
NO. 26-338

IN THE

Shawnee Supreme Court

NOVEMBER TERM 2026

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

Petitioners,

— *versus* —

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

Respondent

*On Writ of Certiorari
to the Shawnee Court
of Appeals for the
Second District*

BRIEF FOR
PETITIONERS

TEAM HEALTH LAW HELLIONS

Attorneys for Petitioners

QUESTIONS PRESENTED

- (1) Whether explicit, mandatory pre-session warnings in prominent 16-point bold red font disclaiming human provider status, combined with hyperlinked digital terms, defeat apparent agency claims against a healthcare system as a matter of law.

Suggested Answer: Yes

- (2) Whether Respondent's medical malpractice and strict product liability claims are substantively extinguished as a matter of law under Shawnee's absolute four-year statutes of repose (SRS §§ 12-410(a) and 12-404(b)), where:

- a. Passive, annual, virtual check-ups spaced 365 days apart represent discrete diagnostic omissions rather than an affirmative "continuous course of treatment" under SRS § 12-404(b); and
- b. The strict product liability expired four years after March 2017 delivery under SRS § 12-410(a) because a lesion visible on 2018 radiological scans were objective discoverable through ordinary prudence, software code is not a toxic physical substance, and routine cloud algorithm updates do not restart product delivery.

Suggested Answer: Yes

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OPINIONS BELOW

The unreported opinion and order of the Circuit Court of Simmons County, State of Shawnee (*Miller v. Metropolitan Health System, Inc.*, Case No. 25-L-24601; entered March 6, 2025) appears in the Record of Appeal in R. at 1-6, where the Circuit Court **GRANTED** Defendants’ combined Motion for Summary Judgment, dismissing Respondent’s complaint **WITH PREJUDICE**. The unreported opinion of the Shawnee Court of Appeals for the Second District (*Miller v. Metropolitan Health Systems, Inc.*, Docket No. 25-123; decided February 24, 2026) appears in the Record of Appeal in R. at 7-25. The Court of Appeals **REVERSED** the Circuit Court’s grant of summary judgment on both issues, and **REMANDED** the case for trial. The order of the Supreme Court of Shawnee (*Metropolitan Health System, Inc. v. Miller*, Docket No. 26-338) appears in the Record of Appeal in R. at 26, where the Supreme Court **GRANTED** Petitioners’ petition for leave of appeal, pursuant to Shawnee Supreme Court Rule 315, limiting review to Questions 1 and 2 from the Questions Presented.

STATUTORY PROVISIONS INVOLVED

The following provisions are relevant to this proceeding: Shawnee Revised Statutes (“SRS”) §§ 12-402, 12-404, and 12-410; set forth in the Record of Appeal. R. at 14-15.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Occupational Background and Asbestos Exposure History. The decedent, Elias Miller (“Mr. Miller” or “Elias Miller”) was born on January 12, 1950. R. at 2. From 1970 until his retirement in 2016, Mr. Miller worked in the maintenance department at the Shawnee Steel Company mill in Cartersville, handling asbestos-insulated machinery without respiratory protective equipment. R. at 2.

Mr. Miller was a lifelong non-smoker, was not asthmatic, and had no family history or prior documented history of respiratory disease. R. at 2, 3. Prior to his retirement, his most recent employment-sponsored chest screening in 2012 was read by a radiologist as “unremarkable”. R. at 3. Following the closure of the steel mill in 2016, Simmons County experienced a severe population decline, dropping to approximately 7,500 residents, and lost over 75% of its healthcare professionals between 2016 and 2025. R. at 3. Both local hospitals closed in 2015 following bankruptcy, leaving no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices in the entire county. R. at 3. The nearest facility providing in-person radiology consultations and CT scans was MHS’s flagship hospital in Goshen—a 190-mile, 3.5-hour drive from Cartersville. R. at 3.

Delivery of Cyber MD, Technical Validation, and Platform Integration.

Petitioner Metropolitan Health System, Inc. (hereinafter “MHS”) is a large regional healthcare network based in Goshen, Shawnee. R. at 3. In 2012, MHS contracted with

Petitioner Cyber-Care Solutions, LLC (hereinafter “CCS”), an independent digital health infrastructure provider, to design and host a proprietary remote telehealth platform. R. at 3. The platform’s patient-facing interface was controlled exclusively by MHS, displaying MHS branding throughout, while CCS marks were strictly prohibited on all patient-facing pages. R. at 3. Below the user login prompt, the webpage stated: *“By entering the portal, I accept the MHS Terms and Conditions.”* R. at 3.

Clicking the blue underlined hyperlinked text *“Terms and Conditions”* opened a standalone webpage displaying 34 lines of single-spaced, unformatted black text on a plain white background, rendered in a font size noticeably smaller than the rest of the website. R. at 3, 4. Approximately three-quarters down the page, the terms contained the following clause:

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 4.

Digital audit logs confirm that Mr. Miller clicked this hyperlink once on April 9, 2018, remaining on the page for four seconds before closing it, and never accessed the link again during subsequent logins. R. at 4.

In February 2017, CCS received clearance from the FDA under Section 510(k) for Cyber MD, an interactive conversational AI diagnostic system that allows patients to input symptoms, compiles clinical history, generates differential diagnoses, and orders/interprets diagnostic tests. R. at 4. On March 1, 2017, CCS delivered possession of Cyber MD to MHS, and MHS integrated the software into its remote telehealth portal. R. at 4. Cyber MD's baseline coding algorithm was trained on a dataset of 40,000 images from three hospital systems, achieving a 97% overall accuracy rate in classifying lung lesions. R. at 4.

Conspicuous Pre-Session Disclaimers and Express Red-Font AI Notices.

Before launching a chat session on Cyber MD, every user was required to navigate a mandatory pop-up box stating in prominent, 16-point bold RED font:

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

R. at 4. To proceed into the software interface, the user was required to affirmatively click an "Accept" button. R. at 4. System logs confirm Mr. Miller accepted this pop-up warning prior to every single telehealth session he initiated in 2018, 2019, 2020, and 2021. R. at 4.

Isolated Annual Telehealth Encounters and Misdiagnosis. On April 9, 2018, experiencing shortness of breath, Mr. Miller logged into the MHS portal and initiated a virtual intake session directly with Cyber MD, during which he detailed his 35-year occupational history with asbestos at the steel mill. R. at 5. Cyber MD ordered mobile chest imaging, evaluated the scans, reported "zero evidence" of malignancy,

diagnosed Mr. Miller with adult-onset asthma, referred him to a local practitioner for inhaler management, and recommended annual follow-up imaging. R. at 5.

Mr. Miller subsequently conducted separate, discrete annual virtual follow-up evaluations with Cyber MD in May 2019, May 2020, and June 2021. R. at 5. During each visit, Cyber MD reviewed new mobile scans and reiterated that there was “zero evidence” of disease. R. at 5. Following the June 2021 report, Cyber MD advised Mr. Miller that annual imaging was no longer necessary. R. at 5. No active medical treatment or therapeutic regimen for pulmonary cancer was ever established or administered by MHS or CCS. R. at 4, 5.

Retrospective Tumor Discovery, Software Retraining, and Statutory Expiration. In October 2022, CCS discovered that pleural shadowing reduced Cyber MD’s diagnostic accuracy in asbestos-exposed lungs to 85%. R. at 4. CCS retrained Cyber MD using 10,000 asbestos-exposed image sets, successfully restored high accuracy, and released the updated software version to clients on December 13, 2023. R. at 4. The 2022 accuracy drop was not disclosed to the public. R. at 4.

On October 30, 2023—nearly two months *before* CCS released the retrained software model—Mr. Miller suffered a spontaneous pneumothorax and was airlifted to MHS’s flagship hospital in Goshen. R. at 5. Scans revealed a 6.4 cm malignant mass in his left lung with extensive metastases to the pleura and spine. R. at 5. Retrospective expert review established that a 7 mm lesion was clearly visible on his initial April 2018 scans—partially obscured by pleural changes—and had grown

continuously to 47 mm by June 2021. R. at 5. Cyber MD’s 2017 baseline coding algorithm had consistently failed to identify the lesion. R. at 5.

Elias Miller died on April 14, 2024, at seventy-four years of age. R. at 6. Respondent Evelyn Miller (hereinafter “Ms. Miller”) filed this wrongful death and strict product liability action in July 2024—more than seven years after Cyber MD’s initial delivery in 2017, and more than six years after the initial April 2018 misdiagnosis. R. at 4, 6.

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County. In July 2024, Respondent filed a complaint against Petitioners, Case No. 25-L-24601, alleging two claims. R. at 2, 7. First, that MHS is vicariously liable under the doctrine of apparent agency for the diagnostic errors of CCS’s Cyber MD system. R. at 7. Second, that the “continuous course of treatment” exception under Shawnee Revised Statutes (“SRS”) § 12-404(b) does not bar the four-year repose period against CCS and a products liability claim under SRS § 12-410(b)(3). R. at 12. Shortly thereafter, MHS and CCS filed a Motion for Summary Judgment, pursuant to Shawnee Rule of Civil Procedure 56, Case (“SRCP”). R. at 2. The Circuit Court **GRANTED** the Petitioners’ motion, dismissing Respondent’s Complaint **WITH PREJUDICE**.

For the apparent agency claim against MHS, the Circuit Court found that MHS did not hold themselves out as a provider of care. R. at 8. Mr. Miller’s affirmative assent, in addition to digital audit logs confirming Mr. Miller accessing

the hyperlink to MHS's Terms & Conditions gave reasonable, conspicuous notice and unambiguous manifestation of assent to MHS's terms. R. at 5,9. Additionally, Mr. Miller was required to navigate a pop-up box in 16-point red font before beginning a chat session with Cyber MD. R. at 5, 9. The pop-up box informs users that Cyber MD is not a licensed health care professional and is an artificial intelligence program, requiring the user to click "Accept" before proceeding. R. at 5, 9.

The Circuit Court also rejected Respondent's contractual unconscionability defense. R. at 9. Because Mr. Miller had reasonable alternatives, MHS's terms were not one-sided or unfair that Mr. Miller lacked a meaningful choice in his health care; therefore, denying Ms. Miller's claim. R. at 10.

For the statute of repose and "continuous course of treatment" exception claim, the Circuit Court held that SRS § 12-404 bars actions arising from patient care more than 4 years after "the date on which the act or omission or occurrence alleged" that caused injury or death. R. at 11. The continuous treatment doctrine provides an exception to the aforementioned statute; however, Mr. Miller's interactions with Cyber MD were "independent and separate", not continuous for a known disease. R. at 12. The products liability claim was also rejected as the diagnostic misinterpretation and product delivery occurred prior to the four-year cap under SRS § 404. R. at 12-13.

Shawnee Court of Appeals for the Second District. In October 2025, Respondent appealed the lower court's judgment, Docket No. 25-123, in dismissing her claims against Petitioners. R. at 16. The Court of Appeals reviewed the grant of summary

judgment *de novo*. R. at 21. The Court of Appeals **REVERSED** on both issues and **REMANDED** for further proceedings. R. at 16, 28. In the apparent agency claim against MHS, The Court of Appeals held that a genuine issue of material fact existed on whether MHS provided reasonable conspicuous notice of its agency disclaimer and whether the disclaimer was procedurally unconscionable. In the statute of repose claim against CCS, the interpretation of SRS §§ 12-404 and 12-410 were narrowly tailored, leading to an incorrect granting of summary judgment for CCS. R. at 28.

Shawnee Supreme Court. MHS and CCS filed a petition for leave of appeal, Case No. 26-338, pursuant to Shawnee Supreme Court Rule 315. R. at 29. This Court **GRANTED** Petitioners' appeal. *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the holding from the Shawnee Court of Appeals for the Second District. The Circuit Court of Simmons County correctly held that Petitioners are entitled to summary judgment, respective to both claims brought forth by Respondent. Those two claims are framed for this Court's review. First, whether MHS can be held vicariously liable as an apparent agent of the diagnostic errors from Cyber MD's system when it was integrated into MHS' telehealth platform. Second, whether Respondent's claims against CCS are barred or tolled/extended under the four-year statutes of repose under SRS §§ 12-404 or 12-410.

I.

Petitioner, Metropolitan Health Services, Inc., is not liable for diagnostic errors from CCS's Cyber MD system because MHS did not hold themselves out as a provider

of care under the apparent agency doctrine. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 525 (Ill. 1996). An individual cannot pin liability on a hospital if they possess constructive knowledge or conspicuous notice of a physician’s independent status. *Id.* at 521; *York v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 222 Ill.2d 147, 182 (Ill. 2006) Respondent cannot accuse MHS of liability when Mr. Miller was put on inquiry—if not conspicuous—notice by (a) the sign-in wrap agreement on MHS’s telehealth website; and (b) a pop-up box informing users that Cyber MD is not a licensed healthcare professional. MHS’s hyperlinked Terms & Conditions were presented in a manner that provided notice to Mr. Miller. Whether or not Mr. Miller elected to read MHS’s Terms & Conditions is irrelevant when assessing conspicuous notice. *Meyer v. Uber Technologies Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

MHS’s hyperlinked terms brings users to a standalone page on a white contrasting background, notifying users that physicians and software, including “clinical evaluations, imaging reviews, and diagnostic interpretations” are independent contractors, not employees or agents of MHS. R. at 5, ¶ 10; *See, Dahdah v. Rocket Mortg. LLC*, 166 F.4th 556, 569 (6th Cir. 2026); *Meyer*, 868 F.3d at 78. Additionally, a user must click “Accept” when a pop-up box in red, 16-point font notifies users that Cyber MD is not a licensed healthcare professional. R. at 5, ¶ 13. This notifies users before they could launch a chat session on Cyber MD. R. at 5, ¶ 13. Weighing the totality of the circumstances within this fact-intensive inquiry, Mr. Miller was put on notice of MHS’s independent status; therefore, MHS cannot be held liable under apparent agency.

Respondent raises a defense of contractual unconscionability, arguing that the sign-in agreement between Mr. Miller is disproportionately one-sided in favor of Petitioner, rendering MHS' contract of adhesion unenforceable. Unfortunately for Ms. Miller, her claims do not support the facts within the record. While the geographical limitations of hospitals within Respondent's area of residency in Cartersville, Shawnee are unfavorable, these circumstances are not impossible. Mr. Miller had the opportunity to seek in-person care, visited one of the primary care practices in Simmons County, or had Ms. Miller aid in driving the 3.5 hours to Goshen for radiology consultation and CT scans. R. at 5-6, ¶¶ 6-7. Mr. Miller engaged in annual chat sessions with Cyber MD during the course of April 2018 to June 2021. R. at 6, ¶¶ 15-17. None of which, at any point, was Mr. Miller legally forced to assent or adhere to the contractual agreement made with MHS. While Mr. Miller's untimely passing is unfortunate, the record shows that Mr. Miller had multiple opportunities to seek in-person care during the two years preceding the incident. R. at 6, ¶¶ 17-18. Further, Ms. Miller has not provided proof these hardships were debilitating to Mr. Miller. *Sanders v. JGWPT Holdings, LLC*, No. 14 C 9188, 2017 WL 4281123, at *7 (N.D. Ill. Sep. 27, 2017). Given these circumstances, the procedural and substantive nature of the contractual agreement between MHS and Mr. Miller does not support Respondent's claims of unconscionability.

II.

Both of Respondent's claims are extinguished as a matter of law. The Court of Appeals erred in holding otherwise and its decision should be reversed. R. at 22, 24.

Statutes of repose reflect a deliberate legislative choice to establish an absolute, outer temporal boundary on a defendant's exposure to liability, operating as a strict and non-discretionary cutoff that runs strictly from the date of the defendant's last culpable act or initial product delivery. Unlike procedural statutes of limitations—which encourage the diligent prosecution of known claims and begin to run only upon accrual or discovery—a statute of repose creates an absolute substantive bar that extinguishes the underlying cause of action altogether, regardless of when an injury manifests, is discovered, or accrues. *CTS Corp. v. Waldburger*, 573 U.S. 1, 7–9 (2014); *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505–06 (2017).

The unqualified statutory phrase “in no event shall such action be brought” operates as an emphatic legislative command that strips courts of any residual authority to extend statutory deadlines through equitable common-law doctrines. *Id.* at 505–06; *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 668 (Ill. 1986). This substantive bar applies with equal force even when plaintiffs navigate complex administrative frameworks, as a state's authority to extinguish a cause of action after a set duration remains absolute. *Augutis v. United States*, 732 F.3d 749, 752–54 (7th Cir. 2013); *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 SD 33, ¶¶ 18–21, 878 N.W.2d 406, 411–14; *Harlfinger v. Martin*, 754 N.E.2d 63, 66–68 (Mass. 2001); *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 642–44 (Colo. 1988).

The temporal baseline of this litigation is entirely undisputed. CCS delivered Cyber MD to MHS on March 1, 2017. R. at 4. Elias Miller underwent his initial

diagnostic evaluation on April 9, 2018. R. at 5. Under SRS §§ 12-404(b) and 12-410(a), these triggering acts set absolute four-year statutes of repose in motion that expired in March 2021 for the strict product liability claim and in April 2022 for the medical malpractice claim. R. at 4, 5. Because Respondent did not commence this action until July 2024—more than two years after both substantive repose periods had completely run—and because no statutory exceptions apply, all claims are extinguished as a matter of law. R. at 6.

Additionally, Respondent's medical malpractice claim cannot be saved by the continuous course of treatment exception under SRS § 12-404(b). Cyber MD's failure to identify a latent tumor during an initial intake is a discrete diagnostic omission that failed to establish a course of affirmative care for lung cancer. *Nykorchuck v. Henriques*, 577 N.E.2d 1026, 1027–28 (N.Y. 1991); *Young v. N.Y.C. Health & Hosp. Corp.*, 693 N.E.2d 196, 198–200 (N.Y. 1998). Routine annual virtual check-ups spaced 365 days apart represent separate diagnostic screenings rather than an unbroken, continuous "occurrence" causing cumulative harm. *Cunningham v. Huffman*, 609 N.E.2d 321, 324–25 (Ill. 1993); *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648–50 (4th Cir. 2004).

Respondent's strict product liability claim against CCS is similarly time-barred under SRS § 12-410(a), as the four-year product repose bar expired in March 2021, four years after initial delivery. R. at 4, 6. Respondent failed to produce any evidence establishing an express multi-year safety warranty (§ 12-410(b)(1)) or intentional fraud (§ 12-410(b)(2)), as keeping internal training datasets proprietary

does not constitute fraudulent concealment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). The prolonged exposure exception (§ 12-410(b)(3) Clause A) applies strictly to toxic physical materials, not software code. *Koch v. Shell Oil Co.*, 52 F.3d 878, 880–83 (10th Cir. 1995). The objective discoverability exception (§ 12-410(b)(3) Clause B) fails because the 7 mm tumor was clearly visible on raw 2018 radiological scans and discoverable through ordinary prudence. R. at 5. Mr. Miller's 35-year occupational asbestos exposure, clean asthma history, and four explicit red AI warnings created an objective duty of inquiry to seek a human second opinion, which would have revealed the lesion immediately without any scientific breakthrough. *Pate v. Columbia Mach.*, 930 F. Supp. 451, 465–66 (D. Idaho 1996). Moreover, CCS's December 13, 2023 algorithm retraining release occurred after Mr. Miller's hospitalization and does not restart the 2017 product delivery clock. *Id.* at 466.

Finally, even if Respondent could invoke a product exception under SRS § 12-410(b), strict product liability claims stemming from medical diagnostic software are subordinate to healthcare malpractice repose under SRS § 12-404(b). Section 12-410(a) explicitly binds product liability actions to Section 12-402, which in turn defers directly to the absolute medical malpractice repose bar of Section 12-404(b). This statutory linkage enforces the "gist of the action" doctrine, prohibiting plaintiffs from re-labeling patient-care diagnostic errors to evade strict malpractice time bars. *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 474 (8th Cir. 2008). Because the substantive extinction of Elias Miller's personal injury claim in April 2022 during

his lifetime extinguished the underlying cause of action, no derivative wrongful death recovery can be maintained. *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991).

ARGUMENT

Standard of Review. This appeal raises two legal questions. The Supreme Court of Shawnee reviews these questions *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. APPARENT AGENCY DOCTRINE

A. Hospital Liability and its Legal Framework

Typically, the hiring party who employs an independent contractor is not liable for harm caused by the latter's acts or omissions. *Carney v. Union Pacific Ry. Co.*, 77 N.E.3d 1, 7 (Ill. 2016); RESTATEMENT (SECOND) OF TORTS § 409 (1965) (“[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”); e.g., *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1389 (3d Cir. 1995) (integrating Restatement § 409). However, if an independent contractor acts as an “apparent or ostensible agent” of a hospital, liability *may* attach to the hospital as the employer. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 522 (Ill. 1993) (emphasis added); *Carney*, 77 N.E.3d at 8; *Kashishian v. Port*, 167 Wis.2d 24, 39 (Wis. 1992) (explaining hospitals cannot escape liability just because negligent care is rendered by an independent contractor). These situations may incur liability on a hospital. *Gilbert*, 156 Ill.2d at 524.

Under the doctrine of apparent agency, a hospital may be vicariously liable for negligent actions caused by an independent contractor. *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill.2d 147, 193-94 (Ill. 2006); *Gilbert*, 156 Ill.2d at 524; *Baptist Mem'l Hosp. Sys. v. Sampson*, 939 S.W.2d 945, 949 (Tex. 1998); *Sword v. NKC Hosp. Inc.*, 714 N.E.2d 142, 148-49 (Ind. 1999) (comparing similar vicarious liability concepts for apparent agency and respondeat superior). The following factors from *Gilbert* must be satisfied to prove an apparent agency claim: (1) MHS held itself out as a provider of care without notifying said care is administered by independent agents; (2) MHS had knowledge that the agent's actions created an "appearance of authority" and MHS acquiesced to it; and (3) consistent with "ordinary care and prudence," Mr. Miller relied on MHS or the agent's conduct. *Gilbert*, 156 Ill.2d at 525.

"Holding Out" is the primary element Ms. Miller disputes with Petitioners in this matter. R. at 21. The first two elements under *Gilbert* are frequently grouped together when assessing the "holding out" factor. *First Midwest Bank v. Ottawa Reg'l Hosp. and Healthcare Ctr.*, 242 N.E.3d 934, 945 (Ill. App. Ct. 2023); e.g., *Lamb-Rosenfeldt v. Burke Med. Grp., Ltd.*, 967 N.E.2d 411, 420 (Ill. 2012); *Wallace v. Alexian Bros. Med. Ctr.*, 907 N.E.2d 490, 495 (Ill. App. Ct. 2009). The "holding out" element is satisfied if a hospital holds itself out as a provider of care without notifying patients that said care is administered by independent contractors. *Gilbert*, 156 Ill.2d at 525. As the party asserting this claim, Ms. Miller bears the burden to satisfy the "holding out" element under *Gilbert*. *Id.*

A patient possessing actual or “constructive knowledge” of the independent status of an agent cannot place liability on a hospital. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d at 521 (explaining that an exception to vicarious liability for hospitals exists if a patient, in some manner, is put on notice of the independent status of an independent-contractor physician.); *York v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 222 Ill.2d 147, 182 (Ill. 2006); e.g., *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999); *Steele v. Provena Hospitals*, 996 N.E.2d 711, 735 (Ill. App. Ct. 2013). Subjective knowledge to claim vicarious liability against a hospital will not satisfy the “holding out” element. *Mizyed v. Palos Cmty. Hosp.*, 58 N.E.3d 102, 116 (Ill. App. Ct. 2016) (affirming summary judgment for hospital, holding that regardless of patient’s subjective inability in reading or speaking English, patient was placed on notice of the physician’s independent status); accord, RESTATEMENT (FIRST) OF AGENCY § 267 cmt. a. (1993) (“The mere fact that acts are done by one whom the injured party believes to be the defendant’s servant is not sufficient to cause the apparent master to be liable”).

A patient must reasonably believe the hospital or its employees were rendering care. *Webster v. CDI Indiana, LLC.*, 917 F.3d 574, 577 (7th Cir. 2019) (applying *Sword’s* holding in its apparent agency inquiry when determining a patient’s knowledge); *Sword*, 714 N.E.2d at 151-52; See, e.g., *Diggs v. Novant Health, Inc.*, 628 S.E.2d 851, 860 (N.C. Ct. App. 2006); *Burless v. West Virginia Univ. Hospitals, Inc.*, 601 S.E.2d 85, 97 (Va. Ct. App. 2004). Courts will look into the “totality of the circumstances” based on the “actions or inactions of the hospital” in the apparent

agency inquiry. *Webster*, 917 F.3d at 577. Interactions outside a hospital setting do not limit this inquiry. *Id.* Flexibility is permitted when assessing the totality of the circumstances of whether a patient has notice of a contractor’s independent status. *Steele v. Provena Hospitals*, 966 N.E.2d 711, 735 (Ill. App. Ct. 2013).

1. Contracts: Foundational Principles and Enforceability Standards

a. Failing to Read the Terms of a Contract Does Not Make it Unenforceable.

Regardless of if a party has read the terms of a contract before assenting to its terms, common-law has consistently acknowledged that this will not negate the enforceability of a contract. The Court in *Upton* set forth this principle, explaining that it is a “[person’s] own fault” for failing to read a contract or not “know[ing] what is contain[s]” before signing. *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875). Multiple courts since *Upton* have agreed with this principle, explaining that a contract’s enforceability is not eliminated if an individual elects not to read its terms before signing. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) (acknowledging that a party cannot avoid the terms of a contract on the basis that they fail to read before signing); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (“A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.”); *Paper Exp., Ltd v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (“[I]t is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them.”); e.g., *Berkson v. Gogo LLC.*, 97 F.Supp.3d 359, 394 (E.D.N.Y. 2015).

If an individual has the opportunity to read a contract before signing, but signs *before* reading, they cannot challenge a contract’s validity. *Hawkins v. Cap. Fitness, Inc.*, 29 N.E.3d 442, 446 (Ill. App. Ct. 2015) (emphasis added); *Bumgarner v. Green*, 489 S.E.2d 43, 47 (Ga. Ct. App. 1997) (explaining that unless an emergency exists that would excuse a party from reading a contract’s terms, an individual remains bound). Competent adults that are able to understand the nature of what they assent to. *Black v. Wabash St. L & P. Ry, Co.*, 111 Ill. 351, 358 (Ill. 1884); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir. 1997); *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *e.g., Thornton v. Uber Technologies, Inc.*, 858 S.E.2d 255, 258 (Ga. Ct. App. 2021). Such standards are necessary to provide a “safe harbor” that protects the interests of sellers against indeterminate or meritless claims. *Carr*, 95 F.3d at 547.

b. Electronic Contracts and Determining Enforceability

Electronic contracts exist in four general categories¹: (1) clickwraps; (2) browsewraps; (3) scrollwraps; and (4) sign-in wrap agreements. *Contrast, Dahdah v. Rocket Mortg., LLC.*, 166 F.4th 556, 568-69 (6th Cir. 2026) (recognizing four categories in which electronic contracts exist), *with Berman v. Freedom Fin. Network, LLC.*, 30 F.4th 849, 856 (9th Cir. 2022) (addressing only browsewraps and clickwrap in the majority opinion); *Id.* at 866-67 (Baker, J., concurring) (introducing and explaining the category of sign-in wrap agreements); *e.g., Chabolla v. ClassPass, Inc.*,

¹ Courts vary in grouping “scrollwraps” and “clickwraps” together because of similar enforceability standards.

129 F.4th 1147, 1154 (9th Cir. 2025); *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024). In Judge Baker’s concurrence from *Berman*, he further explained the categories, stating:

A “**browsewrap**” agreement is one in which an internet user accepts a website’s terms of use merely by browsing the site. A “**clickwrap**” agreement is one in which an internet user accepts a website’s terms of use by clicking an ‘I agree’ or ‘I accept’ button, with a link to the agreement readily available. A “**scrollwrap**” agreement is like a “clickwrap,” but the user is presented with the agreement and must physically scroll to the bottom of it to find the “I agree” or “I accept” button. “**Sign-in wrap**” agreements are those in which a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service.

Berman, 30 F.4th at 65-66 (Baker, J., concurring)

Contracts do not need to fall neatly into one of the four categories, but still must provide inquiry notice. *Oberstein v. Live Nation Ent.*, 60 F.4th 505, 512-13 (9th Cir. 2023); *Berman*, 30 F.4th at 856; *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 30-31 (2d Cir. 2002). This applies to both traditional and electronic contracts equally. *Chabolla v. ClassPass, Inc.*, 129 F.4th 1147, 1154 (9th Cir. 2025); *Berman*, 30 F.4th at 855-56 (“[E]lemental principles of contract formation apply with equal force to contracts formed online.”); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). A contract is enforceable if there is (1) reasonable notice of its terms; and (2) reasonable manifestation of assent exists from an individual to a contract’s terms. *Kauders v. Uber Technologies, Inc.*, 159 N.E.3d 1033, 1049 (Mass. 2021).

2. Sign-In Wrap Agreements: Enforceable Through Reasonable Notice and Objective Manifestation of Assent

An electronic contract is a sign-in wrap agreement if it requires a user to sign-up to use an Internet product or service. *Sellers v. JustAnswer LLC.*, 289 Cal.Rptr.3d 1, 15 (Cal. Ct. App. 2021). After receiving a sign-up screen, users are required to accept a separate agreement before accessing the service. *Id.* The website’s “terms of use” notifies users when they proceed through the website’s sign-in or login process. *Berkson v. Gogo LLC.*, 95 F.Supp.3d 359, 399 (E.D.N.Y. 2015). A user is not required to review a website’s terms or express manifestation of assent to its terms by checking a box or clicking an “I agree” button. *Sellers*, 289 Cal.Rptr.3d. at 21. A sign-in wrap agreement is enforceable if (1) the website’s interface gives reasonable, conspicuous notice to a user; and (2) the user’s conduct objectively shows manifestation of their assent. *Dahdah v. Rocket Mortg., LLC.*, 166 F.4th 556, 577 (6th Cir. 2026); *Oberstein v. Live Nation Ent. Inc.*, 60 F.4th 505, 515 (9th Cir. 2023); *Berman v. Freedom Fin. Network, LLC.*, 30 F.4th 849, 856 (9th Cir. 2022).

a. Reasonable, Conspicuous Notice

A term's provisions are conspicuous if, on its face, the appearance of the contract attracts the attention of a reasonable person when viewing it. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004); *Dresser Indus. Inc. v. Page Petroleum Inc.*, 853 S.W.2d 505, 511 (Tex. 1993); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177-78 (9th Cir. 2014); *e.g., Deacero, S.A.P.I. de C.V. v. BNSF Ry. Co.*, 696 S.W.3d 212, 218 (Tex. App. 2024) (using UCC as interpretive guidance in evaluating

fair and conspicuous notice.); *accord*, UCC § 2-2021(B)(10)[1]² (“Conspicuous,’ with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”) The Sixth Circuit in *Dahdah* uses four questions to decide if a website’s terms are conspicuous for a “reasonably prudent Internet user.” *Dahdah v. Rocket Mortg., LLC.*, 166 F.4th 556, 569 (6th Cir. 2026); *Berman v. Freedom Fin. Network, LLC.*, 30 F.4th at 856. A holistic approach is used when assessing the totality of the circumstances of a website. *Dahdah*, 166 F.4th at 569-70. No specific question is dispositive. *Id.* The four questions are as followed:

- A.) Does the website display the offer on an “uncluttered” page?
- B.) Is the proposed offer close or far away from the button a user must click to indicate acceptance of the website’s proposal?
- C.) Does the proposal’s design (i.e. font size and color) draw the user’s attention to the proposal?; and
- D.) Did the user and website operator engage in a way that would infer a contractual relationship to the proposal’s terms?

Id. at 569, 571, 574.

b. MHS’s Hyperlinked Text of its Terms & Conditions on its Telehealth Platform Constitute Conspicuous Notice.

MHS Terms and Conditions that were displayed in a blue, underlined hyperlink gave Mr. Miller reasonable, conspicuous notice of its terms.

² The Uniform Commercial Code (“UCC”) applies to goods and not service; however, UCC definition of “conspicuous,” UCC § 2-2021, applies equally and functions similarly in cases involving service.

i. MHS's Terms & Conditions were Placed on a Separate, Uncluttered Page for Users

The first question courts consider is how a website's interface displays the terms of an electronic agreement. *Dahdah v. Rocket Mortg., LLC.*, 166 F.4th 556, 569 (6th Cir. 2026); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017). In *Meyer*, the Second Circuit explained how Uber's interface, including the uncluttered design of the website and its language, provides a user notice to its terms. *Meyer*, 868 F.3d at 78. Uber's interface included an entire, visible screen with text that included hyperlinks to Uber's Terms & Conditions and Privacy Policy. *Id.* The text's placement appeared directly below the register button for users to either create an account or to connect payment methods. *Id.* Further, if a user clicked on the blue hyperlink, Uber's terms would automatically be sent to them. *Id.* Accordingly, Uber's website didn't contain information that would distract a user. *Id.* at 77-78. The Second Circuit in *Meyer* contrasted Uber's interface with Amazon.com in *Nicosia*. *Id.* at 78.

In *Nicosia*, Amazon's website displayed fifteen to twenty-five links, several buttons, and advertisements. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236-37 (2d Cir. 2016); e.g., *Berman v. Freedom Fin. Network, LLC.*, 30 F.4th 849, 856 (9th Cir. 2022). The design and content of Amazon's webpage obscured its Terms & Conditions. *Nicosia*, 834 F.3d at 237. Further, the website's design was flooded with user information relating to personal addresses, purchase summary, shipping options, and payment methods. *Id.* Altogether, the information was sufficiently distracting to weaken notice of Amazon's terms. *Id.* A website that has a streamline design conveying its message will put a user on conspicuous notice. *Dahdah*, 166 F.4th at

569; *Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 477 (9th Cir. 2024). Streamline designs apply to hyperlinked texts as well. *Meyer*, 868 F.3d at 79 (“As long as the hyperlinked text was itself reasonably conspicuous[,] . . . a reasonabl[e] prudent smartphone user w[ill] have constructive notice of the terms.”). The fact that a user voluntarily chooses not to read a website’s terms falls on them. *Id.* The hyperlinked text still gives inquiry notice to a user. *Id.*

Here, the webpage that provided MHS’s Terms & Conditions would give notice to a reasonably prudent Internet user. Like the website in *Meyer*, MHS’s Terms & Conditions were on a standalone webpage. R. at 4, ¶ 10. Users like Mr. Miller would be redirected to the standalone webpage upon clicking the hyperlinked text “Terms and Conditions.” *Id.* Unlike *Nicosia*, there were no other visually competing elements that would redirect a reasonably prudent user from reviewing MHS’s Terms & Conditions. MHS’s standalone page was presented on a plain white background with 34 lines of single-space black text. Additionally, MHS’s domain contained the one hyperlinked text, underlined in blue font below the user login. R. at 4, ¶ 10. Contrasting the websites from *Nicosia* and *Berman*, MHS’s website design did not draw Mr. Miller’s attention away from noticing the hyperlinked Terms & Conditions. Digital audits confirm Mr. Miller clicking the hyperlink text and viewing the webpage before proceeding to MHS’s patient portal. R. at 5, ¶ 11.

Therefore, the simplistic layout of MHS’s website and standalone webpage put Mr. Miller on conspicuous notice.

ii. The Placement of MHS’s Terms & Conditions were Noticeable to Mr. Miller, as Confirmed by Digital Audit Logs

The placement of a website’s terms and the button the user must click to signal their acceptance to its terms are assessed in the second question. *Dahdah v. Rocket Mortg., LLC.*, 166 F.4th 556, 571 (6th Cir. 2026). The closer a term is placed next to an action button signaling acceptance, the higher likelihood conspicuous notice will be met. *Id.*; *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 515-16 (9th Cir. 2023); *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1020-21 (9th Cir. 2024) (finding that sign-in terms placed beneath an action button gave conspicuous notice to users). Terms placed too far away challenge conspicuous notice for users. *Chabolla v. ClassPass Inc.*, 129 F.4th 1147, 1151-52 (9th Cir. 2025).

In *Huynh*, the website Boom Fantasy notified users that by signing up or logging in, they agreed to its Terms of Service and Privacy Policy. *Huynh v. Boom Shakalaka, Inc.*, 814 F.Supp.3d 1141, 1144 (Cal. Dist. Ct. 2026). Users were unable to use Boom Fantasy’s app or participate in events without agreeing to their Terms of Service. *Id.* Upon clicking the “Terms of Service” hyperlink, the website would display the Terms of Service in its entirety to the user. *Id.* The terms were displayed directly below the login button. *Id.* The court in *Huynh* found that because the website notified users they agreed to Boom Fantasy’s “Terms of Service” by creating an account or logging in, proper notice was given. *Id.* at 1149.

Here, the placement of MHS’s Terms & Conditions is directly analogous to the website in *Huynh*. Like *Huynh*, MHS’s login notifies users by stating:

“By entering the portal, I accept the MHS Terms and Conditions.” R. at 4, ¶ 9.

Consistent with *Kebaugh*, *Oberstein*, and *Huynh*, MHS's terms were placed directly below MHS's user login. R. at 4, ¶ 9. This is supported by MHS digital audit logs confirming Mr. Miller clicked the hyperlink before proceeding forward on MHS's portal. R. at 5, ¶ 11. Therefore, the placement of MHS's hyperlinked Terms & Conditions satisfies this inquiry.

iii. The Design of MHS's Terms & Conditions, Including the Font Size and its Color, gave Notice to Mr. Miller

The font size or color of a website's terms and whether they draw the user's attention is the third question courts evaluate. *Dahdah v. Rocket Mortg., LLC*, 166 F.4th 556, 573 (6th Cir. 2026). Hyperlinks—including those formatted blue underlined text—that sufficiently sets itself apart from surrounding text, will alert and puts a user on notice. *Berman v. Freedom Fin. Network, LLC.*, 30 F.4th 849, 857 (9th Cir. 2022); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 77-78 (2d Cir. 2017). Hyperlinks can disclose a website's terms, as long as they are presented in a “readily apparent” manner. *Berman*, 30 F.4th at 857; *Sellers v. JustAnswer LLC.*, 73 Cal.App.5th 444, 481 (Cal. Ct. App. 2021). Terms written in small font can still provide notice. *Dahdah*, 166 F.4th at 573; *Meyer*, 868 F.3d at 78; *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 515-16 (9th Cir. 2023). Barely legible or only underlined text is insufficient to alert users of a clickable hyperlink. *Dahdah*, 166 F.4th at 574; *Berman*, 30 F.4th at 856-57.

Here, MHS was permitted to disclose their terms and conditions in its hyperlink, so long as it is readily apparent to a reasonably prudent user of its

existence. MHS's hyperlinked text was blue and underlined.³ R. at 4, ¶ 9. Consistent with *Sellers*, *Berman*, and *Meyer*, a reasonably prudent user would be put on notice that MHS's hyperlink had further information relating to its Terms and Conditions. R. at 4. That additional information included the notification of physicians and software independent status and that these physicians and software were not employees or agents of MHS, having no operational control over independent contractors. R. at 4-5, ¶ 10. Mr. Miller was able to notice the hyperlink and clicked on it, confirmed by MHS's digital audit logs. R. at 5, ¶ 11. Therefore, the font and size of MHS's hyperlink containing its Terms & Conditions satisfies this inquiry.

iv. This Court can Infer a Contractual Relationship Formed Between Mr. Miller and his access to MHS's Patient Portal

The final question courts consider is whether the user engages with the website operator in a manner that would expect to include contractual terms. *Dahdah v. Rocket Mortgage, LLC*, 166 F.4th 556, 574 (6th Cir. 2026). When a user creates an account for subsequent transactions, a “continuing, forward-looking relationship” is formed, proving a user's manifestation and satisfying this inquiry. *Id.*; *Sellers v. JustAnswer LLC*, 73 Cal.App.5th 444, 471 (Cal. Ct. App. 2021); e.g., *B.D. v. Blizzard Ent., Inc.*, 76 Cal.App.5th 931, 947 (Cal. Ct. App. 2022). One-off visits do not meet the threshold a contract terms govern. *Dahdah*, 166 F.4th at 575.

Here, Mr. Miller's interactions with MHS telehealth platform demonstrate a continuing relationship that would encompass adherence to MHS's contractual

³ Confirmed by HLMCC Request for Clarification # 19

terms. Mr. Miller created an account on MHS's portal and engaged in chat sessions with Cyber MD. R. at 6, ¶ 15. During the timeline of April 2018 to June 2021, Mr. Miller continued virtual follow-up evaluations during his visits upon Cyber MD's recommendations. R. at 6, ¶¶ 16-17. Mr. Miller submitted new mobile scans for Cyber MD at each subsequent visit. R. at 6, ¶ 17. Additionally, Mr. Miller had a chest X-ray and CT scan done on the advice of Cyber MD. R. at 6, ¶ 15. The contractual clause notifying users of Cyber MD's independent status and that MHS were not agents or agents of software similar to Cyber MD governs the interactions Mr. Miller had with Cyber MD. The "clinical judgment[s]" and "diagnostic methods" that Cyber MD as an independent contractor provided to Mr. Miller falls within the scope of the contractual clause. R. at 4-5, ¶ 10. These interactions would not fall within a one-off visit that *Dahdah* mentioned.

These four considerations that courts evaluate demonstrate that Mr. Miller had reasonable, conspicuous notice; therefore, the first element in proving the enforceability of a sign-in wrap agreement is met.

c. Objective Manifestation of Assent

A person showing objective manifestation of assent through their conduct will hold a sign-in wrap agreement enforceable. *Dahdah v. Rocket Mortg., LLC*, 166 F.4th 556, 574 (6th Cir. 2026); *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 515 (9th Cir. 2023); *Berman v. Freedom Fin. Network, LLC.*, 30 F.4th 849, 856 (9th Cir. 2022) When a website informs users that taking certain actions constitute acceptance of its terms, the objective prong is met. *Dahdah*, 166 F.4th at 581 (interpreting

RESTATEMENT (SECOND) OF CONTRACTS as guidance to explain objective manifestation of assent in sign-in wrap agreements.); RESTATEMENT (SECOND) OF CONTRACTS § 30(1) (1981) (“An offer may invite or require acceptance to be made . . . by performing . . . a specifi[c] act[.]”); RESTATEMENT (SECOND) OF CONTRACTS § 30(2) (1981) (“[A]n offer invites acceptance in any manner and by any medium reasonable in the circumstances.”); *Oberstein*, 60 F.4th at 517. Manifestation of acceptance does not require a user to explicitly click an “I Agree” action button. *Dahdah*, 166 F.4th at 568-69. Users creating an account will satisfy the objective prong. *Id.*; *Oberstein*, 60 F.4th at 515-16; *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024).

Here, Mr. Miller created an account to access MHS’s patient portal, showing his objective manifestation of assent to MHS’s Terms & Conditions. R. at 4. Like the website in *Oberstein*, MHS binds a user to accept its terms if a user decides to create an account and login to MHS’s telehealth platform. R. at 4, ¶ 9. Mr. Miller would not be able to interact with Cyber MD or have access to MHS’s patient portal without him creating an account first. R. at 9, 18. The fact that MHS did not have an explicit “I Agree” button to show manifestation of assent is irrelevant in this inquiry, Mr. Miller’s conduct by creating an account to access MHS’s patient services shows an outward manifestation of assent, consistent with the Sixth Circuit in *Dahdah*.

Therefore, both elements to prove the enforceability of a sign-in wrap agreement are met and MHS cannot be held liable in Ms. Miller’s apparent agency claim.

B. Even if MHS’s Terms & Conditions Do not Satisfy All the Elements from *Dahdah*, the Totality of the Circumstances Shows Ms. Miller was Put on Inquiry Notice by the Pop-Up Box Informing Him that Cyber MD is Not a Licensed Healthcare Professional

The contract between MHS and Mr. Miller still remains enforceable because a pop-up box alerts users that Cyber MD is not a licensed healthcare professional. A pop-up screen requires users to explicitly click that they agree to terms in order to proceed are a form of “clickwrap” or “click-through” agreement. *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 513 (9th Cir. 2023); *Saeedy v. Microsoft Corp.*, 757 F.Supp.3d 1172, 1189 (Wash. Dist. Ct. 2024); *Chabolla v. ClassPass Inc.*, 129 F.4th 1147, 1154 (9th Cir. 2025). Clickwraps are routinely enforceable. *Chaballa*, 129 F.4th at 1154. A website providing multiple pop-up screens that block a user, requiring them to click “Confirm” will demonstrate a user had explicit notice to a website’s terms. *Good v. Uber Technologies, Inc.*, 491 Mass. 116, 131 (Mass. 2024); *Saeedy*, 757 F.Supp.3d. at 1200-01.

In *Saeedy*, Microsoft had multiple interrupt notices for users in bold, large text on updating its terms before providing a “Learn more” hyperlink in blue text, contrasting on a white background and above a blue “Next” button. *Saeedy*, 757 F.Supp.3d at 1200-01. Interrupt notices and emails notified users of term updates. *Id.* at 1200. Both the interrupt notices and emails gave reasonable, conspicuous notice to the plaintiffs of its updated policies. *Id.* at 1201.

Here, The pop-up box before a user can interact with Cyber MD is analogous to the interrupt notices in *Saeedy*. The size and font was displayed in red, 16-point font. R. at 6, ¶ 13. Before a user could proceed, the pop-up box informed users that:

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

Id. A user could not launch a chat session with Cyber MD unless they clicked “I Accept.” R. at 5, ¶ 13. Users, including Mr. Miller, were notified by this pop-up box before beginning a chat session. *Id.* The pop-up box would’ve placed Mr. Miller on inquiry notice that Cyber MD being an AI software program each time he launched a chat session⁴. Mr. Miller would’ve also been informed that Cyber MD was not a healthcare professional. Additionally, Mr. Miller’s conduct shows his manifestation of assent. Mr. Miller would have to click the “I Accept” action button to proceed with his virtual evaluations with Cyber MD. *Id.*

Accordingly, Ms. Miller has failed to maintain her apparent agency claim against MHS and the sign-in wrap agreement remains enforceable.

II. UNCONSCIONABILITY

A contract is unconscionable if an individual does not have *any opportunity* to make a “meaningful choice” in deciding if they should agree to a contract’s terms that are unreasonably unfavorable to them. *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 125 (Cal. 2019) (emphasis added); *Barocas v. Barocas*, 94 A.D.3d 551, 552 (N.Y. App. Div. 2012); *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 462 (Tenn. Ct. App.

⁴ Confirmed by HLMCC Request for Clarification # 15.

2010). The totality of the circumstances must show that a contract's terms are so disproportionately unfair for one party, it warrants a court to withhold enforcing it. *OTO L.L.C.*, 8 Cal.5th at 125; *Vintage Health*, 309 S.W.3d at 462. The party asserting an unconscionability claim bears the burden to prove the contract in dispute is unconscionable. *OTO L.L.C.*, 8 Cal.5th at 125; *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1148 (Cal. 2013) (explaining that because unconscionability is a contract defense, the party asserting this defense bears the burden to prove its unenforceability). Here, Ms. Miller challenges the validity of the agreement between Petitioners and Mr. Miller. R. at 9. As such, Ms. Miller bears the responsibility to satisfy her unconscionability defense. *Id.*

A. Procedural Unconscionability

The conscionability of a contract is assessed both procedurally and substantively. *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 125 (Cal. 2019). Both elements do not need to be equally met for a contract to be unconscionable, instead utilizing a “sliding scale” inquiry. *Id.* Procedural unconscionability looks at the circumstances surrounding a contract's formation and negotiation, asking if there was “oppression or surprise” because of unequal bargaining power. *Id.* Other factors used to assess a contract's formation include: age, education, intelligence, business acumen, experience of the parties in similar transactions, who drafted the contract, and whether terms were explained to the weaker party. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025).

Ms. Miller argues the adhesion contract is unenforceable due to the procedural nature and structural coercion Mr. Miller was subjected to, rendering MHS with superior bargaining power. R. at 9. Further, Respondent claims Mr. Miller had no realistic alternatives for care in Cartersville, depriving him the opportunity to make a meaningful choice. *Id.* Because Ms. Miller challenges the structural components and nature of the MHS agreement, we first direct our attention on the procedural nature of the inquiry. Generally, the first step in a procedural unconscionability inquiry begins by identifying if a contract is one of adhesion. *OTO, L.L.C.*, 8 Cal.5th at 126 (Cal. 2019) While operated on a “take-it-or-leave-it-basis” by the party with superior bargaining power, adhesion contracts, alone, do not make a contract unenforceable. *Id.*; *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1001 (9th Cir. 2021) (explaining that although adhesion contracts possess a minimal degree of unconscionability, adhesion contracts alone are not unconscionable); *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 19 (1st Cir. 2009) (“The mere fact that a contract is one of adhesion does not render it per se unenforceable[.]”); *Salley v. Option One Mortg. Corp.*, 592 Pa. 323, 344 (Pa. 2007) (“[M]erely because a contract is one of adhesion does not render it unconscionable and unenforceable as a matter of law.”). Courts instead consider if oppression or surprise existed at the time of a contract’s formation and negotiation. *OTO, L.L.C.*, 8 Cal.5th at 125-26; *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 581 (Cal. Ct. App. 2007).

1. *Oppression*

Oppression arises when the inequality of bargaining power produces no opportunity of meaningful choice and no real negotiation. *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 581 (Cal. Ct. App. 2007); *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (Cal. Ct. App. 2002); *A&M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486 (Cal. Ct. App. 1982). Meaningful choice refers to “reasonably available alternatives” a person possesses. *Lennar Homes of California, Inc. v. Stephens*, 232 Cal.App.4th 673, 689 (Cal. Ct. App. 2014). Factors that courts consider when deciding “oppression” include, but are not limited to:

(1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney.”

OTO, L.L.C. v. Kho, 8 Cal.5th 111, 126-27 (Cal. 2019)

Oppression is not found when a person has reasonable alternatives available to receive services free from contractual terms a party claims to be “unconscionable.” *Dean Witter Reynolds, Inc. v. Super Ct.*, 211 Cal.App.3d 758, 768 (Cal. Ct. App. 1989); *Lennar Homes of California*, 232 Cal.App.4th at 689; *Fisher v. MoneyGram Intern., Inc.* 66 Cal.App.5th 1084, 1095-96 (Cal. Ct. App. 2021); *e.g.*, *Wayne v. Staples, Inc.*, 135 Cal.App.4th 466, 482 (Cal. Ct. App. 2006) In *OTO, L.L.C.* an employee presented plaintiff a contract without explaining the contract’s contents or significance. *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 127 (Cal. 2019). To keep their job, plaintiff was required to sign the contract. *Id.* Plaintiff did not have the opportunity to review the contract

in its entirety, risking adverse action from his employer. *Id.* The employer with the higher bargaining power gave the impression to plaintiff that negotiation efforts were futile; therefore, depriving plaintiff of making a meaningful choice. *Id.* Given these circumstances, the court in *OTO, L.L.C.* found significant oppression, rendering the contract unconscionable. *Id.* at 128.

Here, Mr. Miller was in satisfactory health for the majority of his life and a screening from 2012 showed his condition as stable. R. at 3, ¶ 5. Mr. Miller was able to navigate through MHS's hyperlink, the intake session, and conduct follow-up evaluations between April 2018 to June 2021. R. at 5-6, ¶¶ 11, 15, 17. Unlike the plaintiff-employee in *OTO, L.L.C.*, Mr. Miller was able to review MHS Terms & Conditions at any time during his subsequent logins. R. at 5. Mr. Miller was in a non-emergency situation when he assented to the contractual agreement between himself and MHS in 2018. R. at 5-6, ¶¶ 11, 15. The record does not show that Mr. Miller was either coerced or in duress when he accepted MHS's Terms & Conditions, nor in his subsequent interactions with Cyber MD.

2. Surprise

Surprise is the extent to which the agreed-upon terms of the bargain are hidden by the party seeking to enforce them. *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 581 (Cal. Ct. App. 2007); *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (Cal. Ct. App. 2002); *A&M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486 (Cal. Ct. App. 1982). In *OTO, L.L.C.*, the contractual agreement to arbitrate was found to establish the element of surprise when determining

procedural unconscionability. *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 128 (Cal. 2019). The arbitration agreement contained complex sentences, including statements of legal jargon and statutory references. *Id.* The agreement was written in extremely small font in a single dense paragraph with over 51 lines of text. *Id.* The text was found to be illegible and “visually impenetrable” for the reasonable person. *Id.*

Here, MHS’s Terms & Conditions were presented on a standalone webpage after he was redirected by clicking the hyperlinked text. R. at 4-5, ¶¶ 10-11. Respondent would argue that MHS’s terms were buried, thereby fulfilling the element of surprise in this inquiry; however, this assertion is inaccurate. First, the relevant clause within HS Terms & Conditions were not buried, but were in a “noticeable” font than the rest of the standalone webpage. R. at 4-5, ¶¶ 10-11. Although the terms were compact in 34 lines of single-spaced, unformatted black text, the clause is not so limited in legibility that the court in *OTO, L.L.C.* deemed to satisfy the “surprise” element.

Unlike the arbitration agreement in *OTO, L.L.C.*, MHS’s clause was straightforward and notified that all physicians and software through MHS digital portal were performed by independent contractors. R. at 4-5, ¶ 10. MHS notified users that the software and physicians were not agents or employees of MHS, having no operational control over its diagnostic interpretations or clinical assessments. *Id.* The clause did not contain legal jargon or was presented in an obscure manner that an Internet user would have issues reading it.

Therefore, Respondent’s defense asserting procedural unconscionability fails.

B. Substantive Unconscionability

Substantive unconscionability evaluates the fairness of an agreement's terms, asking if said terms were overly harsh or one-sided. *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 125 (Cal. 2019). In *Sanders*, plaintiff asserted a substantive defense of contract unconscionability, claiming location hardships. *Sanders v. JGWPT Holdings, LLC*, No. 14 C 9188, 2017 WL 4281123, at *7 (N.D. Ill. Sep. 27, 2017). Plaintiff was required to attend an arbitration hearing that was five hours away from Plaintiff's residence. *Id.* Beside basic assertions of unfairness, no evidence was provided to show Plaintiff couldn't travel that distance, pay to travel, or the associated costs. *Id.* The substantive defense in *Sanders* was rejected by the court. *Id.* at *1. Ultimately, pleading basic assertions of "unfairness" in limitations is not enough to make a contract substantively unconscionable. *Id.* at *7.

Ms. Miller argues that access to health facilities in Simmons County were extremely limiting, leaving Mr. Miller with no "realistic alternatives" to seek health care. While Respondent may hold this belief, no evidence supports the healthcare infrastructure was so "oppressive" or "one-sided" to Mr. Miller it rendered him incapable of receiving health care. First, Mr. Miller was in a non-emergency situation between the period of August 2018 to June 2021: three years in which he could've went in-person to MHS's flagship hospital in Goshen. This facility was a 3.5 hour commute from Cartersville, Shawnee. R. at 4, ¶ 7. Using the rationale from *Sanders*, Ms. Miller has not provided evidence to support her claim, nor does the record indicate the 3.5 hour commute would render Mr. Miller incapable from receiving care.

Even with Mr. Miller's age, Respondent could've helped her husband by driving him to Goshen for treatment.

Furthermore, Mr. Miller also had access to three primary care facilities in Simmons County. R. at 4, ¶ 7. Additionally, a mobile radiology service was near Cartersville that did chest x-rays and CT scans, which Mr. Miller did visit to receive and later upload his scans for Cyber MD to evaluate. R. at 6, ¶ 15. Collectively, these circumstances do not suggest Mr. Miller was in a position disproportionately one-sided for MHS benefit or unfair to him, it makes the contractual agreement substantively unconscionable. Accordingly, Respondent's defense fails, both procedurally and substantively.

On these grounds, we kindly ask the Supreme Court of Shawnee to reverse the judgment from Shawnee Court of Appeals for the Second District, holding that (1) MHS did not hold themselves out as a provider of care under apparent agency; and (2) Respondent's defense of contract unconscionability fails and that the contract remains enforceable.

III. RESPONDENT'S MEDICAL MALPRACTICE AND STRICT PRODUCT LIABILITY CLAIMS ARE SUBSTANTIVELY EXTINGUISHED AS A MATTER OF LAW BY SHAWNEE'S ABSOLUTE FOUR-YEAR STATUTES OF REPOSE UNDER SRS §§ 12-404(B) AND 12-410(A)

Respondent's medical malpractice and strict product liability claims are substantively extinguished as a matter of law because Shawnee's absolute four-year statutes of repose ran uninterrupted before Respondent commenced this action in July 2024. R. at 6. First, SRS § 12-404(b) bars the medical malpractice claim because

the four-year repose period triggered by Cyber MD's April 2018 misdiagnosis expired in April 2022, and routine annual telehealth logins do not satisfy the continuous course of treatment exception. Second, SRS § 12-410(a) bars the strict product liability claim because Cyber MD was delivered in March 2017, no statutory exceptions under § 12-410(b) apply, and the prior extinction of Elias Miller's underlying personal injury claim precludes both product liability and derivative wrongful death recovery.

A. The Four-Year Medical Malpractice Repose Period Under SRS § 12-404(b) Expired in April 2022 and Cannot be Tolloed by Routine Annual Telehealth Logins

1. Cyber MD's Failure to Diagnose a Tumor is a Diagnostic Omission That Cannot Legally Satisfy the Continuous Treatment Exception under SRS § 12-404(b)

The plain statutory text of § 12-404(b) demonstrates that Respondent's medical malpractice claim is time-barred on its face. Section 12-404(b) opens with an unyielding mandate: "In no event shall such action be brought more than four (4) years after the date on which occurred the act or omission or occurrence alleged to have been the cause of such injury or death." R. at 14. The legislature then enacted a single, narrowly tailored exception: "However, such period shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence." R. at 14.

The statutory syntax requires three distinct elements: first, the provider must have affirmatively "engaged in" conduct; second, that conduct must constitute a "continuous course of treatment"—meaning remedial or therapeutic care directed at

an identified disease; and third, that treatment must be "for the same illness, injury, or condition that gives rise to the claim of negligence." R. at 14. Where a healthcare provider fails to detect a disease and consequently administers no therapy, the provider has not "engaged in" a course of "treatment" for that "same illness." A diagnostic failure is an omission to establish care, not the affirmative rendering of continuous treatment.

This plain-meaning textual reading is fully supported by established medical malpractice jurisprudence. In clinical and legal terms, "treatment" denotes affirmative medical management or therapeutic intervention designed to cure or alleviate an identified disease. A physician's failure to establish a course of treatment for an undiagnosed condition cannot legally constitute a continuous course of treatment to toll statutory repose. *Nykorchuck v. Henriques*, 577 N.E.2d 1026, 1027–28 (N.Y. 1991). Cyber MD never administered treatment for lung cancer; on April 9, 2018, it evaluated raw scans, diagnosed adult-onset asthma, and explicitly referred Mr. Miller to an independent local practitioner for inhaler management. R. at 4 – 5. While a failure to treat a condition may be negligent, it is a self-contradictory proposition to assert that the failure to establish a course of treatment is itself a course of treatment. *Nykorchuck*, 577 N.E.2d at 1028.

Furthermore, continuous treatment requires a showing that the patient actually sought and obtained an ongoing course of affirmative medical care. *Young v. N.Y.C. Health & Hosp. Corp.*, 693 N.E.2d 196, 198–200 (N.Y. 1998) (holding that continuous treatment does not apply where a patient is unaware of the need for

further care and no course of treatment is established); *Hall v. Bolognese*, 178 N.Y.S.3d 564, 568 (N.Y. App. Div. 2022) (emphasizing that continuous treatment requires a showing that the patient actually sought and obtained an ongoing course of affirmative medical care); *Martinelli v. Fusi*, 963 A.2d 640, 644–46 (Conn. 2009) (explaining that when a plaintiff has no knowledge of a medical condition and no expectation of ongoing treatment, there is no rationale for applying continuous treatment tolling). Cyber MD consistently reported "zero evidence" of malignancy across four consecutive years in 2018, 2019, 2020, and 2021. R. at 5. MHS cannot be held to have been continuously treating a malignant tumor that it repeatedly maintained did not exist. *Id.* Respondent's argument that passive annual monitoring constitutes continuous care contradicts established precedent. *Nykorchuck*, 577 N.E.2d at 1028; *Young*, 693 N.E.2d at 199–200 (reaffirming that a doctor's failure to communicate test results and establish a course of treatment constitutes a passive omission rather than continuous treatment). Because MHS never undertook active clinical treatment for cancer, SRS § 12-404(b) provides no basis for tolling.

2. Annual Virtual Check-Ups Represent Discrete Diagnostic Omissions Rather Than an Unbroken, Cumulative "Occurrence" under SRS § 12-404(b)

Mr. Miller's annual virtual logins represent discrete acts of diagnostic omission rather than an unbroken, cumulative "occurrence." In interpreting statutory repose provisions governing acts, omissions, or occurrences, courts expressly reject the broad common-law continuous treatment doctrine. *Cunningham v. Huffman*, 609 N.E.2d

321, 323–25 (Ill. 1993) (holding that statutory "occurrence" language tolls repose only where continuous negligent treatment inflicts cumulative physical harm).

A repeated failure to correctly diagnose a latent disease does not constitute an ongoing, cumulative occurrence; rather, it represents a series of discrete wrongs, each supporting an independent cause of action. *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 SD 33, ¶ 26, 878 N.W.2d 406, 415 (explaining that continuing tort principles require an unbroken course of negligent treatment producing cumulative injury, not discrete diagnostic acts). Cyber MD's annual evaluations were separate digital screenings spaced twelve months apart. R. at 5. Re-evaluating new mobile scans during subsequent yearly check-ups does not stitch independent diagnostic errors into a single, continuous tort. *Pitt-Hart*, 2016 SD 33, ¶ 26, 878 N.W.2d at 415. Consequently, the diagnostic misdiagnosis in April 2018 remains a discrete omission that triggered the repose clock. R. at 5.

3. Full 365-day gaps Between Annual Logins Severs Clinical Continuity as a Matter of Law, Defeating the Policy Rationales of Continuous Treatment.

Even if this Court considers Mr. Miller's annual virtual logins in 2019, 2020, and 2021, Cyber MD's periodic evaluations were chronologically severed and not continuous within the meaning of the law. R. at 5. Mr. Miller logged into the portal on April 9, 2018, May 2019, May 2020, and June 2021, leaving a full 365-day chronological gap between each encounter. R. at 4, 5. Spacing patient interactions 365 days apart breaks clinical continuity as a matter of law. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648–50 (4th Cir. 2004) (holding that medical

encounters separated by substantial multi-month intervals fail to establish an uninterrupted physician-patient relationship).

A passive cloud application sitting idle on an MHS server for 12 months between patient logins cannot maintain an active, continuous care relationship. R. at 4—5. Periodic physical check-ups accompanied by a failure to order or perform diagnostic tests do not toll statutory time bars under a continuous treatment theory. *Miller v. United States*, 932 F.2d 301, 304–05 (4th Cir. 1991); *Harlfinger v. Martin*, 754 N.E.2d 63, 74–76 (Mass. 2001) (holding that multi-year gaps between visits defeat claims of continuous treatment); *Nykorchuck*, 577 N.E.2d at 1027–28 (noting that discrete examinations separated by substantial intervals do not constitute continuous treatment).

Furthermore, the policy rationale supporting continuous treatment tolling is wholly inapplicable here. The continuous treatment exception exists solely to protect a patient's trust in their provider and avoid forcing a patient to interrupt active treatment by instituting suit against the physician attempting to cure them. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080–81 (2d Cir. 1988); *Castillo*, 372 F.3d at 648; *Cunningham*, 609 N.E.2d at 325; *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 668 (Ill. 1986); *Nykorchuck*, 577 N.E.2d at 1027. Because Mr. Miller received no active, corrective therapy from MHS for lung cancer, he faced no such dilemma. R. at 5. Allowing routine annual wellness check-ups to toll repose would grant lifetime tolling to any patient undergoing a yearly exam, completely eviscerating the legislative goal of capping long-tail medical liability. *Mega*, 490 N.E.2d at 668.

B. Respondent’s Strict Product Liability Claim is Barred Under SRS § 12-410(a) Because Delivery Occurred in 2017 and No Statutory Exceptions Apply.

1. Respondent Produced Zero Evidence of an Express Multi-Year Warranty or Intentional Fraud Under SRS § 12-410(b)(1) or (b)(2).

Under SRS § 12-410(a), strict product liability actions are barred four years from the date of first sale, lease, or delivery. R. at 14. CCS delivered Cyber MD to MHS in March 2017. R. at 4. Therefore, the absolute four-year product repose period expired in March 2021—more than three years before Respondent filed this lawsuit in July 2024. R. at 5.

Because Petitioners established the 2017 delivery date, the burden shifts entirely to Respondent to produce concrete, admissible evidence proving a statutory exception under SRS § 12-410(b). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (holding that where the factual context renders a claim implausible, the nonmoving party must offer highly persuasive evidence).

Exception SRS § 12-410(b)(1) requires proof that the seller expressly warranted safe utilization for longer than four years. R. at 14. The record contains zero evidence of an express multi-year safety warranty issued by CCS. R. at 4. Exception SRS § 12-410(b)(2) requires intentional misrepresentation or fraudulent concealment. R. at 14. Cyber MD received FDA clearance in 2017. R. at 4. CCS voluntarily retrained the algorithm upon discovering an accuracy drop in October

2022. *Id.* Maintaining internal training datasets as proprietary trade secrets does not constitute intentional fraud or misrepresentation. *Id.* Respondent offered zero evidence of scienter, fatally extinguishing Subparts (b)(1) and (b)(2) as a matter of law. *Celotex*, 477 U.S. at 323.

**2. *The Prolonged Exposure Exception under RS § 12-410(b)(3)
Clause A Applies Exclusively to Physical Toxins, Not
Automated Cloud Software***

The first clause of SRS § 12-410(b)(3) waives repose for harm caused by prolonged exposure to a defective product. R. at 14. Cyber MD is an automated cloud software tool, not a physical product subject to prolonged exposure. Statutory prolonged exposure exceptions apply exclusively to physical products—such as asbestos, toxic chemicals, pesticides, or hazardous substances—where harm is caused by cumulative biological absorption over time. *Koch v. Shell Oil Co.*, 52 F.3d 878, 880–83 (10th Cir. 1995) (distinguishing cases involving scientifically undetectable chemical toxins from standard available testing); *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 644–45 (Colo. 1988).

Mr. Miller logged into a web portal for a few minutes once per year. R. at 4—5. He suffered no physical contamination or biological absorption from computer software code. R. at 5. A delayed medical diagnosis resulting from an automated software evaluation does not constitute physical exposure to a defective product as a matter of law. *Koch*, 52 F.3d at 880–83. Therefore, Clause A of SRS § 12-410(b)(3) is inapplicable.

3. *The Objective Discoverability Exception Under SRS § 12-410(b)(3) Clause B Fails Because the Tumor was Visible on 2018 Scans and Discoverable Through Ordinary Prudence*

The second clause of SRS § 12-410(b)(3) waives repose only if the injury-causing aspect was not discoverable by an ordinary reasonably prudent person until more than four years after delivery. R. at 6. The physical injury—the 7 mm tumor—manifested itself and was fully discoverable on day one in April 2018. R. at 5, ¶ 18. The undisputed facts confirm that on standard retrospective review by human oncologists, the 7 mm lesion was clearly visible on his 2018 scans. *Id.* By June 2021, the tumor had grown continuously to 47 mm. *Id.*

The ordinary reasonably prudent person under SRS § 12-410(b)(3) is an objective standard measuring a diligent medical consumer in the patient's position. A product design flaw does not constitute a hidden defect simply because an uneducated lay user fails to understand internal engineering or software source code. *Pate v. Columbia Mach.*, 930 F. Supp. 451, 465–66 (D. Idaho 1996) (holding that a design defect is not a hidden defect when the physical features and operational layout of the product are discernible); *Anderson v. M.W. Kellogg Co.*, 766 P.2d at 642–43 (holding that an open and obvious danger is not a hidden defect). An open operational flaw or design limitation is not a hidden defect when the physical features or operational outputs of the product are fully discernible. *Pate*, 930 F. Supp. at 465–66; *Anderson v. M.W. Kellogg Co.*, 766 P.2d at 642–43. Like the missing safety switch in *Pate*, an algorithmic coding limitation in the cloud is not a hidden defect when the raw physical outputs—the digital radiological files—were fully accessible. R. at 5.

Elias Miller's high-risk profile triggered an objective duty of inquiry. Mr. Miller had thirty-five years of heavy occupational asbestos exposure without respiratory protective equipment. R. at 2. He was a lifelong non-smoker with no family history or prior documented history of asthma or respiratory disease. R. at 2—3. Despite this clean pulmonary background, Cyber MD diagnosed him with adult-onset asthma following a brief digital intake. R. at 5. Before initiating each telehealth session, Mr. Miller navigated a mandatory pop-up box in prominent 16-point bold RED font explicitly warning that Cyber MD is an artificial intelligence software program and not a licensed healthcare professional. R. at 4. Audit logs confirm he clicked "Accept" on this exact red-font AI warning four separate times in 2018, 2019, 2020, and 2021. R. at 4.

Expressly warned that he was relying on a non-human algorithm, it was both easy and reasonable for an ordinarily prudent person facing an anomalous asthma diagnosis to seek a human second opinion. R. at 5. Had he taken his raw digital files to an independent human radiologist, the 7 mm tumor—clearly visible on day one—would have been immediately discovered. *Id.* Unlike *Koch*, where a chemical pesticide was physically and scientifically impossible to detect until an entirely new biopsy assay was invented a decade later, no scientific breakthrough was required here. *Koch v. Shell Oil Co.*, 52 F.3d 878, 879-80 (10th Cir. 1995). Existing 2018 radiological technology captured the lesion, and human medical expertise was fully capable of reading it. R. at 5. Thus, Exception (b)(3) fails on the record.

4. *Software Algorithm Retraining in December 2024 Does not Reset the March 2017 Product Discovery Date under SRS § 12-410(a).*

SRS §12-410(a) triggers strictly from initial delivery in March 2017. R. at 4, 14. CCS's December 13, 2023 retraining release occurred nearly two months after Mr. Miller was hospitalized on October 30, 2023. R. at 4, 6. Statutory product repose runs strictly from initial delivery, and subsequent updates or modifications do not restart the repose clock for prior deployments. *Pate v. Columbia Mach.*, 930 F. Supp. 451, 466 (D. Idaho 1996). Tying delivery to routine cloud updates would subject software developers to perpetual, infinite strict liability, destroying legislative finality. *Id.*

5. *Even if a Product Exception Applied, Statutory Subordination and the Prior Extinction of Elias Miller's Personal Injury Claim Preclude Product and Derivate Wrongful Death Recovery.*

Even if Respondent could theoretically establish an exception under SRS § 12-410(b), the strict product liability claim against CCS remains substantively barred because it is legally subordinate to, and precluded by, the expiration of the underlying personal injury claim. The statutory architecture of Shawnee tort law establishes a chain of structural subordination. SRS § 12-410(a) explicitly binds product liability actions to SRS § 12-402, which in turn defers directly to the absolute medical malpractice repose bar of SRS § 12-404(b). R. at 14. SRS § 12-402(a) explicitly defers to Section 12-404: "Except as otherwise provided in this section, and except as provided in SRS § 12-404 of this chapter, an action for damages for personal injury... shall be commenced within two (2) years." R. at 14. SRS § 12-404(b) sets the ultimate four-year absolute repose cap for all claims arising out of patient care. R. at 14. Thus,

strict product liability claims stemming from medical software utilized in patient care are directly subordinate to the four-year healthcare malpractice repose bar of SRS § 12-404(b).

This statutory linkage enforces the longstanding "gist of the action" doctrine. Courts look to the gravamen or true factual substance of the injury rather than how a plaintiff labels the complaint. *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 474 (8th Cir. 2008) (holding that courts look to the factual gravamen of a complaint to determine the applicable limitations period, prohibiting plaintiffs from re-labeling diagnostic medical errors to evade strict malpractice time bars). Because the underlying injury stems exclusively from a clinical diagnostic evaluation rendered during patient care in April 2018, the strict product liability claim against CCS is subordinate to, and barred by, SRS § 12-404(b). R. at 5, 6.

Finally, a wrongful death action under SRS § 12-402(b) is strictly derivative of the decedent's right to maintain an action at the time of death. If the decedent's underlying personal injury claim was already time-barred prior to death, no derivative wrongful death action can be maintained. *Miller*, 932 F.2d at 303. Elias Miller's underlying personal injury claim was substantively extinguished by SRS § 12-404(b) in April 2022, four years post-initial misdiagnosis. R. at 5—6. When Mr. Miller passed away on April 14, 2024, he possessed no viable cause of action. R. at 6. Because an extinguished personal injury claim cannot be revived posthumously, Respondent's July 2024 wrongful death and strict product liability claims are legally

dead and barred as a matter of law. R. at 6. *Miller*, 932 F.2d at 303; *Med. Liab. Mut. Ins. Co.*, 519 F.3d at 474.

CONCLUSION

Metropolitan Health System, Inc. cannot be held vicariously liable under apparent agency because MHS provided conspicuous, unambiguous notice disclaiming agency, and Mr. Miller repeatedly assented to explicit pre-session warnings rendered in prominent 16-point bold red font prior to every telehealth session. Furthermore, Respondent's contract unconscionability defense fails as a matter of law because Mr. Miller was never legally coerced into assenting and retained meaningful, reasonable alternatives to seek in-person medical care, rendering the agreement neither procedurally nor substantively unconscionable.

Additionally, Respondent's claims are substantively extinguished by Shawnee's absolute four-year statutes of repose under SRS §§ 12-404(b) and 12-410(a). Cyber MD's failure to diagnose a tumor constitutes a discrete diagnostic omission rather than a continuous course of treatment, while the strict product liability claim expired four years post-delivery without satisfying any statutory exceptions. Because Elias Miller's personal injury claim expired during his lifetime, all derivative wrongful death recovery is precluded as a matter of law.

For the foregoing reasons, Petitioners Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC respectfully request that this Court **REVERSE** the judgment of the Shawnee Court of Appeals for the Second District and **REINSTATE** the Circuit Court's order granting summary judgment in favor of Petitioners.

Respectfully Submitted,

Health Law Hellions

ATTORNEYS FOR PETITIONERS