

No. 26-338

**IN THE SUPREME COURT OF
SHAWNEE**

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

V.

**EVELYN MILLER, INDIVIDUALLY AND EX REL. THE ESTATE
OF ELIAS MILLER, RESPONDENT**

*ON WRIT OF CERTIORARI
TO THE SECOND DISTRICT SHAWNEE COURT OF APPEALS*

BRIEF FOR THE PETITIONERS

**TEAM (MAL)PRACTICE
MAKES PERFECT**

Attorneys for Petitioners

QUESTIONS PRESENTED

- I. Under the doctrine of apparent agency, can a hospital be held vicariously liable for the diagnostic inaccuracies of an artificial intelligence software program owned and operated by a third party when the hospital disclosed the non-agency relationship with that third party in easily accessible Terms and Conditions and explicitly notified users that the artificial intelligence software program was not a licensed healthcare professional?
- II. Under Shawnee Revised Statutes sections 12-404 and 12-410, do the statutes of repose bar a claim filed outside of the repose periods when:
 - A. The continuous course of treatment exception does not apply because there is no continuous treatment by a healthcare provider?
 - B. The exceptions for product liability do not apply because the defect was discoverable within the repose period by a reasonably prudent person and the harm occurred within weeks of delivery?

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OPINIONS BELOW

The unreported opinion of the Circuit Court of Simmons County for the State of Shawnee in *Evelyn Miller, Individually and Ex. Rel. the Estate of Elias Miller, Deceased, v. Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC*, No. 25-L-24601 (Mar. 6, 2025), is contained in the Record of Appeal at pages 2–15. The Circuit Court GRANTED Defendants’ combined motion for summary judgment and dismissed Plaintiff’s complaint with prejudice. The unreported opinion of the Shawnee Court of Appeals for the Second District in *Evelyn Miller, Individually and Ex Rel. the Estate of Elias Miller, Deceased, v. Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC*, No. 25-123 (Feb. 24, 2026), is contained in the Record of Appeal at pages 16–28. The Second Appellate District REVERSED the trial court’s decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of the State of Shawnee are relevant to this proceeding: Sn. Rev. Stat. §§ 12-404 and 12-410.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In 2012, Metropolitan Health System (hereinafter “MHS”), a regional hospital located in the State of Shawnee, contracted with Cyber-Care Solutions (hereinafter “CCS”), a digital health infrastructure provider, to design and host a proprietary remote telehealth platform. (R. at 4.) As part of that telehealth platform, MHS and CCS (hereinafter, jointly, “Petitioners”) provided users with access to an artificial intelligence program, Cyber MD, for a limited scope of

diagnostic purposes. (R. at 5.) Notably, MHS disclosed CCS as the independent contractor responsible for training Cyber MD, while MHS purely offered Cyber MD's services on the MHS telehealth platform. (R. at 5.) This case arises from the diagnostic inaccuracies of Cyber MD resulting in the passing of Elias Miller (hereinafter "Respondent"). (R. at 2.) Respondent's spouse, Evelyn Miller, brought this suit individually and on behalf of Respondent's estate in June of 2024. (R. at 7.)

Respondent's Forty-Six-Year Occupational History Exposed to Asbestos. In 1970, Respondent began working in the maintenance department at the Shawnee Steel Company in Cartersville, Shawnee. (R. at 3.) Respondent worked at the Cartersville plant for forty-six years until his retirement in 2016, where he was frequently exposed to asbestos-insulated machinery. (R. at 3.) Despite safety protocols, Respondent consistently ignored these warnings and worked without respiratory protective equipment. (R. at 3.) Respondent received health care during his tenure, and his most recent employment-sponsored chest screening in 2012 was deemed "unremarkable" by a radiologist. (R. at 3.)

Simmons County as a Medically Underserved Area. Respondent's hometown, Cartersville, is a rural community located in Simmons County, Shawnee. (R. at 3.) Following a bout of economic hardship—largely due to the closure of the steel mill in 2016—Cartersville experienced a severe population decline. (R. at 4.) Simmons County lost over seventy-five percent of its healthcare professionals by 2025. (R. at 4.) Additionally, both local hospitals closed following bankruptcy in 2015, leaving Simmons County without urgent care facilities,

diagnostic imaging centers, and three remaining primary care practices. (R. at 4.)

As such, state and federal officials declared Simmons County a Health Professional Shortage Area and a Medically Underserved Area. (R. at 4.) However, residents of Simmons County were not without access to health care: MHS offered in-person radiology consultations and CT scans at its flagship hospital in Goshen—a three-and-a-half-hour drive from Cartersville. (R. at 4.)

MHS’s Contractual, Non-Agency Relationship with Third Parties. In 2012, MHS contracted with CCS to create a remote telehealth platform controlled exclusively by MHS. (R. at 4.) Only MHS branding appeared on the platform’s interface, and CCS logos did not appear on any patient-facing pages. (R. at 4.) Patients accessed the MHS telehealth platform by navigating through MHS’s primary website domain. (R. at 4.) Each time users accessed their portal, they were met with the following disclaimer directly below the user login: “*By entering the portal, I accept the MHS Terms and Conditions.*” (R. at 4.) When users clicked the blue, underlined “Terms and Conditions” hyperlink, they were taken to a standalone page of 34 lines of single-spaced, black text against a plain white background. (R. at 4.) Approximately three-quarters down the page, in a font slightly smaller than the rest of the text, the following clause appeared:

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 5.) Audit logs indicate Respondent clicked the hyperlinked “Terms and Conditions” once on April 9, 2018, remaining on the page for approximately four seconds before closing it. (R. at 5.) Respondent did not access the link again during subsequent logins. (R. at 5.)

Integration of Cyber MD as a Third-Party Service on the MHS Telehealth Platform. In February 2017, CCS received clearance from the Food and Drug Administration (“FDA”) for Cyber MD, an interactive conversational artificial intelligence diagnostic system that allowed patients to input symptoms via text or voice and ask follow-up questions. (R. at 5.) Cyber MD also featured a limited scope of diagnostic processes, including compiling clinical history, generating differential diagnoses, and ordering or interpreting diagnostic tests. (R. at 5.)

Before initiating a chat with Cyber MD, patients were presented with a pop-up box stating in red, sixteen-point font: “*Cyber MD is not a licensed health care professional. It is an artificial intelligence software system.*” (R. at 5.) Users were required to click “Accept” to proceed. (R. at 5.)

The verification studies and data that CCS used to train Cyber MD were provided to the FDA. (R. at 5.) The initial software achieved a ninety-seven percent overall accuracy rate in classifying lung lesions among a dataset of 40,000 images from three hospitals. (R. at 5.) However, in October 2022, CCS discovered Cyber MD’s diagnostic accuracy dipped to eighty-five percent when evaluating images of patients with prior occupational asbestos exposure due to pleural shadowing

masking underlying tumors. (R. at 5–6.) Following the drop in accuracy, CCS retrained Cyber MD using 10,000 asbestos-exposed image sets and successfully restored high accuracy before releasing the updated version to clients in December 2023. (R. at 6.) CCS did not provide this information to the public. (R. at 6.)

Respondent’s Sole Reliance on Cyber MD for Complete Health Care. In April 2018, Respondent logged into his MHS telehealth portal and initiated a virtual intake chat session with Cyber MD. (R. at 6.) Respondent notified the artificial intelligence program of his history working with asbestos at the steel mill and mentioned he had been experiencing shortness of breath. (R. at 6.) Cyber MD ordered a chest X-ray and CT scan through a mobile radiology service visiting Cartersville, informing Respondent that Cyber MD would analyze the scans and go over the results with Respondent once the scans were ready. (R. at 6.)

Two weeks later, Cyber MD evaluated the raw imaging files, reported “zero evidence” of malignancy, and diagnosed Respondent with adult-onset asthma. (R. at 6.) Cyber MD then referred Respondent to a local practitioner for inhaler management and recommended annual imaging. (R. at 6.)

On his own volition, Respondent accessed Cyber MD for additional screenings. (R. at 6.) Each independent session took place a year apart with sessions in May 2019, May 2020, and June 2021. (R. at 6.) During each visit, Cyber MD reviewed new mobile scans and reiterated that there was “zero evidence” of malignancy. (R. at 6.) Following Respondent’s last visit with Cyber MD in 2021, the

artificial intelligence software system informed him that additional screenings were no longer necessary. (R. at 6.)

On October 30, 2023, Respondent suffered a spontaneous pneumothorax and was airlifted to MHS's flagship hospital in Goshen. (R. at 6.) Scans revealed a 6.4 malignant mass in his left lung with metastases to the pleura and spine. (R. at 6.) Analyzing the scans ordered by Cyber MD, licensed healthcare professionals at MHS discovered a 7 mm lesion on Respondent's initial scans from 2018. (R. at 6.) The lesion was partially obscured by pleural changes and had grown to 47 mm as seen in Respondent's last scan in 2021. (R. at 6.)

Respondent died from stage IV lung adenocarcinoma in April of 2024. (R. at 2, 7.) At the time of his death, Respondent was seventy-four years old. (R. at 7.)

II. NATURE OF PROCEEDINGS

The Circuit Court. In July 2024, Mrs. Miller brought this action against MHS and CCS for the diagnostic inaccuracies of Cyber MD individually and as Special Administrator of the Estate of her late husband, Respondent. (R. at 2, 7.) Respondent brought claims against MHS for vicarious liability under the doctrine of apparent agency for the diagnostic inaccuracies of Cyber MD. (R. at 2.) Respondent also brought claims against CCS for strict product liability based on a design defect inherent in the Cyber MD software system and a failure to warn. (R. at 2.)

MHS and CCS both moved for summary judgment following the close of discovery. (R. at 2.) In its motion for summary judgment, MHS contended that it cannot be held vicariously liable under apparent agency because Cyber MD was not an agent of MHS and disclosed its non-agency relationship with contracted third

parties in the MHS Terms and Conditions. (R. at 2.) Additionally, both MHS and CCS argued that the applicable statutes of repose—Shawnee Revised Statutes sections 12-404 and 12-410—bar Respondent’s claims as a matter of law. (R. at 2–3.) Finding no genuine issues of material fact, the Circuit Court of Simmons County for the State of Shawnee granted Petitioners’ motions for summary judgment and dismissed Respondent’s complaint with prejudice. (R. at 3, 13.)

The Court of Appeal. Respondent appealed the circuit court’s order granting summary judgment for MHS and CCS. (R. at 16.) On February 24, 2026, the Shawnee Court of Appeals for the Second District issued an opinion reversing Petitioners’ grant of summary judgment. (R. at 16.) The Second District found a genuine issue of material fact existed as to Respondent’s notice of and assent to MHS’s agency disclaimer, as well as Respondent’s affirmative defense claiming a lack of meaningful choice in choosing his health care. (R. at 27.) The appellate court also held that the lower court’s grant of summary judgment was based on an improperly narrow interpretations of Shawnee Revised Statutes sections 12-404 and 12-410. (R. at 27.)

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of the Shawnee Court of Appeals for the Second District and find that MHS is not vicariously liable under the doctrine for apparent agency for the diagnostic inaccuracies of Cyber MD. Further, this Court should render Respondent’s claims time-barred under the Shawnee Revised Statutes sections 12-404 and 12-410.

I.

The Court of Appeals for the Second District erred in holding a genuine issue of material fact existed as to whether MHS disclosed a non-agency relationship with CCS because it is undisputed MHS provided Respondent with reasonable notice of its non-agency relationship with third parties, including CCS, in the MHS Terms and Conditions.

First, Respondent fails to establish the requisite elements of apparent agency. Under the first, “holding out,” element of the doctrine, courts consider whether a principal purported to hold itself out as the sole provider of services rendered by a third party. With respect to the first element, Respondent cannot establish MHS held itself out as the provider of Cyber MD because disclaimers alerting Respondent of MHS’s non-agency relationship with contracted third parties were explicitly stated within the reasonably conspicuous MHS Terms and Conditions. Additionally, the second element of apparent agency pertaining to the acts of the alleged agent in creating the appearance of authority is not relevant for this Court’s analysis because it is the acts of MHS as the alleged principal, not CCS as the alleged agent, in determining whether an agency relationship existed. Finally, Respondent has not met the third element demonstrating reasonable reliance on the appearance of an agency relationship because he did not rely on the reputation of MHS in its capacity as a hospital to render complete health care.

Second, Respondent had actual notice of the nature of Cyber MD solely as an artificial intelligence software program, and not as that of a licensed healthcare professional. The contract principles of notice and assent refute Respondent’s claim

of vicariously liability through apparent agency in this case. Each time Respondent initiated a chat with Cyber MD, he was provided with a notice in red, sixteen-point font stating the nature of Cyber MD solely as an artificial intelligence program—not a licensed health care professional. Respondent could not proceed without clicking “Accept.” Courts routinely uphold online agreements requiring users to deliberately click “I Agree” because the users have to affirmatively assent to the terms of the agreement. The Court of Appeals erred in holding that this notice did not disclose MHS’s non-agency relationship with CCS. However, it did not have to. The reasonably conspicuous hyperlink containing the MHS Terms and Conditions provided sufficient inquiry notice of that relationship.

Third, Respondent was sufficiently notified of and assented to the MHS Terms and Conditions disclosing non-liability. Even if a user does not have actual notice of contractual terms, courts will enforce online agreements so long as the user was provided inquiry notice of the contractual provisions. Agreements based on inquiry notice are enforced if the website provides reasonably conspicuous notice of the terms and the user performs an action—like clicking a button or checking a box—that unambiguously manifests their assent to those terms. Each time Respondent signed in to his telehealth portal, he was met with a disclaimer informing him that he agreed to the MHS Terms and Conditions by entering into his portal. This disclaimer was located directly below the user login. As such, Respondent was sufficiently notified that by entering the MHS telehealth portal, he

would be subject to the contractual terms contained within the hyperlinked MHS Terms and Conditions.

II.

The Court of Appeals for the Second District erred in holding that Respondent's claims were filed timely, as they were barred by Shawnee Revised Statutes sections 12-404 and 12-410.

First, the continuous course of treatment exception does not apply because Respondent did not receive continuous treatment of the relevant injury: the misdiagnosis of asthma. The undisputed facts demonstrate that Respondent did not receive continuous treatment beyond his initial screening in 2018. The subsequent screenings did not constitute ongoing medical care, as they were independent, intermittent examinations. Courts have routinely held that this type of intermittent treatment does not constitute continuous treatment, as this would be contrary to the legislative intent behind the statute of repose. It would result in the indefinite liability of medical professionals, leaving them without any statutory protection. Further, the continuous treatment exception does not apply to single acts of treatment. Finally, Cyber MD does not qualify as a healthcare provider as required by the exception, as the diagnostic system is merely a medical device and not a licensed professional. Thus, the repose period expired in 2022, and Respondent's malpractice claim is time-barred.

Second, Shawnee Revised Statute section 12-410 bars Respondent's product liability claim because they were raised outside the period of repose and no exceptions apply. The latent defect exception does not apply because Cyber MD's

misdiagnosis of Respondent's condition was discoverable by an ordinary reasonably prudent person. The undisputed facts demonstrate that Respondent was at a high risk of developing respiratory disease after exposure to asbestos throughout his forty-six-year career. Respondent never met with a healthcare professional to check up on his lung health for over ten years, only seeking professional medical attention when he suffered a collapsed lung. Upon experiencing respiratory issues, an ordinary reasonably prudent person in Respondent's position would not have taken risks by relying solely on an online, artificial intelligence software program, and would have taken the inconvenient, but not prohibitive, drive to the nearest hospital to seek care. The prolonged exposure exception does not apply because the harm caused by Cyber MD's diagnostic inaccuracy occurred at the time Respondent received his misdiagnosis, it was not caused by prolonged exposure to the product. Finally, the latent harm exception does not apply because Respondent's harm, a misdiagnosed tumor, manifested throughout the period of repose. Cyber MD was delivered to Respondent in 2018, therefore the repose period expired in 2022, and Respondent's claims are time barred.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal raises two legal issues that warrant de novo review as questions of law. *See Vladimirov v. Lynch*, 805 F.3d 955, 960 (10th Cir. 2015) (holding questions of law are reviewed de novo). This Court also applies a de novo standard when considering a Rule 56(a) motion for summary judgment, since the question of whether no genuine dispute as to any material fact exists is a legal question. *Rice v. Morehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021).

I. MHS IS NOT VICARIOUSLY LIABLE UNDER THE DOCTRINE OF APPARENT AGENCY BECAUSE MHS PROVIDED NOTICE OF ITS NON-AGENCY RELATIONSHIP WITH CCS.

MHS cannot be held vicariously liable under the doctrine of apparent agency because the undisputed facts unequivocally demonstrate that MHS disclosed its non-agency relationship with independent contractors, including CCS. A principal corporation may be held vicariously liable under the doctrine of apparent agency where the principal represents to consumers that an independent contractor is the agent of the principal and consumers “justifiably rely upon the apparent agency.” *Bartholomew v. Burger King Corp.*, 15 F. Supp. 3d 1043, 1050 (D. Haw. 2014). The purpose of apparent agency is to hold principal corporations responsible for creating the appearance of an agency relationship when innocent parties are harmed by their reasonable reliance on the apparent agency. *O’Banner v. McDonald’s Corp.*, 173 Ill. 2d 208, 213 (1996).

Within the medical context, when a patient “knows, or should have known, that the provider of health care is an independent contractor,” a hospital cannot be held liable for the negligent acts of that independent contractor under the doctrine of apparent agency. *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 207 (1988). More specifically, a hospital may be held vicariously liable under the doctrine of apparent agency only if a plaintiff establishes three distinct elements: (1) the hospital held itself out as the provider of services rendered by a negligent third party, (2) the agent created an appearance of authority and the hospital “had knowledge of and acquiesced in [those acts],” and (3) the plaintiff acted in

reasonable reliance upon the apparent agency. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993) (citing *Pamperin*, 144 Wis. 2d at 208). In the context of summary judgment, if a plaintiff fails to establish even one element of apparent agency, then summary judgment is appropriate. *Wallace v. Alexian Bros. Med. Ctr.*, 389 Ill. App. 3d 1081, 1086 (2009).

Here, Respondent cannot establish MHS is vicariously liable under the doctrine of apparent agency because it is undisputed that the requisite elements of apparent agency are not met.

A. MHS Did Not Hold Itself Out as the Provider of Services Rendered by Any Contracted Third Party.

It is undisputed that Respondent cannot establish the first element of apparent agency because MHS deliberately disclosed its non-agency relationship with contracted third parties through reasonably conspicuous disclaimers.

The “holding out” element is only satisfied if the hospital represents itself as the “provider of [health] care [services] without informing the patient that the care is provided by an independent contractor[.]” *Gilbert*, 156 Ill. 2d at 525. The presence of a consent or disclosure form is an important factor in considering whether a principal held itself out as the provider of services offered by an independent contractor. *Wallace*, 389 Ill. App. 3d at 1087.

Courts have held that patient consent forms “are almost conclusive” in determining whether a principal has held itself out as the provider of services rendered by a third party. *Thede v. Kapsas*, 386 Ill. App. 3d 396, 401 (2008); see *York v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 222 Ill. 2d 147 (2006) (finding lack

of notice regarding a negligent physician's independent-contractor status in the hospital's treatment consent form supported the conclusion that the plaintiff relied on the apparent agency). While an analysis of the "holding out" element is largely dependent on the disclaimers' design and accessibility specifications, a patient who "signs such a form can[not] reasonably believe" their treating physician is an agent of the hospital "when the form contains specific language to the contrary." *Lamb-Rosenfeldt v. Burke Med. Grp., Ltd.*, 2012 IL App (1st) 101558, ¶ 27. Within the digital context where patients cannot physically sign consent forms, online provisions informing patients of a principal's non-agency relationship with third parties are enforceable when the patient is provided conspicuous notice of the terms and "unambiguously warn[ed]" of the binding legal consequences. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 55 (1st Cir. 2018).

Here, the undisputed facts are clear: MHS deliberately disclosed its non-agency relationship with CCS and Cyber MD through reasonably conspicuous notice. Each time a user signed into their telehealth portal, a notice stating, "*By entering the portal, I accept the MHS Terms and Conditions,*" appeared directly below the user login. (R. at 4.) Within the conspicuously placed MHS Terms and Conditions, users were notified that *all* clinical evaluations and diagnostic interpretations were provided by independent contractors and automated software applications developed by another company. (R. at 4.) The MHS Terms and Conditions expressly stated that clinical evaluations and services offered on the telehealth platform were the product of independent contractors. (R. at 4.) While a

paper consent form and online service agreement differ in format, we live in an increasingly digital world, and both disclosures provide patients with important information relevant to their health care experience. Respondent had ample opportunity to read and understand the implications of assenting to the terms of service, which included a provision stating MHS's non-agency relationship with third parties like CCS. While Respondent only viewed the page displaying the MHS Terms and Conditions for four seconds, he was not prohibited from revisiting and remaining on the page for as long as he wanted during later logins. The mere fact that Respondent chose not to carefully review the page does not refute that he was provided conspicuous notice of the disclaimers alerting him of MHS's non-agency relationship with CCS. Therefore, Respondent fails to establish MHS held CCS out as its agent because Respondent was reasonably informed about the non-agency disclaimer every time he accessed his telehealth portal.

B. CCS Did Not Create an Appearance of Apparent Agency

The second element of apparent agency applies to the acts of the agent in creating the appearance of authority, and analyzes whether “knowledge of and acquiescence in those acts by the principle must be proven.” *Pamperin*, 144 Wis. 2d at 210. Here, this element is not relevant because the acts of the agent, CCS, are not at issue. The critical inquiry before this Court is whether MHS, as the principal corporation, created an appearance of agency upon which Respondent relied while utilizing Cyber MD.

C. No Reasonable Person Would Conclude That Cyber MD Was a Service Provided By MHS.

Respondent fails to satisfy the third element of apparent agency because the undisputed facts demonstrate that a reasonable person in Respondent's position would have concluded CCS and Cyber MD were not operating on behalf of MHS. In analyzing the third element of apparent agency, courts consider whether a patient "relied upon the acts of the hospital or its agent" in receiving medical care.

Pamperin, 144 Wis. 2d at 211. Specifically, courts recognize it is "the reputation of the hospital . . . upon which a patient relies" in analyzing the third element of apparent agency. *Id.*; see also *Arthur v. St. Peters Hosp.*, 169 N.J. Super. 575, 579 (Law. Div. 1979). The inquiry is whether a patient "is seeking care from the hospital itself" or whether the hospital solely serves as "a place for his or her personal physician to provide medical care." *Pamperin*, 144 Wis. 2d at 212. For the purposes of apparent agency, an individual seeking services directly from a hospital reasonably relies upon the fact that complete care "will be provided by the hospital through its staff." *Id.*

Here, Respondent did not reasonably rely on the reputation of MHS in its capacity as a hospital because he did not seek complete health care from MHS.¹ While Respondent sought care from Cyber MD through the MHS telehealth portal, he never actually sought complete care from MHS staff. Following Respondent's

¹ While only MHS branding appeared throughout its remote telehealth platform, the mere display of a principal's trademark or logo "does not constitute a representation sufficient to create an apparent agency," especially if additional precautions are taken to disclose a non-agency relationship. *Jackson Hewitt, Inc. v. Kaman*, 100 So. 3d 19, 32 (Fla. Dist. Ct. App. 2011); see *Triplett v. Soleil Group*, 664 F. Supp. 2d 645, 657 (D.S.C. 2009).

first chat session with Cyber MD in April of 2018, the artificial intelligence program referred him to a local practitioner—not MHS providers—for inhaler management. (R. at 5.) Prior to that chat session with Cyber MD in 2018, Respondent’s last interaction with any medical provider was in 2012 for an employment-sponsored chest screening with a radiologist. (R. at 2.) Respondent never sought complete health care at MHS’s flagship hospital in Goshen for his diagnosis of adult-onset asthma. (R. at 5.) Instead, Respondent independently initiated chat sessions with Cyber MD—an artificial intelligence system that he had been notified was not a licensed healthcare professional—for the only known health care he received in the twelve years since meeting with the radiologist in 2012. (R. at 2.) Respondent’s decision not to seek any health care from a licensed professional following his forty-six-year-career, during which he was exposed to asbestos at the steel mill, is precisely why he cannot claim he “reasonably relied” on MHS for complete health care. (R. at 2.) Since Respondent has not reasonably relied on MHS for complete care, he fails to establish the third element of apparent agency.

D. Under General Contract Principles, Respondent Was Sufficiently Notified of and Assented to Non-Agency Disclaimers Relinquishing Liability from Third Parties.

Respondent was sufficiently notified of the lack of agency between MHS and CCS, as well as the nature of Cyber MD, and unambiguously assented to the disclaimers each time he accessed the telehealth platform. The contract principles of notice and assent refute an apparent agency theory of liability in this case. *See Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (1958) (holding that a patient’s *meaningful notice* of whether a negligent physician was an agent of the hospital is

relevant in determining whether the patient relied on apparent agency); *Williams v. Dimensions Health Corp.*, 279 A.3d 954 (1958) (finding a hospital vicariously liable under apparent agency because the hospital did not give *meaningful notice* that trauma center physicians were independent contractors).

This Court should apply ordinary contract principles in analyzing whether Respondent was notified of MHS's non-agency relationship with CCS because courts routinely do so in determining whether a binding, online agreement has been formed. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73 (2d Cir. 2017). The enforceability of online agreements is a "fact-intensive inquiry" based primarily on whether the binding terms were "reasonably conspicuous" and the user's "manifestation of assent unambiguous as a matter of law." *Id.* at 76. Even if a user does not have actual notice of the terms of an agreement, the user will still be bound by the agreement "if a reasonably prudent user would be on *inquiry* notice of the terms." *Id.* at 74–75 (emphasis added). Courts enforce online agreements based on inquiry notice if the website "provides reasonably conspicuous notice of the terms" and the user performs an action—like clicking a button or checking a box—that "unambiguously manifests [their] assent to those terms." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022).

Here, the undisputed facts show Respondent was informed of MHS's non-agency relationship with CCS and the nature of Cyber MD solely as an artificial intelligence system through notice and assent to those provisions. Through MHS's notice of non-agency disclaimers, MHS establishes it was not holding itself out as

the provider of Cyber MD, and Respondent’s claim of vicarious liability under the doctrine of apparent agency fails.

- i. The notice in red, sixteen-point font alerting Respondent to the nature of Cyber MD’s software provided actual notice that Cyber MD was not a licensed healthcare professional.*

Respondent was explicitly notified of the nature of Cyber MD as an artificial intelligence software system—not a healthcare professional—each time he initiated a chat with Cyber MD. (R. at 4.) Courts routinely uphold online agreements requiring a user to deliberately click “I Agree” because the user has “affirmatively assented to the terms of [the] agreement.” *Meyer*, 868 F.3d at 75.

In *Santana v. SmileDirectClub, LLC*, the court enforced an agreement contained in SmileDirectClub’s online registration process where patients were required to check an “I Agree” box next to the company’s hyperlinked Terms and Conditions. 475 N.J. Super. 279, 290 (App. Div. 2023). The plaintiff in that case argued SmileDirectClub’s hyperlinked terms did not explicitly state important contractual provisions like “arbitration” or “waiver of right to sue” within the text of the hyperlink itself. *Id.* The court found that “the *context* in which the ‘I Agree’ checkbox appeared,” as opposed to the text of the hyperlink itself, is the relevant inquiry in determining whether a user was provided sufficient notice of the contractual provisions. *Id.* (emphasis added).

Here, the context in which Respondent was notified of Cyber MD’s nature as an artificial intelligence program is sufficient for establishing his unambiguous assent to the notice. Each time Respondent initiated a chat with Cyber MD, he was provided with a notice in red, sixteen-point font stating: “*Cyber MD is not a licensed*

health care professional. It is an artificial intelligence software program.” (R. at 4.) Respondent could not proceed without clicking “Accept.” (R. at 4.) By requiring Respondent to deliberately click “Accept,” he affirmatively assented to the notice of Cyber MD’s software. The Shawnee Court of Appeals erred in finding that the pop-up box informing Respondent of Cyber MD’s nature was defective, reasoning it did not inform Respondent of MHS’s non-agency relationship with CCS. (R. at 20.) The disclaimer notifying Respondent of Cyber MD’s nature did not *have* to disclose that information, since Respondent assented to that non-agency disclaimer in the reasonably conspicuous MHS Terms and Conditions located below the user login. Therefore, this Court should find Respondent was provided actual notice of and unambiguously assented to the nature of Cyber MD’s software.

ii. MHS’s hyperlinked “Terms and Conditions” provided inquiry notice of the lack of apparent agency between MHS and CCS.

Each time Respondent signed in to his telehealth portal, he assented to the MHS Terms and Conditions notifying him of MHS’s non-liability for third parties contracting with MHS. Courts generally bind users to hyperlinked terms within an online agreement when the user performs a separate action, like clicking “Sign in” or “Enter Portal.” *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024). These types of agreements are enforceable so long as the user is provided conspicuous notice of the terms and is “unambiguously warn[ed]” of the binding legal consequences. *Cullinane*, 893 F.3d at 55. If a user lacks actual notice, courts still uphold online agreements based on inquiry notice if the website provides “reasonably conspicuous notice of the terms” and the user performs some action,

“such as clicking a button or checking a box,” unambiguously manifesting their assent to those terms. *Berman*, 30 F.4th at 856. However, courts are generally unwilling to enforce online agreements when the terms are “tucked away in obscure corners of the website where users are unlikely to see [them].” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). These types of agreements are typically unenforceable due to the inconspicuous nature of the terms on the webpage. *Id.* The application of such ordinary contract principles in the digital context is essential to protect the “integrity and credibility” of online bargaining. *Berman*, 30 F.4th at 856 (quoting *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2nd Cir. 2002)).

In *Meyer*, the Second Circuit held that Uber’s smartphone application provided sufficient inquiry notice to a reasonably prudent user of the hyperlinked “Terms of Service & Privacy Policy.” 868 F.3d. at 78. The plaintiff in *Meyer* claimed he was not provided sufficient notice of Uber’s mandatory arbitration clause. *Id.* at 70. Uber responded, arguing that plaintiff was provided reasonable notice of and assented to Uber’s mandatory arbitration clause when he signed up for the Uber smartphone application. *Id.* Indeed, upon signing up for the Uber application, that plaintiff manually input his credit card information and was required to click the button marked “REGISTER” to complete Uber’s registration process. *Id.* at 71. Located directly below the “Register” button and input fields for the user’s credit card information was the following black text: “By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.” *Id.* The capitalized

“Terms of Service & Privacy Policy” was a blue, underlined hyperlink that when clicked opened a standalone page to Uber’s Terms of Service and Privacy Policy.

Meyer, 868 F.3d at 71.

The court in *Meyer* found the hyperlinked “Terms of Service & Privacy Policy” provided the plaintiff with reasonable inquiry notice of the terms contained therein for three reasons. *Id.* at 78. First, the “Terms of Service & Privacy Policy” hyperlink was located directly below the “Register” button. *Id.* Notably, the court held that, even though the “Terms of Service” were only available through a hyperlink, reasonable notice was still established. *Id.* The court reasoned that the language, “[b]y creating an Uber account, you agree,” provided users with clear notice that by registering for an Uber account, they would be “subject to contractual terms.” *Id.* Second, the “entire screen [was] visible at once,” and the user “[did] not need to scroll beyond what was immediately visible” to access the terms of service. *Id.* Finally, although the text including the disclaimer and hyperlinked “Terms of Service & Privacy Policy” was in a small font, the black text contrasted the white background, and the hyperlink was bright blue and underlined. *Id.* Therefore, the plaintiff was provided sufficient inquiry notice of Uber’s terms and conditions, and, consequently, unambiguously assented to those terms when he registered for an Uber account. *Id.* at 79, 80.

Unlike the court’s finding of sufficient inquiry notice and unambiguous assent in *Meyer*, in *Nicosia v. Amazon.com, Inc.*, the Second Circuit found that Amazon’s interface did not provide conspicuous notice of Amazon’s terms and

conditions, nor did that plaintiff unambiguously assent. 834 F.3d 220, 238 (2nd Cir. 2016). In *Nicosia*, the plaintiff claimed he was unaware he agreed to Amazon’s mandatory arbitration provision after placing an online order. *Id.* at 227. Amazon argued the “Conditions of Use,” containing the mandatory arbitration provision, provided sufficient inquiry notice because upon placing his order, the plaintiff was met with a notice at the top of the webpage stating, “[b]y placing your order, you agree to Amazon.com’s privacy notice and conditions of use.” *Id.* at 236. Within this disclaimer, the language “privacy notice and conditions of use” was hyperlinked to Amazon’s Conditions of Use. *Id.* The Second Circuit held that Amazon’s interface did not provide sufficient notice because it contained summaries of that customer’s purchase and delivery information “between fifteen and twenty-five links,” “text . . . in at least four font sizes and six colors (blue, yellow, green, red, orange, and black),” several buttons, and advertisements. *Id.* at 237. Additionally, the disclaimer alerting users of Amazon’s “privacy notice and conditions of use” at the top of the page was “not directly adjacent” to the “[p]lace your order” button located on the right side of the page. *Id.* at 236. Thus, the court held that the plaintiff did not unambiguously assent to Amazon’s Conditions of Use by clicking the “[p]lace your order” button because the hyperlinked “conditions of use” were not sufficient to qualify as reasonably conspicuous. *Id.* at 238.

Here, MHS provided reasonably conspicuous notice of the MHS Terms and Conditions, and Respondent assented to those terms each time he signed in to his telehealth portal. For an online agreement to be legally binding, a user must be

provided reasonably conspicuous notice of the agreement's terms and "unambiguously assent" to those terms. *Berman*, 30 F.4th at 856. Actual notice is not required so long as a "reasonably prudent user would be on *inquiry* notice of the terms." *Meyer*, 868 F.3d at 74–75 (emphasis added). This Court should find that MHS provided conspicuous notice of the MHS Terms and Conditions and that a reasonably prudent user would be on inquiry notice of those terms for three reasons.

First, similar to Uber's hyperlinked "Terms of Service" located directly below the "Register" button in *Meyer*, MHS's hyperlinked "Terms and Conditions" were located directly below the user login *each* time Respondent accessed his portal. (R. at 3). Respondent did not have to search for the MHS Terms and Conditions, and he did, in fact, access the Terms and Conditions for four seconds in April 2018 before closing the page. (R. at 4.) Even though Respondent only accessed the MHS Terms and Conditions for four seconds, he was provided ample opportunity to access the reasonably conspicuous hyperlink alerting him that CCS was an independent contractor and MHS assumed no liability for the actions of third parties. The court in *Meyer* explicitly stated that the conspicuous display of hyperlinked terms is sufficient for establishing reasonable notice of those terms. *Meyer*, 868 F.3d. at 78. The *Meyer* court further reasoned that the conspicuous location of the terms and language of the text made it clear that by creating an account, users would be "subject to contractual terms." *Id.* at 78. Even if Respondent argues he did not have actual notice of the terms, courts consistently uphold online agreements if a reasonably prudent user would be on *inquiry* notice of the terms. *Id.* at 74–75. A

reasonably prudent user would have observed the hyperlinked MHS Terms and Conditions each time they accessed their portal, and Respondent *did* access the MHS Terms and Conditions. (R. at 4.) Therefore, the reasonably conspicuous hyperlink to the MHS Terms and Conditions provided Respondent with inquiry notice of the contractual terms, and by logging in to his account, Respondent assented to those terms.

Second, Respondent did not have to scroll through the MHS interface to locate the MHS Terms and Conditions. Unlike Amazon's interface in *Nicosia* containing information between "fifteen and twenty-five links" along with numerous buttons and advertisements, the MHS interface contained a single hyperlink alerting Respondent of the MHS Terms and Conditions. (R. at 3.) The MHS terms were not obscured, nor did Respondent have to scroll the page to find the hyperlink. (R. at 3.) The accessibility of the MHS hyperlink provides further reason Respondent had reasonable notice of the MHS Terms and Conditions.

Finally, the display of the blue, underlined MHS hyperlink contrasted against the webpage's background provided conspicuous notice of the MHS Terms and Conditions. (R. at 3.) In *Nicosia*, the Second Circuit held that Amazon's interface did not provide reasonable notice to the company's Conditions of Use because the "text [was] displayed in at least four font sizes and six colors (blue, yellow, green, red, orange, and black)." *Nicosia*, 834 F.3d at 237. The display of MHS's hyperlinked Terms and Conditions is factually similar to the sufficiently conspicuous Conditions of Use in *Meyer*. In *Meyer*, the hyperlinked terms governing

the Uber’s smartphone application were “bright blue and underlined.” *Meyer*, 868 F.3d. at 78. Just like in terms of service in *Meyer*, the MHS Terms and Conditions are bright blue and underlined. Therefore, MHS provided reasonably conspicuous notice of the Terms and Conditions disclosing non-liability for third party contractors, and Respondent assented to those terms each time he accessed his telehealth portal.

E. Holding MHS Vicariously Liable for the Actions of CCS Sets a Dangerous Precedent That Places Individuals Living in Medically Underserved Areas at Risk.

If this Court finds MHS vicariously liable for the negligence of CCS, despite MHS having deliberately notified users of its non-agency relationship with third party contractors, hospitals will become increasingly hesitant to provide telehealth to rural communities. MHS provided Respondent with reasonably conspicuous notice of the hyperlinked MHS Terms and Conditions, and Respondent was provided ample opportunity to engage with these terms. Further, Respondent had a meaningful choice to seek health care elsewhere—namely, MHS’s flagship hospital in Goshen.² However, Respondent declined to pursue alternative health care options, and, instead, chose to engage with Cyber MD on MHS’s telehealth portal. (R. at 5.) Without access to Cyber MD through the MHS telehealth platform,

² To the extent Respondent asserts an affirmative defense of procedural unconscionability, that defense has already been disproven given that Respondent had the opportunity to read and understand the MHS Terms and Conditions and seek health care elsewhere. *See Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005 (9th Cir. 2024) (holding users are bound to hyperlinked terms within an online agreement when the user affirmatively clicks “Sign in” or “Enter Portal”); *e.g.*, *Meyer*, 868 F.3d 66 (2d Cir. 2017) (finding inquiry notice sufficient for binding a user to the contents of an online agreement); *cf. Harrison v. Winchester Place Nursing*, 996 N.E.2d 1001 (Ohio Ct. App. 2013) (ruling inconvenience is not a legitimate basis for rendering a valid contract void).

Respondent and others living in rural communities like Simmons County would be left without viable health care options. *See* Fazal Khan, MD-JD, *From Pixels to Prescriptions: The Case for National Telehealth Licensing & Ai-Enhanced Care*, 57 Ind. L. Rev. 581, 592 (2024). By punishing MHS for the diagnostic inaccuracies of an artificial intelligence program owned and operated by an independent contractor, this Court risks disincentivizing healthcare providers from developing technology for patients in Medically Underserved Areas.

In sum, there is no question that Respondent had knowledge of and access to essential provisions warning him of MHS's non-agency relationship with CCS each time he accessed his telehealth portal. As such, he fails to demonstrate a genuine dispute of material fact exists because he cannot show a reasonable person would have concluded CCS was an agent of MHS. Therefore, MHS cannot be held vicariously liable for the negligence of CCS under the doctrine of apparent agency and its motion for summary judgment should be granted. (R. at 25.)

II. RESPONDENT'S CLAIMS ARE TIME-BARRED BY THE STATUTES OF REPOSE BECAUSE NEITHER THE CONTINUOUS TREATMENT EXCEPTION NOR ANY PRODUCT LIABILITY EXCEPTIONS APPLY.

According to the United States Supreme Court, a statute of repose places “an outer limit on the right to bring a civil action,” beginning on the date of the last culpable act or omission of the defendant. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). “A statute of repose ‘bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.’” *Id.* “The statute of repose limit is ‘not related to the accrual of any cause of action; the injury need not have occurred, much less have

been discovered.” *Id.* Statutes of repose reflect a legislative intent that a defendant should “be free from liability after the legislatively determined period of time.” *CTS Corp.*, 573 U.S. at 9.

Given the legislative intent behind statutes of repose, tolling is permissible only “where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances.” *California Pub. Employees’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017). In other words, tolling often requires an express statutory exception to avoid disruption of the legislative intent to ensure protection of healthcare providers and device manufacturers. *Id.* Accordingly, Respondent’s claims are time-barred.

A. The Continuous Treatment Exception Does Not Apply Because Respondent Did Not Receive Continuous Treatment for the Relevant Injury by a Licensed Healthcare Provider.

Respondent’s claims are barred by Shawnee’s four-year statutes of repose because Cyber MD’s diagnostic screenings do not constitute a continuous course of treatment under Shawnee Revised Statutes section 12-404 (hereinafter “Section 12-404”). Respondent’s initial misdiagnosis occurred in April of 2018. (R. at 5.) Thus, the general four-year repose window for medical malpractice expired April of 2022. To the extent Respondent asserts that “the diagnostic timeline should be viewed as a single, continuous course of treatment that extended the repose clock,” this claim fails as a matter of law. (R. at 12.)

Section 12-404 mandates that claims arising out of patient care shall be brought within two years of discovery, but “in no event shall such action be brought

more than [four] years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.” Sn. Rev. Stat. § 12-404. However, Section 12-404 states that “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.” Sn. Rev. Stat. § 12-404(b) (emphasis added).

The continuous treatment exception tolls statutory periods in medical malpractice actions when a provider continues to treat the same medical condition. *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466 (8th Cir. 2008); *Miller v. United States*, 932 F.2d 301 (4th Cir. 1991). “The continuing course of treatment doctrine applies to professional malpractice claims and can be applied in order to determine when the ‘last act’ occurs to trigger the period of repose for such claims.” *Fulmore v. Johnson & Johnson*, 581 F. Supp. 3d 752, 758 (E.D.N.C. 2022). In other words, the statute of repose begins with the final act constituting the treatment. *Id.*

Here, Cyber MD’s annual diagnostic evaluations do not satisfy the continuous treatment doctrine because (1) the relevant misdiagnosis did not result in continuous course of treatment beyond the initial screening and (2) an artificial intelligence intake system does not act as a replacement for a certified physician.

- i. Respondent’s misdiagnosis of adult-onset asthma did not result in a continuous course of treatment based on the nature of his relationship with Cyber MD and the nature of his treatment.*

In determining whether the continuous treatment doctrine stretches the start of the repose period, this Court must first determine what constitutes treatment. *See Chrisco v. Raemisch*, 374 F. Supp. 3d 1093, 1097 n. 4 (D. Colo. 2019). Several

courts have adopted different forms of analysis in determining what constitutes continuous treatment: the Massachusetts Supreme Court documents several of these interpretations, stating that these cases emphasize that a statute of repose requires active, ongoing treatment, and “the ongoing existence of a passive doctor-patient relationship” is insufficient as continuous treatment because continuous treatment is “*for the same or related illnesses or injuries*, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship.” *Harlfinger v. Martin*, 435 Mass. 38, 52–53 (2001) (emphasis added) (relying on *Raynor v. Kyser*, 338 Ark. 366, 372 (1999) (continuous treatment doctrine requires “active, ongoing medical care and attention beyond the time of a specific negligent act or series of acts”; three and one-half year hiatus between visits defeats claim of continuous treatment)); *Tullock v. Eck*, 311 Ark. 564, 571 (1993) (patient’s continued ingestion of prescribed medication is not “continuing treatment” in the absence of any further contact with defendant physician); *Rowntree v. Hunsucker*, 833 S.W.2d 103, 106–08 (Tex., 1992); *McDermott v. Torre*, 56 N.Y.2d 399, 452 (1982) (continuous treatment doctrine “does not contemplate circumstances where a patient initiates return visits merely to have his or her condition checked”); *Schleicher v. Cupelo*, 700 N.Y.S.2d 354, 357 (Sup. Ct. 1998) (continuous treatment doctrine does not toll statute of limitations “where no apparent treatment is prescribed and only monitoring is contemplated”); *see also Borgia v. City of New York*, 12 N.Y.2d 151, 157 (1962). Respondent’s misdiagnosis

did not result in continuous treatment based on the nature of the relationship between Cyber MD and Respondent.

Respondent's misdiagnosis of asthma did not result in continuous treatment because intermittent check-ups do not constitute continuous. The language of Section 12-404 assumes the existence of an ongoing relationship of active management for a known condition. This is also evinced by the legislative intent to prevent patients from interrupting their "physician's corrective efforts" with "the disruption of a malpractice action." *Holland v. United States*, 302 F. Supp. 2d 484, 488 (M.D.N.C. 2004). Here, however, the sole treatment administered by Cyber MD, routine screening appointments, do not constitute continuous treatment. (R. at 5.)

The screenings provided by Cyber MD do not constitute continuous treatment, as they were wholly independent of one another as routine annual checkups. Checkups are not active or continuous treatment: the continuous treatment doctrine is inapplicable to a patient's visits to a hospital merely for routine examinations where the patient appears to be in "perfect health."

Charalambakis v. City of New York, 46 N.Y.2d 785, 786 (1978) (refused to apply the continuous treatment doctrine to an infant born prematurely given excessive oxygen in her incubator causing blindness). Further, in *Davis v. City of New York*, a patient went to a cancer detection center for a diagnostic examination, after which she was advised that "there was nothing to be concerned about and to return in two years." 38 N.Y.2d 257, 258–59 (1975). A year later, she went to the center for additional examination, though the record did "not disclose the results of this examination or

any advice or communication which resulted from it.” *Id.* at 259. The court ruled the care constituted “intermittent rather than continuous medical services,” as it was wholly “discrete and complete.” *Davis*, 38 N.Y.2d at 260.

Here, Respondent’s subsequent screenings were merely intermittent and do not constitute continuous treatment. Respondent received continuous treatment for adult-onset asthma during the period from his first scan in April 2018 to when he received the scan’s results two weeks later. (R. at 5.) This constituted continuous treatment as Respondent sought medical advice for his symptoms and waited to receive the relevant recommendations. (R. at 5.) However, the continuity of this treatment ended as soon as Respondent received said results of his scan. After his first session, Cyber MD found “‘zero evidence’ of malignancy,” diagnosed Respondent with adult-onset asthma, referred him to a local practitioner for inhaler management, and recommended annual follow-up imaging. (R. at 6.) Subsequent failures to identify the lesion do not change the primary error, and therefore, the relevant negligent action was the misdiagnosis of Respondent’s lung condition as asthma. Thus, Respondent’s intermittent screening with Cyber MD fails to establish the requirements of continuous treatment.

If this Court were to allow independent examinations to toll the repose period, intermittent bouts of treatment would evolve into an indefinite course, forever holding medical providers liable. This directly conflicts with the legislative intent of protecting healthcare providers from such delayed litigation and the economic instability that follows, considering they would now be indefinitely liable

for any single act or omission. Such a ruling would open the floodgates for thousands of lawsuits, resulting in a massive waste of judicial resources. There are further issues with an undefined extension of the repose period lasting indefinitely: witnesses' memories fade, evidence is lost, and documents are destroyed.

The legislature has repeatedly expressed a narrow application of the exceptions to the statute of repose because “at some point a defendant should be able to put past events behind him.” *CTS Corp.*, 573 U.S. at 9. While there are circumstances where these limited exceptions apply, such circumstances are not present here. The continuous treatment exception intended to allow patients to file suit despite being unable to pinpoint the exact date of their injury. *See, e.g., Forshey v. Jackson*, 222 W. Va. 743, 751 (2008). It does not, nor was it ever meant to, apply to isolated acts of negligence. *See, e.g., Whitman v. Robinson Nursing & Rehab. Ctr., LLC*, 2024 Ark. App. 591, 4 (2024) (“The doctrine requires a series of negligent acts or a continuing course of improper treatment. The doctrine is inapplicable to cases involving single or isolated acts of negligence.” (citation omitted)).

Here, there is but one relevant action: the misdiagnosis of asthma. (R. at 6.) Respondent can, in fact, pinpoint the exact date of his injury: the results of the 2018 screening. (R. at 6.) This was a single act, not a continuous course of treatment. As stated by the *Whitman* court, the continuous treatment exception cannot apply to single acts of negligence. 2024 Ark. App at 4. Accordingly, Respondent's inaccurate diagnosis was a single act of negligence, thereby falling beyond the scope of harm the legislature intended the continuous treatment exception to address.

Just as later acts of negligence by different doctors do not constitute continued treatment, Respondent's later chat sessions with a diagnostically inaccurate artificial intelligence portal do not constitute continued negligent treatment. *See Miller*, 932 F.2d at 305 ("Equally important, as we and other courts have recognized, the rationale for this tolling theory only permits its application when the treatment at issue is for the same problem and by the same doctor, or that doctor's associates or other doctors operating under his direction.") Accordingly, Cyber MD did not administer a continuous course of treatment, as required by Section 12-404, and there exists no genuine issue of material fact as to the extension of the repose period.

ii. *Cyber MD does not meet the requirements of a licensed healthcare provider.*

Even if the Court finds Respondent's independent screenings constitute a continuous course of treatment, Cyber MD fails to meet the requirements of a healthcare professional under Section 12-404 because it does not have a medical license. Section 12-404 requires the administration of continued treatment by a *healthcare provider*. Sn. Rev. Stat. § 12-404(b).

The Virginia Supreme Court defines healthcare provider according to the Virginia Code, which states, in relevant part, "a person, corporation, facility or institution *licensed* by this Commonwealth to provide health care or professional services as a physician or hospital." Va. Code Ann. § 8.01-581.1 (emphasis added). Under the Family and Medical Leave Act, healthcare provider is defined in relevant part as "a doctor of medicine . . . who is authorized to practice medicine . . . by the

State in which the doctor practices,” and “[t]he phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.” 29 C.F.R. § 825.125

Here, Respondent fails to meet the requirements of Section 12-404 simply because Cyber MD is not a licensed professional. Cyber MD is “an interactive conversational [artificial intelligence] diagnostic system” that patients interact with “via text or voice” to ask questions and receive answers. (R. at 4.) While Cyber MD did receive FDA clearance, Cyber MD does not have a medical license. (R. at 4.) “The FDA regulates devices; the practice of medicine is regulated by states through boards of medicine licensure.” Megan Sword, *To Err Is Both Human and Non-Human*, 88 UMKC L. Rev. 211, 229 (2019). Thus, Cyber MD is a medical device, not a medical professional.

In recent years, the courts have routinely warned of the dangers of reliance on artificial intelligence in professional fields. *See, e.g., United States v. Farris*, 171 F.4th 920, 923 (6th Cir. 2026); *Noland v. Land of the Free, L.P.*, 114 Cal. App. 5th 426 (2025); *Fletcher v. Experian Info. Sols., Inc.*, 168 F.4th 231 (5th Cir. 2026). Within the legal field, courts have held that “[n]ew technologies . . . are no substitute for tried-and-true safeguards managed by practicing attorneys.” *Farris*, 171 F.4th at 923. In the same way, an artificial intelligence system is no substitute for a licensed medical professional. Just as the courts do not consider artificial intelligence systems as the equivalent of licensed attorneys, this Court should not consider Cyber MD as the equivalent of a licensed medical professional. Section 12-

404 explicitly requires the continued administration of treatment by a healthcare provider. The presence of such a licensed healthcare professional is plainly missing from the present case.

iii. *Public policy favors barring Respondent's claim in order to ensure the accessibility of healthcare services in Medically Underserved Areas.*

While artificial intelligence is not a replacement for a certified physician, it remains an incredibly beneficial tool for increasing access to healthcare. Such programs help improve the quality of life of individuals who would otherwise have no convenient access to healthcare. “[N]early one in five Americans reside in rural communities, yet a mere one-tenth of licensed physicians practice within these regions.” Fazal Khan, MD-JD, *From Pixels to Prescriptions: The Case for National Telehealth Licensing & Ai-Enhanced Care*, 57 Ind. L. Rev. 581, 592 (2024). “Certain rural counties face the alarming scenario of having a single practicing physician responsible for the care of over 3,500 residents, falling significantly short of the recommended population-to-provider ratio of 2,000:1, viewed as a baseline for ensuring adequate access to care.” *Id.* Systems akin to Cyber MD can act as a means of initial access to reach the final point: a licensed physician. Applying the continuous treatment doctrine to cases such as this would discourage the use of telehealth platforms by holding medical providers liable for actions that are simply not their own. Holding diagnostic tools to the same standard as licensed physicians stunts the future of healthcare by disincentivizing the use of telehealth platforms.

Respondent's independent screenings do not constitute continuous treatment by a medical provider. Accordingly, application of the continuous treatment doctrine

in this case is not only erroneous, but also detrimental to the accessibility and innovation of healthcare services. Therefore, Respondent's claim is consequently time-barred by Section 12-404.

B. The Statute of Repose for Product Liability Actions Bars Respondent's Claims Because They Were Raised Outside the Repose Period and No Exceptions Apply.

Respondent's product liability claims are barred by Shawnee Revised Statutes section 12-410. The repose period for product liability claims based on strict liability is "within four (4) years from the date of first . . . delivery of possession to [the product's] initial user or consumer." Sn. Rev. Stat. § 12-410(a). CCS delivered Cyber MD to MHS on March 1, 2017. (R. at 19.) Respondent began using Cyber MD on April 9, 2018, when he initiated a virtual intake session with Cyber MD. (R. at 6.) Respondent did not file suit until over six years later in July of 2024, well outside the four-year period of repose. (R at 7.) Under Shawnee Revised Statutes section 12-410(b)(3) (hereinafter "Section 12-410"), the period of repose shall not apply in three specific instances: (1) "the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four years after the time of delivery," (2) "the harm was caused by prolonged exposure to a defective product," or (3) the harm caused within the period of repose "did not manifest itself until after that time." Sn. Rev. Stat. § 12-410(b)(3). The facts in this case fail to satisfy the exceptions provided in Section 12-410, and Petitioners are entitled to judgment as a matter of law.

- i. *The injury-causing diagnostic inaccuracy was discoverable by an ordinary reasonably prudent person within the period of repose.*

The Second Appellate District erred in ruling that Respondent's claims are not defeated by the absolute four-year repose bar of Shawnee Revised Statutes section 12-410(a) because the injury-causing aspect of Cyber MD, a diagnostic inaccuracy, was a mistake discoverable by an ordinary reasonably prudent person under Section 12-410. An analysis of Section 12-410 is largely fact-intensive, and most cases addressing analogous statutes of repose do so on summary judgment. *See Varner v. Domestic Corporation*, 2017 WL 3730618, 9 (S.D. Fla. 2017).

In *Baumann v. Excel Industries*, the Court of Appeals of Kansas upheld the entry of summary judgment in favor of the defendant, holding that a statute with language analogous to Section 12-410 was inapplicable because the injury-causing aspect of the defective product was readily discoverable by a reasonably prudent person. 17 Kan. App. 2d 807, 808–09 (1993). In *Baumann*, the plaintiff was injured while working on the motor of a running, ride-on lawnmower. *Id.* at 809. The plaintiff filed suit outside the period of repose and argued his claims were saved because the injury-causing aspect of the mower was not discoverable by a reasonably prudent person. *Id.* at 818. To decide if the latent defect exception applied, the court looked at whether a reasonable person would have been able to comprehend the risks “and determine *how* to avoid the danger.” *Id.* at 819 (emphasis added). The court explained that, for a defect to be discoverable, a user should be able to reasonably detect the hidden danger and guard against it. *Id.* at 818 (citing *Gisriel v. Uniroyal, Inc.*, 517 F.2d 699, 704 (8th Cir. 1975)). Applying this

framework, the court found that a careful person would have read the manual, been familiar with the part of the mower they were working on, and understood the vulnerabilities they exposed themselves to in using the specific part. *Baumann*, 17 Kan. App. 2d at 818. The court concluded that a reasonably prudent person would have seen that their use of the product *could* result in injury, and, therefore, the latent defect exception did not apply. *Id.*

In *Kerns By and Through Kerns v. G.A.C., Inc.*, the Supreme Court of Kansas endorsed the application of the latent defect exception established in *Baumann*. 255 Kan. 264, 272 (1994). In *Kerns*, the allegedly defective product was a fence surrounding a pool. *Id.* at 267. The court upheld the grant of summary judgment against the plaintiff's product liability claims because they were filed outside the period of repose. *Id.* at 266, 273. In affirming summary judgment, the court sought to determine whether the case fell under an exception to the statute of repose. *Id.* at 270–72. Because the defect, larger holes in the mesh of the fence, was present and discoverable by a reasonably prudent person at the time the fence was installed, the court held there was no duty to warn and the plaintiff's claims were barred. *Id.*

Applying the interpretation of the latent defect exception from *Baumann* and *Kerns* to this case strongly supports the conclusion that Cyber MD's diagnostic inaccuracy was discoverable within the period of repose. Here, Respondent regularly handled asbestos-insulated machinery, without personal safety equipment, while working at a steel mill for forty-six years. (R. at 3.) Respondent received employment-sponsored chest screenings through 2012. (R. at 3.) With the

risks of asbestos being common knowledge and employer-sponsored chest screenings affirming the need for caution when it came to Respondent's health, a reasonably prudent person experiencing shortness of breath would realize the potential for a serious issue. (R. at 3, 6.) A visit with a licensed medical professional at a hospital within the four-year period of repose would have revealed the lesion in Respondent's lungs. (R. at 6). A reasonable person would have gone to the hospital and discovered Cyber MD's misdiagnosis, and therefore, the latent defect exception in Section 12-410 is inapplicable.

ii. *Respondent's harm was not caused by prolonged exposure to the defective product.*

The prolonged exposure exception under Section 12-410 does not apply because Respondent's harm was caused by Cyber MD's initial misdiagnosis, not prolonged exposure.

The prolonged exposure exception applies when the manufacturer responsible for the product caused the plaintiff's harm over a prolonged period of time. *Baughn v. Eli Lilly and Co.*, 356 F.Supp. 2d 1166, 1172, 1177 (2005). In *Baughn*, the court examined the application of an analogous prolonged exposure exception. *Id.* at 1168. In *Baughn*, the plaintiff claimed she was harmed by her mother's ingestion of the drug diethylstilbestrol (DES) while she was pregnant with the plaintiff. *Id.* In her late thirties, the plaintiff discovered the harm allegedly caused by DES and sued the manufacturer. *Id.* at 1168, 1172. The court held that the prolonged exposure exception applied because the plaintiff's exposure to the defective product during gestation qualified as prolonged exposure. *Id.*

The Tenth Circuit Court of Appeals held the prolonged exposure exception should be analyzed in a case where a defective product was used for three-and-a-half years. *Koch v. Shell Oil Co.*, 52 F.3d. 878, 885–86 (10th Cir. 1995). In *Koch*, the plaintiff sued the manufacturer of an oral pesticide fed to cattle, alleging harm resulting from the regular use of the product over a three-and-a-half-year period. *Id.* at 878. On remand, the lower court held that the plaintiff’s continued use of the product for three-and-a-half years constituted prolonged exposure. *Koch v. Shell Oil Co.*, 905 F.Supp. 960, 963 (D. Kan. 1995). However, the court clarified that for the exception to apply, it *must* be prolonged exposure to the product, “as opposed to the plaintiff’s initial exposure, [that] caused the plaintiff’s harm.” *Id.*

Unlike with DES in *Baughn* or oral pesticides in *Koch*, Respondent’s harm was not caused by prolonged exposure to the product. In this case, the prolonged exposure exception fails to save Respondent’s claims because Cyber MD’s initial misdiagnosis in 2018 caused Respondent’s injury by allowing his preexisting condition, a lesion in his lungs, to continue manifesting. (R. at 6.) Thus, the prolonged exposure exception remains inapplicable.

iii. The latent harm exception does not apply because Respondent’s disease was not caused by Cyber MD.

The exception for latent harm under Section 12-410 does not apply because Respondent’s harm manifested throughout the entire four-year period following Respondent’s initial chat session with Cyber MD and the subsequent misdiagnosis in 2018. (R. at 6.) The undisputed facts demonstrate that review of past scans, following Respondent’s 2023 visit to MHS’s flagship hospital, revealed a lesion that

had existed throughout the period of repose. (R. at 6.) A seven-millimeter lesion at the time of Cyber MD’s diagnostic inaccuracy in 2018 had grown to forty-seven millimeters by 2021. (R. at 6.) There is no dispute of material fact that the harm to Respondent manifested prior to 2021.

The United States Supreme Court has held that when a person is ignorant of the harm caused by negligent medical care, the governing statutes do not begin to run until the harm is discovered. *U.S. v. Kubrick*, 444 U.S. 111, 121 (1979); *see Nicolazzo v. U.S.*, 786 F.2d 454, 456 (1st Cir. 1986). While the case at bar involves product liability claims, the Supreme Court’s reasoning still applies: ignorance must be blameless to toll a period of repose. In *Nicolazzo*, the court held that the statute of limitations began to run when the plaintiff received a correct diagnosis. 786 F.2d at 456–57. The court reasoned that because the plaintiff sought care from multiple licensed health care professionals who provided various diagnoses that failed to resolve the plaintiff’s health concerns, the exception applied. *Id.*

Here, an ordinary reasonably prudent person would have sought a second opinion, just as the *Nicolazzo* plaintiff did. While the cause of action in *Nicolazzo* was not something discoverable by simply “[making] inquiry among doctors with average training,” Respondent’s tumors were easily identifiable by licensed medical professionals. *Nicolazzo*, 786 F.2d at 456; *Kubrick*, 444 U.S. at 123; (R. at 6.) Because Respondent’s harm manifested during the period of repose and because the harm was discoverable as a result of reasonable diligence, the latent harm exception does not apply.

iv. *Shawnee Revised Statutes section 12-410 governs product liability suits.*

The Second Appellate District was correct in applying the specific product liability statute, Section 12-410, which controls over the general statute of limitations for personal injury and wrongful death actions, Shawnee Revised Statutes section 12-402. *See Kerns*, 255 Kan. at 272 (holding a specific statute of repose controls over a general statute of repose because the legislature had not indicated otherwise); *see also Koch*, 52 F.3d. at 884 (finding a general statute of repose does not control over a specific statute of repose for product liability claims); *Ehrenfelt v. Janssen Pharmaceuticals, Inc.*, 737 Fed.App'x. 262, 266 (6th Cir. 2018) (stating a specific statute of repose for product liability incorporates and overrides the general statute of limitations for torts). “To find otherwise would ignore the general rule of statutory interpretation that a specific statute should control over a general statute.” *Baumann*, 17 Kan. App. 2d at 814.

The Supreme Court of Kansas has analyzed statutes analogous to Section 12-410 and Shawnee Revised Statutes section 12-402 in *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 657 (Kan. 1992) (examining K.S.A.1991 Supp. 60-513, a general statute of limitations covering personal injury and wrongful death claims, and K.S.A. 60-3303, a statute of repose governing product liability claims, including exceptions for latent disease caused by a defendant’s asbestos products). In *Harding*, the plaintiff worked with asbestos-containing drywall products from approximately 1963 until no later than 1977. *Id.* at 656. In 1988, the plaintiff was diagnosed with malignant pleural mesothelioma and passed away as a result of his

illness. *Harding*, 250 Kan. at 657. Following his passing, plaintiff's wife sued the manufacturer of the asbestos-containing products, asserting claims of negligence and strict liability. *Id.*

The court held that the specific statute of repose for product liability actions applied over the general statute of repose. *Id.* at 661. Although the general statute would have excluded the plaintiff's claims, the court reasoned that because the specific statute "provide[d] the limitation for bringing an action arising out of a latent disease caused by the harmful material asbestos, it [wa]s the applicable statute." *Id.* The Kansas Supreme Court's ruling that a specific statute controls over a general one has also been endorsed by the Tenth Circuit. *Koch*, 52 F.3d. at 884.

Here, like in *Harding*, the specific product liability statute, Section 12-410, applies over the general statute of repose laid out in Shawnee Revised Statutes section 12-402. Although *Harding* illustrates how to determine the applicable statute of repose, the court's decision to save the plaintiff's claims under an exception to the repose period was based on a distinguishable set of facts. In *Harding*, the plaintiff sued K.C. Wall for their asbestos-containing products, and the court correctly applied an exception related to suits against the sellers of products containing asbestos. 250 Kan. at 661. In the present case, the Petitioners are not accused of using harmful materials in their products. (R. at 2.) While Respondent was exposed to asbestos on the job, his claims arise from Cyber MD's misdiagnosis of a pre-existing disease—not from exposure to harmful physical material in Petitioners' product. (R. at 2–3.) The court of appeal erroneously held

that Respondent's claims were timely under Shawnee Revised Statute section 12-402 because Section 12-410 is the proper governing statute in this case.

C. There Is No Genuine Dispute of Material Fact as to Respondents' Claims Being Time-Barred.

Respondent's claims are barred by the four-year statutes of repose set forth in Shawnee Revised Statute sections 12-404 and 12-410, as neither exception applies based on the undisputed facts of the record. The continuous treatment exception is inapplicable to the present case because of the nature of the relationship between Cyber MD and Respondent. First, Cyber MD's sole treatment of Respondent was intermittent, and independent screenings do not constitute a continuous course of treatment. Second, an artificial intelligence platform does not serve as a replacement for a licensed medical provider as required by Section 12-404.

Further, the product liability exceptions under Section 12-410 are inapplicable here because Respondent's harm occurred when Cyber MD rendered a misdiagnosis in 2018. (R. at 6.) First, the latent defect exception does not apply because the diagnostic inaccuracy was discoverable by an ordinary reasonably prudent person within the period of repose. Second, the prolonged exposure exception does not apply because the resulting harm from the defect occurred when Respondent received his misdiagnosis. Finally, the latent harm exception does not apply because Respondent's harm manifested within the period of repose.

Tolling the statutes of repose could potentially slow or disincentivize healthcare innovation. Artificial intelligence technology presents the opportunity to meaningfully increase access to medical care in Medically Underserved Areas. Molly

Elise Bush, *Accessible, Affordable, and AI: How Artificial Intelligence Can Advance Healthcare Access*, University of Alabama at Birmingham (December 12, 2025), <https://sites.uab.edu/humanrights/2025/12/12/accessible-affordable-and-ai-how-artificial-intelligence-can-advance-healthcare-access/>. Should this Court toll the statutes of repose, it will have a detrimental effect on the evolution and innovation of medical care. *See id.* As of 2025, eighty-five percent of medical institutions were adopting artificial intelligence systems to streamline clinical productivity and improve engagement with patients. Johns Hopkins University, *AI in Healthcare: Applications and Impact*, Johns Hopkins Engineering Online (September 1, 2025), <https://ep.jhu.edu/news/ai-in-healthcare-applications-and-impact/>. In addition to increasing accessibility for rural residents, artificial intelligence can foster more equitable healthcare environments by improving diagnostic accuracy and facilitating effective communication with health care providers. David B. Olawade et al., *The Role of Artificial Intelligence in Enhancing Healthcare for People with Disabilities*, 364 Soc. Sci. Med. (2025). Allowing the statutes of repose to apply in this case improperly imposes liability on medical institutions, which jeopardizes residents' access to convenient health care in Medically Underserved Areas.

CONCLUSION

This Court should REVERSE the holding of the Shawnee Court of Appeals on the basis that MHS is not vicariously liable under the doctrine of apparent agency and Respondent's claims are barred by the statutes of repose. First, Respondent was provided sufficient notice of the MHS Terms and Conditions disclosing non-liability for third party contractors, as well as Cyber MD's nature solely as an artificial

intelligence software program. Second, the continuous treatment exception does not apply because Respondent did not receive a continuous course of treatment, nor does Cyber MD meet the requirements of a healthcare provider under Section 12-404. Further, the product liability exceptions under Section 12-410 do not apply because Cyber MD's diagnostic inaccuracy was discoverable by an ordinary reasonably prudent person, the harm occurred at the time of Respondent's misdiagnosis, and his harm manifested within the period of repose. Since no exceptions to Section 12-404 or Section 12-410 apply, Respondent's claims are barred, and this Court should GRANT Petitioners' motion for summary judgment on both issues as a matter of law.

Dated: October 1, 2026

Respectfully Submitted,

s/ [OMITTED]

Attorneys for Petitioners

PROOF OF SERVICE

I declare that:

I am over the age of eighteen years and not a party to the within action; my business address is [OMITTED].

On October 1, 2026, I electronically served a copy of the attached BRIEF FOR THE PETITIONERS on the following interested parties:

Counsel for Respondent

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed this 1st day of October, 2026 at Goshen, Shawnee.

s/ [OMITTED]