
NO. 26-338

IN THE

Supreme Court of Shawnee

NOVEMBER TERM 2026

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

Petitioners,

— *versus* —

**Evelyn MILLER, individually and as special administrator for the estate
of Elias Miller, deceased**

Respondent,

*On Writ of Certiorari to the
Shawnee Supreme Court*

BRIEF FOR THE PETITIONERS

CODE BLUEBOOK

Attorneys for the Petitioners

QUESTIONS PRESENTED

- I. Under the doctrine of apparent agency, did the Petitioner “hold out” an artificial intelligence software as its agent, and could a patient reasonably rely on an apparent agency relationship, where the platform conspicuously disclosed that the software was an independent contractor through a prominent hyperlink and a red pop-up, which appeared every time a patient sought care?
- II. Under Shawnee’s four-year Statutes of Repose, does the Respondent’s claim proceed due to tolling or extension when:
 - A. Cyber MD’s intermittent, diagnostic evaluations did not satisfy the Continuous Treatment Doctrine under Shawnee Revised Statute § 12-404; or
 - B. The exceptions in Shawnee Revised Statute § 12-410—the alleged latent, un-discoverable nature of the algorithmic flaw—is deemed irrelevant and subsequent retraining is inadmissible to prove liability.

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OPINIONS BELOW

The unreported Opinion of the Circuit Court for the state of Shawnee in *Evelyn Miller v. Metropolitan Health Systems, Inc.*, Case No. 25–L–24601 (Mar. 6, 2025) is contained in the Record of Appeal on Pages one through twelve. The Circuit Court GRANTED Metropolitan Health System’s Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. The Court entered judgment in favor of Defendants and DISMISSED WITH PREJUDICE Plaintiffs’ complaint. The unreported opinion of the Shawnee Court of Appeals for the Second District in *Evelyn Miller v. Metropolitan Health Systems, Inc.*, Case No. 25–123 (Feb. 24, 2026) is contained on Pages thirteen through twenty-five of the Record of Appeal. The Appellate Court REVERSED the order of the Circuit Court and REMANDED the case for further proceedings.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are important to this proceeding: Shawnee Revised Statute § 12-402, § 12-404, § 12-410, Federal Rule of Civil Procedure 56, and Federal Rule of Evidence 407. Other relevant authorities and sources include the Occupational Health and Safety Association’s regulations and rulings and specific, peer-reviewed studies by Mayo Clinic.

STATEMENT OF THE CASE

STATEMENT OF FACTS

In 2015, the only two hospitals that served Simmons County shut down, and in 2016, the Cartersville steel mill closed. R. at 18. As a result, more than seventy-five percent of private physicians relocated out of the county, prompting the federal government to designate Simmons County as a medical shortage area. R. at 15. In response to the regional healthcare deficit, Metropolitan Health System (“MHS”), launched a remote telehealth portal partnering with Cyber-Care Solutions (CCS) to expand clinical access to Simmons County residents. R. at 18. MHS still maintained comprehensive, in-person facilities, and radiology services were fully operational and available for patients at MHS’s medical center in Goshen, approximately 190 miles away from Simmons County. R. at 18. On the telehealth portal, MHS offered access to an Artificial Intelligence software, Cyber MD, that was owned and operated by CCS. Cyber MD would be able to communicate with patients and provide diagnostics, an alternative for Simmons County residents from having to travel 3.5 hours to receive medical care. R. at 18, 19.

Among the Simmons County residents affected by the closure was Elias Miller, a sixty-eight-year-old retired industrial maintenance technician who had spent forty-six years working at a steel plant. R. at 17, 18. Mr. Miller’s work operating machinery in the steel plant exposed him to asbestos. R. at 17, 18. However, the record does not contain any indication that he suffered from any cognitive deficits or incapacity. See R. Because he was experiencing shortness of

breath, Mr. Miller sought annual, preventive chest screenings from 2018 to 2021. R. at 20.

Because Simmons County had no operating hospitals nearby, Mr. Miller resorted to Cyber MD and MHS's services for these screenings. R. at 18, 19. Mr. Miller would get local imaging from a third-party mobile radiology scanner that traveled to Mr. Miller's area. R. at 20. Mr. Miller then would upload the scans to Cyber MD's platform and receive diagnoses from the Artificial Intelligence software that was available. R. at 20.

While MHS hosted the portal under its domain and displayed its hospital logo, MHS did not employ CCS. R. at 18, 19. Directly under the login box that popped up when accessing the platform, the web page presented a notice stating, "By entering the portal, I accept the MHS Terms and Conditions." R. at 18. The phrase "Terms and Conditions" was displayed in a high-contrast, underlined blue text, which when clicked would lead to a thirty-four-page document on a separate page, where the Terms and Conditions were displayed. R. at 18–19. The Terms and Conditions explicitly disclosed the nature of the relationship between MHS and Cyber MD, stating:

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

R. at 19.

Additionally, MHS incorporated a notice in a red, sixteen-point font that would pop-up before every virtual session a patient would enter. R. at 19. The patients would have to click “Accept” on the following notice before entering any session:

Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.

R. at 19.

On April 9, 2018, Mr. Miller logged onto the portal for his first scan evaluation through this software. R. at 20. Digital audit logs confirm that Mr. Miller clicked the Terms and Conditions hyperlink on the login page for four seconds before proceeding. R. at 19. Additionally, Mr. Miller clicked “Accept” on the pop-up notice every time he used Cyber MD. R. at 19. Over the next four years, Mr. Miller utilized the portal for annual screenings. R. at 20. Each of the four years that he logged onto the portal, Mr. Miller clicked “Accept” on the notice. R. at 19. During Mr. Miller’s first consultation, he shared his occupational history with Cyber MD and provided Cyber MD with scans obtained at the mobile radiology service. R. at 20. Cyber MD did not detect any malignancy and diagnosed Mr. Miller with adult-onset asthma. R. at 20. He was then referred to a local practitioner for his asthma and recommended to do annual follow-up imaging. R. at 20. During each of these subsequent yearly evaluations, Cyber MD analyzed Mr. Miller’s CT scans and generated reports, stating there was no evidence of any conditions or abnormalities. R. at 20.

In late 2023, Mr. Miller experienced a spontaneous pneumothorax, for which he received an in-person evaluation. R. at 20. This evaluation revealed that Mr. Miller had developed a malignant mass in his left lung. R. at 20. A retrospective clinical review of Mr. Miller's prior scans determined that the mass was visible on earlier CT scans, which Cyber MD failed to detect. R. at 20. Mr. Miller's condition deteriorated rapidly, and he passed away from complications of his pneumothorax on April 14, 2024. R. at 19–20.

NATURE OF PROCEEDINGS

The Circuit Court. Following Mr. Miller's death, the Respondent, Mr. Miller's wife, on behalf of Mr. Miller's estate, commenced a medical malpractice action against Metropolitan Health System and Cyber-Care Solutions in the Circuit Court of Simmons County. R. at 2. The complaint alleged that Cyber MD's artificial intelligence was negligent in failing to identify and report the cancer lesions on Mr. Miller's annual CT scans and claimed that MHS was vicariously liable under the doctrine of apparent agency. R. at 2. At the close of discovery, MHS moved for summary judgment on all claims pursuant to Rule 56. R. at 2, 13. MHS asserted they took no affirmative actions to "hold out" Cyber MD as an employed physician or agent, and that the sign-in wrap agreement and pre-session pop-up warnings provided conspicuous notice that Cyber MD was an independent contractor and a non-human artificial intelligence tool. R. at 8–10. Lastly, MHS claimed that the digital Terms and Conditions did not constitute an unconscionable contract of adhesion. R. at 10. Additionally, the Petitioners asserted that any claims were

strictly time-barred by Shawnee’s Statute of Repose, and that the Continuous Treatment Doctrine could not salvage these claims because the annual screenings did not constitute an ongoing course of treatment. R. at 10–11.

The Circuit Court granted summary judgment in favor of the Petitioners. R. at 13. First, the court held that all claims were extinguished by the statute of repose, ruling that annual diagnostics lack the continuity required to invoke the Continuous Treatment Doctrine. R. at 11–13. Regarding the vicarious liability claims, the Court also held that MHS’s hyperlinked terms and the pop-up warning provided clear notice that MHS disclaimed any apparent agency relationship, and that Mr. Miller’s reliance was not reasonable. R. at 8–12. Lastly, the Court agreed with MHS that the agreement was not unconscionable. R. at 12.

The Appellate Court. The Respondent appealed the Circuit Court’s entry of summary judgment to the Shawnee Court of Appeals. R. at 16. The Court of Appeals reversed the Circuit Court’s order, vacating summary judgment and remanding it for further proceedings. R. at 28.

The Court of Appeals based its reversal on three legal determinations. First, the Court held that because Simmons County was a medical shortage area, MHS possessed superior bargaining power that deprived Mr. Miller of meaningful choice, making the issue of whether the disclaimer was procedurally unconscionable an issue of material fact to be decided by a jury. R. at 24, 27. Similarly, the Court held that whether the disclaimers were legally sufficient to dispel apparent agency claims is an issue of fact. R. at 27. Lastly, the Court held that the circuit court

incorrectly interpreted the statute of repose and that the Continuous Treatment Doctrine could be applicable. R. at 26–27. MHS timely filed a Petition for a Writ of Certiorari, requesting that this Court review the decision of the Shawnee Court of Appeals. R. at 29. This Court granted the petition. R. at 29.

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of Shawnee’s Court of Appeals for the Second District because Shawnee’s Statutes of Repose and Limitations time-bar Respondent’s claims of personal injury and wrongful death stemming from healthcare malpractice and product liability. Further, this Court should affirm Simmons County Circuit Court holding to grant Petitioner’s Motion for Summary Judgment because Metropolitan Health Systems has legally acted within their rights to contract to Cyber-Care Solutions to provide medical services to citizens of Shawnee, a resource-depleted area. Additionally, the Respondent does not meet the necessary criteria to invoke Shawnee’s statutory exceptions that may permit tolling the repose period. Petitioners have sufficiently met their burden of proving summary judgment is appropriate and necessitated.

ARGUMENT

Standard of Review. This Court reviews the Court of Appeal’s decision reversing summary judgment de novo, applying the same legal standard governing the trial court. Summary judgment is appropriate where the record demonstrates that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law. Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*,

142 Sn.2d 88, 94 (2018). Summary judgement must be denied if there is a genuine dispute of facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). This Court views all evidence and draws reasonable inferences in the light most favorable to the non-moving party. *Id.* at n.2.

I. MHS CANNOT BE HELD VICARIOUSLY LIABLE UNDER THE APPARENT AGENCY DOCTRINE BECAUSE IT DID NOT HOLD CYBER MD OUT AS ITS AGENT, AND PROVIDED A CONSPICUOUS DISCLAIMER WHICH IS NOT UNCONSCIONABLE.

This Court should reverse the Court of Appeal’s decision on the basis that MHS’s conduct did not establish an apparent agency relationship with MHS. This is because MHS conspicuously disclaimed its relationship with Cyber MD, and by extension CCS. That disclaimer is legally effective despite the language not expressly disclaiming liability, because providing notice of the existence—or non-existence—of an agency relationship is sufficient. Moreover, Mr. Miller’s situation living in a medical shortage area does not create unconscionability and does not warrant the voidability of his assent to the Terms and Conditions.

A. MHS did not “hold out” Cyber MD as its agent because it provided clear contrary notice via a disclaimer.

To establish vicarious liability under the doctrine of apparent agency, the plaintiff must satisfy a two-part test: the principal must have acted in a way that would lead a reasonable person to conclude that the negligent actor was an agent of the principal, and the plaintiff must have relied on the apparent agency

relationship when seeking care. *Burless v. W. Va Univ. Hosps., Inc.*, 601 S.E.2d 85, 88 (W. Va. 2004). The first prong is satisfied when a hospital holds the third-party provider out as its agent, or fails to provide notice indicating otherwise, generally in the form of a disclaimer. *Id.* at 96. To determine whether an agent was held out, courts primarily focus on the principal's affirmative actions, requiring representations that would reasonably cause a patient to believe an employment relationship existed, or a failure of the hospital to "take an action" indicating otherwise to the plaintiff. *Id.* at 88. When evaluating the second prong regarding reliance, courts rely on factors such as whether the plaintiff, based on reasonable belief, relied on that apparent agency relationship when seeking care, and whether the plaintiff relied on the conduct of the hospital or its agent. *Mejia v. Cmty Hosp. of San Bernardino*, 99 Cal. App. 4th 1448, 1453 (2002); *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999) (citing *Kashishian v. Port*, 481 N.W. 2d 277, 285 (Wis. 1992)).

1. MHS did not hold Cyber MD out as its agent because displaying branding does not reasonably demonstrate an agency relationship.

Apparent agency arises from affirmative acts, words, or conduct of the principal that would reasonably induce a third party to believe an employer-employee relationship exists. *Burless*, 601 S.E.2d at 94. Simply displaying company branding on an online platform is not legally sufficient to establish apparent agency, nor to allege that the agent was held out as an employee of the principal. *See Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 120 (Fla. 1995).

The Respondent's apparent agency claim fails to acknowledge the purpose of displaying MHS branding in this context. Indeed, MHS hosted the telehealth portal under its own domain and displayed its health system logos to identify the platform through which care was accessed, not to identify the healthcare provider. Multiple jurisdictions have ruled that logos alone are insufficient to demonstrate apparent agency. *Jackson Hewitt Inc. v. Kaman*, 100 So.3d 236, 236 (Fla. Dist. Ct. App. 2011) (“[T]he use of a logo or trademark symbol alone cannot create an apparent agency.”) (quoting *Am. Int’l Group Inc. v. Cornerstone Bus., Inc.*, 872 So.2d 333, 336 (Fla. 2nd DCA 2004)). Rather, trademarks and logos are used by hospitals to identify the brand of an enterprise, not to manifest a principal-agent relationship. *See Mobil Oil Corp.*, 648 So.2d at 120.

While some courts have held that a hospital's branding could cause a patient to have reasonable belief of an employer-employee relationship, these holdings are distinguishable from the present case. For instance, in *Dragotta v. Southampton Hosp.*, the court found the fact that third-party anesthesiologists used hospital-branded questionnaires relevant to the issue of whether the hospital “held out.” *Dragotta v. Southampton*, 39 A.D.3d 97, 699–700 (NY. App. Div. 2007). However, that factor was not dispositive; the court also considered the fact that the hospital had never informed patients that the anesthesiologists were independent contractors. *Id.* In the present case, although the Cyber MD access portal presented MHS logos, that factor alone cannot indicate apparent agency when other factors clearly indicate the contrary.

Moreover, numerous jurisdictions have established that a healthcare entity holds out a provider if it fails to provide contrary notice. *Burless*, 601 S.E.2d at 96. Under *Burless*, an unambiguous disclaimer explaining the independent status of a provider, “absent other overt acts,” immunizes a hospital from vicarious liability. *Id.* MHS clearly provided notice to its patients on multiple occasions. Even if the MHS branding could have generated initial ambiguity for patients such as Mr. Miller, the Petitioner disproved that ambiguity when it displayed a pop-up explicitly displaying another brand’s name and disclaiming liability. R. at 19, 24. Prior to every care session, the portal displayed a pop-up warning in red color and sixteen-point font stating that “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” R. at 19, 24. A reasonable patient, exercising ordinary caution, would have understood this pop-up notification as clear notice that MHS was neither the provider nor holding Cyber MD out as its agent. The signage clearly highlighting another provider’s name, albeit an artificial intelligence, illustrates the fact that MHS was not attempting to conceal Cyber MD’s status, instead intending to warn its patients of the non-agency status.

A reasonable patient in this position would be on notice that MHS is not the provider nor the principal of Cyber MD. Given the accessibility of the platform, MHS therefore provided sufficient notice to contradict any agency relationship claims with Cyber-Care Solutions. Holding hospitals such as MHS responsible despite providing such unambiguous notice would unreasonably burden hospitals to ensure patients carefully read and understand disclaimers, which is contrary to

what courts have held in such cases. *See Mizyed v. Palos Cmty. Hosp.*, 58 N.E.3d 102, 114–15 (Ill. App. Ct. 2016) (holding a patient responsible for a consent form signed although he did not understand it).

2. Under the totality of the circumstances, the Respondent did not reasonably rely on the alleged apparent agency relationship because he ignored MHS’s clear disclaimer.

Apparent agency requires demonstrating that the plaintiff reasonably relied on the apparent agency relationship when seeking care. *Burless*, 601 S.E.2d at 88. Reliance requires more than a subjective assertion that a patient believed the agent to have been an employee; it strictly mandates that the plaintiff’s belief be objectively reasonable. *Mizyed*, 58 N.E.3d at 115. Whether a patient’s reliance is reasonable must be determined by “considering the totality of the circumstances, including . . . any special knowledge the patient may have about the hospital’s arrangements with its physicians.” *Sword*, 714 N.E.2d at 152. Courts have further established that apparent agency liability simply does not exist “where the patient knows, or reasonably should have known, that the treating physician was an independent contractor.” *Scardina v. Alexian Bros. Med. Ctr.*, 719 N.E.2d 1150, 1154 (Ill. App. Ct. 1999). Therefore, where a healthcare institution provides clear notice alerting the patient of the nature of the relationship between the hospital and the provider, any contrary assumption by the patient is unreasonable as a matter of law and defeats the reliance requirement. *See Mizyed*, 58 N.E.3d at 111 (“[I]t is unlikely that a patient . . . can reasonably believe that [his] treating physician is an employee or agent of a hospital when the [consent] form contains specific language

to the contrary.”) (quoting *Lamb-Rosenfeldt v. Burke Med. Group, Ltd.*, 697 N.E.2d 411, 420 (Ill. App. Ct. 2012)).

The Respondent cannot claim that Mr. Miller’s reliance was consistent with ordinary care when he was confronted with a prominent pop-up sign any time he used the Cyber MD software. R. at 19, 24. To proceed further into the software, Mr. Miller was required to click an “Accept” button that was clearly referring to Terms and Conditions, which he did. R. at 18, 23. This explicit disclosure gave the Respondent direct notice that he was not communicating with an MHS clinician, both expressly in the terms and conditions, and via the clear pop-up mentioning “Cyber MD” as the provider for the virtual sessions. R. at 19, 24. MHS cannot be held responsible for the Respondent’s careless reading of the explicit notices it displayed on the platform.

The doctrine of apparent agency is intended to protect patients when “there is no reason that the patient should have known of these employment relationships.” *See Sword*, 714 N.E.2d at 152. Because MHS provided direct, unambiguous notice of Cyber MD’s existence, the Respondent’s reliance was objectively unreasonable as a matter of law and cannot be protected by the doctrine of apparent agency. Stretching the doctrine to apply to the Respondent’s willful ignorance of a prominent warning sign would lower the bar for plaintiffs to bring claims against hospitals, regardless of how clear notice was presented to patients. The ability of patients to bring claims against hospitals for apparent agency despite

clear warnings would make these warnings irrelevant, ultimately encouraging hospitals to forgo any form of warning to patients.

B. MHS conspicuously disclaimed Cyber MD’s status via a sign-in wrap agreement, thus disproving the Respondent’s apparent agency claim.

Most jurisdictions find that a hospital is deemed to hold itself out “unless it gave the patient contrary notice.” *Mejia*, 99 Cal. App. 4th at 1454. Typically, a disclaimer falls plainly within the meaning of “contrary notice.” *See Sword*, 714 N.E.2d 142 at 152 (“A hospital generally will be able to avoid liability by providing meaningful written notice to the patient[.]”). Courts have not required physical signatures or in-person agreements to deem a disclaimer valid. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). Rather, a sign-in wrap agreement provides legally effective notice if it affords reasonably conspicuous notice of the terms, and if the user manifests assent to the terms. *See Oberstein v. Live Nation Entm’t, Inc.*, 60 F.4th 505, 514 (9th Cir. 2023) (enforcing a sign-in wrap agreement where the website provides “reasonably conspicuous notice and . . . an unambiguous manifestation of assent.”). Under this standard, Courts focus on the disclaimer’s conspicuousness objectively from the perspective of a reasonable person rather than on the user’s subjective understanding of the terms. *Meyer*, 868 F.3d at 77.

1. The web portal disclaimer constitutes an enforceable sign-in wrap because it provided unambiguous notice, and Mr. Miller manifested assent upon entry to the portal.

Courts categorize different types of web agreements based on factors such as the disclaimer's design and how a user can assent to the website's terms. A "sign-in wrap" agreement requires a user to take an affirmative action when presented with terms and conditions, such as signing in. *Meyer*, 868 F.3d at 75. Courts have routinely enforced sign-in wraps when the portal provides: (1) reasonably conspicuous notice of the terms, and (2) a reasonable manifestation of assent to those terms. *Oberstein*, 60 F.4th at 513. Whether sufficient notice was provided is evaluated from the perspective of the user, considering factors such as visual cues and accessibility. *Meyer*, 868 F.3d at 77.

MHS's disclaimer unequivocally satisfies the standards set forth in most jurisdictions. In *Oberstein*, the court enforced a website's terms and conditions because the hyperlink text was "conspicuously distinguished from the surrounding text in bright blue font" and positioned directly adjacent to the action button. 60 F.4th at 516. Similarly in Mr. Miller's case, the notice was presented directly below the user login box, declaring: "By entering the portal, I accept the MHS Terms and Conditions." R. at 18. The phrase was presented in an underlined, high-contrast blue, which is commonly identified as a clickable font. R. at 18. Mr. Miller evidently understood the text to be clickable, as he himself clicked it once and remained on the page for four seconds. R. at 19.

Furthermore, MHS also satisfied the manifestation of assent required by courts. In *Berman*, the same court invalidated a website's terms and conditions because the text failed to explain what action signified acceptance. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855-58 (9th Cir. 2022). Specifically, the court noted that "[t]his notice defect could easily have been remedied by including language such as, 'By clicking the Continue [>>] button, you agree to the Terms & Conditions.'" *Id.* at 858. Very similar language is found in MHS's disclaimer, thus expressly warning Mr. Miller that "[b]y entering the portal," he was assenting to the terms and conditions linked. R. at 18.

While courts have been reluctant to enforce sign-in wrap agreements that have Terms and Conditions accessible via hyperlinks, MHS is distinguishable from such examples. *See Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 481 (2021) (finding that a disclaimer was "not set apart in any other way that may draw the attention of the consumer, such as with blue text or capital letters."). In *Sellers*, the court refused to enforce a sign-in wrap agreement that had faintly printed text in similar color tones to the rest of the text on the page, making it difficult to distinguish. *Id.* However, MHS used prominent, contrasting blue text. R. at 18. Moreover, the transaction at issue in *Sellers* was a one-time five-dollar trial where consumers had no reason to expect that they were establishing an ongoing agreement. 73 Cal. App. 5th at 453, 477, 480. In contrast, receiving health care via a telehealth portal should put a reasonable user on inquiry notice that platform access is conditioned on governing terms of use. *See Meyer*, 868 F.3d at 80 (finding

that creating an account reflects a “continuing relationship” where the user can expect terms and conditions).

Therefore, the Court of Appeals erred in reversing the trial court’s decision granting MHS summary judgment. MHS clearly met the requirements to enforce a sign-in wrap agreement as set forth in varied jurisdictions, and there is no issue of fact to be determined by a jury. *See Oberstein*, 60 F.4th at 517 (“[a]lthough mutual assent is generally a question of fact, whether a certain set of facts is sufficient to establish a contract is a question of law.”); *See also Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 950 (Tex. 1998).

2. In the alternative, even under browsewrap standards, Mr. Miller demonstrated actual acknowledgment of the terms and conditions, effectively disclaiming MHS of liability.

Alternative to a sign-in wrap agreement, a disclaimer is considered a browsewrap agreement when it is a passive sign in, requiring no action from the user. R. at 23. Clickwraps are a third type of digital agreement, which requires the user to click “I agree” before getting access to a page. R. at 23. Courts generally refuse to enforce terms and conditions when the user lacks notice of the agreement, an issue in the two aforementioned agreements. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Conversely, “courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement.” *Id.* at 1176.

In the present case, Mr. Miller had actual notice of MHS's Terms and Conditions. Digital audit logs confirm that on April 9, 2018, he clicked on the blue hyperlink. R. at 20, 23. That click opened a standalone webpage displaying all 34 lines of the agreement. R. at 19. By clicking the link and opening the document, Mr. Miller obtained direct knowledge of the terms and conditions' existence, location, and accessibility, prior to receiving any clinical care from MHS and CCS. R. at 19. While the Respondent argues that Mr. Miller cannot be found to have received actual notice because he closed the window after four seconds, that holding mistakenly places the fault on MHS rather than on Mr. Miller. R. at 8. Under general contract law, a party is charged with knowledge of the contents of a contractual document he agreed to, regardless of whether a user actually read the agreement. *See Nguyen*, 763 F.3d at 1179 (“[F]ailure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract[.]”). In healthcare settings, an accessible disclaimer provides legally effective notice, even if the patient navigates past it without reading the substantive information. *See Mizyed*, 58 N.E.3d at 114–15. Having knowledge of CCS and Cyber MD's independent contractor status by accessing the page, MHS cannot be held responsible for Mr. Miller's deliberate choice to ignore the terms and conditions.

3. MHS’S disclosure of its relationship with Cyber MD effectively dispels the Respondent’s apparent agency claim, despite MHS’s lack of a disclaimer of liability.

Apparent agency disclaimers are a tool to inform patients of the provider’s true employment status, which courts strongly consider when evaluating the “holding out” prong of apparent agency necessary to establish vicarious liability. *James by James v. Ingalls Mem’l Hosp.*, 701 N.E.2d 207, 211 (Ill. App. Ct. 1998). Generally, an apparent agency disclaimer stating the independent contractor status can protect a hospital from claims of vicarious liability. *Burless*, 601 S.E.2d at 96.

Each time Mr. Miller launched a chat session, a red, sixteen-point font saying “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program” was displayed on the page, and Mr. Miller was required to click “Accept” to proceed further. R. at 19. Moreover, MHS reinforced this disclosure every time Mr. Miller accessed the portal. R. at 18. The Court of Appeals found this warning insufficient because it did not explicitly state that MHS disclaimed “vicarious liability;” however, other jurisdictions hold that an agency disclaimer is valid simply upon informing the patient of the provider’s independent status, “absent other *overt* acts.” R. at 24; *Burless*, 601 S.E.2d at 96 (emphasis added).

Additionally, the Court of Appeals incorrectly applied the standard that courts follow regarding disclaimers of apparent agency. The court reasoned that “[w]hether a reasonable patient in Mr. Miller’s position would understand that MHS was disclaiming vicarious liability remains a material factual dispute that must be resolved by a jury.” R. at 24. However, other jurisdictions have established

that a healthcare institution does not have to expressly disclaim tort liability to defeat an apparent agency claim; rather, they are merely required to provide meaningful notice of the provider's independent status. *Sword*, 714 N.E.2d at 152. Indeed, clear notice that a provider is an independent contractor effectively refutes the "holding out" element of apparent agency, even without a liability disclaimer. *Burless*, 601 S.E.2d at 96; *James by James*, 299 Ill. App. 3d at 633. In *James*, the court held that a hospital effectively negated any apparent agency relationship when they disclosed to patients during intake that practitioners were independent of the hospital. 299 Ill. App. 3d at 633.

While some courts have been reluctant to find that an independent contractor disclosure disproves apparent agency without a liability waiver, the reasoning is distinguishable from this case. *See McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 934 (2017). In *McCrosky*, the court concluded that an ordinary patient could interpret the disclosure as addressing billing practices rather than an overarching legal relationship, because the disclaimer specifically emphasized separate physician billing. *Id.* No such ambiguity exists in our case. MHS's Terms and Conditions went far beyond a mere label and explicitly stated that "*All clinical evaluations, imaging reviews, and diagnostic interpretations provided through this digital portal are performed by independent contractor physicians or automated software applications developed by another company.*" R. at 19 (emphasis added). By repeatedly confronting Mr. Miller with plain language that unequivocally established Cyber MD was an independent tool, MHS effectively disproved

apparent agency under the standards used by courts. Imposing a more stringent requirement that hospitals explicitly disclaim all potential liability would lead hospitals to draft disfavored exculpatory agreements, which are routinely struck down by courts for unconscionability. *See Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 98–101 (1963) (voiding exculpatory release forms in hospital admissions because they are against the public interest).

C. THE SIGN-IN WRAP AGREEMENT WAS NOT UNCONSCIONABLE AND MR. MILLER DID NOT LACK THE CAPACITY TO ENTER INTO AN ENFORCEABLE AGREEMENT.

Courts fully enforce adhesion contracts as long as they are “consistent with the reasonable expectations of the consumer.” *Sellers*, 73 Cal. App. 5th at 463. A sign-in wrap or a browsewrap agreement falls within the category of an adhesion contract as they are drafted by a party and offered on a take-it-or-leave-it basis without giving the other party the opportunity to negotiate. *Id.* To invalidate an adhesion contract on the basis of unconscionability, a plaintiff must meet the evidentiary burden of proving procedural and substantive unconscionability. *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025).

1. Simmons County being a medical shortage area does not constitute procedural unconscionability because it did not deprive Mr. Miller of meaningful choice nor coerce him into entering the agreement with MHS.

Procedural unconscionability focuses on the contract formation process to determine whether one party exerted “such superior bargaining power that the

other party lacks a meaningful choice to enter into the contract.” *Id.* While a plaintiff’s socioeconomic context or a medical shortage area can be factors to consider, the Court of Appeals erred in finding procedural unconscionability based on these factors.

Following the 2016 closure of the Cartersville steel plant and the bankruptcy of both local hospitals in 2015, Simmons County lost over 75% of its physicians, resulting in its designation as a medical shortage area. R. at 18. However, that situation is an external factor over which MHS had no control. At no point does the record or MHS’s conduct indicate that MHS leveraged that situation to coerce residents such as Mr. Miller into using their services. See R. Finding procedural unconscionability where a hospital merely attempts to address a medical shortage through innovative measures would further prejudice underserved communities by disincentivizing such services.

Most importantly, Mr. Miller was never deprived of meaningful medical choice and MHS never exploited Simmons County’s medical shortage to coerce patients into using Cyber MD. When evaluating procedural unconscionability in healthcare, courts scrutinize a provider’s conduct if it is oppressive or unfairly surprises a patient. *Haydon v. Elegance at Dublin*, 97 Cal. App. 5th 1280, 1287 (2023). Specifically, courts consider whether the facility exploited a patient’s vulnerability by pressuring him with time, finances, or some other technique. *Id.*

In-person clinical services, evaluations, and diagnostic imaging remained fully operational and available at MHS's hospital in Goshen. R. at 18. The fact that Mr. Miller opted for a remote digital intake portal from home rather than making a 190-mile, three-and-a-half hour drive is a choice based on convenience, not coercion. Before his hospitalization, Mr. Miller sought only yearly, non-urgent evaluations. R. at 20. Because these screenings occurred at a yearly, scheduled interval, Mr. Miller faced no emergency time constraints and had ample opportunity to organize transportation to Goshen for in-person medical care. Furthermore, the CT scans themselves were obtained independently from Cyber MD, using an independent mobile radiology scanner. R. at 20. Utilizing the mobile scanner provided Mr. Miller with even more options than simply traveling to the hospital. He likely could have mailed his scans to specialists, at MHS or elsewhere, or even delivered them to physicians when traveling to Goshen.

MHS did not engage in coercive or deceptive practices; rather, Mr. Miller was simply provided with a more convenient option to receive healthcare check-ups, which he opted for. To establish procedural unconscionability, courts also consider whether a provider pressured a patient into entering an agreement. *See Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 632–34 (Fla. Dist. Ct. App.) (finding procedural unconscionability where the signing person was given five minutes to review a thirty-seven-page document and was rushed to sign). MHS imposed no ticking clock on Mr. Miller; instead, he had as much time as he wanted to accept the terms and conditions, and he was asked to assent to them every time

he used the platform. R. at 19. Moreover, where courts consider the patient's ability to understand the terms of the agreement, Mr. Miller spent 46 years operating and maintaining complex machinery and the record was never presented with Mr. Miller's cognitive deficits, visual impairment, or incapacity. Nothing in the record indicates that Mr. Miller did not make a "meaningful choice" when choosing to receive care from MHS, or when he agreed to the Terms and Conditions presented to him at the time of each healthcare service rendered via Cyber MD. See R. Because MHS applied no pressure on Mr. Miller and he was not required to use Cyber MD, the terms and conditions he assented to after each use are enforceable and not procedurally unconscionable.

2. The agreement was not substantially unconscionable because the terms were fully comprehensible and MHS provided factual transparency.

When evaluating substantive unconscionability, courts focus on the fairness of the contract terms to determine if they are one-sided or oppressive in a way that favors the drafting party. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1994 (11th Cir. 2023). To succeed on a substantive unconscionability claim, a plaintiff must demonstrate that the terms he agreed to are "so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other." *Philpot v. Tenn. Health Mgmt., Inc.*, 279 S.W.3d 573, 579 (Tenn. Ct. App. 2007) (quoting *Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004)).

The Respondent failed to meet her evidentiary burden because, plainly on its face, the Terms and Conditions provided by MHS did not contain terms that courts deem unconscionable. For instance, courts consider whether patients are forced to relinquish their rights or stripped of their ability to seek remedies against a provider. *Woebse*, 977 So.2d at 632. On the other hand, when an agreement does not eliminate a provider's legal duty of care but rather clarifies the operational structure or discloses the existence of a provider, the terms are not deemed unconscionably harsh, and the agreements are enforced by courts. *See Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 498 (Tenn. Ct. App. 2008). MHS's Terms and Conditions were purely informational and did not contain any damage caps or exculpatory provisions that would render the agreement unconscionable. R. at 19. Indeed, by accepting the Terms and Conditions, Mr. Miller was not required to surrender any rights or exculpate MHS or Cyber MD from any liability. Rather, the disclaimer clause was reasonable, factual, and merely disclosed the platform's structure:

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

R. at 19.

The fact that MHS informed their patients that the care provided was made by an independent contractor merely constitutes clinical transparency, not oppression

that the patients face when seeking care through the platform. Accurately disclaiming a diagnostic tool does not create an “unduly harsh or one-sided result.” Haydon, 97 Cal. App. 5th at 1288.

II. RESPONDENT’S CLAIMS ARE PRECLUDED FROM TOLLING AND CONSEQUENTLY BARRED BY SHAWNEE’S FOUR-YEAR STATUTES OF REPOSE.

This Court should reverse the opinion of the lower court because it misapplies Shawnee’s Statutes of Repose and fails to give due consideration to the interdependence of Shawnee’s Statutes of Repose and Limitations. This case involves a plaintiff who suffered an injury caused by his occupational history and a regional defendant hospital that subcontracted to MCC, who operated a healthcare software service designed to help under-resourced communities, such as Shawnee.

The lower court and the Respondent argue that without Petitioner’s alleged defective product, Mr. Miller would have been properly diagnosed, received treatment, and had a higher chance of survival. Additionally, they assert Shawnee’s statutory repose period was tolled throughout the “continuous diagnostic course of treatment” and therefore, their claims are timely.

Neither tolling under Shawnee’s product liability statute nor the Continuous Treatment Doctrine applies here. Classifying singular medical appointments as continuous care would only support the unfounded conclusion that all forms of healthcare constitute treatment, and would dismiss preventative, diagnostic, and follow-up care. Ignoring the significance of Mr. Miller’s knowledge of his exposure to

asbestos, failure to wear protective respiratory equipment for decades, dismissal of overt warnings on Petitioner's software, and lack of timely filing would enable all inattentive patients to raise a slew of endless claims against medical professionals. Not only would this raise the cost of healthcare in Shawnee, but it would detrimentally limit Petitioners' ability to provide services in an attempt to combat perpetual litigation; precisely the issues Shawnee's statutes intended to protect against.

A. The interactions between Mr. Miller and Petitioners fail to satisfy any of the elements required to invoke the Continuous Treatment Doctrine and permit tolling, rendering the doctrine inapplicable.

Shawnee's four-year Statute of Repose is enforceable and blocks all claims filed by Respondent. Although Respondent argues that her claims are timely because the Continuous Treatment Doctrine tolled the repose period, she has ballooned the scope of and misinterpreted the required elements of the doctrine. R. at 27. The Continuous Treatment Doctrine requires Respondent to meet three requirements before tolling is enabled. *Weinstein v. Gewirtz*, 208 A.D.3d 717, 721 (N.Y. App. Div. 2022). First, the patient must seek and receive an actual course of treatment from the defendant hospital or physician. *Id.* Second, the provided treatment must be for the same condition "underlying the plaintiff's medical malpractice claim." *Id.* Third, the treatment received must be "continuous." *Id.* Respondent's argument rests on two premises: (1) the intermittent appointments Mr. Miller participated in constituted continuous care, and (2) mere diagnostic scans are sufficient to classify

as a course of treatment. R. at 25. Courts across the nation have repelled the idea of stretching the bounds of the doctrine so thin. *Weinstein*, 208 A.D.3d at 724. The doctrine arose from a need to protect patients from snap termination of medical care because they “question[ed] the doctor’s techniques” and filed a claim of malpractice. *Litsey v. Allen*, 371 S.W.3d 786, 788–89 (Ky. Ct. App. 2012). Yet, the lower court attempts to smother the doctrine by expanding it beyond its intentionally narrow bounds. This Court should decline the invitation to excessively broaden the doctrine, and conclude Respondent’s claims are not tolled, and thus barred by the statute of repose.

1. Mr. Miller only engaged in routine appointments with Petitioner and never sought or obtained an established course of treatment.

The first element of the Continuous Treatment Doctrine the Respondent neglected to meet, obtaining a course of treatment by the defendant, can be separated into two prongs; the first requires implementation of a treatment regime tailored to a specific condition, and the second requires the defendant must provide the entirety of the proscribed treatment. *Weinstein*, 208 A.D.3d at 721. The doctrine does not apply because Mr. Miller’s diagnosis of asthma and referral to a different physician was solely in response to his concerns of shortness of breath and does not support ongoing care or treatment. R. at 20; *see Dugan v. Troy Pediatrics, LLP*, 105 A.D.3d 1188, 1190 (N.Y. App. Div. 2013). Numerous courts reviewing the Continuous Treatment Doctrine have held the doctrine requires more than a

longstanding physician-patient relationship; a patient must be experiencing a medical condition warranting persistent and dynamic treatment. *Massie v. Crawford*, 78 N.Y.2d 516, 519 (N.Y. 1991). See also *Schwelnus v. Urological Assoc. of L.I., P.C.*, 94 A.D.3d 971 (N.Y. App. Div. 2012); *Dugan*, 105 A.D.3d at 1188. Mr. Miller’s mere virtual visits with Cyber MD clash with the need for a longstanding condition warranting potential treatment. *Dugan*, 105 A.D.3d at 1189–1190. The Respondent contends that the length and diagnostic nature of Mr. Miller’s appointments are sufficient to masquerade as continuing treatment, but this confuses form with substance. R. at 25. Mr. Miller’s follow-ups, separate diagnostic examinations for any potential diseases, in 2019, 2020, and 2021 yielded only “nondiagnoses and resultant nontreatment,” making them insufficient to qualify as a course of treatment. R. at 20; *Schwelnus*, 94 A.D.3d at 973. Maintaining the doctrinal status quo ensures a patient’s ability to file their claims after continuous treatment ends and dismisses procrastinated claims by patients receiving isolated services. *Massie*, 78 N.Y.2d at 519; R at 22. The isolated, diagnostic exams received by Mr. Miller are inadequate to invoke tolling by the Continuous Treatment Doctrine.

Similarly, the second clause contained in the first element of the Continuous Treatment Doctrine, which the Respondent also omitted, states that the defendant provider or medical institution must provide and oversee patient treatment from beginning to end. *Weinstein*, 208 A.D.3d at 721. Respondent’s case fails to meet this standard because the Petitioners referred Mr. Miller to a local physician after

diagnosing him with asthma. R. at 20. Indeed, referral to a different doctor terminates the doctor-patient relationship and long-term treatment. *Flynn v. Szwed*, 586 N.E.2d 539, 115 (Ill. App. Ct. 1991). Petitioners referring Mr. Miller to a new physician terminated any established relationship, extinguished continuous care, and severed liability. *Pierre-Louis v. Ching-Yuan Hwa*, 182 A.D.2d 55, 59 (N.Y. App. Div. 1992). Accepting Respondent's view would undermine the purpose of encouraging the most accurate and efficient medical care through tasking a single physician with responsibility from initial intake to remission. *Pierre-Louis*, 182 A.D.2d at 57–58 (quoting *McDermott v. Torre*, 56 N.Y.2d 399, 408 (N.Y. 1982)). Further, a new physician may adopt liability if wrongfully relying on another's diagnosis without conducting their own medical investigation. *Id.* Mr. Miller's referral to a new physician on the basis of his original complaint discharges liability from Petitioners and terminates tolling provided by the Continuous Treatment Doctrine.

2. Respondent's argument that the underlying condition did not change throughout Mr. Miller's interactions with Petitioners erroneously conflates "high-risk respiratory" diseases with asthma.

Respondent fails to meet the second element required to invoke the Continuous Treatment Doctrine. The plaintiff must show the condition they initially sought care for is "connected to the injury of which the plaintiff complains." *Cefaratti v. Aranow*, 138 A.3d 837, 844 (Conn. 2016). Respondent fails to satisfy this element of the doctrine because Petitioners were evaluating Mr. Miller regarding

two substantially different conditions. R. at 20. A definitive correlation cannot be established because difficulty breathing, later resulting in an asthma diagnosis, is too removed from a spontaneous pneumothorax. *Flynn*, 586 N.E.2d at 544; R. at 20. Mayo Clinic’s assertion that shortness of breath may be a sign of anaphylaxis, Chronic Obstructive Pulmonary Disease, pulmonary embolism, obesity, anxiety disorders, or stress further demonstrates this. *Shortness of Breath*, Mayo Clinic (Aug. 4, 2025 20:12 ET), <https://www.mayoclinic.org/symptoms/shortness-of-breath/basics/causes/sym-20050890>. Experiencing symptoms associated with numerous diseases is not only outside the “limited [] scope” of general practitioners but also shows the condition underlying the malpractice claim is not the same as the initial complaint. *Schwelnus*, 94 A.D.3d at 973.

To illustrate this principle, consider *Wohlert v. Seibert*, where the plaintiff reported to his family physician that he had been experiencing swelling in his eye, light sensitivity, and severe pain. *Wohlert v. Seibert*, 23 Pa. Super. 213, 214 (Pa. Super. Ct. 1903). Although the defendant physician examined his eye, prescribed medicines, topical applications, and pain medications to alleviate the condition, the court held it was unforeseeable that the non-specific complaints of eye swelling and pain would develop into a severe condition. *Id.* at 215–16. Further, the court reasoned the symptoms were “so nearly identical with those” attributable to cataracts, iritis, keratitis, and more, that the diagnosis by the defendant was reasonable. *Id.* at 216, 219. A defendant medical physician or institution cannot be held liable, absent obvious improper care or negligence, for failing to predict how

common symptoms will develop in the future. *Id.* at 219. Similarly, Mr. Miller experienced difficulty breathing, a common symptom that can be a sign of numerous conditions. R. at 20; Mayo Clinic *supra*. Then, despite receiving a referral to address his symptoms, he suffered a spontaneous pneumothorax. R. at 20. The unforeseeable nature of his developed condition is proven by the spontaneity and urgency of his pneumothorax. *Id.* at 20. Permitting the plaintiff in this case to receive damages under a medical malpractice claim contradicts the “foundational policy reasons for creating the continuous treatment doctrine, and could result in expanding it to virtually all the medical care a patient receives.”¹ *Weinstein*, 208 A.D.3d at 724. Likewise, Mr. Miller's nonspecific symptom that later progresses into a severe disease is insufficient to invoke this doctrine. *Flynn*, 586 N.E.2d at 544.

3. The periodic interactions between Mr. Miller and Petitioners only occurred in ‘substantial intervals’ and fails to establish continuity.

The third and final element of the Continuous Treatment Doctrine requires the received course of treatment to be continuous, yet the Respondent fails to meet this bar because Mr. Miller’s routine exams are inadequate. Substantial intervals between patient visits are not dispositive of a lack of continuity, however, they do shift the burden to the Respondent to prove Mr. Miller’s interaction with Petitioners goes beyond “the mere continuation of the doctor/patient relationship,” which she has failed to do. *Massie*, 78 N.Y.2d at 519; *Siegel v. Wank*, 183 A.D.2d 158, 161 (N.Y.

¹ While the court explored this issue, the case was ultimately decided on other grounds.

App. Div. 1992). Mr. Miller engaged in annual evaluations from Cyber MD in 2019, 2020, and 2021, and there is no evidentiary language in the record to suggest any form of communication, updates, or diagnoses made during intervals of inactivity with Petitioners. R. at 20. Mr. Miller has not demonstrated he ever consulted with either Petitioner outside of his annual scans, nor did he indicate any symptoms or conditions that would have warranted visits surpassing “routine, periodic health examinations.” *Siegel*, 183 A.D.2d at 161; *Gottfried v. Loh*, 784 N.Y.S.2d 352, 355 (N.Y. Sup. Ct. 2004); *see* R. Courts have held services provided after fifteen months thwart the purpose of protecting patients from jeopardizing their health by ending healthcare to file malpractice claims. *Flynn*, 586 N.E.2d at 545; *Massie*, 78 N.Y.2d at 520. Mr. Miller’s twelve-month intervals should compel this Court to find the same conclusion. Moreover, existing case law has concluded continuity does not exist when a patient is merely getting their “condition checked.” *Massie*, 78 N.Y.2d at 520. Here, not only did Mr. Miller not have an established condition, but, identical to getting one’s condition checked, he was only participating in annual follow-up scans until the software deemed it was no longer necessary. R. at 20. Given this, the court should conclude that Mr. Miller’s care provided by Petitioners was not continuous for the purpose of eliciting the Continuous Treatment Doctrine.

The same conclusion sprang from *Shiffman v. Harris*, which contained similar facts to the present case. The plaintiff in this case was referred to the defendant physician after an abnormality developed in her left breast. *Shiffman v. Harris*, 280 A.D.2d 752, 752 (N.Y. App. Div. 2001). The defendant performed a

mammogram and recommended follow-up examinations that intermittently occurred four times. *Shiffman*, 280 A.D.2d at 753. Finally, doctors learned the plaintiff's breast implant had ruptured, causing the plaintiff to require surgery; she later sued her physician for failure to detect the rupture. *Id.* at 753. The court found for the defendant because a patient cannot leverage minimal contact with providers to benefit from the Continuous Treatment Doctrine, this Court should find the same:

No treatment was undertaken at that time or at any time thereafter. Rather, defendant recommended annual diagnostic examinations to determine whether any treatment would be required at some future time. Such diagnostic examinations do not constitute continuous treatment [citation omitted]. [] [The] defendant never "treated" Shiffman for a leaking implant and there is no claim for medical malpractice in that regard. Rather, the claim is that defendant failed to diagnose such condition . . . and is therefore beyond the applicable Statute of Limitations.

Id. at 753–54.

The staggering similarities between *Shiffman* and the present case clearly give the Court its holding. Mr. Miller did not have a condition requiring treatment beyond annual diagnostic exams and the injury giving rise to the claim was entirely different from the one the Petitioners initially evaluated. R. at 20; *supra* Part A(2). Similar to *Shiffman*, where the plaintiff was seen for an abnormality, Mr. Miller was initially seen for difficult breathing. *Id.* Neither of these complaints warrants a course of continuous treatment, rather they only warrant intermittent check-ups; therefore, the Continuous Treatment Doctrine cannot apply. R. at 20.

B. Even assuming any of the Continuous Treatment Doctrine elements applied, the four-year statutes of repose would nevertheless bar Respondent's claim.

Assuming, *arguendo*, the Respondent strains the Continuous Treatment Doctrine enough to find it applicable to her facts; Shawnee's Statute of Repose still bars her claims. Although the Respondent argues consideration of the doctrine would toll the repose period until 2021, making her 2024 claims timely, she erroneously calculates the tolling windows invoked by the doctrine. R. at 27. Indeed, their contentions fail to address two crucial pieces of the doctrine: (1) the defendant physician must administer the entirety of care to the patient and (2) the medical condition initially treated by the defendant physician must be the same condition the claim is grounded in. *Weinstein*, 208 A.D.3d at 719. Failure to adhere to the above criteria significantly cuts the tolling range the court may authorize. Therefore, Respondent's interpretation of their tolling window obliterates the established limitations, and this Court should not entertain uprooting settled law.

1. The transfer of Mr. Miller to a new physician in 2018 terminated all continuous treatment ascertained prior to that shift.

Assuming the Continuous Treatment Doctrine applies, the first potential tolling window—a trivial two weeks—has no impact on the repose period. Tolling begins once a physician pursues treatment for their patient regarding a specific diagnosis and ends when treatment is no longer necessary or the physician-patient relationship is terminated. *Pierre-Louis*, 182 A.D.2d at 59. Such time would have occurred during the two weeks in between Mr. Miller's initial visit with Petitioners and his later referral to a local physician because Mr. Miller would have been receiving specific

treatment for his diagnosed condition, asthma, presuming an existing physician-patient relationship. R. at 20; *Litsey*, 371 S.W.3d at 789. Even if the Respondent prevails on her theory of continuous care, she overstates the scope and power of the Continuous Treatment Doctrine rules as they relate to the timing and applicability of tolling. Two weeks after the algorithm misread the scans, Petitioners referred Mr. Miller to a local physician for further treatment of his breathing difficulties. R. at 20. Regarding Mr. Miller's breathing difficulties, claims against Petitioners, as well as any established continuous treatment, terminated as a result of the referral to a new physician. *Supra* Part A.1. Thus, both the Continuous Treatment Doctrine and tolling would only be applicable during the two weeks between Mr. Miller's initial visit with Petitioners and his later referral. R. at 20; *Litsey*, 371 S.W.3d at 789. Given this, the four-year statute of repose would have begun in May 2018 and expired May 2022,² two years before Respondent filed a claim against Petitioners. R. at 21. The first tolling period, grounded in the asthma condition, has no impact on the four-year statute of repose.

2. Respondents brought their claim in 2024, six years after the “act or omission” allegedly causing death transpired, and two years after the repose period ran.

Reassuming the Continuous Treatment Doctrine is applicable, the second potential tolling window would have extended for only seven months, still excluding Respondent's claims under the repose period. As stated, the repose period tolls once treatment for a specific diagnosis by the physician in an existing physician-patient

² These dates assume two weeks after April 2018 would fall into May 2018.

relationship begins and ends when the patient no longer needs treatment or care. *Pierre-Louis*, 182 A.D.2d at 58. Mr. Miller presented to the MHS hospital in Goshen, received immediate medical treatment for a pneumothorax, and continued to receive care regarding that specific diagnosis until his death; thus, the applicable tolling period would have begun in October, 2023 and continued until April 14, 2024. R. at 20–21. The Respondent contends this would allow their claims to be timely, but even assuming this scenario, the repose period would have only paused for a maximum of seven months. R. at 27. The alleged action of malpractice giving rise to the pneumothorax occurred in April 2018, during the initial scan where the AI software failed to identify the lesions. R. at 20. Even considering the seven-month tolling, the four-year repose period would have expired in November 2023. *Staley v. United States*, 2022 U.S. Dist. LEXIS 63554, 39 (D. Utah); R. at 27. The consideration of this tolling period does not alter the conclusion that the statute of repose has expired, ultimately barring Respondent’s claims.

Staley v. United States highlights the coexistence of tolling and successful dismissal of time-barred claims. *Staley v. United States*, 2022 U.S. Dist. LEXIS at 39. There, the plaintiff alleged his dentist was negligent in failing to diagnose his gum disease and filed a medical malpractice claim in November 2015. *Id.* at 3. Utah’s state statute utilized here is analogous to Shawnee’s statute of repose:

A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

Id. at 33.

A separate statute in Utah requires plaintiffs alleging medical malpractice to file claims with an agency, where they will remain pending until litigation, during such time the repose period tolls. *Id.* at 35–36. The plaintiff’s claim tolled for six months; however, the Utah court found the relevant injury took place in December 2010. *Id.* at 32. As in the present case, regardless of whether the time period allowing claims to be brought by plaintiffs was calculated with consideration to tolling, the four-year statute of repose prevails and extinguishes all actions. *Id.* at 39.

C. Both the Statutes of Limitation and Repose time-bar claims of personal injury and wrongful death, as a result of Petitioner’s alleged defective product.

Shawnee’s four-year repose period trumps applicable statutory exceptions and extinguishes all untimely claims grounded in product liability. Despite the Respondent recognizing the exception set forth in § 12-410(b)(3), she overlooked the extent to which § 12-404 is rooted in the other statutes. Although the Respondent asserts the “latent and undiscoverable” exception permits tolling when read alone, courts have consistently held statutory construction is intentional and courts must read similar statutes in harmony. *Baumann v. Excel Indus.*, 845 P.2d 65, 70 (Kan. Ct. App. 1993). The beginning of the Shawnee statute clearly informs courts that they must read and interpret the product liability section in conjunction with the actions and limitations section. Shawnee Revised Statute § 12-410. Hence, the Respondent must bring claims based on product liability within two years of the

wrongful act that caused injury or death. *Id.* The wrongful act giving rise to Respondent's claims occurred in 2018, after Petitioner's software failed to identify a visible lesion on Mr. Miller; thus, actions filed after 2020 were prohibited. R. at 20. In addition, the language in all of Shawnee's statutes demonstrate their codependence:

§ 12-410: (a) Repose Period. No product liability action based on strict liability in tort shall be commenced except within the applicable limitations period in Section 12-402

§ 12-402: (a) Personal Injury. Except as otherwise provided in this section, and except as provided in section 12-404 of this chapter

§ 12-404: (b) Repose Period. In no event shall such action be brought more than four (4) years after the date on which occurred the act or omission or occurrence alleged to have been the cause of such injury or death.

Sn. Rev. Stat. § 12-410; Sn. Rev. Stat. § 12-402 (a); Sn. Rev. Stat. § 12-404(b).

The purpose of interweaving statutes of repose with statutes of limitations is to create distinct boundaries: the first being shorter and flexible, the second being absolute and rigid. *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 287 (Tex. 2010). Ultimately, it is the Respondent's burden to prove her claims comply with Shawnee's Statutes of Limitation and Repose and she failed to sufficiently do this. *Massie*, 78 N.Y.2d at 519.

- 1. At the outset, Respondent's failure to adhere to the two-year statute of limitations stifles their ability to bring their claims.**

The Respondent failed to comply with Shawnee’s statutes when bringing their claims of personal injury and wrongful death that stemmed from alleged product defects; thus, the limitation and repose period bar them. R. at 26. The language included in the Product Liability provision tethers the four-year repose period to the statute of limitations:

(a) Repose Period. No product liability action based on strict liability in tort shall be Commenced except within the applicable limitations period in Section 12-402 . . .

Sn. Rev. Stat. § 12-410.

The Statute of Limitations further provides:

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

Sn. Rev. Stat. § 12-402.

The given provisions required Respondent to file claims rooted in product liability by April 2020, at the latest, because that is two years after the software failed to identify the lesion on Mr. Miller, constituting the “wrongful act.” R. at 26. Even so, Respondent filed her action in July 2024. R. at 21. As previously stated, laying a statute of repose on top of a statute of limitations ensures courts impose two limits on untimely claims. *Methodist Healthcare*, 307 S.W.3d at 287. Shawnee’s two-year statute of limitations encourages plaintiffs to bring claims arising from product liability as soon as possible, while the four-year repose period protects against complacent plaintiffs and ensures medical institutions can operate without the burden of never-ending litigation. *Id.* The only time a party may surpass the first boundary and proceed with an untimely claim is when a statutory exception

applies. *Id.* Here, the limitations period required Respondent to file their claims within two years and even in the event of an applicable discovery exception, should have filed within four years; Respondent's negligence bars recourse because of the explicit limitations included in the statute.

2. Respondent's claims are clipped by the embedded nature of Shawnee's statutes regardless of any applicable statutory exceptions.

The interwoven nature of Shawnee's regulations forbids Respondent's claims from proceeding, despite the discovery exception described in § 12-410(b)(3) applying to Mr. Miller's circumstances. Absent an explicit exception, statutes of repose create a blanket prohibition against untimely claims. *Methodist Healthcare*, 307 S.W.3d at 286. Shawnee's Statute of Repose lists three exceptions provided by the statute:

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

1. The product seller expressly warrants that its product can be utilized safely for a period longer than four (4) years;
2. The product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it; or
3. The harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four (4) years after delivery.

Sn. Rev. Stat. § 12-410.

Exceptions one and two are not relevant to this analysis and will not be addressed in this brief. Mr. Miller's circumstances may permit use of both exceptions listed in (b)(3): prolonged exposure to a defective product and lack of discoverability of defect within the repose period. Sn. Rev. Stat. § 12-402 (b)(3).

Should this Court validate the lower court's finding that CSS's software was defective, the aforementioned exceptions may apply to Mr. Miller. R. at 26. Yet, § 12–404 renders these exceptions irrelevant and inapplicable. Sn. Rev. Stat. § 12–404. Each statute governing Shawnee works in tandem with the others, but § 12–404 acts as the primary gatekeeper permitting or denying claims. The following analogy provides a clear illustration of the relationship between statutes:

An airplane must meet three security standards to proceed to takeoff; (1) adequate fuel levels; (2) completed maintenance checks; and (3) certification of appropriate weather conditions. Regardless of whether the airplane has met proper fuel levels and maintenance standards, if bad weather is on the horizon, the plane is grounded; weather is the ultimate gatekeeper to takeoff.

§ 12–404 acts as the ‘weather barrier’ because it can extinguish any action and void exceptions made by §§ 12–402 and 12–410. Assuming Respondent’s claims under product liability proceed through the statute of limitations provided by § 12–402, and later advance to § 12–404, the repose period still bars them because “[i]n no event shall such action be brought more than four [] years” after the date of the act or omission; the Continuous Treatment Doctrine exception does not alter this analysis. Sn. Rev. Stat. § 12–404(b); *see supra* Part A, B. The act or omission occurred in 2018 and Respondent did not bring the claims until 2024, nearly six years later. R. at 20–21. As previously stated, statutes of repose promote important social policy goals, such as ensuring professionals are “free from liability after the legislatively determined period of time.” *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014)). Additionally, courts should read statutes addressing the same subject matter in

harmony to each other. *Baumann*, 845 P.2d at 70. Excluding Respondent's current claims upholds the policy goals driving the purpose of repose statutes.

D. The path to resolving these claims must run through Respondent's failure to carry her burden of proof of the alleged defect and Mr. Miller's underlying liability regarding the injury.

Not only does the repose period bar all claims by Respondent, but they cannot hold Petitioners wholly liable for the alleged product defect contributing to Mr. Miller's death. Even if the court holds otherwise in regard to the repose period, the lower court erred in not considering Mr. Miller's contributing actions. R. at 27–28. Legislatures across numerous states have opted to include a form of contributory fault in most tort liability cases, including strict liability instances. *Smith v. Ingersoll-Rand Co.*, 14 P.3d 990, 995 (Alaska 2000). Legislation intends product liability statutes to protect consumers harmed by products produced by negligent or careless manufacturers, although, legislation has not created these statutes for the purpose of shielding reckless consumers from liability or displacing blame unto others. *Id.* at 994. The Respondent argues the sole cause of Mr. Miller's death is the software's alleged defect failing to identify a small lesion, but this is inconsistent with the rules of product liability. R. at 26–27. This Court should find the repose period bars Respondent's claims, but even if held otherwise, this Court should evaluate comparative liability on the part of Respondent.

1. Evidence of software retraining is inadmissible and cannot be used by Respondent to prove liability; the burden of proof is not satisfied.

The retraining of Petitioner's AI software system contributes to the undiscoverable, latent nature of the algorithmic flaw; however, Federal Rules of Evidence 407 prevents evidence of such retraining from being introduced. As a result, Respondent cannot use the retraining to show a defective product or design ever existed or that Petitioners acted negligently. Fed. R. Evid. 407. The rule clearly states plaintiffs cannot use any remedial measures taken *after* an alleged injury to prove the product was defectively designed:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Fed. R. Evid. 407.

Mr. Miller's alleged injuries are rooted in the initial 2018 scan, where Cyber-Care did not identify visible lesions. R. at 20. Presumably, during this time, the software was accurate approximately eighty-five to ninety-five percent of the time. R. at 19. It was not until four years later, in 2022, that Petitioners discovered the algorithm was inaccurate more often when viewing an asbestos-exposed image set.

R. at 19–20. As a result, Petitioners took the *subsequent* measure of retraining the software to increase its accuracy for this subset of patients. R. at 20. Petitioners executed this measure after the failure to identify issues in 2018 occurred, which is exactly the type of evidence legislation designed rule 407 to protect. R. at 19–20; Fed. R. Evid. 407. It is important to encourage individuals and companies to make changes to their products to increase safety, as Petitioners were doing here, without fear of these actions being used against them. *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991). Even if the retraining of the AI software demonstrates the original design was defective, rule 407 precludes Respondent from using this information to suggest as much. Fed. R. Evid. 407.

2. The doctrines of Assumption of Risk and Comparative Liability undercut Respondent’s assertion that Petitioners are completely at fault.

This Court cannot fairly discuss liability of Petitioners without also discussing two blemishes erupting on the face of Respondent’s claims. The first is assumption of risk. Courts routinely categorize participation in an activity as an assumption of risk when a plaintiff voluntarily “encounters a known danger,” acts unreasonably in doing so, and later files a strict product liability claim alleging fault belongs to the manufacturer. *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 864 (Ariz. 1995). Further, courts define “fault” as any act or omission that may be reckless, negligent, or intentional and opens one up to liability. *Daly v. General Motors Corp.*, 575 P.2d 1162, 1180 (Cal. 1978). The assumption of risk doctrine is pertinent to this case because the sequence of events leading to Mr. Miller’s death displays unnecessary

and unreasonable risks. *See* R. Acknowledging Mr. Miller could not have known of the algorithmic flaw in Petitioner's software, he did know of his history with asbestos exposure and reckless disregard of safety protocols. R. at 17–18. The Occupational Safety and Health Administration (OSHA) deemed asbestos as a toxic and hazardous material in 1970, prompting them to stop use of the material.³ R. at 3. New safety protocols and regulations at Mr. Miller's workplace proved he was aware of asbestos toxicity but continued to neglect wearing respiratory equipment. R. at 3. Mr. Miller's intentional blunder of not wearing safety respirators and then disregarding Petitioner's software warnings equals a reckless act subject to fault. The Respondent cannot proceed on strict product liability claims without first addressing Mr. Miller's assumption of risk pertaining to his asbestos exposure.

The second blemish is comparative fault. Comparative fault allocates liability in direct proportion to each party's percentage of fault. *Jimenez*, 904 P.2d at 866–67. Here, the court must consider comparative fault because Mr. Miller made choices that directly impacted his health and cannot be wholly attributed to Petitioner's software. *See* R. As noted previously, Mr. Miller was aware of the dangers of asbestos, neglected to adhere to safety protocols, waited decades to seek medical treatment after exposure, and disregarded the software's warnings. R. at 17–18;

³ *OSHA at 50*, U.S. Department of Labor, <https://www.osha.gov/osha50> (last visited Sep. 30, 2026); Martonik JF et al., *The history of OSHA's asbestos rule makings and some distinctive approaches that they introduced for regulating occupational exposure to toxic substances*, National Library of Medicine (Mar. 2001), <https://pubmed.ncbi.nlm.nih.gov/11331993/>.

supra Part I.B. It is unreasonable to expect man-made products to become the user's insurer of safety and health, especially if that product is tasked with identifying illnesses in patients willingly handling toxic materials without safety respirators for numerous years. *Daly*, 575 P.2d at 1166. Regardless of Petitioner's alleged software defect, Mr. Miller is subject to comparative fault and actions asserting liability must be appropriately apportioned.

CONCLUSION

This Court should REVERSE Shawnee's Court of Appeals for the Second District on the grounds that Petitioners did not hold themselves out to consumers as possessing an agency relationship and the disclaimer was legally enforceable. Mr. Miller acknowledged and agreed to several warnings given to him in a clear and conspicuous manner. Additionally, Shawnee's Statute of Repose bar all untimely claims filed by Respondent, and exceptions permitting tolling are inapplicable.

Respectfully submitted,

ATTORNEYS FOR PETITIONERS