligence software program rather than a licensed healthcare professional. R. at 5. These direct disclosures defeat the “holding out” element because Mr. Miller knew or reasonably should have known that Cyber MD was not an MHS employee or agent. And for the same reason, Mr. Miller could not reasonably rely on MHS’s branding as creating a contrary appearance of agency.

A. MHS did not hold Cyber MD out as its agent because it expressly disclosed Cyber MD’s independent status before Mr. Miller received diagnostic care.

MHS is entitled to summary judgment on the “holding out” element because its direct disclosures dispelled any reasonable appearance that Cyber MD was an MHS employee or agent. *First Midwest Bank v. Ottawa Regional Hospital & Healthcare Center*, 242 N.E.3d 934, 946 (Ill. App. Ct. 2023); *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1087–88 (2009). The “holding out” inquiry focuses on whether the hospital presented itself as the provider of care without informing the patient that an independent provider actually rendered that care. *Gilbert*, 156 Ill. 2d at 525; *Mizyed v. Palos Community Hospital*, 58 N.E.3d 102, 107 (Ill. App. Ct. 2016). Thus, the critical inquiry is whether the patient knew or reasonably should have known that the allegedly negligent provider was independent of the hospital. *Mizyed*, 58 N.E.3d at 107.

Here, MHS informed Mr. Miller of Cyber MD’s status before he received diagnostic care. Patients accessed the telehealth platform through MHS’s domain, where the login page stated directly below the login fields: “By entering the portal, I accept the MHS Terms and Conditions.” R. at 4. The accompanying Terms and Conditions explained that diagnostic services could be performed by “automated software applications developed by another company” and expressly stated that those applications “are not employees or agents of Metropolitan Health System.” R. at

4-5. Digital audit logs establish that Mr. Miller accessed those Terms before initiating his first Cyber MD session. R. at 5.

MHS did not rely on the Terms and Conditions alone. Before Cyber MD could be used, every patient was required to navigate a separate pop-up warning displayed in red, 16-point font stating that “Cyber MD is not a licensed health care professional” and “[i]t is an artificial intelligence software program.” R. at 5. A patient could not proceed without affirmatively clicking “Accept.” *Id.* Taken together, the Terms expressly disclaimed an agency relationship while the mandatory pre-session warning identified the nature of the entity providing the diagnostic service. Because these disclosures occurred before Mr. Miller received Cyber MD’s diagnostic care, MHS did not hold Cyber MD out as its agent.

1. MHS’s express disclosures defeat the holding-out element because a patient placed on notice of a provider’s independent status cannot reasonably believe that provider is the hospital’s agent.

Apparent agency depends on manifestations attributable to the alleged principal that would cause a reasonable person to believe an agency relationship exists. *Arrendale v. American Imaging & MRI, LLC*, 183 N.E.3d 1064, 1068 (Ind. 2022). Accordingly, the “holding out” inquiry focuses on what the patient knew or reasonably should have known concerning the provider’s relationship with the hospital. *Mizyed*, 58 N.E.3d at 107; *First Midwest Bank*, 242 N.E.3d at 946. When a hospital provides meaningful notice that the treating provider is independent, a patient cannot reasonably attribute that provider’s conduct to the hospital. *Mizyed*, 58 N.E.3d at 107.

Wallace illustrates this principle. There, the appellate court affirmed summary judgment for a hospital where the patient received written notice explaining that physicians providing

treatment were independent contractors rather than hospital employees. 389 Ill. App. 3d at 1087–88. Because the disclosure placed the patient on notice of the physicians’ independent status, the patient could not establish that the hospital held those physicians out as its agents. *Id.*

The same reasoning applies here. MHS’s Terms and Conditions did not merely provide a generalized disclaimer. They specifically addressed the precise type of provider at issue by explaining that diagnostic services could be performed by automated software applications “developed by another company” and that those applications were “not employees or agents” of MHS. R. at 4-5. Mr. Miller accessed those Terms on April 9, 2018, before initiating his first Cyber MD session. R. at 5. And unlike the disclosure in *Wallace*, MHS’s Terms were reinforced by a second mandatory warning immediately before Cyber MD could be used, expressly informing Mr. Miller that Cyber MD was artificial-intelligence software and not a licensed healthcare professional. R. at 5. If the express notice of independent-contractor status in *Wallace* defeated apparent agency, MHS’s direct and repeated disclosures do so here as well.

First Midwest Bank further demonstrates why Respondent cannot establish holding out based on MHS’s branding. There, the plaintiff relied on promotional materials that identified an independent physician among the hospital’s providers. 242 N.E.3d at 946. Nevertheless, the court concluded that those generalized representations did not create a triable apparent-agency claim where the patient received direct notice of the physician’s independent status. *Id.* Direct notice concerning the particular provider therefore controlled over the more generalized appearance created by the hospital’s promotional materials. *Id.*

Respondent relies on similar generalized manifestations here. MHS controlled the telehealth platform’s patient-facing interface, displayed MHS branding throughout the portal,

hosted the platform through its own domain, and prohibited CCS branding from appearing on patient-facing pages. R. at 4. Those facts may have created an initial impression that the platform was affiliated with MHS, but affiliation is not the dispositive inquiry. The question is whether Mr. Miller knew or reasonably should have known that the entity providing the allegedly negligent diagnostic care was not MHS's agent. *Mizyed*, 58 N.E.3d at 107. Whatever initial impression MHS's branding created was directly dispelled before treatment when MHS informed Mr. Miller that automated software applications were developed by another company and were not MHS employees or agents. R. at 4-5. Under *First Midwest Bank*, generalized branding cannot overcome specific notice concerning the status of the provider whose negligence forms the basis of the claim.

Accordingly, the undisputed record establishes that MHS did not hold Cyber MD out as its agent.

2. *MHS's Terms and Conditions provided conspicuous notice that automated software applications providing diagnostic services were not MHS employees or agents.*

MHS's digital Terms and Conditions provided legally sufficient notice of Cyber MD's relationship with MHS. Online agreements provide effective notice when the interface reasonably communicates the existence of contractual terms and connects the user's affirmative action with assent to those terms. *Berman v. Freedom Financial Network, LLC*, 30 F. 4th 849, 853, 856 (9th Cir. 2022); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

In *Berman*, the Ninth Circuit declined to enforce hyperlinked terms where the notice appeared in small, low-contrast text and the interface failed to clearly inform users that clicking the accompanying button constituted assent to the terms. 30 F. 4th at 856–57. The defect was not

merely that the terms were accessible through a hyperlink; rather, the interface failed to adequately connect the user's action with assent to those terms. *Id.*

MHS's interface did precisely what *Berman* found lacking. Directly below the portal's login fields, MHS displayed the statement: "By entering the portal, I accept the MHS Terms and Conditions." R. at 4. The words "Terms and Conditions" appeared as a standard blue, underlined hyperlink. *Id.* Thus, the interface expressly informed users both where the governing terms could be found and that entering the portal constituted acceptance of them. Unlike the ambiguous interface in *Berman*, MHS directly connected the action necessary to access the portal with assent to the hyperlinked terms.

The substance of those Terms was equally clear. The Terms informed users that clinical evaluations, imaging reviews, and diagnostic interpretations could be performed by "automated software applications developed by another company" and expressly provided that "[t]he physicians and software are not employees or agents of Metropolitan Health System." R. at 5. The language therefore addressed not merely independent physicians in general, but the precise circumstance presented here: diagnostic services performed by software developed by another company.

Mr. Miller also received actual access to those terms. Digital audit logs establish that he opened the Terms and Conditions on April 9, 2018, before his first Cyber MD encounter. R. at 5. Although Mr. Miller remained on the Terms page for only four seconds, R. at 5, a party who manifests assent to accessible contractual terms ordinarily cannot avoid their effect merely because he elected not to read them. *Hines v. National Entertainment Group, LLC*, 140 F. 4th 322, 330 (6th Cir. 2025); *Santana v. SmileDirectClub, LLC*, 475 N.J. Super. 279, 286 (App. Div. 2023). Mr.

Miller's decision to spend only four seconds reviewing the Terms therefore does not transform an express disclosure into a representation of agency.

Nor does Simmons County's shortage of healthcare alternatives render MHS's disclosure ineffective. Procedural unconscionability examines the circumstances surrounding contract formation, including the parties' relative bargaining power, the conspicuousness and comprehensibility of the terms, and the availability of meaningful choice. *Payne v. Savannah College of Art & Design, Inc.*, 81 F. 4th 1187, 1194 (11th Cir. 2023); *Hines*, 140 F. 4th at 328. A standardized or take-it-or-leave-it agreement does not, without more, establish procedural unconscionability. *Payne*, 81 F.4 th at 1194; *Hines*, 140 F. 4th at 328–30.

The record demonstrates that Simmons County faced severe healthcare shortages. Both local hospitals had closed, the county had no permanent diagnostic imaging center, and the nearest facility offering in-person radiology consultations and CT scans was MHS's flagship hospital 190 miles from Cartersville. R. at 4. Those circumstances explain why Mr. Miller chose telehealth, but they do not alter what MHS disclosed to him before he received care. Mr. Miller was presented with accessible Terms expressly disclaiming an agency relationship, R. at 4-5, and there is no evidence that he was incapable of reading or understanding those terms. Limited treatment alternatives therefore do not convert MHS's express disclaimer into a manifestation that Cyber MD was its agent.

The Terms and Conditions placed Mr. Miller on notice that automated diagnostic software was developed by another company and was not an employee or agent of MHS. Because the holding-out inquiry turns on what the patient knew or reasonably should have known, that direct disclosure defeats Respondent's claim that MHS represented Cyber MD as its agent.

3. ***Cyber MD’s mandatory pre-session warning reinforced MHS’s agency disclaimer by expressly identifying Cyber MD as artificial-intelligence software.***

Even apart from the Terms and Conditions, the mandatory warning immediately preceding every Cyber MD session further dispelled the appearance Respondent attributes to MHS’s branding. Before a user could initiate a Cyber MD session, a standalone pop-up displayed in red, 16-point font stated: “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” R. at 5. The user was required to affirmatively click “Accept” before proceeding. *Id.*

Courts evaluating electronic agreements distinguish interfaces that merely display passive hyperlinks from those requiring an affirmative action acknowledging conspicuous notice. *See Berman*, 30 F. 4th at 853; *Santana*, 475 N.J. Super. at 288–89. In *Santana*, the court emphasized that an electronic interface requiring affirmative action after presenting the user with notice can establish inquiry notice before telemedicine services are received. 475 N.J. Super. at 288–89.

Cyber MD’s warning provided that affirmative notice. Unlike the Terms and Conditions, which Mr. Miller accessed through a hyperlink, the Cyber MD warning could not be bypassed simply by declining to open another page. Every user was required to navigate the warning and click “Accept” before Cyber MD would launch. R. at 5. Thus, immediately before receiving diagnostic services, Mr. Miller was affirmatively informed that the entity with which he was about to interact was an artificial-intelligence software program rather than a licensed healthcare professional.

The warning is particularly significant when considered together with MHS’s Terms. The Terms supplied the relationship-specific disclosure: automated software applications providing

diagnostic services were developed by another company and were not MHS employees or agents. R. at 4-5. The mandatory warning then supplied the provider-specific disclosure: Cyber MD itself was artificial-intelligence software rather than a licensed healthcare professional. R. at 5. Together, these disclosures informed Mr. Miller both what Cyber MD was and what relationship automated diagnostic software had with MHS before he received Cyber MD's diagnostic services.

Respondent nevertheless relies on Cyber MD's subsequent conversational statements, including its statement that, "[o]nce I have your scans, I will analyze them closely, and go over the results with you," as contributing to an appearance that Cyber MD functioned as an MHS healthcare provider. R. at 6. But that statement occurred only after Mr. Miller had entered the portal, received MHS's agency disclaimer, encountered the mandatory warning identifying Cyber MD as artificial-intelligence software, and affirmatively accepted that warning. R. at 4-5. The statement described what Cyber MD would do with Mr. Miller's scans; it did not represent that Cyber MD was an employee or agent of MHS, nor did it retract either of the disclosures Mr. Miller had already received.

Apparent agency must arise from manifestations attributable to the alleged principal, and reliance on a contrary appearance is unreasonable where the patient has received affirmative notice of the provider's status. *Arrendale*, 183 N.E.3d at 1068, 1070. Here, MHS expressly disclaimed an agency relationship, and Cyber MD expressly identified itself as artificial-intelligence software before Mr. Miller received diagnostic care. Respondent therefore cannot transform Cyber MD's later description of its diagnostic functions into a representation by MHS that Cyber MD was its agent.

Because the undisputed record establishes that Mr. Miller received direct notice concerning both Cyber MD's nature and its relationship with MHS before receiving diagnostic care, Respondent cannot establish that MHS held Cyber MD out as its agent.

B. MHS's Disclosure of Cyber MD's Independent Status Defeats Respondent's Claim of Reasonable Reliance on an Apparent Agency.

A hospital may be held vicariously liable under apparent agency when its conduct reasonably causes a patient to believe that a treating provider is acting on the hospital's behalf, reflecting the realities of modern healthcare in which patients often rely on the hospital rather than independently selecting individual providers. *Frezados v. Ingalls Mem'l Hosp.*, 991 N.E.2d 817, 820 (Ill. App. Ct. 2013) (citing *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788 (Ill. 1993)). But apparent agency requires more than a patient's subjective assumption of an agency relationship; the asserted reliance must be objectively reasonable. *Porter*, 756 F. 2d at 673-74. Thus, apparent authority exists only where a person exercising ordinary prudence and considering the restrictions or contrary information brought to his attention would reasonably rely on the alleged appearance of agency. *Id.*

1. Respondent cannot establish apparent agency through reliance that ordinary care and prudence would reject.

Apparent agency requires objectively reasonable reliance in light of all information brought to the patient's attention, not merely a patient's subjective belief that a provider appeared to act for a hospital. *Porter*, 756 F. 2d at 673-74. A patient must act as a person of ordinary prudence would under all circumstances, including any contrary information or restrictions brought to the patient's attention. *Id.* at 673-74 (quoting *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 13 (Mo. 1970)).

Accordingly, when a patient is placed on notice that a provider is an independent contractor, it is unreasonable to assume that provider is the hospital's agent. *Wallace v. Alexian Bros. Med. Ctr.*, 907 N.E.2d 490, 495-96 (Ill. App. Ct. 2009). The plaintiff must also show that the apparent agency actually caused the decision to accept the allegedly negligent care. *Porter*, 756 F.2d at 674; *Wallace*, 907 N.E.2d at 500.

In *Wallace*, the plaintiff signed a consent form expressly stating that the physicians treating her daughter were independent contractors and “not the employees or agents” of the hospital. *Wallace*, 907 N.E.2d at 492. The plaintiff had signed identical forms during several prior visits to the same hospital. *Id.* She later sought to hold the hospital vicariously liable for the physicians’ alleged malpractice. *Id.* at 492-93. The court affirmed summary judgment for the hospital because the plaintiff knew or should have known the physicians were independent contractors and failed to establish actual reliance on an apparent agency relationship. *Id.* at 495, 500. The court emphasized that the consent form expressly used the term “independent contractors,” specifically stated that the hospital was “not responsible for the services these physicians provide,” and represented that the signatory had read the form and had an opportunity to ask questions. *Id.* at 496. The plaintiff’s later assertions that she did not read or understand the forms, was in shock, and nevertheless relied on the hospital for treatment did not establish the required apparent agency relationship. *Id.* at 493, 500. Thus, the plaintiff could not establish reliance because she had both an opportunity to participate in the treatment decision and repeated notice that the physicians were independent contractors. *Id.* at 500-01.

Porter likewise demonstrates that a patient's subjective assumption of agency cannot substitute for objectively reasonable reliance. *Porter* went to the defendant hospital with a collapsed lung, where a hospital employee told him that Dr. Schneider was “our best person for

the job.” *Porter*, 756 F.2d at 670. After treating the emergency, Schneider gave Porter the option of having surgery there or returning to Illinois, and Porter waited two days before choosing Schneider. *Id.* at 670, 674. Although Porter testified that the statement describing Schneider as “our best person” caused him to assume Schneider was a hospital employee, the court held that Porter failed to show that his belief actually caused him to choose Schneider. *Id.* at 673-74. Additionally, Porter was expressly given the option to return to Illinois, discussed the decision with others, and waited two days before electing to proceed with Schneider. *Id.* at 674. Because Porter had time and alternatives before proceeding, and no evidence showed that he selected Schneider because he believed Schneider was the hospital’s agent, the required reliance was absent. *Id.*

The same objective principles defeat Respondent’s attempt to establish reasonable reliance here. Like the plaintiff in *Wallace*, Mr. Miller received express notice contradicting any appearance that Cyber MD was MHS’s agent. Although MHS’s branding appeared throughout the telehealth platform, the Terms and Conditions specifically disclosed that diagnostic services could be performed by “automated software applications developed by another company” and that those applications “are not employees or agents of Metropolitan Health System.” R. at 4-5. Mr. Miller affirmatively accessed those Terms on April 9, 2018. R. at 5. Thus, just as the consent form in *Wallace* placed the plaintiff on notice that the treating physicians were independent contractors, MHS’s disclosure directly informed Mr. Miller that the software providing diagnostic services was not MHS’s agent.

Respondent may emphasize that Mr. Miller viewed the Terms for only four seconds, R. at 5, but *Wallace* rejected reliance based on a plaintiff’s subjective failure to read or understand a disclosure where the provider’s independent status was clearly stated. Mr. Miller also received

notice beyond the Terms themselves: before using Cyber MD, he was required to accept a red, 16-point warning stating that “Cyber MD is not a licensed health care professional” but “an artificial intelligence software program.” R. at 5. Thus, even if Mr. Miller initially perceived an affiliation, he encountered specific contrary information identifying Cyber MD as software and distinguishing it from an MHS healthcare professional before he chose to use it. R. 4-5.

Like the plaintiff in *Porter*, Respondent cannot establish apparent agency merely by showing that he accepted treatment from a provider he may have assumed was affiliated with the hospital. Although Miller repeatedly used Cyber MD for diagnostic evaluations, R. at 6, the evidence fails to establish that he chose Cyber MD or continued relying on its recommendations because he believed it was MHS’s agent. Nor does the record show that his decision not to seek different care was based on Cyber MD’s perceived affiliation with MHS. Instead, as in *Porter*, Respondent relies on the treatment relationship itself to infer reliance, without showing that the alleged appearance of agency actually caused Miller’s treatment decisions. Because Respondent failed to connect Mr. Miller’s treatment decision to an objectively reasonable belief in an agency relationship, Respondent cannot satisfy the justifiable reliance standard governing apparent authority.

Accordingly, because MHS expressly disclosed Cyber MD's independent status and Respondent has not shown that an objectively reasonable belief in an MHS-Cyber MD agency relationship caused Miller to rely on Cyber MD's care, the required element of reasonable reliance is not satisfied.

2. *MHS's branding of the telehealth platform does not establish reasonable reliance in light of its express disclosures concerning Cyber MD.*

In determining apparent agency, courts consider multiple circumstances, including whether a hospital's advertising creates the appearance of an agency relationship. *Solorzano*, 243 N.E.3d at 272. But branding is not considered in isolation; in the medical-malpractice context, a patient's acknowledgment that a provider is an independent contractor and not employed by the hospital generally forecloses apparent-agency liability. *Id.* at 267. Accordingly, whether branding reasonably creates an appearance of agency must be considered together with information supplied to the patient concerning the provider's actual relationship with the hospital. *Id.* at 272-273.

In *Solorzano*, the hospital's website described its orthopedic specialists as "our team" and "our compassionate physicians." *Id.* Additionally, the plaintiff's treating physician maintained an office in the hospital's professional building, had been issued a hospital badge, and had held senior leadership positions including chairman of the orthopedics department and president of the hospital's medical staff. *Id.* The plaintiff also entered the physician's office through the hospital's main entrance after receiving a referral identifying his location as "West Suburban Hospital." *Id.* at 275-76. The court held that these circumstances created a genuine issue of material fact as to apparent agency because neither the hospital nor the physician expressly informed the plaintiff that the physician was not a hospital employee. *Id.* at 274. Although the plaintiff signed a consent form identifying "Romano Orthopaedics, LLC," the form did not state who employed the providers or expressly disclaim an employment relationship with the hospital. *Id.* at 273-74. The court therefore found the form ambiguous and declined to require an ordinary patient to infer the physician's employment status from a separate corporate name. *Id.* at 274. Considering that ambiguity alongside the hospital's advertising, signage, referral materials, physician affiliations,

and absence of any contrary disclaimer, the court concluded that a factfinder could find that the plaintiff justifiably relied on the hospital holding the physician out as its agent. *Id.* at 274.

Raymond similarly involved representations that affirmatively associated the patient's treatment with the hospital without clearly identifying the treating physician as independent. The hospital's consent form prominently displayed the hospital logo and stated, "I wish to receive medical care and treatment at Wilcox Memorial Hospital," while authorizing hospital services directed by the patient's physicians. *Raymond v. Wilcox Mem'l Hosp.*, 403 F. Supp. 3d 868, 884-85 (D. Haw. 2019). The treating physician also never informed the plaintiff that he was not a hospital employee. *Id.* at 885. The court found sufficient evidence for the jury to conclude that the plaintiff reasonably believed the physician was the hospital's agent because the hospital's own representations presented the physicians and hospital as part of the same system. *Id.* at 884-85. Critically, the only language addressing physician employment stated merely that "not all physicians are employees of this medical facility." *Id.* at 885. Rather than clearly identifying the plaintiff's physician as independent, that use of the hospital logo combined with the ambiguous statement could suggest that most physicians were hospital employees. *Id.* Thus, the patient could reasonably rely on the hospital's affirmative representations because nothing clearly informed him that his particular physician was not the hospital's agent. *Id.*

MHS's branding is Respondent's strongest fact, but *Solorzano* demonstrates why branding cannot be isolated from the information MHS actually provided Mr. Miller. MHS exclusively controlled the telehealth platform's patient-facing interface, displayed its branding throughout the platform, prohibited CCS branding, and required patients to enter through MHS's primary domain. *R.* at 4. But unlike the hospital in *Solorzano*, MHS did not leave Miller to infer Cyber MD's status from a separate corporate name or unexplained organizational structure. The Terms and Conditions

expressly stated that clinical evaluations and diagnostic interpretations could be performed by “automated software applications developed by another company” and, more importantly, that “[t]he physicians and software are not employees or agents of Metropolitan Health System.” R. at 4-5. Those same terms further stated that MHS exercised no operational control over the diagnostic methods used by the automated software. R. at 5. Mr. Miller accessed that disclosure on April 9, 2018, before initiating his first Cyber MD session. R. at 5. Thus, although MHS’s branding could initially suggest affiliation, the ambiguity that drove the result in *Solorzano* is absent here: MHS expressly explained the precise relationship that *Solorzano* found had never been disclosed.

Raymond reinforces the same distinction. There, the hospital’s branded form affirmatively told the patient he would receive treatment “at Wilcox Memorial Hospital,” while its supposed disclaimer merely stated that “not all physicians” were hospital employees and never identified the plaintiff’s physician as independent. Here, MHS’s disclosure did not vaguely warn that some providers might be independent; it specifically stated that automated software providing diagnostic services was developed “by another company” and that the software was “not [an] employee or agent” of MHS. R. at 4-5. Cyber MD also separately required Miller to accept a conspicuous pop-up stating in red, 16-point font that “Cyber MD is not a licensed health care professional” and “is an artificial intelligence software program” before he could proceed. R. at 5. Miller thereafter initiated his consultation directly with Cyber MD, which ordered and interpreted his imaging and communicated its own diagnostic conclusions. R. at 6. Accordingly, unlike *Raymond*, the branding here did not stand alone: MHS accompanied that branding with direct information distinguishing the diagnostic software from MHS and expressly disclaiming the very agency relationship Respondent now asserts.

Therefore, because apparent agency requires consideration of the hospital's representations as a whole, MHS's branding cannot establish reasonable reliance where MHS expressly informed Mr. Miller that the diagnostic software was developed by another company and was not MHS's employee or agent.

3. *Simmons County's limited healthcare alternatives may explain why Mr. Miller used MHS's platform, but it does not establish that he reasonably believed Cyber MD was MHS's agent.*

In medical malpractice cases involving apparent agency, a patient's limited ability to choose among physicians or hospitals does not eliminate the requirement to establish reasonable reliance on the alleged principal's representations. *Wallace*, N.E.2d at 496-97. The plaintiff must present evidence that she "actually did rely on the apparent agency" alleged between the hospital and provider; without such evidence, the reliance element is not satisfied. *Id.* at 500. Although reliance may be established when a patient relies on a hospital to provide complete emergency care rather than upon a particular physician, *Monti v. Silver Cross Hosp.*, 637 N.E.2d 427, 430 (Ill. App. Ct. 1994) (quoting *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 796 (Ill. 1993)), an apparent-agency claim may nevertheless be defeated when the patient knew or should have known that the provider was independent. *Wallace*, N.E.2d at 496-97.

In *Wallace*, a fourteen-year-old was transported by ambulance to the defendant hospital following a serious automobile accident, and treatment began before her mother arrived. *Id.* at 492. The mother later signed a consent form expressly stating that the attending and consulting physicians were independent contractors, were not hospital employees or agents, and that the hospital was not responsible for their services. *Id.* She argued that because emergency personnel selected the hospital and brought her daughter there for treatment, her reliance on the hospital itself

rather than on any particular physician was sufficient to establish apparent agency. *Id.* at 500. The court affirmed summary judgment for the hospital because the plaintiff failed to establish the reliance required for apparent agency. *Id.* at 500-01. The court emphasized that merely seeking treatment from the hospital, even during extenuating circumstances, did not itself establish that the plaintiff “actually did rely on the apparent agency” between the hospital and the physicians. *Id.* at 500. Moreover, the consent form clearly identified the physicians as independent contractors and stated that the hospital was not responsible for their services, placing the plaintiff on notice of their independent status. *Id.* at 496. Thus, even though emergency personnel selected the hospital, the plaintiff’s knowledge actual or constructive of the physicians’ independent status made any reliance on an agency relationship unreasonable. *Id.* at 495-96.

In *Monti*, the patient suffered a serious head injury, was rendered unconscious, and was transported by ambulance to the nearest hospital for emergency treatment. *Monti*, 637 N.E.2d at 428, 430. Because she could not select the hospital or any particular physician, the court considered whether reliance could still be inferred from the circumstances surrounding her emergency care. *Id.* at 430. The court reversed summary judgment for the hospital, holding that a jury could find justifiable reliance where those responsible for an unconscious emergency patient relied on the hospital to provide the complete range of diagnostic and treatment services the patient required. *Id.* The court emphasized that emergency personnel selected the hospital because it was the nearest facility and that the patient’s husband thereafter relied on the hospital for her continuing care. *Id.* In that emergency setting, the patient had no meaningful opportunity to evaluate providers or make an informed treatment choice. *Id.* Accordingly, the court permitted reliance to be inferred from the hospital’s role in furnishing complete emergency care. *Id.*

Like the plaintiff in *Wallace*, Mr. Miller may have relied on MHS generally as the institution through which he could obtain medical care, but that does not establish reliance on a belief that Cyber MD was MHS's agent. Simmons County's severe healthcare shortage made MHS's telehealth platform a practical means of obtaining care, particularly where both local hospitals had closed, no urgent-care or permanent imaging facilities remained, and the nearest in-person radiology and CT services were approximately 190 miles away. R. at 3-4. But *Wallace* makes clear that seeking care through a hospital, rather than independently selecting a particular provider, does not by itself establish the reliance necessary for apparent agency. Mr. Miller's limited alternatives may explain why he used MHS's platform, but they do not show that he believed Cyber MD was acting on MHS's behalf. Before treatment, MHS explicitly disclosed that the diagnostic software was developed by another company, was not MHS's agent, and operated independently of MHS's clinical control. R. at 5. Miller accessed those Terms and separately accepted a warning identifying Cyber MD as artificial intelligence rather than a licensed healthcare professional. R. at 5. Thus, healthcare scarcity may explain Miller's reliance on MHS for access to care, but it does not establish reliance on an agency relationship or erase the information presented that distinguished Cyber MD from MHS.

Further, the ruling in *Monti* does not extend that inference to Miller's circumstances. Mr. Miller lived in a medically underserved county with severely limited healthcare options: Simmons County had lost more than seventy-five percent of its healthcare professionals, had no hospitals, no urgent-care facilities, and no permanent diagnostic imaging centers, and the nearest facility offering in-person radiology consultations and CT scans was approximately 190 miles away. R. at 3-4. Those facts undeniably constrained his options, but Mr. Miller was not an unconscious emergency patient transported by ambulance to the nearest available hospital. Instead, he was

experiencing shortness of breath and personally logged into MHS's telehealth platform, where he initiated a Cyber MD session himself. R. at 6. Unlike the patient in *Monti*, Mr. Miller had the ability to review and agree to the information presented through the platform before proceeding.

That distinction matters because *Monti* permitted reliance to be inferred from the necessity of obtaining immediate emergency care when the patient could not meaningfully choose the hospital or providers. Mr. Miller's limited access to local healthcare may explain why telehealth was an attractive or practical option, but it did not place him in the same emergency posture. Before treatment, Mr. Miller opened MHS's Terms which stated that automated software applications could be developed by another company, expressly stated that such software was not an employee or agent of MHS, and stated that MHS exercised no operational control over its diagnostic methods. R. at 5. He also encountered a separate red, 16-point warning stating that Cyber MD was not a licensed healthcare professional but an artificial intelligence software program. R. at 5. Unlike *Monti*, Mr. Miller's limited healthcare options may explain where he sought care, but they did not prevent him from receiving information identifying who, or what, was providing it. Accordingly, the scarcity of alternatives cannot substitute for evidence that Mr. Miller actually and reasonably believed Cyber MD was acting as MHS's agent.

Accordingly, Respondent cannot convert Mr. Miller's limited access to healthcare into proof sufficient enough to establish the distinct reliance required to show that he reasonably believed Cyber MD was MHS's agent.

II. PLAINTIFF’S CLAIMS ARE BARRED BY SHAWNEE’S STATUTES OF REPOSE BECAUSE NEITHER CONTINUOUS TREATMENT NOR THE UNDISCOVERABLE NATURE OF THE ALLEGED INJURY EXTENDS THE REPOSE PERIOD.

Respondent’s position asks this Court to expand the Shawnee Legislature’s carefully defined exceptions to otherwise absolute four-year statutes of repose beyond the circumstances the Legislature expressly authorized. Sn. Rev. Stat. § 12-404(b) provides that a healthcare-malpractice claim must be brought within two years of discovery, but “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 in such action to have been the cause of such injury or death.” R. at 14. Although the Legislature expressly provided an exception for a “continuous course of treatment,” Respondent cannot transform Cyber MD’s discrete annual evaluations into continuous treatment merely to avoid the statute’s four-year bar. R. at 24. The Legislature similarly imposed a four-year period of repose for strict-products-liability claims under Sn. Rev. Stat. § 12-410(a), subject only to specifically enumerated exceptions. It is undisputed that Respondent commenced this action more than four years after the alleged act or omission giving rise to the malpractice claim and more than four years after the triggering event specified in § 12-410(a). Because Respondent cannot satisfy the statutory requirements of either claimed exception, both causes of action are barred. Moreover, even if Respondent establishes § 12-410(b)(3)’s undiscoverability exception, § 12-402 cannot revive an underlying claim that the trial court determined § 12-404 had already extinguished before Mr. Miller’s death. R. at 12-13. Holding otherwise would not merely apply the exceptions enacted by the Legislature; it would expand them beyond their text and undermine the finality the statutes of repose were enacted to provide.

A. Cyber MD’s annual diagnostic screenings do not constitute a continuous course of treatment under Sn. Rev. Stat. § 12-404(b).

Sn. Rev. Stat. § 12-404(b) bars healthcare-malpractice claims brought more than four years after the alleged act or omission unless the healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition giving rise to the negligence claim. R. at 14. Here, Cyber MD’s annual diagnostic screenings lack the affirmative treatment and continuity necessary to constitute a continuous course of treatment. Rather, the screenings were discrete diagnostic encounters separated by twelve-month intervals. Accordingly, Respondent cannot invoke § 12-404(b)’s continuous-treatment exception to avoid the four-year statute of repose.

1. A continuous course of treatment requires affirmative and ongoing medical care for an identified condition.

Courts applying the continuous-treatment doctrine distinguish affirmative and ongoing treatment from a mere continuing physician-patient relationship or periodic diagnostic examinations. *Gomez v. Katz*, 61 A.D.3d at 112. In *Gomez*, the court explained that the term “course of treatment” speaks to affirmative and ongoing conduct by the physician, such as surgery, therapy, or the prescription of medication. *Id.* In *Grey v. Stamford Health Sys., Inc.*, the Connecticut Supreme Court held that a patient’s return for annual mammograms did not constitute a continuous course of treatment, even though a radiologist allegedly failed to detect the patient’s cancer during an earlier examination. 282 Conn. at 764. These authorities distinguish affirmative treatment of an identified condition from periodic diagnostic examinations intended to determine

whether a condition exists. Thus, recurring diagnostic examinations do not constitute a continuous course of treatment merely because the patient returns to the same provider for repeated screenings.

2. *Cyber MD’s annual diagnostic screenings were discrete examinations rather than affirmative and ongoing treatment.*

Routine annual diagnostic examinations conducted solely for screening purposes do not constitute affirmative and ongoing treatment under the continuous-treatment doctrine. *Chalifoux v. Radiology Assocs. of Richmond, Inc.*, 281 Va. 690, 699 (2011). In *Chalifoux*, the court held that because the mammograms were conducted for screening purposes only, there was “no indication that the radiologists were engaged in any active consultation with the gynecologist or in the ongoing treatment of appellant for any specific condition.” *Id.* (quoting *Baker v. Radiology Assocs.*, 35 S.W.3d 354, 359 (Tenn. 2000)).

Similarly, in *Grey v. Stamford Health Sys., Inc.*, the court declined to apply the continuous-treatment doctrine where the plaintiff exhibited no suspicious symptoms, received no ongoing treatment for a particular breast condition, and underwent only routine breast-cancer screening examinations during regular medical checkups. *Grey*, 282 Conn. at 764. The court reasoned that routine periodic examinations, unlike treatment for an identified condition, have no natural termination point culminating in a cure. *Id.* Applying the continuous-treatment doctrine to such routine examinations would therefore undermine the doctrine’s purpose and risk allowing the exception to “swallow the rule.” *Id.*

Respondent will likely argue that Cyber MD’s mandatory annual follow-up protocol establishes continuity because Cyber MD itself directed Mr. Miller to return each year for additional imaging. But that argument conflates continuity of diagnostic monitoring with

continuity of treatment. The relevant inquiry is not merely whether successive encounters were contemplated in advance, but whether those encounters constituted an ongoing course of treatment for the condition giving rise to the alleged negligence. A predetermined schedule may establish a continuing relationship between provider and patient, but it does not alter the nature of the care actually rendered. Where each encounter remains a discrete diagnostic screening rather than affirmative treatment, scheduling the next screening in advance cannot alone transform those examinations into a continuous course of treatment.

The same reasoning applies here. Respondent's characterization of Cyber MD's encounters as "ongoing clinical management" elevates the scheduling of repeated diagnostic examinations over the substance of the care actually rendered. After the initial evaluation, Mr. Miller returned only once each year in 2019, 2020, and 2021, when Cyber MD reviewed new mobile scans and reaffirmed its prior diagnostic assessment. R. at 6. Although Cyber MD established an annual follow-up imaging protocol, that protocol established only the frequency of future screening; it did not transform those screenings into affirmative treatment for a condition that Cyber MD had not diagnosed. Like the screening examinations in *Chalifoux* and *Grey*, Cyber MD's annual encounters consisted of diagnostic imaging and reassessment rather than affirmative treatment of an identified disease.

Indeed, Cyber MD could not have been continuously treating Mr. Miller for the disease giving rise to this action while simultaneously concluding during each annual screening that Mr. Miller did not have that disease. The twelve-month intervals between those encounters further demonstrate that Mr. Miller underwent periodic diagnostic surveillance rather than a continuous course of treatment. Indeed, the trial court characterized the encounters as "separate, discrete, and independent diagnostic screenings spaced twelve months apart," rather than an "active, continuous

treatment regimen for a known disease.” R. at 12. Respondent’s interpretation would also undermine the finality that § 12-404’s repose period is designed to provide. If routine annual screening constitutes continuous treatment merely because a provider recommends that the patient return the following year, the repose period could remain open indefinitely for patients who undergo recurring preventive examinations. Such a rule would leave no meaningful endpoint for a “course of treatment” and would risk allowing the continuous-treatment exception to swallow the Legislature’s four-year rule. *See Grey*, 282 Conn. at 764.

This result would also conflict with the repose statute’s purpose of providing “absolute economic certainty to healthcare systems and device manufacturers.” R. at 12. Accordingly, Cyber MD’s annual diagnostic screenings fall squarely within the type of periodic examinations that *Chalifoux* and *Grey* distinguish from continuous treatment and therefore do not satisfy § 12-404(b)’s continuous-course-of-treatment exception.

B. The undiscoverable nature of Respondent’s alleged injury does not satisfy an exception to the four-year statute of repose under Sn. Rev. Stat. § 12-410(a).

Section 12-410(b)(3) creates a limited exception to Shawnee’s four-year product-liability statute of repose where the injury-causing aspect of a product existing at delivery could not have been discovered by an ordinarily reasonably prudent person within four years. R. at 14. Respondent contends that Cyber MD’s alleged algorithmic defect satisfies that exception because the defect remained undiscoverable until 2023. R. at 26-27. But even assuming the alleged defect falls within § 12-410(b)(3), the exception does not independently revive a product-liability action barred by the underlying limitations provisions incorporated through Shawnee law. As the trial court recognized, Respondent’s underlying diagnostic claim was already barred under § 12-404 before

this action was commenced in July 2024. R. at 12-13. Accordingly, § 12-410(b)(3) cannot preserve Respondent’s otherwise untimely product-liability claim.

1. Statutes of repose operate independently of a Respondent’s ability to discover an injury.

Unlike statutes of limitations, statutes of repose impose an absolute deadline for bringing a claim, independent of whether the plaintiff has discovered the injury or whether the cause of action has accrued. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8–9 (2014). A statute of repose therefore “effect[s] a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.” *Id.* at 9. Thus, a statute of repose may expire before a plaintiff discovers the injury or even before the plaintiff’s cause of action accrues. *Id.* at 8–9; *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505–06 (2017).

In *Kerns*, a six-year-old child suffered catastrophic injuries after climbing a five-foot chain-link fence surrounding a swimming pool and nearly drowning. *Kerns*, 875 P.2d at 953-54. The plaintiff alleged that the fence’s two-to-three-inch mesh, although intended to keep children out, actually made the fence easier to climb, and he relied in part on evidence that numerous reports concerning the danger of such fencing emerged in the late 1980s. *Id.* at 957. The plaintiff nevertheless admitted that the allegedly defective large-mesh configuration existed when the fence was installed in 1968 or 1969. *Id.* at 955, 957. The court held that the statute of repose barred the claim because the injury-causing feature was reasonably discoverable when the fence was installed, regardless of the later reports discussing its danger. *Id.* at 957. The relevant question was whether the large-mesh characteristic itself existed and could be appreciated by a reasonably prudent person at delivery. *Id.* Because that physical feature was present and observable from the

outset, later publications identifying or discussing the hazard did not establish that the defect had previously been undiscoverable. *Id.* The court therefore treated later recognition of the danger as distinct from the earlier objective existence and discoverability of the defect itself. *Id.*

Kerns reinforces the same point. The plaintiff there relied on reports issued years after the fence was installed, but those later reports did not determine when the dangerous feature became discoverable because the large-mesh condition already existed and was observable when the fence was installed. Likewise, CCS's 2022 determination that pleural shadowing reduced Cyber MD's accuracy among asbestos-exposed patients was a later characterization of a diagnostic problem that had already manifested itself in Mr. Miller's scans. R. 5-6. Mr. Miller disclosed his extensive occupational asbestos history to Cyber MD in 2018. R. 6. Cyber MD ordered and interpreted chest imaging in response to his symptoms and exposure history, yet reported no malignancy despite the visible lesion. R. 6. The same discrepancy recurred as the lesion enlarged over multiple years of imaging. R. 6. Moreover, Cyber MD expressly warned users before each session that it was "not a licensed health care professional" but an artificial-intelligence software program. R. 5. Although Cyber MD referred Mr. Miller to a local practitioner for inhaler management after the 2018 evaluation, the record contains no indication that he obtained an independent professional review of the scans or sought another diagnostic interpretation before Cyber MD ultimately advised him in 2021 that annual imaging was no longer necessary. R. 6. Accordingly, the fact that CCS itself did not formally isolate and describe the asbestos-related accuracy problem until 2022 does not establish that the diagnostic failure was objectively undiscoverable before then.

That distinction between a statute of limitations and a statute of repose is especially important here. Section 12-410(a) measures Shawnee's four-year repose period from an objective event: the "first sale, lease, or delivery of possession" of the product to its initial user or consumer.

Sn. Rev. Stat. § 12-410(a). MHS integrated Cyber MD into its telehealth platform on March 1, 2017. R. at 5, 11. The trial court therefore determined that the four-year product-liability repose period expired in 2021, approximately three years before Plaintiff commenced this action in July 2024. R. at 11.

Respondent cannot avoid that statutory deadline merely by alleging that Cyber MD’s defect remained unknown until after the repose period expired. That circumstance is precisely what distinguishes a statute of repose from a statute of limitations. The relevant inquiry is therefore not whether Respondent actually discovered the alleged defect within four years of Cyber MD’s delivery. Rather, because § 12-410(b)(3) creates an express exception to an otherwise expired repose period, Respondent must establish that the alleged injury-causing aspect of Cyber MD satisfies the specific conditions the Legislature chose to include in that exception. *See Ocasek v. City of Chi.*, 275 Ill. App. 3d 628, 632 (1995).

2. *Respondent cannot satisfy § 12-410(b)(3) merely by showing that Cyber MD’s defect was not actually discovered within four years.*

Section 12-410(b)(3) does not inquire whether a product’s alleged defect was actually discovered within four years of delivery. Instead, it asks whether the “injury-causing aspect of the product” existing 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.” Sn. Rev. Stat. § 12-410(b)(3). R. at 14. Courts interpreting materially identical statutory language apply an objective inquiry into whether the injury-causing aspect of the product was discoverable by a reasonably prudent person. *Kerns ex rel. Kerns v. G.A.C., Inc.*, 255 Kan. at 273; *Baumann*, 17 Kan. App. 2d 818–19. Actual nondiscovery establishes only that the alleged defect was not identified during the repose period;

it does not establish that the defect was incapable of discovery through ordinary prudence. Because Plaintiff bears the burden of establishing that the repose bar does not defeat the claim, Plaintiff must demonstrate more than the fact that Cyber MD's alleged defect remained unknown. *See Ocasek*, 275 Ill. App. 3d at 632. Respondent must establish that the injury-causing aspect of Cyber MD was objectively undiscoverable within the statutory period.

Arnold illustrates the circumstance in which an injury-causing aspect truly is undiscoverable through ordinary inspection or prudent use. There, a high-school quarterback wearing a Riddell PAC-3 football helmet suffered a spinal fracture resulting in permanent quadriplegia after a head-first collision during a football game. *Arnold v. Riddell, Inc.*, 882 F. Supp. 979, 985–86 (D. Kan. 1995). Testing showed that the PAC-3 performed twenty to fifty percent worse on crown impacts than other helmets and that adding only one-eighth of an inch of additional energy-attenuating padding improved performance by twenty percent or more. *Id.* at 986. The court held that the statutory exception applied because the injury-causing defect in the helmet's padding system was not reasonably discoverable by an ordinary user. *Id.* at 988–89. Neither inspection nor normal prudent use would reveal the inadequate energy management of the helmet's internal padding system. *Id.* at 988. Instead, discovering the defect required biomechanical engineers using sophisticated testing equipment such as accelerometers and even cadavers to measure forces and evaluate the effects of crown impacts on the human body. *Id.* Thus, the defect in *Arnold* was functionally undetectable without specialized experimentation and undiscoverable by the ordinary prudent person. *Id.*

Cyber MD presents a materially different circumstance. The Court of Appeals treated Miller's inability to inspect Cyber MD's proprietary source code as evidence that the injury-causing aspect of the product was objectively undiscoverable. The court reasoned that because

Cyber MD operated within CCS's proprietary cloud infrastructure and neither Mr. Miller nor his treating providers could inspect its source code, they could not discover the alleged algorithmic flaw through ordinary prudence. R. at 26–27. But § 12-410(b)(3) does not ask whether the consumer could identify the precise technical mechanism responsible for a product's defective performance. Rather, its text asks whether the “injury-causing aspect” of the product was discoverable. Sn. Rev. Stat. § 12-410(b)(3). R. at 14. Thus, the proper inquiry is whether Cyber MD's allegedly deficient diagnostic performance in asbestos-exposed patients was objectively discoverable, not whether Mr. Miller could personally locate or understand the coding error allegedly responsible for that deficiency.

Here, the alleged injury-causing deficiency manifested itself in the diagnostic results Cyber MD produced. Mr. Miller returned for annual Cyber MD evaluations in May 2019, May 2020, and June 2021, and each time Cyber MD reviewed newly obtained scans and again reported “zero evidence” of disease. R. 6. The lesion, however, grew continuously from the 7 mm abnormality visible in 2018 to 47 mm by 2021. R. 6. After the 2021 evaluation, Cyber MD went even further and advised Mr. Miller that annual imaging was no longer necessary. R. 6. Unlike *Arnold*, no sophisticated experiment on Cyber MD's source code was necessary to reveal the alleged injury-producing failure because the software's diagnostic conclusions could be compared directly against the underlying scans on which those conclusions were based. The issue, therefore, was not whether the internal coding mechanism could be identified, but whether Cyber MD's deficient diagnostic performance could have been detected through ordinary prudence.

CCS's later discovery does not establish otherwise. In 2022, CCS discovered that Cyber MD's diagnostic accuracy had declined to approximately eighty-five percent when evaluating patients with prior occupational asbestos exposure and thereafter retrained the software. R. at 5–

6. That evidence establishes when CCS actually discovered and characterized Cyber MD's diminished diagnostic accuracy; it does not establish when that deficiency first became discoverable through ordinary prudence. Section 12-410(b)(3) makes the latter inquiry controlling. *See Kerns*, 255 Kan. at 273; *Baumann*, 17 Kan. App. 2d at 818–19. Respondent has not established that detecting Cyber MD's diminished accuracy required access to or understanding of its proprietary source code, nor has Plaintiff established that reasonably prudent evaluation of Cyber MD's diagnostic performance could not have revealed that deficiency within four years of delivery.

Respondent therefore relies on evidence of actual nondiscovery to establish objective undiscoverability, but those concepts are not interchangeable under § 12-410(b)(3). Respondent's evidence shows that CCS did not actually discover Cyber MD's diminished accuracy until 2022 and that Mr. Miller and his treating providers lacked access to the proprietary source code. R. at 5–6, 26. It does not establish that Cyber MD's diminished diagnostic performance was incapable of discovery through ordinary prudence within the statutory period. If actual nondiscovery were sufficient to establish statutory undiscoverability, a plaintiff could avoid the four-year repose period whenever a defect remained unknown during that period, regardless of whether ordinary prudence could have revealed the product's injury-causing aspect. That interpretation would transform § 12-410(b)(3)'s narrow exception into the very discovery rule that a statute of repose is designed to foreclose and substantially diminish the finality provided by § 12-410(a). The Legislature instead chose an objective standard, preserving an exception only when the injury-causing aspect “was not discoverable by an ordinary reasonably prudent person.” Sn. Rev. Stat. § 12-410(b)(3). R. at 14. Because Respondent has not carried its burden of establishing § 12-410(b)(3)'s exception, the four-year repose period bars the product-liability claim.

3. *Even if Respondent satisfies § 12-410(b)(3), § 12-402 cannot revive a claim already extinguished by Shawnee’s healthcare-malpractice statute of repose.*

Even assuming that Respondent establishes the § 12-410(b)(3) exception by demonstrating that Cyber MD’s defect was undiscoverable, that establishes only that § 12-410(a)’s four-year product-liability repose period does not apply. This answers only whether § 12-410(a) bars Respondent’s claim; it does not establish that Respondent has otherwise brought a timely claim. The trial court expressly addressed this alternative and concluded that, even if § 12-410(b)(3) exempted Respondent’s claim from § 12-410(a)’s repose period, the claim remained subject to the applicable personal-injury or wrongful-death limitations periods under § 12-402. R. at 12-13. Specifically, the trial court explained that “even if the latent defect fell within the statutory exception of § 12-410(b)(3), a product liability cause of action must still be commenced within the underlying personal injury or wrongful death limitations period set forth in § 12-402.” R. at 12. The court further concluded that Mr. Miller’s underlying diagnostic claims had already been extinguished under § 12-404’s four-year repose period in April 2022. R. at 12-13. The Court of Appeals nevertheless concluded that § 12-402(b) rendered Respondent’s action timely because Mr. Miller died in April 2024 and Respondent commenced this action in July 2024. R. at 26-27. That conclusion fails to address whether Mr. Miller’s death could revive an underlying claim that had already been extinguished by repose approximately two years earlier.

Other state supreme courts addressing the interaction between statutes of repose and subsequently arising claims have recognized the distinction that the Court of Appeals overlooked. In *Firestone Tire & Rubber Co. v. Acosta*, the decedent was killed in 1987 when a multi-piece rim and wheel assembly exploded, and his estate subsequently brought a wrongful-death action against the manufacturers. The product had been delivered in 1966, and Florida’s then-existing twelve-

year product-liability statute of repose expired in 1978, although the legislature later repealed that statute in 1986. 612 So. 2d 1361, 1362–63 (Fla. 1992). The Florida Supreme Court held that the later repeal could not revive the claim because the statute of repose had already extinguished the cause of action before it accrued; once the repose period expired, the defendants acquired a vested right not to be sued. *Id.* at 1363–64.

Similarly, in *Lawler*, the decedent timely filed a medical-malpractice action based on treatment occurring between 2007 and 2009 but died in November 2013, after the applicable four-year statute of repose had expired. Her daughter subsequently amended the pending action to add a wrongful-death claim arising from the same alleged malpractice. *Lawler*, 2017 IL 120745, ¶¶ 3–6. The Illinois Supreme Court held that the wrongful-death claim was not barred because the original malpractice action had been timely filed and the later wrongful-death claim related back to that pending action. *Id.* ¶¶ 20–27. Critically, however, the court recognized that “[i]f plaintiff had filed an original complaint alleging a wrongful death cause of action at that time, it would have been barred by the statute of repose.” *Id.* ¶ 27.

Here, as in *Firestone*, the subsequent event on which Respondent relies occurred only after the relevant repose period had already expired. The trial court determined that § 12-404’s four-year repose period extinguished Mr. Miller’s underlying diagnostic claims in April 2022, approximately two years before Mr. Miller died in April 2024. R. at 11-13. *Lawler* further supports the trial court’s conclusion. Although the *Lawler* court permitted the wrongful-death claim to proceed, it did so because the decedent had timely filed her medical-malpractice action before the repose period expired, allowing the subsequent wrongful-death claim to relate back to an already-pending action. *Lawler*, 2017 IL 120745, ¶¶ 20–27. Mr. Miller, by contrast, had no action pending when the trial court determined that § 12-404’s repose period expired in April 2022. R. at 11-13.

Indeed, *Lawler* expressly recognized that an original wrongful-death complaint filed after expiration of the repose period would have been barred. *Lawler*, 2017 IL 120745, ¶ 27. The court likewise distinguished *Real v. Kim*, where the absence of a timely pending action prevented the plaintiff from avoiding the repose bar. *Lawler*, 2017 IL 120745, ¶ 30 (discussing *Real v. Kim*, 112 Ill. App. 3d 427, 434 (1983)).

Unlike the plaintiff in *Lawler*, Respondent had no timely action pending when § 12-404's repose period expired in April 2022. R. at 11-13. Mr. Miller did not die until April 2024, and Respondent did not commence this action until July 2024. R. at 7. Thus, there was no timely action to which Respondents subsequently arising wrongful-death claim could relate back. Respondent's filing may have occurred within § 12-402(b)'s two-year limitations period measured from Mr. Miller's death, but compliance with that limitations period does not resolve whether an underlying cause of action remained viable when Mr. Miller died.

As discussed above, a statute of limitations governs the time within which a viable claim must be brought, whereas a statute of repose terminates liability after the legislatively prescribed period regardless of accrual. *CTS Corp.*, 573 U.S. at 8–9. The Court of Appeals therefore conflated two analytically distinct questions: whether Respondent filed within § 12-402(b)'s limitations period and whether a viable underlying claim remained when that limitations period began to run. The Court of Appeals effectively treated § 12-402(b)'s two-year limitations period as reviving liability that the trial court determined § 12-404 had already extinguished approximately two years before Mr. Miller's death. Neither the statutory framework nor the foregoing authorities support treating § 12-402(b)'s limitations period as a revival provision. Allowing a subsequently arising limitations period to revive liability already extinguished by repose would likewise defeat the certainty that repose is intended to provide, because defendants could again become subject to

liability years after the Legislature declared that exposure terminated. *See Firestone*, 612 So. 2d at 1363–64. R. at 12. Accordingly, even if this Court concludes that § 12-410(b)(3) exempts Respondent’s product-liability claim from § 12-410(a)’s four-year repose period, § 12-402(b) does not revive the underlying claim that the trial court determined § 12-404 had already extinguished. The court of appeal’s judgment should therefore be reversed.

CONCLUSION

This case requires the application of established principles of apparent agency and statutory repose to a new technological setting. MHS cannot be held vicariously liable for Cyber MD’s diagnostic errors because Mr. Miller was expressly informed of Cyber MD’s independent status before receiving diagnostic care and therefore cannot establish the holding out or reasonable reliance necessary for apparent agency. Likewise, Respondent cannot avoid Shawnee’s four-year statutes of repose because Cyber MD’s discrete annual diagnostic screenings did not constitute a continuous course of treatment, and the alleged undiscoverability of Cyber MD’s algorithmic defect cannot preserve claims otherwise extinguished by the applicable repose periods. Accordingly, Petitioners respectfully ask this Court to reverse the judgment of the Shawnee Court of Appeals and reinstate the Circuit Court’s grant of summary judgment in favor of Petitioners.

Respectfully submitted,

ATTORNEYS FOR PETITIONER