

C.A. NO. 26-338

**IN THE
SUPREME COURT FOR
THE STATE OF SHAWNEE**

METROPOLITAN HEALTH SYSTEM, INC. AND CYBER-CARE SOLUTIONS, LLC

Petitioners,

v.

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 OF THE RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED

Issue 1: Whether Metropolitan Health System, Inc. is vicariously liable under the doctrine of apparent agency for the errors of its AI health diagnostic system; and

Issue 2: Whether Shawnee’s four-year statute of repose bars Evelyn Miller's claims.

STATEMENT OF THE CASE

I. Factual Background

Elias Miller worked for the Shawnee Steel Company (the “Company”) in the maintenance department for its primary steel mill in Cartersville, Shawnee, from 1970 until his retirement in 2016. R0016–17. Mr. Miller routinely handled asbestos-insulated machinery during his time at the Company, where safety protocols were loosely enforced. R0018. Mr. Miller had a chest screening in 2012, where his results were described as “unremarkable.” *Id.* Mr. Miller never smoked, was not asthmatic, and had no family history of respiratory disease. *Id.*

Following a severe economic downturn, Simmons County experienced a population decline. *Id.* The population of Simmons County, which includes Cartersville, dropped to about 7,500 residents and lost over seventy-five percent of its healthcare professionals between 2016 and 2025. *Id.* During this time, both local hospitals closed after filing for bankruptcy. *Id.* After these closures, the nearest facility providing in-person radiology consultations and CT scans was the flagship hospital for Metropolitan Health System, Inc. (MHS) in Goshen, three and a half hours—or 190 miles—from Cartersville. *Id.* Simmons County was designated as a “Health Professional Shortage Area” and a “Medically Underserved Area.” *Id.*

MHS is a large regional healthcare network based in Goshen. *Id.* Prior to the economic downturn, MHS contracted with a digital health infrastructure provider, Cyber-Care Solutions, LLC (CCS), to design and host a proprietary remote telehealth platform. *Id.* Under this contract,

MHS had exclusive control of the platform’s patient-facing interface. *Id.* The interface displayed MHS branding throughout, while CCS marks were strictly prohibited on all patient-facing pages. *Id.*

To use the platform, patients navigate through MHS’s primary domain, where they are greeted with: “By entering the portal, I accept the MHS Terms and Conditions.” *Id.* The text “Terms and Conditions” linked to a standalone webpage with thirty-four lines of single-spaced, unformatted black text on a plain white background, in a font size noticeably smaller than the rest of the website. R0018–19. Approximately three-quarters down the page, the terms contained a clause stating, “[a]ll clinical evaluations, imaging reviews, and diagnostic interpretations . . . are performed by independent contractor physicians or automated software applications developed by another company.” R0019. Mr. Miller opened this link once in April 2018, remained on the page for four seconds, and never accessed it again. *Id.*

In February 2017, CCS rolled out Cyber MD, an interactive AI diagnostic system. *Id.* Before interacting with Cyber MD, patients must accept a pop-up disclaimer stating, “Cyber MD is an AI software program, not a licensed health care professional.” But Cyber MD then receives patient symptoms, asks follow-up questions, compiles clinical histories, generates differential diagnoses, and orders and interprets diagnostic tests for those patients. *Id.*

On March 1, 2017, MHS integrated Cyber MD into its telehealth portal. *Id.* The initial software operated on a dataset of 40,000 images from three hospital systems and achieved ninety-seven percent overall accuracy in classifying lung lesions. *Id.* In October 2022, CCS discovered Cyber MD’s accuracy dropped to eighty-five percent when evaluating images of patients with prior occupational asbestos exposure. R0019–20. The decrease in accuracy is

attributed to pleural shadowing, which masks underlying tumors. R0020. Fourteen months after this discovery, CCS retrained Cyber MD and released the updated version to clients. *Id.*

Mr. Miller logged into the MHS portal and initiated a virtual intake session with Cyber MD on April 9, 2018, after experiencing shortness of breath. *Id.* During the session, Mr. Miller detailed his history with asbestos exposure. *Id.* MHS's software ordered a chest X-ray and CT scan through a mobile radiology service. *Id.* It then evaluated the scan and 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 followed the treatment plan prescribed by MHS, completing the recommended annual screenings and receiving virtual evaluations from Cyber MD in May 2019, May 2020, and June 2021. *Id.* During each visit, Cyber MD evaluated new scans and continued to report "zero evidence" of disease. *Id.* After the 2021 evaluation, Cyber MD advised that annual imaging was no longer necessary. *Id.*

On October 30, 2023, Mr. Miller suffered a collapsed lung and was airlifted to MHS's flagship hospital. *Id.* There, scans revealed a 6.4 cm malignant mass in his left lung with extensive metastases to the pleura and spine. *Id.* Expert review established that a 7 mm lesion was clearly visible on the initial 2018 scans and grew continuously to 47 mm by 2021. *Id.* Cyber MD's 2017 baseline coding algorithm consistently failed to detect the lesion. *Id.* The lesion was partially obscured by pleural changes, but Cyber MD's 2017 coding algorithm consistently failed to identify the lesion. *Id.* Mr. Miller succumbed to his disease and died on April 14, 2024.

R0021.

II. Procedural History

In July 2024, Evelyn Miller, Mr. Miller’s widow, filed claims against MHS and CCS. R0002. Mrs. Miller filed claims against MHS for vicarious liability under the doctrine of apparent agency for the diagnostic errors of the artificial intelligence software tool Cyber MD. *Id.* Mrs. Miller also filed claims against CCS for strict product liability based on design defect and failure to warn inherent in the Cyber MD software algorithm. *Id.*

Following the close of discovery, the circuit court of Simmons County granted the defendants’ Motion for Summary Judgment. *Id.* The circuit court granted summary judgment on the vicarious liability claims, ruling that the “holding out” element from *Gilbert v. Sycamore Municipal Hospital* was not satisfied and the contract was not unconscionable. R0008; 0010. Further, the circuit court ruled the products liability claim was time-barred by Shawnee Revised Statutes §§ 12-404 and 12-410. R0012–13. In its reasoning, the circuit court observed that the defect within Cyber MD’s code existed in 2017 when the product was delivered. R0013.

After the circuit court granted the defendants’ Motion for Summary Judgment, the Shawnee Court of Appeals for the Second District reversed the grant and remanded for further proceedings. R0016. The Appeals Court held that whether the unformatted, buried hyperlink provides reasonably conspicuous notice to an elderly person is a triable question of fact. R0023. The Appeals Court further held the trial court erred in dismissing the unconscionability arguments as a matter of law because Simmons County is a Medically Underserved Area. R0024. The Appeals Court reversed the summary judgment grant on the products liability claim, ruling the annual cancer surveillance protocol was a single, continuous course of treatment extended through 2021, and the four-year repose period under § 12-404(b) did not start until

2021. R0025. Additionally, the product liability claim was not barred by § 12-410 because the trial court's application ignored explicit sections of § 12-410(b)(3). R0026.

SUMMARY OF THE ARGUMENT

There is a genuine dispute of material fact as to whether Mr. Miller assented to MHS's provision denying an agency relationship with CCS. Because Mr. Miller did not seek care from Cyber MD in particular, reasonable persons could find that he relied on MHS as an institution to provide his care. Mr. Miller also navigated through MHS's primary domain—wrapped in its exclusive corporate branding—to initiate his virtual intake session. Thus, one could reasonably conclude that MHS held itself out as the care provider and Mr. Miller's belief that Cyber MD was authorized to act on its behalf was justified.

Though MHS stated entry to the portal constituted assent to the terms, both the notice and substance of the terms must be conspicuous for the patient's assent to be presumed. Despite the notice's close proximity to the "Sign In" button, MHS's agency disclaimer was located toward the bottom of a separate webpage and buried in fine print. Therefore, reasonable minds could differ as to whether Mr. Miller truly assented to the terms.

In any event, there is triable question of fact as to whether the agreement was unconscionable. Mr. Miller needed prompt medical attention and was located in a Medically Underserved Area. As such, he was faced with significant structural barriers to care and lacked a meaningful choice in accepting the terms. Mr. Miller had neither an opportunity to negotiate nor an adequate substitute for the instant intake session. Instead, the agency disclaimer was unreasonably favorable to MHS, and a rational basis exists to conclude that the agreement was unconscionable.

Mrs. Miller’s claims are not barred by the four-year repose periods in S.R.S. §§ 12-404(b) and 12-410(a) as each claim falls squarely within a statutory exception. These exceptions reflect the Shawnee Legislature’s preference for protecting vulnerable patients and plaintiffs who could not reasonably know they had a cause of action until it was too late. The “continuous course of treatment” exception in § 12-404(b) covers Mrs. Miller’s medical malpractice claims because Mr. Miller received continuous treatment from MHS from 2018 to 2021. Mrs. Miller’s product liability claims similarly avoid preclusion because Cyber MD contained an undiscoverable defect and Mr. Miller suffered a latent injury, both of which render the relevant repose period inoperative under § 12-410(b). At the least, this case presents a genuine issue as to these material facts.

ARGUMENT

The denial of summary judgment is reviewed *de novo*, applying the same legal standards as the trial court. Summary judgment is appropriate only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018).

On appeal, all evidence is viewed in the light most favorable to the nonmoving party, and all inferences must be drawn in the nonmoving party’s favor. Summary judgment must be denied when fair-minded individuals could differ on the inferences drawn from the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I. MHS IS VICARIOUSLY LIABLE UNDER THE DOCTRINE OF APPARENT AGENCY FOR THE DIAGNOSTIC ERRORS OF CYBER MD.

To hold a hospital liable for the actions of a third party, a plaintiff must show that a patient reasonably relied on the hospital’s apparent authority over the wrongdoer. *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 575 (7th Cir. 2019). The inquiry focuses on the totality of the

circumstances, including the hospital's manifestations and the patient's knowledge of the hospital's arrangement with the wrongdoer. *Id.*

Agency is established when (1) the hospital's actions would lead a reasonable person to believe that the third party was its agent or employee, (2) the hospital knew its actions created the appearance of authority, and (3) the patient relied upon the third party's conduct. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 795 (Ill. 1993) (adopted as binding in Shawnee).

The primary focus here is element one. If MHS held itself out as a full-service healthcare provider without furnishing sufficient notice of its arrangement with CCS, it will be liable under the doctrine of apparent agency.

A. MHS held itself out as a health care provider, which justified Mr. Miller's belief that MHS was responsible for his care.

A hospital is subject to vicarious liability for the tortious conduct of the wrongdoer if the patient holds a reasonable belief, traceable to the hospital's manifestations, that the wrongdoer was authorized to act on its behalf. Restatement (Third) of Agency §§ 2.03, 7.08 (2006).

When a patient seeks care from the hospital as an institution, he is entitled to assume that the care will be provided by the hospital through its own staff. *Gilbert*, 622 N.E.2d at 795.

Unless a patient intends to obtain care from a particular provider, courts assume he relies on the hospital's reputation. *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 854 (Wis. 1988). A patient rarely knows exactly who will care for him; thus, it is unreasonable to demand he inquire into the employment status of each of his physicians. *Id.*; *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 258 (Ky. 1985).

In *Gilbert v. Sycamore Municipal Hospital*, the active staff physicians were independent contractors. 622 N.E.2d at 791. However, the decedent signed a consent form stating that hospital employees would treat the patients. *Id.* at 796. Additionally, the decedent requested care

from a particular physician but was treated by another. *Id.* at 791–92. Still, the court held that a genuine issue of material fact existed as to apparent agency. *Id.* at 792. One could reasonably conclude that, at the time of treatment, the decedent relied upon the institution—not an individual physician—to render his health care services. *Id.*

The *Gilbert* court also emphasized that inequitable results would follow if hospitals could market themselves as providers of complete health care yet evade liability when a patient is injured by the actions of someone who appears to be its employee. *Id.* at 793–94. The Wisconsin Supreme Court echoed the same principle in *Pamperin v. Trinity Memorial Hospital*, reasoning that when hospitals profit from employing independent providers, they cannot escape liability when those providers deliver subpar care. 423 N.W.2d at 854.

The plaintiff in *Pamperin* came to the hospital seeking emergency services and was treated by an independent contractor. *Id.* at 850. Because he was admitted without the direction of a personal physician and did not otherwise select his treating physicians, the court held that he relied on the hospital to provide his care. *Id.* at 856–57. This conclusion also rested on the notion that patients rarely choose where to obtain emergency medical care because of a contractual relationship. *Id.* at 860. Generally, patients merely seek care from nearby providers. *Id.*

Paintsville Hospital Co. v. Rose presented a similar situation. There, the doctor was not a hospital employee. *Paintsville*, 683 S.W.2d at 255. The court ruled that the decedent had a right to expect that his care would be rendered pursuant to the hospital’s operating procedures. *Id.* at 256. The doctor was an agent of the hospital because he was listed on the staff roster, the emergency room was open to the public, and the decedent’s care was provided in the hospital’s facilities. *Id.* Further, it would have been unreasonable to require the patient to determine the employment status of each of his care providers. *Id.* at 258.

Mr. Miller never sought care from a particular provider. Even in *Gilbert*, where the decedent initially requested care from a particular provider, the court still held that he sought care from the institution. By contrast, Mr. Miller's conduct parallels that of the patient in *Pamperin*. Mr. Miller sought to quickly obtain medical attention from the hospital itself. No personal physician directed his admission, nor did Mr. Miller select his care providers. As soon as he realized he needed medical assistance, he navigated through MHS's primary domain and logged into its portal. As such, Mr. Miller relied upon the hospital's reputation and was entitled to assume that MHS would provide his care.

In addition, the consent form signed by the patient in *Gilbert* and the staff roster in *Paintsville* are analogous to MHS's exclusive branding. The consent form in *Gilbert* justified the patient's belief that the hospital's employees would provide the care, as did the staff roster in *Paintsville*. Thus, Cyber MD's patient-facing interface could justify a similar belief. CCS marks were prohibited on all pages and only MHS branding was permitted. This gave the impression that Cyber MD functioned on behalf of MHS.

Moreover, *Pamperin* made clear that individuals typically do not choose a hospital because of a particular contractual relationship, but because it is the most accessible to them. State and federal authorities declared Simmons County a Health Professional Shortage and Medically Underserved Area. In fact, the closest hospital was MHS's flagship hospital in Goshen, almost 200 miles away. Thus, one could reasonably find that Mr. Miller chose MHS not because it offered telehealth infrastructure, but because it was the most accessible to him given the circumstances.

Finally, it would have been unreasonable to impose upon Mr. Miller the burden of determining whether Cyber MD was an agent of MHS. Patients are often unaware of who will

treat them. *Gilbert* and *Pamperin* also emphasize that it would be unjust for MHS to market itself as a comprehensive health care facility and profit from doing so yet escape liability because of a complex contractual arrangement of which patients have no reason to know.

Given this, there is at least a triable issue as to whether Mr. Miller could have reasonably believed Cyber MD was an agent or employee of the hospital. If the *Gilbert* and *Pamperin* courts found a genuine issue of material fact as to apparent agency, then a genuine issue of material fact exists here as well.

B. The sign-in-wrap agreement did not confer legally sufficient notice that the care was rendered by an independent third party.

Federal courts have recognized that “clickwrap” agreements requiring web users to click “I agree” confer legally sufficient notice. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). However, other web-based agreements, including “browsewrap” and “sign-in-wrap,” often require no affirmative acceptance. *Id.* Their validity depends on whether the user had actual or constructive knowledge of the terms. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).

In the absence of actual knowledge, an online contract is enforced only when the user is provided with reasonably conspicuous notice of the terms and unambiguously manifested assent to them. *Id.* Notice is conspicuous if displayed in a manner such that a reasonably prudent person could have seen it. *Id.* This inquiry depends on the content and design of the website as well as the agreement’s webpage. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016); *Nguyen*, 763 F.3d at 1179.

Web users can assume important provisions will be prominently displayed, and website owners bear the burden of putting users on notice of those provisions. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 857 (9th Cir. 2022); *Nguyen*, 763 F.3d at 1179. Mere technical

accessibility of the terms via hyperlink or scroll box is insufficient if the user is not prompted to review those terms and unambiguously manifest assent to them. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034–35 (7th Cir. 2016); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015).

In *Meyer v. Uber Technologies, Inc.*, the website displayed a notice below the registration button stating that users accepted the terms and conditions by creating an account. 868 F.3d 66 at 71. This notice was immediately visible on an uncluttered screen and adjacent to the button intended to manifest assent. *Id.* The text also contrasted with the background, and a blue, underlined hyperlink to the terms was provided. *Id.* The court held that this notice was sufficiently conspicuous. *Id.* at 78.

Meyer underscores that the overall conspicuousness depends upon the interplay of a website’s features, and other cases support the position that no single feature is adequate. In *Nguyen*, a conspicuous hyperlink adjacent to the relevant button was provided on each page of the website. 763 F.3d at 1174. However, only after following the link were users notified that their purchase constituted assent to the terms. *Id.* The court held that the hyperlink’s conspicuousness and close proximity to the relevant button alone were insufficient to confer notice. *Id.*

Nicosia v. Amazon.com, Inc. similarly emphasized that a hyperlink’s conspicuousness alone is insufficient to confer constructive notice of the terms. 834 F.3d at 237. In that case, the language “conditions of use” was in blue font, indicating that it was a clickable link, but the rest of the notice was in small, unformatted font. *Id.* at 236. As such, the court concluded that there was a genuine dispute as to whether the notice was reasonably conspicuous. *Id.* at 237.

However, courts refuse to enforce terms buried in fine print. In *Berman v. Freedom Financial Network, LLC*, the hyperlink was underlined, but it appeared in the same small, gray font as the rest of the sentence disclosing the existence of the terms. 30 F.4th 849 at 854. Because it was not sufficiently set apart from the surrounding text, the court concluded that the notice failed the conspicuousness test. *Id.* at 857.

Finally, even technical accessibility of the terms is insufficient if the user is not urged to review, understand, and unambiguously accept them. In *Sgouros v. TransUnion Corp.*, the service agreement was provided in a scroll box directly above the button that stated, “I Accept.” 817 F.3d at 1033. A hyperlink to a printable version of the terms was also available to users, but the disputed arbitration clause was buried on page eight. *Id.* The court reasoned that sufficient notice depends on whether the web page communicated all terms, as well as whether the user received reasonable notice of their existence. *Id.* at 1034. Ultimately, the court refused to presume that, by simply clicking a button, one is aware of content requiring additional action, such as scrolling or following a link to a separate page. *Id.* at 1035.

The court in *Berkson v. Gogo LLC* reached a similar conclusion. There, the user was not obliged to review the terms, and those terms did not appear in a pop-up or on a new page once the user clicked “SIGN IN.” *Berkson*, 97 F. Supp. 3d at 404. The hyperlink to the terms was underlined and located beneath the relevant button, but it was not in large font, all caps, bold, or “accessible from multiple locations on the webpage.” *Id.* Finally, the hyperlink was not as conspicuous as the “SIGN IN” button. *Id.* This all played a role in the court’s ruling that the agreement was not binding against the plaintiff. *Id.*

Similar to the agreement in *Meyer*, the agreement in this case is a sign-in wrap. Rather than clicking “I agree” to the relevant terms, Mr. Miller merely logged into the portal. The

validity of the agreement thus depends on whether he had actual or constructive knowledge of the terms.

As in *Meyer*, the hyperlink here is set apart from the surrounding text and adjacent to the button intended to manifest assent to the terms. Further, MHS's website, unlike that in *Nguyen*, indicated that logging into the portal constituted assent to the terms and conditions. That said, *Nguyen* clarified that reasonably conspicuous notice depends not only on the website's content and design, but also the agreement's webpage. Consequently, while the conspicuousness of the hyperlink, its proximity to the relevant button, and other website features deserve consideration, the inquiry also extends to the page containing the terms. This is further supported by the *Sgouros* and *Berkson* opinions, which rested in large part upon the websites' failure to sufficiently communicate all applicable terms or require the user to review them.

Sgouros's reasoning supports the position that Mr. Miller was not reasonably notified of the terms. Unlike the terms in that case, MHS did not even make its terms accessible on the login page. Instead, they could only be accessed by following a hyperlink to a stand-alone page. Because this additional action was required, it is unreasonable to presume Mr. Miller was aware of the content on the stand-alone page.

It is true that Mr. Miller was furnished with a hyperlink to the disputed terms just as the users in *Sgouros* were. But in reaching its conclusion that the agreement was not binding, the *Sgouros* court drew support from the fact that the disputed clause was buried on page eight and that the "I Accept" button did not draw the user's attention to it. This is comparable to MHS's agency disclaimer provision here, which is located three-quarters down the terms and conditions page.

Relatedly, the websites' failure to prompt users to review the terms influenced the outcome in *Sgouros* and *Berkson*. As such, MHS's interface failing to compel Mr. Miller to review the terms before logging in must be given weight. This ensures that the burden of putting users on notice of binding terms remains with the website owner.

Beyond this, Mr. Miller accessed this link only once. He never accessed it again during subsequent logins, and while the hyperlink was blue and underlined, this interface bears close resemblance to the notice provided in *Berkson*. That hyperlink was also underlined, but it was neither accessible from several points on the website nor conspicuous when compared against the obvious "SIGN IN" button beneath it.

Defendant may contend that by clicking the hyperlinked terms once for four seconds, Mr. Miller had constructive knowledge of their existence. However, the inquiry does not focus on whether he viewed the terms. It matters only that he knew they existed and that the substance was adequately communicated to him. *Nguyen* reasoned that failure to read a contract before agreeing to the terms does not excuse one from the obligations under it, but website owners bear the burden of putting users on notice of the binding terms.

While the hyperlink here may be conspicuous, the terms themselves are not. If, as *Meyer* and *Nguyen* indicate, conspicuousness truly depends upon the interplay of all interface features, then this Court must consider the substance of the terms—not just their disclosure. Upon clicking the hyperlink, users are taken to a stand-alone page with 34 lines of single-spaced, unformatted text that is noticeably smaller than the rest of the webpage. Contrary to the rule from *Berman*, these provisions are not prominently displayed.

Thus, reasonable minds could differ as to whether Mr. Miller was put on notice of the terms, appreciated their significance, and unambiguously manifested assent to them.

C. The contract was procedurally unconscionable and left Mr. Miller with no meaningful choice but to accept the Terms and Conditions.

Unconscionability involves two determinations: “that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party.” *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003).

Procedural unconscionability refers to the lack of meaningful choice in accepting the challenged provision. *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 235 (3d Cir. 2012). A contract prepared by one party and signed by an individual in a weaker position with little say over the terms is generally unenforceable as procedurally unconscionable. *Id.*

However, more than a disparity in bargaining power must be shown. *Id.* The individualized circumstances must be considered to ascertain whether the bargaining situation was so unfair as to violate public policy. *Id.*; *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025).

In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, the plaintiff began working for the defendant in 2006. 673 F.3d at 225. At that time, she signed an “Employee Acknowledgment” form that subjected her to an arbitration clause. *Id.* Two years later, the plaintiff took another job. *Id.* However, she returned to the defendant’s employ in 2009 and again signed an “Employee Acknowledgment” form. *Id.* In ruling on her challenge to the arbitration provision, the court recognized that she was the weaker party to the agreement as the employee. *Id.* at 237. However, she elected to leave and subsequently return, indicating she had a meaningful choice about whether to accept the terms. *Id.* Ultimately, the court concluded that the agreement was not procedurally unconscionable. *Id.*

By contrast, the agreement in *Alexander v. Anthony International, L.P.* was unconscionable. 341 F.3d 256 at 272. The plaintiff there had no more than a seventh-grade

education. *Id.* at 258. In addition, signing the agreement was a condition of his employment, but he had no opportunity to negotiate or reject any terms. *Id.* at 259. The plaintiff testified that he only accepted because he desperately needed the job. *Id.* The company also benefited from requiring employees to commit to arbitration and making it burdensome for them to seek relief. *Id.* at 267. Given the “take-it-or-leave-it” nature of the agreement and the plaintiff’s limited employment options due to his lack of education, the court reasoned the contract was unconscionable. *Id.* at 266.

In *Quilloin*, the plaintiff had a meaningful choice in whether to agree to the relevant terms, as demonstrated by her resignation. She chose to capitalize on another professional opportunity before returning to the employ of the defendant. By contrast, Mr. Miller had no such choice. He was experiencing shortness of breath and could obtain prompt care only by utilizing Cyber MD. It may be contended that Mr. Miller could have driven 190 miles to the nearest flagship hospital. However, this was an inadequate substitute for the instant intake session offered through MHS’s portal.

Mr. Miller was also not given the opportunity to negotiate the terms. Instead, the agreement was on a “take-it-or-leave-it” basis, akin to that in *Alexander*. Just as the plaintiff in *Alexander* was the desperate, weaker party, Mr. Miller lacked the level of bargaining power possessed by MHS and was desperate for medical attention.

Though mere disparity in bargaining power is insufficient to establish unconscionability, the agreement here goes beyond that. Courts must consider individualized circumstances; here, the circumstances indicate that the bargaining situation was so unfair as to violate public policy. *Hines*, 140 F.4th at 328.

Not only was Mr. Miller the weaker party with little say over the terms, but he lived in a medically underserved area and faced significant structural barriers to care. MHS took advantage of the situation by inserting a non-negotiable agency disclaimer. If upheld, such disclaimer allows MHS to profit from its contract with Cyber MD and simultaneously shield itself from liability by making it burdensome for individuals to seek relief. This parallels the agreement in *Alexander*, which the court held unenforceable.

Given that the terms here were unreasonably favorable to MHS and Mr. Miller lacked a meaningful choice in accepting them, the agency disclaimer is unconscionable.

II. MRS. MILLER'S CLAIMS ARE NOT BARRED BY SHAWNEE'S FOUR-YEAR STATUTES OF REPOSE.

Neither the four-year repose period in S.R.S. § 12-404(b) nor that in § 12-410(a) bars Mrs. Miller's claims in this case. Each claim falls under an exception found explicitly in the text of these statutes. For the medical malpractice claims, that is the "continuous course of treatment" exception in § 12-404(b). And for the product liability claims, the exception in § 12-410(b) for undiscoverable defects and latent injuries controls. These exceptions reflect the Shawnee Legislature's policy choices in favor of protecting vulnerable plaintiffs and those who have suffered from undiscoverable product defects and latent injuries.

A. Mrs. Miller's medical malpractice claims fall under the "continuous course of treatment" exception in S.R.S. § 12-404(b).

Shawnee's medical malpractice statute of repose provides:

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

Shawnee Rev. Stat. § 12-404(b). The plain text of this statute—particularly subsection (b)’s declaration that the repose period “shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment” indicates that the repose period simply does not apply in continuous treatment cases. In lieu of the statute of repose, the relevant limitation reverts to subsection (a), which provides: “No action for damages for injury or death against any physician, hospital, or healthcare provider arising out of patient care shall be brought more than two (2) years after the date on which the claimant knew, or through reasonable diligence should have known, of the injury or death.” Shawnee Rev. Stat. § 12-404(a).

However, as the United States Supreme Court has explained, “statutes of repose,” unlike statutes of limitation, “begin to run on ‘the date of the last culpable act or omission of the defendant.’” *Cal. Pub. Emp. Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017). Consistent with that principle, this Court may alternatively hold that the statute of repose is merely tolled until the end of Mr. Miller’s treatment.

Regardless of how this Court reads § 12-404, Mrs. Miller’s claim is not barred. In this case, MHS was engaged in a continuous course of treatment for Mr. Miller’s underlying condition. So, if this Court holds that the repose period is tolled until that treatment ended in 2021, then Mrs. Miller’s 2024 claims were brought within the requisite four years. In any event, Mrs. Miller brought her claim within two years of the date on which she knew, or through reasonable diligence should have known, of the injury or death. Mrs. Miller did not have reason to know of her husband’s injury until October 30, 2023, when he suffered a collapsed lung. She brought this action the following July, less than a year later. As such, Mrs. Miller satisfied the limitations period in § 12-404(a).

1. Mr. Miller had a physician-patient relationship with MHS.

Some jurisdictions have linked “continuous course of treatment” to the existence of a continued physician-patient relationship. *See Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648 (4th Cir. 2004); *Martinelli v. Fusi*, 290 Conn. 347, 366 (2009). The Ohio Supreme Court defines a physician-patient relationship as a consensual arrangement in which the patient seeks medical services in reliance on the provider’s “special knowledge and skill in diagnosing and treating diseases and injuries which the patient lacks.” *Lownsbury v. VanBuren*, 762 N.E.2d 354, 358 (Ohio 2002). That analysis applies equally to relationships “between an individual and a professional corporation that is a healthcare provider[.]” *Castillo*, 372 F.3d at 649–50.

The continuous course of treatment exception exists as a special protection for patients, whose vulnerability both legislatures and courts recognize. While § 12-404(b) includes this exception textually, courts in jurisdictions without such an explicit provision have also adopted the continuous course of treatment as a doctrine. *See Martinelli*, 290 Conn. at 355–56; *Comstock v. Collier*, 737 P.2d 845, 848 (Colo. 1987). The Second Circuit Court of Appeals outlined two policy rationales for the doctrine in *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1080–81 (2d Cir. 1988). First, “it is not reasonable to expect a patient who is in the continuing care of a doctor to discover that the doctor’s acts may be the cause of his injuries.” *Id.* at 1080. And second, it is “absurd to expect a patient being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care.” *Id.* at 1081. Additionally, the Colorado Supreme Court cites a theory of continuing negligence for its adoption of the continuous course of treatment doctrine: “the physician has a continuing duty of treatment and care and a duty to rectify any mistakes made during the course of treatment.” *Comstock*, 737 P.2d at 849.

MHS mistakenly argues that it had no physician-patient relationship with Mr. Miller. In so doing, MHS attempts to liken Cyber MD to the unnamed physician-employees in *Castillo v. Emergency Medical Associates, P.A.* There, the Fourth Circuit found no continuous course of treatment when the plaintiff was treated by multiple unnamed emergency department physicians, none of whom were her regular doctor. *Castillo*, 372 F.3d at 650. No evidence suggested that the doctors consulted one another, and the plaintiff “was urged to seek follow up care from her ‘own MD’ or others should her condition not improve.” *Id.* The provider further disclaimed to the plaintiff that the treatment she received was “rendered on an emergency basis [and] not intended to be a substitute for comprehensive medical attention.” *Id.* These interactions were “discrete and isolated,” such that the plaintiff “could have no reasonable expectation of an ongoing physician-patient relationship.” *Id.* at 650–51.

Here, a genuine issue of material fact exists as to whether Mr. Miller was engaged in a physician-patient relationship with MHS. The *Castillo* plaintiff’s failure to show a physician-patient relationship is distinguishable from the case at bar. Each of the aforementioned facts in *Castillo* stands in contrast to Mr. Miller’s relationship with MHS. As demonstrated in Section I of this brief, Cyber MD is an agent of MHS, Mr. Miller’s regular healthcare provider. When Mr. Miller sought care from MHS, MHS provided him with medical diagnoses and recommended follow-ups. During this time, Mr. Miller relied on MHS’s special knowledge and skill in diagnosing his asbestos-related health problems, something that he could not do himself. In fact, where Mr. Miller lived was officially dubbed a Health Professional Shortage Area and a Medically Underserved Area. Mr. Miller had little choice but to seek out and rely upon MHS for the care he needed. This evidence thus suggests that MHS and Mr. Miller had a physician-patient relationship.

2. MHS engaged in a continuous course of treatment for Mr. Miller's underlying condition.

Mr. Miller's follow-up diagnoses with MHS were part of a continuous course of treatment for the same condition. Mr. Miller began his physician-patient relationship with MHS when he initiated a virtual intake session in April 2018 to seek treatment for symptoms derived from his asbestos exposure. The subsequent follow-up diagnoses were not isolated events like those in *Castillo*; rather, they were connected by the same physician-patient relationship, as well as the same underlying condition. Each time Mr. Miller participated in a follow-up evaluation with MHS, it was because of MHS's prompt. MHS ordered the X-ray and CT scans for Mr. Miller. And it was MHS that analyzed the raw imaging files from those scans. These evaluations were conducted for the purpose of diagnosing Mr. Miller's condition through MHS's telehealth service. They continued until 2021, at which time Mr. Miller was discharged and treatment concluded.

The misdiagnoses of Mr. Miller's condition indeed constitute continuing treatment. MHS points to *McDermott v. Torre*, a New York case which suggests that "continuous treatment does not contemplate circumstances where a patient initiates return visits merely to have his or her condition checked[.]" 437 N.E.2d 1108, 1108 (N.Y. 1982). But under these facts, Mr. Miller did not initiate his own return visits. MHS coordinated those visits via its recommendation that Mr. Miller follow up each year.

MHS also cites *McDermott* for the proposition that "the continuing nature of a diagnosis does not itself amount to continuous treatment." *Id.* But Mrs. Miller's claims do not run afoul of this principle. As detailed above, Mrs. Miller does not assert one diagnosis as the basis for a continuous course of treatment in this case. In other words, she is not claiming that the lasting effects of a single diagnosis constituted continuing treatment. Rather, she points to her husband's

multiple regular diagnoses, which were conducted over the course of several years for the same condition.

Summary judgment is not proper because a genuine issue of material fact exists as to the continuous course of treatment exception. A reasonable factfinder could conclude from the evidence that Mr. Miller's treatment through MHS continued from 2018 to 2021. The repose period therefore does not apply, or, in the alternative, only begins running at the conclusion of treatment. Either way, Mrs. Miller's claim is not time-barred.

B. Mrs. Miller's product liability claims fall under the undiscoverable defect and latent injury exception in S.R.S. § 12-410(b).

Under § 12-410(a), strict product liability claims are subject to a four-year repose period running "from the date of first sale, lease, or delivery of possession to [the product's] initial user or consumer." But the same section excepts claims regarding an "injury-causing aspect of the product that existed at the time of delivery [and] was not discoverable by an ordinary reasonably prudent person until more than four (4) years after the time of delivery[.]" Shawnee Rev. Stat. § 12-410(b). Additionally, the repose period "shall not apply . . . if the harm, caused within four (4) years after the time of delivery, did not manifest itself until after that time." *Id.*

Both of the abovementioned exceptions to the product liability statute of repose apply here. The record provides more than enough evidence for a genuine dispute of material fact on this front. Cyber MD's code contained an error that constitutes an undiscoverable defect, and Mr. Miller's undiagnosed illness is a latent injury. Each of these facts alone suffices to defeat the product liability statute of repose. Therefore, like § 12-404(b), the repose period in § 12-410(a) does not bar Mrs. Miller's product liability claims against CCS.

1. The injury-causing aspect of Cyber MD constitutes an undiscoverable defect.

In interpreting a provision similar to § 12-410(b), the Tenth Circuit referred to the applicable statute's latent defect framework as "an objective test—'whether the defect was not readily apparent or discoverable by a reasonably prudent *user*.'" *Eaton v. Jarvis Products*, 965 F.2d 922, 929 (10th Cir. 1992) (emphasis added). Thus, factfinders should adopt the perspective of a reasonably prudent user when determining whether a product's defect was not discoverable until more than four years after delivery.

The defect present in this case is an error in Cyber MD's baseline coding algorithm. This defect caused the software's diagnostic accuracy to drop "when evaluating images of patients with prior occupational asbestos exposure[.]" R0005. The circuit court found that over the course of Mr. Miller's treatment, "Cyber MD's 2017 baseline coding algorithm had consistently failed to identify" a malignant mass in Mr. Miller's left lung which continued to grow substantially during that time. R0006.

A genuine dispute of material fact exists as to whether the error in Cyber MD's code was readily discoverable by a reasonably prudent user. The circuit court correctly observed that the defect existed at the time the product was delivered in 2017. However, no evidence suggests that a reasonably prudent user could have discovered this defect—much the opposite. It was ultimately discovered by a forensic analysis in 2023, six years after the product's delivery to MHS. As the court of appeals noted, "[t]he defect became discoverable only after Mr. Miller suffered a collapsed lung in October 2023 and expert oncologists performed retrospective reviews of the baseline code." R0027. Therefore, the circuit court's impermissibly narrow holding overlooked the express statutory exception for undiscoverable defects. The undiscoverable defect here renders the repose period in § 12-410(b) inoperative.

2. Cyber MD's misdiagnosis of Mr. Miller's lung cancer is a latent injury.

Shawnee has enshrined what other jurisdictions have called the “latent injury” exception in its statutes. Many jurisdictions favor this legal concept. *See Jones v. United States*, 751 F.Supp.2d 835, 841–42 (E.D.N.C. 2010) (cataloging cases). The latent injury exception ensures that plaintiffs have access to courts when a statute of repose would otherwise be “used to bar suits before a plaintiff could have discovered their illness or injury.” *Id.* at 841. The Florida Supreme Court opined that “the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff’s cause of action if his or her injuries are latent and undiscoverable within the repose period.” *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So.2d 556, 559 (Fla. 2000).

The latent injury exception presents yet another genuine dispute of material fact in this case. Here, the latent injury at issue is the misdiagnosis of a malignant lesion in Mr. Miller’s left lung, which spread around his chest and spine. This lesion was “clearly visible on [Mr. Miller’s] 2018 scans,” meaning the injury was caused within four years of the 2017 delivery. R0006. At no point in the four years after delivery did Mr. Miller discover—nor would any reasonably prudent person have discovered—this injury. It simply did not manifest itself until after that time. The stage IV lung adenocarcinoma caused Mr. Miller’s lung to collapse in October 2023 and ultimately culminated in his death in April 2024. Not until the former of these incidents did the injury manifest itself. By that point, more than four years had lapsed since delivery. The product liability statute of repose is therefore defeated also by the latent injury exception.

CCS fails to consider the dire health care circumstances in Simmons County when it argues that Mr. Miller’s injuries were discoverable if only he sought a second opinion. Indeed, the lesion on Mr. Miller’s lung was clearly visible in his scans. But reasonable diligence would not have required Mr. Miller to get a second opinion in this instance. No permanent diagnostic

imaging centers existed in Simmons County, and Mr. Miller would have had to drive nearly 200 miles to obtain an in-person radiology consultation from the nearest capable facility. Until 2023, Mr. Miller had no reason to question the expertise of his health care provider. Even if he did, seeking a second opinion in this case would have demanded more than reasonable diligence.

Summary judgment on the basis of the product liability repose period in § 12-410(a) is accordingly improper. Not only does the undiscoverable defect in Cyber MD's coding render the statute of repose inapplicable, but so does Mr. Miller's latent injury. Either of these § 12-410(b) exceptions alone is sufficient to defeat the statute of repose.

3. Mrs. Miller's claims are permitted under the discovery rule exception in S.R.S. § 12-402(c).

Because the repose period in § 12-410(a) is inoperative here, that subsection causes the limitation on Mrs. Miller's product liability claims to revert back to § 12-402. Shawnee Rev. Stat. § 12-410(a). This framework operates in much the same manner as the medical malpractice statute discussed above. Section 12-402(a) provides that personal injury claims "shall be commenced within two (2) years after the cause of action accrues." Likewise, wrongful death claims must be brought in the two years following the decedent's death. Shawnee Rev. Stat. § 12-402(b). The same section provides a discovery rule exception, which reads as follows: "If the injury or its causal relationship to the conduct of another is not immediately discoverable through the exercise of reasonable diligence, the limitation period shall not begin to run until the claimant knows, or reasonably should have known, of the injury and the tortfeasor's identity." Shawnee Rev. Stat. § 12-402(c).

The wrongful death claim in this case was timely because it was brought less than two years from the date of Mr. Miller's death. Mr. Miller passed away on April 14, 2024, and the present action was filed just a few months later, in July 2024.

As to personal injury, the discovery rule exception covers Mrs. Miller's claims. The cause of action may have accrued more than two years before the present action, but subsection (c) specifically provides an exception for this situation. Mr. Miller's injury was not immediately discoverable through the exercise of reasonable diligence, as the preceding discussion shows. Mr. Miller relied on MHS's diagnostic services to provide him with the medical information he needed. Nor could he reasonably have sought a second opinion, given that he lived in an area with such a severe shortage of health care professionals.

Mrs. Miller's claims are not barred by the four-year statutes of repose in §§ 12-404(b) and 12-410(a). At a minimum, this case presents a genuine issue of material fact as to MHS's continuous course of treatment for Mr. Miller's condition, the undiscoverable nature of the defect in Cyber MD's coding, and the injury to Mr. Miller which only manifested itself years later. Each of these facts finds its legal expression in an explicit statutory exception to Shawnee's statutes of repose. Further, the policy rationales behind each exception counsel against barring Mrs. Miller's claims. In holding that Mrs. Miller's claims are not time-barred, this Court ought to consider the vulnerability of patients and the impossible burden that would otherwise fall upon plaintiffs to bring causes of action they could not reasonably know of.

CONCLUSION

For the above-stated reasons, Mrs. Miller respectfully requests this Court affirm the Shawnee Court of Appeals' denial of MHS and CCS's Motion for Summary Judgment.