

No. 26-338

In the Supreme Court of Shawnee

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

V.

**EVELYN MILLER, INDIVIDUALLY AND AS SPECIAL
ADMINISTRATOR FOR THE ESTATE OF ELIAS MILLER,
DECEASED, RESPONDENT**

*ON WRIT OF CERTIORARI
TO*

BRIEF FOR THE RESPONDENT

Oral Argument

Date:

Round:

[OMITTED]

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Under the doctrine of apparent agency, is a healthcare institution vicariously liable for diagnostic errors by a third-party AI software integrated into its branded telehealth platform, when that platform neither identifies the AI provider nor clearly discloses the lack of an agency relationship?
2. Under Shawnee's four-year statutes of repose, are Respondent's claims barred where: (a) Cyber MD's continued annual monitoring of Mr. Miller's respiratory condition constituted a continuous course of treatment extending the repose period under Shawnee Revised Statute section 12-404; and (b) Cyber MD's latent, undiscoverable algorithmic defect falls within the express exceptions to repose under Shawnee Revised Statute section 12-410?

OPINION BELOW

The decision of the Shawnee Court of Appeals for the Second District is reported at *Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC v. Evelyn Miller*, No. 25-123 (2d Dist. Feb. 24, 2026).

STANDARD OF REVIEW

The standard of review is *de novo*. R. at 21. A motion for summary judgment is appropriate when there is no genuine dispute of material fact, and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). When considering summary judgment, a court must view the evidence in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This appeal challenges the grant of summary judgment in favor of Petitioners Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC and raises only questions of law. Under *de novo* review, the Court independently evaluates the questions of law without deference to the lower courts' rulings. *Highmark Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 563 (2014).

STATEMENT OF THE CASE

1. *Statement of Facts*

a. *Elias Miller's Forty-Six Years of Occupational Asbestos Exposure.*

Elias Miller worked in maintenance at the Shawnee Steel Company in Cartersville, Shawnee, from 1970 until retiring in 2016. R. at 3. Mr. Miller's employment at the Steel Company spanned a total of forty-six years. R. at 3. In

1950, the Shawnee Steel Company opened its steel mill with machinery heavily insulated with asbestos per mid-century industry standards. R. at 3.

In his maintenance role, Mr. Miller regularly worked with asbestos-insulated machinery in the steel plant. R. at 3. Although new steel mills stopped utilizing asbestos after changes to Occupational Safety and Health Administration (“OSHA”) standards in the 1970s, the Cartersville Steel Plant still retained its original insulation. R. at 3. The safety enforcement was lenient, with Mr. Miller often working without respiratory protection. R. at 3.

Mr. Miller never smoked, and, before working at the plant, had no history of asthma or other respiratory disease. R. at 3. In 2012, prior to retirement, a radiologist determined that Mr. Miller’s chest screenings read as “unremarkable.” R. at 3.

b. *The Collapse of Healthcare Access in Simmons County.*

Cartersville is a rural town located in Simmons County, Shawnee. R. at 3. In 2015, both local hospitals closed after filing for bankruptcy. R. at 4. After the economic downturn and closure of a major assembly plant in 2016, the population of Simmons County dropped to 7,500 people. R. at 3–4. As a result, the county lost about 75% of its healthcare workforce. R. at 4. This left the county with no urgent care clinics, no imaging centers for diagnostic testing, and only three primary care facilities. R. at 4. The nearest facilities capable of providing computed tomography (“CT”) and radiology services are 190 miles and a 3.5-hour drive away at Metropolitan Health System, Inc.’s (“MHS”) Goshen hospital. R. at 4. As a result of

poor access to healthcare services, both the state and federal government formally designated Simmons County a “Health Professional Shortage Area and Medically Underserved Area.” R. at 4.

c. *MHS’s Branded Telehealth Platform.*

Based in Goshen, MHS operates as a large regional healthcare network. R. at 4. In 2012, MHS contracted Cyber-Care Solutions, LLC (“CCS”) to build and host an in-house remote telehealth platform. R. at 4. MHS exclusively controlled the patient-facing interface, inserting MHS branding throughout the platform. R. at 4. CCS marks were contractually prohibited from being on any patient-facing interfaces. R. at 4. Patients must access the telehealth platform by entering MHS’s domain at “(www.mhs.com/telehealthplatform).” R. at 4.

Underneath the user login, the web portal stated, “By entering the portal, I accept the MHS Terms and Conditions.” R. at 3. If a patient clicked the blue, hyperlinked “Terms and Conditions” text, a bare webpage opened to thirty-four single-spaced lines of unformatted black text on a white background, in wording smaller than the rest of the MHS web portal. R. at 4. Three-quarters down the page, an apparent agency disclaimer appeared stating:

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

R. at 5. Audits of the digital log show that Mr. Miller clicked this hyperlink once on April 9, 2018, and stayed on the page for four seconds. R. at 5.

d. *Cyber MD's Development and Undisclosed Defects.*

In February 2017, the FDA granted CCS clearance to use Cyber MD, a conversational AI platform that analyzes symptoms, asks follow-up questions, reviews patient history, develops diagnostic differentials, orders diagnostic tests, and interprets diagnostic test results. R. at 5. While the verification studies and data used to train Cyber MD were disclosed to the FDA prior to approval, this information was never provided to the public. R. at 5.

Cyber MD was marketed by CCS as “Cyber MD: Care Everywhere.” R. at 5. When launching Cyber MD, a pre-session pop-up in red sixteen-point font stated: “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” To move forward, users had to click “Accept.” R. at 5.

In 2017, MHS integrated Cyber MD into its telehealth system. Initial software versions of Cyber MD were trained utilizing a dataset of 40,000 images across three hospital systems. R. at 5. This early version of Cyber MD achieved a 97% accuracy rate in classifying lung lesions. R. at 5.

In October 2022, CCS internally discovered Cyber MD's accuracy rate fell to 85% in assessing asbestos-exposed patients because pleural shadowing was hiding tumors. R. at 5–6. CCS did not release an updated version to clients until December 13, 2023, after training a new model on a dataset of 10,000 asbestos-exposed images. R. at 6. Fourteen months elapsed between discovery and correction. R. at 6.

CCS never disclosed accuracy drops in Cyber MD to the public or to Mr. Miller. R. at 6.

e. *Mr. Miller's Four-Year Treatment Plan.*

In April 2018, Mr. Miller experienced shortness of breath. R. at 6. He logged into his MHS portal and began the virtual intake process with Cyber MD. R. at 6. During the intake with Cyber MD, Mr. Miller disclosed his forty-six-year asbestos exposure history, prompting Cyber MD to order chest X-rays and a CT scan through a mobile imaging service visiting the town. R. at 6. After sending the test orders, Cyber MD told Mr. Miller, "Once I have your scans, I will analyze them closely and go over the results with you." R. at 6.

Two weeks later, Mr. Miller logged in to his MHS portal, and Cyber MD stated the imaging showed "zero evidence" of malignancy. R. at 6. Cyber MD diagnosed Mr. Miller with asthma, referring him to a local practitioner for inhaler management and recommending annual follow-up imaging. R. at 6. Mr. Miller returned to Cyber MD in May 2019, May 2020, and June 2021, each time with new scans and Cyber MD stating that there was "zero evidence" of malignancy. R. at 6. Following the 2021 check-in, Cyber MD told Mr. Miller that "annual imaging was no longer necessary." R. at 6. Six weeks before CCS released the corrected model. R. at 6.

In October 2023, Mr. Miller was airlifted to MHS's Goshen Hospital after suffering a spontaneous pneumothorax. R. at 6. The post-expert review emphasized that back in 2018, the seven-millimeter lesion was clearly visible in the scans, likely

obscured by pleural changes. R. at 6. Due to Cyber MD’s diagnostic oversight, the lesion continued to grow, reaching forty-seven millimeters by 2022. R. at 6. By 2023, scans showed a sixty-four-millimeter malignant lesion in Mr. Miller’s left lung, with extensive metastasis throughout the pleura and spine. R. at 6. On April 14, 2024, Mr. Miller died at age seventy-four. R. at 7.

2. *Procedural History*

a. *The Circuit Court.*

Evelyn Miller, Respondent, filed suit in the Circuit Court of Simmons County, State of Shawnee, in July 2024, individually and as Special Administrator of the Estate of Elias Miller, against MHS and CCS for the death of her husband. R. at 2, 7. She alleged that MHS should be held vicariously liable for Cyber MD’s diagnostic errors through an apparent agency theory and asserted strict product liability claims against CCS based on design defects and failure to warn in the Cyber MD software algorithm. R. at 2.

Following discovery, MHS and CCS filed motions for summary judgment. R. at 2. MHS argued that Cyber MD was not its employee or agent and that the platform’s Terms and Conditions disclaimed any agency relationship. R. at 2. MHS and CCS further argued that Shawnee Revised Statutes sections 12-404 and 12-410 (hereinafter “sections 404 and 410”) barred Respondent’s claims under the applicable statutes of repose. R. at 2–3. The trial court granted summary judgment for both defendants, concluding that MHS was not liable under the apparent agency theory and that the relevant Shawnee statutes barred Respondent’s claims against CCS. R. at 10, 13.

b. *The Appeals Court.*

Respondent appealed the Circuit Court's decision on both the apparent agency and statute of repose claims to the Shawnee Court of Appeals for the Second District. R. at 16. The court held that the district court committed legal errors as to both claims. R. at 16–17. Specifically, genuine disputes of material fact existed as to whether MHS could be held vicariously liable under the doctrine of apparent agency and whether Respondent's claims were barred by the four-year statutes of repose outlined in sections 12-404 and 12-410. R. 16, 27–28. Thus, the appeals court reversed and remanded for further proceedings. R. at 16, 28.

Defendants MHS and CCS petitioned to the Shawnee Supreme Court pursuant to Rule 315. R. at 29. This Court granted cert limited to the questions presented. R. at 29.

SUMMARY OF ARGUMENT

The appeals court properly held that MHS failed to provide a sufficiently conspicuous apparent agency disclaimer for the diagnostic errors committed by CCS and its AI program, Cyber MD. The disclaimer lacked the requisite visible distinction to put a reasonable patient on notice of the independent relationship between the two companies. Furthermore, even if the disclaimer was more noticeable, a patient like Mr. Miller could not have known that Cyber MD was designed by another company due to the exclusive MHS branding across its telehealth portal interface. Aside from the lack of meaningful assent to the

apparent agency disclaimer, the Terms and Conditions Agreement was procedurally unconscionable.

Further, the appeals court properly held that Respondent's medical malpractice claims were timely because the continuous treatment doctrine applied to Cyber MD's ongoing monitoring of Mr. Miller's asbestos-related respiratory condition, extending the four-year repose period. Section 12-404 governs medical malpractice claims and establishes both a two-year discovery limitations period and a four-year statute of repose to bring forth claims.

Although the negligence began with Cyber MD's 2018 evaluation, the legislature expressly created an exception to the four-year repose period where the defendant healthcare provider engages in a continuous course of treatment for the same illness, injury, or condition underlying the malpractice claim. This exception squarely applies here. Cyber MD established a continuous course of care directed at Mr. Miller's asbestos-related respiratory condition. Beginning in 2018, Cyber MD evaluated his respiratory symptoms and asbestos history, ordered and reviewed lung imaging, misdiagnosed his condition as asthma, directed annual follow-up evaluations, reviewed subsequent scans, and ultimately incorrectly determined in 2021 that further imaging was unnecessary. Mr. Miller's interactions with Cyber MD were not isolated encounters; he followed the course of care advised at the initial evaluation.

The continuous treatment doctrine reflects the reality that patients rely on their healthcare providers' judgment and an ongoing course of care. That reliance

becomes particularly important in medically underserved communities, such as here where Mr. Miller had limited access to alternative medical providers and relied on Cyber MD's continued monitoring of his respiratory condition. Cyber MD's reliance on artificial intelligence does not alter the application of the exception when the requirements were otherwise satisfied.

Additionally, Respondent's strict product liability claims are timely because of the three express exceptions listed in Shawnee Revised Section 12-410(b)(3), lifting Shawnee's four-year statute of repose. Section 12-410(a) creates a two-clause framework for strict product liability claims.

The first clause requires claims to be brought within the limitations period of section 12-402, the general limitations statute. Section 12-402(b) requires a wrongful death claim to be brought within two years of the death. This action was brought within these two years, so the first clause is satisfied.

The second clause is not absolute. In section 12-410(b), the legislature inserted three disjunctive exceptions into section 12-410(b)(3). Each exception in section 12-410(b)(3) lifts the repose bar on its own, with Respondent only needing to satisfy one. Here, all three apply. First, the repose period is lifted because Mr. Miller's harm built up over four consecutive years of reliance on a defective treatment plan created by Cyber MD from 2018 to 2021. As each appointment went by without proper monitoring of Mr. Miller's malignant lesion, his cancer grew unmonitored. Second, the injury-causing defect existed in CCS's proprietary code at the time of delivery. No ordinary, reasonably prudent person could have discovered

it. CCS itself did not find the flaw until October 2022, more than four years after Mr. Miller first started using Cyber MD. Third, the repose bar is lifted because the harm Cyber MD created did not manifest until Mr. Miller's lung collapsed in October 2023, more than six years after first delivery. Since all three exceptions are independently satisfied, the four-year repose period in section 12-410(a) does not bar Respondent's strict product liability claims from being timely under section 12-402.

ARGUMENT

I. MHS IS VICARIOUSLY LIABLE FOR THE DIAGNOSTIC ERRORS BY CCS'S AUTONOMOUS AI SOFTWARE TOOL.

The appeals court correctly found MHS vicariously liable for the diagnostic errors committed by CCS's autonomous AI software tool, Cyber MD. Cyber MD is integrated into MHS's branded telehealth platform. R. at 5. Healthcare institutions may be liable for the medical malpractice and negligent conduct committed by their agents, including independent contractors and third-party providers, through the doctrine of apparent agency. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999). The doctrine of apparent agency provides that a hospital will be bound by the authority that it gives a healthcare provider as well as by the authority it appears to give a healthcare provider. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 523 (1993). When a plaintiff reasonably believes that an actor is an agent of the hospital or healthcare institution, that hospital or healthcare institution is liable for the actor's malpractice or negligence. *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 576–577 (7th Cir. 2019).

An apparent agency relationship is established where: (1) the hospital acts in a manner that would lead a reasonable person to conclude that the entity or practitioner alleged to be negligent was an employee or agent of the hospital; (2) the principal had knowledge of and acquiesced in the acts creating the appearance of authority; and (3) the plaintiff acted in reliance upon the conduct of the principal, consistent with ordinary care and prudence. *Gilbert*, 156 Ill. 2d at 525. The first element—commonly referred to as “holding out”—is the main issue of dispute here because Mr. Miller presumed that MHS held itself out as the principal of Cyber MD.

a. The Apparent Agency Disclaimer in MHS’s Terms and Conditions Agreement Was Not Sufficiently Conspicuous to Garner Meaningful Assent by Mr. Miller.

Under the apparent agency doctrine established by *Gilbert*, MHS is vicariously liable for Cyber MD’s negligence because the clause disclaiming all operational control over independent contractor physicians’ and automated software applications’ conduct (“Apparent Agency Disclaimer”) was inconspicuous. Unless a website user has actual knowledge of a term or condition, a court will only find an agreement enforceable if: (1) the website provides reasonably conspicuous notice of the terms to which the user will be bound, and (2) the user takes some action, such as clicking a button or checking a box, that clearly manifests their consent to those terms. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022) (finding that users must manifest assent to the terms of a clickwrap agreement by completing a separate action such as clicking a button). Merely continuing to browse a website does not bind a user to the website’s terms and conditions. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

Here, MHS intended to bind its patients to its Terms and Conditions agreement when they signed into the telehealth portal, i.e., by executing a sign-in wrap agreement. Sign-in wrap agreements are similar to click-wrap agreements in that they bind users to hyperlinked terms when they execute a separate action, such as clicking a button that reads “Sign In” or “Enter Portal.” *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024).

The court in *Cullinane v. Uber Techs., Inc.* articulated the general characteristics that make a website’s terms of a sign-in wrap agreement conspicuous. 893 F.3d 53, 62 (1st Cir. 2018). These characteristics include using larger and contrasting fonts, using all capital letters for headings, or somehow visually distinguishing the term from the surrounding text by the use of symbols or other marks. *Id.* In *Cullinane*, the plaintiffs alleged that they were not reasonably notified of the arbitration clause in Uber’s Terms of Service & Privacy Policy. *Id.* at 55. There, when registering for the Uber application, users could click on the hyperlinked “Terms of Service & Privacy Policy”, which led to a separate ten-page document with terms and conditions. *Id.* Although the hyperlink contained some characteristics that may distinguish a term, the presence of other terms on the same screen in a similar or larger size typeface diminished the hyperlink’s ability to attract users’ attention. *Id.* at 63.

Like the plaintiffs in *Cullinane*, Mr. Miller could not have noticed the apparent agency disclaimer because the Terms and Conditions did not display any of the characteristics that make a term conspicuous. Although the hyperlink itself

was distinguishable through the blue underlined text, the terms displayed on the standalone webpage after clicking on the link were visually unclear. R. at 4. The text was single-spaced, unformatted, rendered in a noticeably smaller font size, and displayed in all black text against a plain white background. R. at 4. The apparent agency disclaimer was not emphasized through the use of all capital letters, bolded typeface, or any other method that would make it distinct from the other terms. R. at 4–5. Furthermore, the disclaimer did not appear until three-quarters down the standalone webpage. R. at 4. Even though Mr. Miller clicked on the hyperlinked Terms and Conditions once, the apparent agency disclaimer was not conspicuous enough to put him on actual or inquiry notice such that MHS could disclaim liability from Cyber MD, CCS, or any other third-party provider.

The case *Markow v. Rosner* provides an example of an apparent agency disclaimer that defeats the “holding out” presumption between a hospital and an independent medical treatment provider. 3 Cal. App. 5th 1027, 1039 (2016). There, the plaintiff repeatedly saw an independent contractor physician over a period of four and a half years and signed over twenty-five informed consent forms containing an apparent agency disclaimer on the second page. *Id.* at 1033–34. The apparent agency disclaimer was printed in boldface and displayed in a larger font size than any other paragraphs on that page. *Id.* at 1034. Accordingly, the court found that the plaintiff indisputably knew or should have known that the physician was not an employee or agent of the healthcare institution. *Id.* at 1041.

Unlike the apparent agency disclaimer in *Markow*, MHS's disclaimer lacked the prominent placement and formatting that makes a disclaimer conspicuous. Whereas the *Markow* disclaimer appeared in boldface type and in noticeably larger font, the MHS disclaimer used the identical typeface as all other terms in the agreement. R. at 4–5. Moreover, the entire Terms and Conditions agreement used a noticeably smaller font in contrast to the rest of the MHS website. R. at 4. The discrepancies between the *Markow* and MHS disclaimers highlight that MHS did not take the same affirmative steps to ensure that patients were aware of the independent provider relationship. Thus, MHS's disclaimer was not sufficiently conspicuous to overcome Mr. Miller's impression that MHS provided the diagnostic services.

Mr. Miller unjustly suffered a misdiagnosis by the Cyber MD system. MHS relies on a disclaimer buried among identical text to claim that it defeats the “holding out” element of the apparent agency doctrine. However, MHS fails to succeed on this argument because no reasonable patient could have been alerted to the term based on its indistinguishable appearance. Therefore, this Court should affirm the appeals court's decision reversing summary judgment for MHS because its inconspicuous disclaimer failed to overcome the reasonable impression that Cyber MD acted as its agent.

- b. Even If the Apparent Agency Disclaimer Was Conspicuous, It Was Not Adequately Clear that Cyber MD Was Developed by a Separate Company.

Patients had no way of knowing that Cyber MD was a product of a company separate from MHS, much less a product by CCS. As discussed above, healthcare institutions may be liable for the conduct of third-party providers and independent contractor physicians if the institution or its agent acted in a manner that would lead a reasonable person to conclude that the actor alleged to be negligent was an employee or agent of the hospital. *Gilbert*, 156 Ill.2d at 525. Where, as here, a patient is unaware that a provider is not an employee or agent of a hospital, that patient has the right to seek compensation from the hospital for any negligent conduct. *Id.* at 522.

Application of the *Gilbert* court's rule on apparent agency have found that a hospital should be held vicariously liable for the negligence of independent contractor physicians. For example, in *York v. Rush-Presbyterian-St. Luke's Medical Center*, the court found the defendant hospital liable because the consent form did not specifically disclaim liability for the treatment performed by the plaintiff's anesthesiologist. 222 Ill. 2d 147, 195 (2006). The consent form stated that the plaintiff would "authorize [one] Dr. Rosenberg and such assistants and associates as may be selected . . . to perform [a knee replacement surgery]" *Id.* at 153. Because the consent form did not contain any information as to who his attending anesthesiologist would be, and whether that anesthesiologist was an independent contractor or employee of the hospital, the court found that the plaintiff had relied

on the hospital—and its agents—to provide his care and treatment. *York*, 222 Ill. 2d at 172.

Similar to the consent form in *York*, the apparent agency disclaimer here failed to mention CCS and Cyber MD as independent actors of MHS. Although the clause broadly encompasses “independent contractor physicians” and “automated software applications developed by another company,” nothing in the clause or the MHS website specifically indicates CCS or Cyber MD as such. R. at 5. Like the plaintiff in *York*, Mr. Miller could not have known that Cyber MD, purporting to be his provider specifically, was not an agent of MHS. Accordingly, MHS cannot demonstrate that a reasonable person would know that Cyber MD is not its employee or agent.

The exclusive MHS branding on the website deprives patients like Mr. Miller of any opportunity to discover that Cyber MD was a product of a completely independent company. Even if Mr. Miller had thoroughly reviewed the Terms and Conditions agreement, he could not have known that Cyber MD itself was designed by another company. The appeals court rightfully found that there is a genuine dispute of material fact as to whether Mr. Miller meaningfully understood Cyber MD as an independent entity from MHS.

- c. Notwithstanding MHS’s Apparent Agency Disclaimer, the Process of Entering into the Terms and Conditions Agreement Was Procedurally Unconscionable.

Aside from MHS’s inconspicuous apparent agency disclaimer, the agreement was procedurally unconscionable because of the discrepancy in bargaining power

between MHS and Mr. Miller. A court may find an agreement procedurally unconscionable when the individualized circumstances surrounding the contract were so unfair that there was no voluntary meeting of the minds. *Schoeger v. Jim Brown, Inc.*, 33 N.E.3d 96, 100 (Ohio Ct. App. 2015). Courts examine the parties' age, education, intelligence, business acumen, and prior experience in similar transactions to determine whether there was unequal bargaining power to constitute unconscionability. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025). Additionally, procedural unconscionability may be found when the contract's language is inconspicuous and incomprehensible. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023).

MHS's apparent agency disclaimer was buried among unclear, abstruse legal terminology. As the appeals court noted, Mr. Miller lived in a community where healthcare infrastructure had collapsed, placing him in a situation with severe structural barriers to healthcare access. R. at 24. He sought the most accessible form of care available to him, through MHS; he did not seek out Cyber MD independently. R. at 22. The inconspicuousness of MHS's apparent agency disclaimer nullifies any possibility that Mr. Miller could have meaningfully assented to this term. Unless there is actual notice of an apparent agency disclaimer, healthcare institutions must face accountability for the diagnostic errors of the actors they employ, regardless of whether those actors are traditional employees, independent contractors, or third-party providers.

II. THE STATUTES OF REPOSE DO NOT BAR RESPONDENT'S CLAIMS WHEN BOTH SECTIONS 12-404 AND 12-410 CONTAIN TOLLING EXCEPTIONS THAT ARE SATISFIED HERE.

The appeals court properly held that both statutes of repose at issue contain express exceptions which are satisfied here because section 12-404(b)'s continuous treatment exception tolled the repose period for the malpractice claim, and section 12-410(b)(3)'s independent exceptions lifted the repose bar on Respondent's product liability claim against CCS. Section 12-404(b) tolls the four-year repose period for healthcare malpractice claims where the provider engages in a continuous course of treatment for the same condition underlying the malpractice claim. Sn. Rev. Stat. § 12-404(b). Separately, section 12-410(b)(3) lifts the repose period for product liability claims where the harm resulted from prolonged exposure to a defective product, where the injury causing the defect was not discoverable within four years of delivery, or where the harm did not manifest until after that time. Sn. Rev. Stat. § 12-410(b)(3).

Statutes of repose ordinarily create an absolute temporal bar reflecting the legislature's judgment that defendants should eventually be free from liability. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8–9 (2014). Generally, they are not subject to tolling without an indication that the legislature intended otherwise, such as through an express statutory exception. *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017).

Sections 12-404(b) and 12-410 are satisfied here and, subsequently, they extend the repose period. Cyber MD continuously treated Mr. Miller for the same condition underlying the malpractice claim, extending the repose period under

section 12-404(b). Further, the product liability claim falls within section 12-410(b)(3) because the alleged defect existed at delivery but was not discoverable within the four-year repose period, due to the resulting harm manifesting later. Thus, neither statute of repose bars Respondent's claims.

a. Cyber MD's Continued Monitoring of Mr. Miller's Condition Tolled the Repose Period Under Section 12-404(b).

The appeals court properly held that Cyber MD's monitoring of Mr. Miller's asbestos-related respiratory condition constituted continuous treatment under section 12-404(b), thereby extending the four-year repose period through 2021. Section 12-404 provides both a two-year discovery limitations period¹ and a four-year repose period.² Sn. Rev. Stat. § 12-404(a)–(b). Relevant here, subsection (b) provides that although an action generally may not be brought more than four years after the act, omission, or occurrence causing the injury, that 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).

Because Shawnee courts have not yet defined the requirements for a continuous course of treatment under section 12-404, this Court should look to other

¹ The two-year discovery limitations period is satisfied because this action was filed in 2024, within two years of the discovery of Mr. Miller's cancer, rendering the medical malpractice claim timely under the discovery provision. R. at 18.

² Section 12-402 does not govern this claim because, by its own terms, it excepts healthcare malpractice claims (“[e]xcept... as provided in section 12-404 of this chapter”), which are instead governed by section 12-404. Sn. Rev. Stat. § 12-402(a).

courts interpreting similar statutory language. The state of New York provides a similar continuous treatment exception in section 214-a of the New York Civil Practice Law and Rules, which extends the limitations period through the patient's "last treatment where there is continuous treatment for the same illness, injury, or condition" giving rise to the alleged malpractice. N.Y. C.P.L.R. § 214-a. Courts examining that provision consider whether: (1) the patient actually received a course of treatment from the defendant; (2) whether that treatment concerned the same condition underlying the malpractice claim; and (3) whether the treatment was continuous. *Gomez v. Katz*, 61 A.D.3d 108, 111–13 (2009). When the continuous treatment doctrine applies, the limitations period is tolled until the date of the patient's last treatment for the particular condition underlying the malpractice claim. *Rudolph v. Jerry Lynn, D.D.S., P.C.*, 16 A.D.3d 261, 261 (1st Dep't 2005).

The Shawnee legislature supplied an exception in section 12-404(b), through the continuous treatment doctrine, and it applies for two reasons. First, Mr. Miller's repeated evaluations remained tied to the same asbestos-related respiratory condition that gave rise to the malpractice claim. Second, those evaluations were not isolated encounters because Cyber MD prescribed annual follow-up imaging and continued that monitoring through 2021, until it informed him imaging was no longer necessary.

- i. *Mr. Miller's Asbestos-Related Respiratory Condition Was the Same Condition Underlying Each Cyber MD Evaluation and the Malpractice Claim.*

Mr. Miller's asbestos-related respiratory condition was the same condition underlying each Cyber MD evaluation and the alleged negligence, satisfying section 12-404(b)'s requirement that the continuous course of treatment concern the same illness, injury, or condition giving rise to the claim. In applying the continuous treatment doctrine, courts look to whether the course of care remained directed toward the condition that ultimately gave rise to the malpractice claim. *See Watkins v. Fromm*, 108 A.D.2d 233, 244 (1985). Moreover, a provider's failure to correctly diagnose the underlying cause of a patient's condition does not defeat continuous treatment when the provider continues treating or evaluating symptoms that are ultimately attributed to the same condition. *Cefaratti v. Aranow*, 321 Conn. 637, 652–55 (2016); *Miccio v. Gerdis*, 120 A.D.3d 639, 640 (2014). Thus, the critical inquiry is whether the patient continued to seek treatment for the same condition underlying the malpractice claim, not whether the provider correctly diagnosed that condition during the treatment period. *Cohen v. Gold*, 165 A.D.3d 879, 882 (2018).

In *Cefaratti*, the court emphasized that a patient need not know the precise cause of their condition for the continuous treatment doctrine to apply, so long as the ongoing treatment or monitoring concerned the same condition connected to the alleged negligence. 321 Conn. at 641–43. In this case, the defendant left a surgical sponge in the patient's abdomen during surgery, after which the patient experienced continuous abdominal discomfort during postoperative care. *Id.* at 642.

The patient did not know the cause of the pain until a CT scan revealed the sponge in her abdomen. *Cefaratti*, 321 Conn. at 642. The court explained that an “identified medical condition” exists when the condition being treated is connected to the injury underlying the patient’s claim. *Id.* at 643. Although the defendant contended that the continuous treatment doctrine did not apply because the patient did not know the nature or cause of her condition, the court rejected this argument and concluded that follow-up visits may constitute continuing treatment when the condition is monitored and related to the alleged negligence. *Id.* at 655. Accordingly, the court held that there was a genuine issue of material fact as to whether the postoperative care tolled the limitations period under the continuous treatment doctrine. *Id.* at 656.

Like the patient in *Cefaratti*, Mr. Miller sought annual care for a condition whose true cause had not yet been identified. R. at 6. Further, after the initial encounter, Cyber MD continued evaluating the asbestos-related respiratory condition through imaging and recommended annual follow-up care to monitor it. R. at 6. The later discovery of Mr. Miller’s lung lesion, like the later discovery of the surgical sponge in *Cefaratti*, revealed the underlying cause of the condition rather than a new or unrelated condition. R. at 6. And, as in *Cefaratti*, where the retained sponge had been present since the alleged negligence, Mr. Miller’s lung lesion was visible on the original scan and continued to grow while Cyber MD failed to detect it. R. at 6. Thus, Mr. Miller’s continuing care remained tied to the same condition

that gave rise to the malpractice claim even though the precise cause remained unidentified.

By comparison, in *Miller v. United States*, the court held that later medical care did not constitute continuous treatment when the care was unrelated to the original negligence and was provided independently by separate physicians. 932 F.2d 301, 302 (4th Cir. 1991). The patient in *Miller* initially visited a government physician for complaints involving pain in several parts of her body. *Id.* at 302. During that examination, the physician did not order a mammogram, and the patient later returned to the physician for care unrelated to breast cancer. *Id.* Later that year, she noticed a change in her breast, and a specialist referred her to a separate specialist for an evaluation, which ultimately led to a breast cancer diagnosis. *Id.* at 302–03. The patient’s estate alleged that the first physician had failed to diagnose her cancer. *Id.* at 304. The court explained that the doctrine applies when a patient receives continuous treatment for the same medical problem from the same physician, or physicians acting under the physician’s supervision. *Id.* Because the patient’s later visits were unrelated to the alleged original failure to diagnose, and the subsequent treatment was independently provided by other physicians, the court held that the doctrine did not toll the limitations period. *Id.* at 305–06.

Unlike the patient in *Miller*, whose later care was unrelated to the original failure to diagnose breast cancer, Mr. Miller’s later care remained tied to the same respiratory condition involved in Cyber MD’s original misdiagnosis. R. at 6. While

the patient in *Miller* received care from different physicians for separate medical issues, Mr. Miller returned to Cyber MD for the same annual imaging that Cyber MD recommended after the initial scan. R. at 6. And unlike the later treatment in *Miller*, which was not sufficiently connected to the original alleged malpractice, Mr. Miller's subsequent scans involved the same undetected lung lesion that was visible in 2018. R. at 6. Cyber MD reviewed that same condition until 2021, when it told Mr. Miller that annual imaging was no longer necessary. R. at 6. Thus, Mr. Miller returned to the same provider for continued evaluation of the same condition underlying the original misdiagnosis.

The contention that Mr. Miller's lung cancer was not the same condition Cyber MD was treating is unpersuasive. Although Cyber MD initially diagnosed Mr. Miller with asthma, rather than cancer, the continuous treatment doctrine does not require the physician to diagnose the underlying condition at the outset correctly. *See McDermott v. Torre*, 56 N.Y.2d 399, 405 (1982) (declining to apply continuous treatment where the later visit was initiated merely to have a condition checked rather than pursuant to an ongoing course of treatment). Mr. Miller returned annually pursuant to Cyber MD's prescribed monitoring plan for the same respiratory condition that gave rise to the original failure to diagnose. Consequently, the later care remained connected to the same respiratory condition rather than involving a new or unrelated medical issue. Mr. Miller thus satisfied the "condition" requirement of the continuous treatment doctrine for which he sought care.

- ii. *Cyber MD's Repeated Evaluation and Monitoring of Mr. Miller's Respiratory Condition Constituted a Continuous Course of Treatment.*

Cyber MD established a continuous course of treatment for Mr. Miller because each annual evaluation continued the treatment plan Cyber MD established in 2018. The continuous treatment doctrine applies when the alleged negligence consists of “a series of negligent acts” or a “continuing course of improper treatment.” *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 475 (8th Cir. 2008). Treatment is continuous where further care is expressly anticipated by both the provider and patient, including through regularly scheduled follow-up appointments that conform to the prior course of care. *Gomez*, 61 A.D.3d at 112–13; *Kaufmann v. Fulop*, 47 A.D.3d 682, 684 (2008). This principle extends to diagnostic care: periodic diagnostic examinations may constitute continuous treatment when they are prescribed as part of ongoing care for an existing condition and are anticipated by both the provider and patient. *Goldschmidt v. Cortland Reg'l Med. Ctr., Inc.*, 190 A.D.3d 1212, 1216 (2021).

In *Goldschmidt*, the court determined that a series of scheduled follow-up scans could constitute a continuous course of treatment because the examinations were part of an anticipated course of ongoing diagnostic care. 190 A.D.3d at 1216. There, a CT scan revealed a mass that the radiologist believed was likely benign, and the radiologist recommended follow-up imaging for the patient. *Id.* The patient returned for additional scans at specified intervals, during which the radiologist continued to characterize the mass as benign, even after a new mass appeared in

the lungs. *Goldschmidt*, 190 A.D.3d at 1216. Later, the patient received a second opinion and was diagnosed with lung cancer. *Id.* The court distinguished intermittent diagnostic services from periodic examinations prescribed as part of ongoing treatment, explaining that the latter may support continuous treatment when further care is anticipated by both physician and patient. *Id.* Hence, the regularly scheduled follow-up scans created a question of fact as to whether the continuous treatment doctrine applied. *Id.*

Mr. Miller's follow-up imaging was not a series of isolated diagnostic encounters, but part of an established plan of ongoing care, like the patient's treatment plan in *Goldschmidt*. R. at 6. Cyber MD referred Mr. Miller to a local physician for inhaler management and recommended that he return for annual follow-up imaging to monitor his condition. R. at 6. Mr. Miller complied and returned at approximately the same time each year for additional scans, like the patient in *Goldschmidt* who returned at specified intervals. R. at 6. Thus, as in *Goldschmidt*, the periodic imaging was expressly contemplated in advance and undertaken at regular intervals to evaluate and monitor the same respiratory condition for which Mr. Miller originally sought care, rendering the treatment continuous rather than constituting intermittent diagnostic screenings.

Conversely, in *Castillo*, repeated encounters with the same healthcare provider did not constitute continuous treatment because the visits were discrete and isolated rather than part of an established course of care. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 649–50 (4th Cir. 2004). The patient in *Castillo*

sought treatment in the emergency room, where the hospital characterized the encounter as emergency care rather than comprehensive treatment, and instructed her to obtain follow-up care from her own physician. *Castillo*, 372 F.3d at 644. When her symptoms persisted, she later contacted the hospital and returned for additional treatment. *Id.* at 645. The court recognized that a physician-patient relationship may exist between an individual and a corporate healthcare provider, even when different physicians participate in the patient's care. *Id.* at 649. Nevertheless, the doctrine did not apply because the emergency room visits were disconnected encounters rather than an ongoing treatment plan. *Id.* Thus, *Castillo* confirms that continuity requires more than sporadic medically related encounters with the same healthcare organization. *Id.* at 649.

Unlike the patient in *Castillo*, who had isolated encounters with the hospital, Mr. Miller formed a plan for treatment including follow-up treatment related to the original diagnosis. R. at 6. Further, Mr. Miller's interactions with Cyber MD were anticipated, and he was never informed that this was not comprehensive medical attention, unlike the patient in *Castillo*. R. at 6. Accordingly, Mr. Miller's treatment constituted a continuous course of treatment under section 12-404 because Cyber MD advised follow-up care as part of Mr. Miller's ongoing treatment plan, Mr. Miller returned in accordance with that plan, and Cyber MD continued evaluating the same condition annually.

The continuous treatment doctrine recognizes that patients reasonably rely on the judgment of healthcare providers who continue to manage their care and

should not be forced to distrust or investigate those providers while treatment remains ongoing. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080–81 (2d Cir. 1988). The trusting relationship between a patient and healthcare provider may prevent a patient from questioning the adequacy of the care being provided. *Id.* Requiring a patient to investigate a potential malpractice claim while relying on a provider for continued care would undermine the purpose of the exception. *Ulrich*, 853 F.2d at 1080–81. This is of particular importance in medically underserved communities where patients do not have a plethora of providers to seek care from or receive a second opinion.

The rationale behind the doctrine should not disappear when care is delivered through an artificial intelligence platform. Mr. Miller continued to rely on Cyber MD’s judgment as it monitored his condition over the course of several years, unaware that artificial intelligence was used to monitor his condition. Moreover, the doctrine’s protection should be strongest when a patient in a medically underserved community relies on the limited care he has access to and has no reason to interrupt his prescribed course of care. For the foregoing reasons, this Court should affirm the appeals court decision that the continuous treatment doctrine applies and extends the statute of repose, rendering Respondent’s claim timely.

- b. Respondent’s Strict Product Liability Claims Are Timely Because Section 12-410(b)(3)’s Express Exceptions Lift the Four-Year Statute of Repose.

The appeals court correctly held that section 12-410’s four-year repose period does not bar Respondent’s strict product liability claims because all three express

exceptions written into section 12-410(b) are satisfied. Section 12-410(a) creates a two-clause structure. Titled “Repose Period,” section 12-410(a) provides that no strict product liability claims shall be commenced except: (1) within the limitations period set in section 12-402, and (2) within four years of first delivery. Sn. Rev. Stat. § 12-410(a).

The first clause³ incorporates section 12-402, the general limitations statute. Sn. Rev. Stat. § 12-402. The second clause imposes a four-year repose period running from first delivery rather than from injury or discovery, with “in any event” signaling a firm bar. Sn. Rev. Stat. § 12-410(a). Read together, this two-clause framework operates in tandem to protect different parties. The first clause gives plaintiffs an equitable pathway⁴ to relief when injury remains reasonably hidden, while the second clause affords manufacturer defendants a firm endpoint in potential liability. However, this second clause is not absolute.

The Shawnee Legislature built express exceptions into the second clause in the following section. Section 12-410(b) is titled “Exceptions to Statute of Repose,” listing the circumstances where the repose period is lifted. Section 12-410(b)(3) states that the four-year period of repose “shall not apply if”:

The harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an

³ The first requirement is satisfied and not in dispute. Section 12-402(b) requires an action for wrongful death “be commenced within two (2) years from the date of the decedent’s death.” Sn. Rev. Stat. § 12-402(b). Mr. Miller died on April 14, 2024, and this action was commenced in July 2024. R. at 7. Thus, only the second requirement is at issue.

⁴ Section 12-402(c) provides that a claim is not barred if the injury could not reasonably have been discovered within the applicable period. Sn. Rev. Stat. § 12-402(c). This discoverability provision is not at issue here, since Respondent’s wrongful death claim is timely under section 12-402(b) alone.

ordinary reasonably prudent person until more than four (4) years after the time of delivery, or if the harm, caused within four (4) years after the time of delivery, did not manifest itself until after that time.

Sn. Rev. Stat. § 12-410(b)(3). Highlighted by “or,” the provision is written as a disjunctive sentence with three clauses: (1) prolonged exposure, (2) non-discoverability, and (3) delayed manifestation. Sn. Rev. Stat. § 12-410(b)(3). These are not cumulative steps, but independent exceptions that lift the four-year statute of repose. Thus, Respondent only needs to satisfy one of these exceptions for the repose bar to be lifted as intended by the Shawnee Legislature.

Defendants facing similar statutes have argued that a statutory exception lifting the repose period exposes defendants to indefinite liability, nullifying the purpose of a repose period. *See Koch v. Shell Oil Co.*, 52 F.3d 878, 883–84 (10th Cir. 1995); *Ehrenfelt v. Janssen Pharms., Inc.*, 737 F. Appx 262, 267–68 (6th Cir. 2018). But *Koch v. Shell Oil Co.* directly rejects this argument. 52 F.3d at 883–84 (10th Cir. 1995). A statute of repose provision containing text that directly references the general statute of limitations does not automatically nullify an explicit legislative exception to that statute of repose. *Id.* In *Koch*, part of the statute at issue, K.S.A. section 60-3303(d)(1), is almost identical to section 12-410(b)(3), differing only on the length of the repose period. *Id.* at 883; Kan. Stat. Ann. § 60-3303(b)(2)(D). The defendant manufacturers argued that a neighboring subsection “shall modify the application of” the general statute of repose, overriding the statute of repose exceptions. *Id.* The Tenth Circuit disagreed, stating the manufacturers’ arguments were “erroneous.” *Id.* at 884. The general repose provision in section 60-3303(c) and

the specific exceptions in section 60-3303(b)(2)(D) could coexist with the specific exceptions controlling in the circumstances identified by the legislature. *Koch*, 52 F.3d at 883–884.

The Sixth Circuit later reaffirmed the Tenth Circuit’s position in *Koch*, emphasizing that the various provisions must be read in “*pari materia* . . . as to make them consistent, harmonious and sensible.” *Ehrenfelt*, 737 Fed. Appx. at 267–68 (6th Cir. 2018) (quoting *Kan. One-Call Sys., Inc. v. State*, 294 Kan. 220, 274 (2012)). If the provisions cannot be harmonized, the court applies the settled principle that “statutes complete in themselves, relating to a specific thing, take precedence over general statutes.” *Id.* at 265 (quoting *Harding v. K.C. Wall Prods., Inc.*, 250 Kan. 655, 661 (Kan. 1992)).

This same principle governs here and resolves any ambiguity between the two clauses. Section 12-410 is a specific strict product liability provision that includes exceptions for latent defects, while section 12-402 is a general provision for personal injury and wrongful death actions. Sn. Rev. Stat. § 12-402; Sn. Rev. Stat. § 12-410(b)(3). The two provisions are easily harmonized because section 12-410(a) expressly incorporates the statute of limitations into its text. If any conflict remains, section 12-410 and its exceptions would control over section 12-402 because it is the more specific provision. Sn. Rev. Stat. § 12-402; Sn. Rev. Stat. § 12-410(b)(3).

Overall, the exceptions in section 12-410(b)(3) fully apply to Respondent’s claims. Because the three clauses are disjunctive, Respondent only needs to satisfy

one of the exceptions to remove the second clause of the legislature’s framework. Sn. Rev. Stat. § 12-410(a). Consequently, the general statute of limitations under section 12-402 applies to Respondent’s timely claim. Sn. Rev. Stat. § 12-402(b).

- i. *The Repose Period Is Lifted Because Mr. Miller’s Harm Was Caused by Four Years of Reliance on A Defective Product From 2018 To 2021.*

The first exception of section 12-410(b)(3) applies to Respondent’s strict product liability claims because Mr. Miller’s harm accumulated over four consecutive years of medical dependence on the same defective product. The first provision of section 12-410(b)(3) lifts the repose period for harm caused by “prolonged exposure to a defective product.” Sn. Rev. Stat. § 12-410(b)(3). The provision speaks of harm in general, with nothing in the text confining exception to harm caused by chemical or physical contact. Courts interpreting parallel Kansas statutes have likewise refused to read limits into the text that it does not contain. *See Koch*, 52 F.3d at 883–84.

Koch confirms how the first repose period exception operates when the prolonged exposure results from repeated use of the same defective product. *Id.* at 884. In *Koch*, a dairy farmer lost a large portion of his herd after feeding it a product containing a toxic pesticide for nearly thirty months. *Id.* at 879. Initial testing of frozen tissue from the herd did not detect the pesticide. *Id.* New techniques did not emerge until nearly ten years after the last purchase of the pesticide, when they were finally able to test the tissue. *Id.* at 879–80. The manufacturers urged a “limiting interpretation” of the prolonged-exposure clause to durable goods, but the court refused to apply such a restrictive view to K.S.A. § 60-

3303(b)(2)(D).⁵ *Koch*, 52 F.3d at 883–84. While the court in *Koch* did not decide whether the exception applied to the facts or determine whether the defect was discoverable, it made clear that the exception turns on the prolonged exposure rather than the product’s durability. *Id.* at 884–85. The court explained that the Kansas Supreme Court recognized the applicability of the prolonged-exposure exception to products where “the useful safe life” is “essentially a *non sequitur*.” *Id.* at 884.

Cyber MD fits this pattern of prolonged exposure. Like the products discussed in *Koch*, software delivered through cloud infrastructure is the modern-day equivalent to products whose “useful safe-life” is itself “a *non sequitur*.” *Id.* Because an algorithm never wears out and changes only if developers modify the code, every use by a consumer will reproduce any defect in the product’s baseline software. That is what happened here. At each visit from 2018 to 2021, Cyber MD ordered new imaging, evaluated it, and found no signs of malignancy. R. at 6. At each visit, Mr. Miller’s diagnostic evaluations were conducted by the same faulty 2017 baseline code. R. at 5–6. Cyber MD’s code remained the same until it was modified on December 13, 2023, to address the decrease in diagnostic accuracy

⁵ K.S.A. Section 60-3303(b)(2)(D) and Section 12-410(b)(3) share the same prolonged-exposure, non-discoverability, and delayed-manifestation language because both can be traced back to Section 110 of the Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,734 (Oct. 31, 1979). See Bernard Bell, *Fortieth Anniversary: The Commerce Department’s Foray Into Re-Writing Products Liability Law*, Yale J. on Regul.: Notice & Comment (Oct. 29, 2019), <https://www.valejreg.com/nc/fortieth-anniversary-the-commerce-departments-foray-into-re-writing-products-liability-law/>. The MUPLA is one of the few Commerce Department model acts that states drew on for repose exceptions after the 1970s products-liability insurance crisis. *Id.* The Kansas Court of Appeals has confirmed the legislature “used [MUPLA] as a reference” in drafting this exact provision. *Baumann v. Excel Indus., Inc.*, 845 P.2d 65, 70 (1993).

discovered in October 2022. R. at 5–6. The modification came over a month after Mr. Miller’s spontaneous pneumothorax occurred. R. at 6.

The resulting harm from Cyber MD was cumulative in exactly the way the first exception of § 12-410(b)(3) contemplates. On October 30, 2023, after a spontaneous pneumothorax led to the discovery of a sixty-four-millimeter mass in Mr. Miller’s lung, an expert review determined that a seven-millimeter mass was “clearly visible” on Mr. Miller’s first scans analyzed by Cyber MD in 2018. R. at 6. Expert review determined the mass “continuously” grew, reaching forty-seven millimeters in 2021. R. at 6. Each missed reading extended the period in which Mr. Miller’s cancer grew unmonitored, with the sequence of continued treatment ending when Cyber MD advised Mr. Miller that yearly scans were “no longer necessary.” R. at 6. A patient who is repeatedly evaluated by a defective diagnostic algorithm fulfills continuous exposure to a defective product in every sense. Cyber MD repeatedly evaluated Mr. Miller, and the harm compounded with each use as the undetected lesion continued to grow. Nothing about that accumulating harm was visible to Mr. Miller, and starting a repose period at delivery would penalize him for relying on a product that appeared to perform as advertised.

The prolonged-exposure exception exists to protect the reliability and credibility of products whose value depends on a continued relationship with the consumer. Few products depend on this relationship more than telemedicine. Residents of Simmons County, like a growing number of Americans, must travel several hours to reach the nearest specialist or imaging facility. R. at 4. As rural

communities lose access to conventional medical services, telemedicine and emerging diagnostic technologies are filling that void left behind by more traditional medical services.

Rapid development of these technologies is a legitimate public interest, but that interest cannot come at the expense of federal and state-recognized medically underserved communities, for two reasons. R. at 4. First, medically underserved communities depend on these new technologies to be reliable and trustworthy. R. at 4. Second, providing relief for harm caused by new technologies is a cornerstone of tort law.⁶ Without the potential of liability, a manufacturer has little reason to keep monitoring an algorithm once it is in the field, to retrain it promptly when a flaw surfaces, or to warn the patients relying on the device. That concern is illustrated here: Cyber MD's defect went uncorrected for years and went unfixed until after the discovery of Mr. Miller's injury. R. at 5–6. Because Mr. Miller's harm was caused by prolonged exposure to Cyber MD's defective diagnostic program across four consecutive years, the first exception of section 12-410(b)(3) is satisfied and lifts the four-year statute of repose period on its own.

⁶ Victor E. Schwartz chaired the Department of Commerce task force that drafted MUPLA and is credited as its principal author. *See* Bell, *supra* note 5. The foundation of the MUPLA is “the recognition that product liability law is a branch of the law of torts.” Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 Vand. L. Rev. 579, 583–84 (1980). This incentive is built into the Model Uniform Product Liability Act itself. One of the Act's primary policy goals was “to place the incentive for loss prevention on the party or parties who are best able to accomplish that goal.” *Id.* at 581–583. As a result, MUPLA required a manufacturer to act as a reasonably prudent seller in warning users of dangers discovered after the product is sold. *Id.* at 589–590.

ii. *The Repose Bar Is Lifted Because a Defect Buried in Proprietary Code Is Not Discoverable by an Ordinary Individual.*

The second exception listed in section 12-410(b)(3) independently applies here because Cyber MD's algorithmic defect existed at the time of delivery and no ordinary user could have discovered it. Under section 12-410(b)(3), the second exception to the statute of repose removes the four-year limit when three elements are met: (1) there is an "injury-causing aspect" to the product in question; (2) that defective aspect of the product "existed at the time of delivery"; and (3) it "was not discoverable by an ordinary reasonably prudent person until ... after the time of delivery." Sn. Rev. Stat. § 12-410(b)(3). The standard is objective, based on "an ordinary reasonably prudent person" could discover. Sn. Rev. Stat. § 12-410(b)(3). A defect is discoverable only if a person "can without danger to himself reasonably detect the hidden danger and guard against it," viewed from the perspective of what a reasonable, careful, and sensible person could perceive "under the circumstances." *Baumann v. Excel Indus., Inc.*, 845 P.2d 65, 73–74 (Kan. Ct. App. 1993) (quoting *Gisriel v. Uniroyal, Inc.*, 517 F.2d 699, 704 (8th Cir. 1975); *Black's Law Dictionary* 1265 (6th ed. 1990)). The standard therefore does not depend on what the manufacturer knew or what a team of expert doctors could infer in hindsight.

Pate v. Columbia Mach., Inc. distinguishes between an actual hidden defect and one that an ordinary user could have or should have observed. 930 F. Supp. 451, 464, 467 (D. Idaho 1996). Idaho's strict product liability statute lifts its repose period where "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 ten years after the time of delivery.” *Pate*, 930 F. Supp. at 465 (quoting Idaho Code § 6-1403(2)(b)(4)).⁷ In this case, the plaintiff was injured while attempting to clear a blockage in a hydraulic concrete block splitter. *Id.* at 458. Although the court found that the splitter was partially defective, a label on the machine in large red lettering warned that the machine “MAY START AT ANY TIME.” *Id.* at 456, 461. Supervisors also repeatedly warned the plaintiff to wait for the splitter to be turned off before attempting to clear any jams, and had sufficient experience in the factory to understand the working environment. *Id.* 451 at 457, 463–464. As a result, the court determined that the statute’s hidden defect exception did not apply because the plaintiff was repeatedly placed on notice of the splitter’s dangers. *Id.* at 464, 467.

Idaho’s product liability statute uses materially similar language to section 12-410(b)(3). Moreover, in *Pate*, the danger was visible, labeled, and clearly explained, whereas Cyber MD’s defect was none of those things. The defective code was housed where no user could see it, with the only notice being an on-screen pop-up stating that Cyber MD is “an artificial intelligence software program.” R. at 5. The notice never mentioned the potential risks of artificial intelligence or the potential flaws that could result from using this type of novel diagnostic software.

⁷ Idaho Code Section 6-1403(2)(b)(4) and Section 12-410(b)(3) share the same non-discoverability language because both can be traced back to Section 110 of the Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,734 (1979). See Bernard Bell, *Fortieth Anniversary: The Commerce Department’s Foray Into Re-Writing Products Liability Law*, Yale J. on Regul.: Notice & Comment (Oct. 29, 2019), <https://www.yalejreg.com/nc/fortieth-anniversary-the-commerce-departments-foray-into-re-writing-products-liability-law/>. The MUPLA served as model for numerous states to address product liability concerns. *Id.* Idaho’s provision differs from Section 12-410(b)(3) only in the length of the repose period, ten years rather than four. *Pate*, 930 F. Supp. at 465.

R. at 5. And, unlike the splitter in *Pate*, whose operator repeatedly warned about the hazards it posed, Cyber MD did not present anything for an ordinary user to inspect, touch, or test. R. at 4–6, 26–27; 930 F. Supp. at 456, 463–64. Applying the standard outlined in *Pate*, it is clear that each element of the second exception of section 12-410(b)(3) is met because Cyber MD’s algorithm contained a real defect present at delivery that no ordinary user could have found.

First, the initial element of the second exception of section 12-410(b)(3) is satisfied because the record identifies the “injury-causing aspect of the product” with considerable precision. Sn. Rev. Stat. § 12-410(b)(3). CCS received FDA clearance for Cyber MD’s initial software baseline in 2017 and advertised it to customers as achieving a “97% overall accuracy rate in classifying lung lesions.” R. at 5. In October 2022, CCS found that Cyber MD’s initial baseline evaluation accuracy dropped to 85% for patients with a history of occupational asbestos exposure. R. at 5–6. CCS did not regain high accuracy until December 13, 2023. R. at 6. When it released an updated version, CCS neglected to tell the public about the initial drop in accuracy, or that accuracy for asbestos-exposed patients stayed low for more than a year after CCS discovered the problem. R. at 6. In Mr. Miller’s case, not only did Cyber MD fail to classify the lesion as advertised to regulators, but it also completely failed to identify any lesion whatsoever. R. at 6. It wasn’t until October 30, 2023, that a retrospective review identified a seven-millimeter lesion “clearly visible” on Cyber MD’s 2018 scan of Mr. Miller. R. at 6. The record is

clear that this is not a vague allegation of a coding error, but an accuracy deficiency documented by CCS's own developers. R. 5–6.

Second, Respondent satisfies the second element of section 12-410(b)(3) because the defect existed at delivery. The coding flaw was embedded in the initial 2017 baseline algorithm, being the same version of Cyber MD that CCS delivered to MHS on March 1, 2017, for integration into the MHS digital portal. R. 5–6. From 2018 to 2021, that same defective algorithm embedded in Cyber MD treated Mr. Miller for shortness of breath, and the error was not discovered until October, 30, 2022. R. at 5–6. Cyber MD's code was not altered, updated, or modified between its delivery and Mr. Miller's four appointments, demonstrating that the product that harmed him was the same product delivered to MHS. R. at 5–6.

Third, the final element of section 12-410(b)(3) is met because no ordinary, reasonably prudent person could have discovered the defect. At the time of delivery, the defect resided in CCS's proprietary code, which was inside CCS's own cloud infrastructure. R. at 4, 26. While the training verification data was provided to the FDA, it was never made public. R. at 5. Thus, even if someone with access to Cyber MD's code could have detected the flaw, the code itself was inaccessible to Mr. Miller and his medical team. R. at 4, 26. The highly technical nature of the coding error also makes the notion that Mr. Miller should have been able to discover the defect on his own completely unrealistic. R. at 4–5. Mr. Miller had no means to “reasonably detect the hidden danger and guard against it.” *Baumann*, 845 P.2d at 73 (quoting *Gisriel*, 517 F.2d at 704).

Most significant of all, the developer itself did not find the flaw within the repose window either. R. at 5–6. CCS did not discover the coding error until October 30, 2022, more than five years after delivery to MHS, and more than four years after delivery to Mr. Miller. R. at 5–6. This shows the highly technical knowledge required to identify this type of defect. If the company that wrote the defective code needed more than five years to find the error, an ordinary patient could not have found it in four. R. at 5–6.

Every signal Mr. Miller received from Cyber MD indicated a properly functioning and safe product. Cyber MD took in Mr. Miller’s asbestos history, ordered the lung scans, and promised to “analyze them closely, and go over the results with” him. R. at 6. Cyber MD then told Mr. Miller four separate times that there was “zero evidence” of any malignant lesions, diagnosed him with asthma, and told him in 2021 that annual imaging was “no longer necessary.” R. at 6. Any reasonably prudent person who receives four consecutive clean readings from a diagnostic system that was cleared by the FDA would not suspect the system is defective. R. at 5. If this Court accepts Petitioner’s position on section 12-410, it risks sending the message that the more sophisticated and more complex the product, the greater protection a manufacturer has. Therefore, the second exception is satisfied and independently lifts the repose bar.

iii. *The Repose Bar Is Lifted Because the Harm Created by Cyber MD Did Not Manifest Until Mr. Miller’s Lung Collapsed in 2023.*

The delayed-manifestation exception of section 12-410(b)(3) also applies because the harm caused by Cyber MD did not surface until more than six years

after first delivery. R. at 5–6. The third exception in section 12-410(b)(3) explicitly provides that the repose period does not apply if: (1) “the harm [was] caused within four (4) years after the time of delivery,” and (2) “did not manifest itself until after that time.” Sn. Rev. Stat. § 12-410(b)(3). Here, both conditions are met.

First, the harm caused by Cyber MD occurred within four years of delivery of the product. R. at 6. The harm occurred while Mr. Miller was being evaluated by Cyber MD from 2018 to 2021. R. at 6. Throughout that period, his malignant lesion went undetected and unclassified. R. at 6.

Second, the harm did not manifest until Mr. Miller experienced a spontaneous pneumothorax on October 30, 2023, more than two years after the close of the repose period. R. at 6. Only after this traumatic event was an expert review able to identify the lesion in the 2018 imaging that Cyber MD analyzed. R. at 6.

The legislature included this exception for precisely this type of situation where a product causes injury silently within the repose period, and the injury surfaces only later. There is no clearer example of harm not manifesting after the fact, than a diagnostic product failing to detect an obvious lesion year after year. R. at 6. As a result of the harm not manifesting until two years after the repose period, the third exception is also satisfied and independently lifts the statute of repose.

Overall, sections 12-404(b) and 12-410(b)(3) reach the same result through different statutory exceptions: Respondent’s claims are not barred by the repose period. Section 12-404(b) preserves the malpractice claim because Cyber MD

monitored Mr. Miller for the same asbestos-related respiratory condition through 2021, placing Respondent's July 2024 suit within the four-year repose period. R. at 6. Section 12-410(b)(3) likewise preserves Respondent's product liability claim because Cyber MD repeatedly exposed Mr. Miller to a defect that existed at delivery, remained undiscoverable throughout the repose period, and manifested only later. R. at 5–7. As a result, the exceptions return the claim to section 12-402, with Respondent properly filing suit within two years of Mr. Miller's death. R. at 7. The statutory exceptions preserve both Respondent's claims as timely.

Neither section 12-404(b) nor section 12-410(b)(3) asks the Court to toll a statute of repose based on judicial equity. Courts may not create equitable exceptions to statutes of repose where the legislature has provided none but a repose period may be tolled when the legislature enacts an express exception. R. at 11. Reading these explicit statutory exceptions out of the statute would not reflect adherence to general repose principles, but would instead override the balance the Shawnee Legislature wrote into the statutory scheme.

At minimum, the record raises genuine disputes of material fact as to whether each of these statutory exceptions applies. The appeals court correctly held that Respondent satisfied the burden necessary to defeat Petitioners' motion for summary judgment. Hence, this Court should affirm the appeals court's decision and permit both claims to be resolved on their merits.

CONCLUSION

The appeals court rightfully reversed summary judgment in favor of Petitioner. To preclude Respondent from recovering would risk leaving patients, especially those in underserved rural communities, vulnerable to negligent medical treatment while healthcare institutions evade liability by hiding behind buried disclaimers. MHS should not escape accountability based on a claim that Mr. Miller's condition was diagnosed too late to satisfy the statute of repose where Cyber MD continuously monitored that same condition through 2021 and the underlying algorithmic defect remained undiscoverable to an ordinary reasonably prudent person throughout that course of treatment. This Court must prevent the creation of a precedent that allows healthcare institutions to reap the benefits of AI technology while disclaiming responsibility for the associated risks and resultant error.

Dated: October 2, 2026

Respectfully Submitted,

s/ Glitch and Gavel

Attorneys for Respondent(s)

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 2, 2026, I electronically served a copy of the attached BRIEF FOR THE RESPONDENT on the following interested parties:

Counsel for Petitioner

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 2nd day of October 2026 at [REDACTED].

s/ Glitch and Gavel
