

SHAWNEE SUPREME COURT

No. 26-338

Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC

Petitioners

v.

Evelyn Miller, individually and as special administrator for the estate of

Elias Miller, deceased

Respondent

On Appeal

BRIEF FOR PETITIONERS

Just-Us League

QUESTIONS PRESENTED

- I. Under the doctrine of apparent agency, is Metropolitan Health System, Inc. (MHS) vicariously liable for healthcare malpractice when it provided conspicuous notice of its terms and the lack of agency relationship with Cyber-Care Solutions, LLC, it unambiguously warned Miller that by entering the portal he agreed to such terms, and Respondent failed to allege the terms were unconscionable?
- II. Under Shawnee's four-year statutes of repose, are Respondent's claims barred when they were filed after the applicable periods and no exception applies because: (1) Cyber MD's annual diagnostic evaluations were discrete screenings without physician oversight; and (2) Respondent cannot establish a specific injury-causing defect existed at delivery or remained undiscoverable by an ordinary reasonably prudent person?

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	<i>iii</i>
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
<u>Facts</u>	3
<u>Procedural History</u>	6
SUMMARY OF THE ARGUMENT	8
ARGUMENT	11
I. THIS COURT SHOULD REVERSE THE LOWER COURT’S DECISION BECAUSE MHS’S AGREEMENT DEFEATS THE HOLDING OUT ELEMENT OF APPARENT AGENCY AND IS ENFORCEABLE	12
A. <u>MHS Is Not Liable Because It Did Not Hold Itself Out to Be Miller’s Provider of Care</u>	13
B. <u>MHS’s Agreement Is Enforceable Because It Provided Conspicuous Notice and Unambiguously Warned Miller That He Agreed to the Terms</u>	16
C. <u>MHS’s Terms Are Not Unconscionable Because Miller Was Not Deprived of a Meaningful Choice to Contract</u>	18
II. THIS COURT SHOULD REVERSE THE LOWER COURT’S DECISION BECAUSE SHAWNEE’S STATUTES OF REPOSE BAR RESPONDENT’S CLAIMS AND NO EXCEPTIONS APPLY	21

A. <u>The Continuous Treatment Exception Does Not Apply Because Cyber MD Did Not Provide a Course of Treatment nor Establish a Physician-Patient Relationship</u>	23
B. <u>The Latent Defect Exception Does Not Apply Because Respondent Cannot Establish the Injury-Causing Defect Existed at Delivery or Remained Undiscoverable</u>	26
CONCLUSION	29

TABLE OF AUTHORITIES

STATUTES

Sn. Rev. Stat. § 12-402	22
Sn. Rev. Stat. § 12-404	22-23
Sn. Rev. Stat. § 12-410.	22, 26

CASES

<i>Baptist Memorial Hospital System v. Sampson</i> , 969 S.W.2d. 945 (Tex. 1998).....	13
<i>Berman v. Freedom Fin. Network, LLC</i> , 30 F.4th 849 (9th Cir. 2022).....	16
<i>Blanche v. United States</i> , No. 12 C 7332, 2015 WL 1396737 1 (N.D. Ill. Mar. 24, 2015)	14
<i>Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.</i> , 582 U.S. 497, 507 (2017).....	21
<i>CTS Corp. v. Waldburger</i> , 573 U.S. 1 (2014).....	21
<i>Cullinane v. Uber Techs.</i> , 893 F.3d 53 (1st Cir. 2018).....	16
<i>Cunningham v. Huffman</i> , 609 N.E.2d 321 (1993)	23
<i>Estabrook v. Mazak Corp.</i> , 140 N.E.3d 830 (Ind. 2020)	26
<i>Gilbert v. Sycamore Mun. Hosp.</i> , 622 N.E.2d 788 (1993)	12
<i>Gomez v. Katz</i> , 874 N.Y.S.2d 161 (2009)	24
<i>Hines v. Nat’l Ent. Grp.</i> , 140 F.4th 322 (6th Cir. 2025).....	18

<i>Hoffner v. Johnson</i> , 660 N.W.2d 909 (N.D. 2003)	23
<i>Kaufmann v. Fulop</i> , 849 N.Y.S.2d 615 (2d Dep't 2008).....	23
<i>Keebaugh v. Warner Bros. Ent. Inc.</i> , 100 F.4th 1005 (9th Cir. 2024).....	16
<i>Meyer v. Uber Technologies, Inc.</i> , 868 F.3d 66 (2d Cir. 2017).....	16-17
<i>Pate v. Columbia Mach.</i> , 930 F. Supp. 451 (D. Idaho 1996)	26
<i>Payne v. Savannah Coll. of Art & Design, Inc.</i> , 81 F.4th 1187 (11th Cir. 2023).....	18-19
<i>Shiffman v. Harris</i> , 280 A.D.2d 752 (2001).	24
<i>Tippecanoe Valley Sch. Corp. v. Landis</i> , 698 N.E.2d 1218 (Ind. Ct. App. 1998)	11
<i>Young v. New York City Health & Hosps. Corp.</i> , 693 N.E.2d 196 (1998)	23
<i>Webster v. CDI Indiana, LLC</i> , 917 F.3d 574 (7th Cir. 2019).	14
 <u>OTHER AUTHORITIES</u>	
Sn. R. Civ. P. 56	11

OPINIONS BELOW

The opinion of the Circuit Court of Simmons County, Case No. 25-L-24601, is reported at R. 1-12. The opinion of the Shawnee Court of Appeals for the Second District, Docket No. 25-123, is reported at R. 13-25. The opinion of the Shawnee Supreme Court, Docket No. 26-338, is reported at R. 26.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent provisions are reproduced in Appendix A. They include:

1. Sn. Rev. Stat. § 12-402. Limitations of Actions: Personal Injury and Wrongful Death; Discovery Rule;
2. Sn. Rev. Stat. § 12-404. Limitations – Health Care Malpractice; and
3. Sn. Rev. Stat. § 12-410. Statute of Repose – Product Liability.

STATEMENT OF THE CASE

Facts

Simmons County (Simmons) suffered a loss of over seventy-five percent of its healthcare professionals, its local hospitals closed, and no urgent care facilities or permanent diagnostic imaging centers were available by 2025. R. at 3. Authorities officially designated Simmons as a “Health Professional Shortage Area” and “Medically Underserved Area.” R. at 3. Metropolitan Health System, Inc. (MHS)’s flagship hospital was the nearest facility providing in-person radiology services. R. at 3. MHS contracted with Cyber-Care Solutions, LLC (CCS) to host a telehealth platform and reach patients virtually, such as those in medically underserved areas like Simmons. R. at 3.

After CCS received FDA clearance for Cyber MD, MHS integrated the system into its telehealth platform on March 1, 2017. R. at 4. Cyber MD is a conversational Artificial Intelligence (AI) diagnostic system that allows patients to input symptoms, asks follow-up questions, compiles clinical history, generates diagnoses, and orders/interprets diagnostic tests. R. at 4. CCS marketed Cyber MD under the tagline “Cyber MD: Care Everywhere,” highlighting its accessibility in areas otherwise lacking access. R. at 4.

Cyber MD achieved a ninety-seven percent overall accuracy rate in classifying lung lesions on a large dataset of 40,000 images from three different hospital systems. R. at 4. The verification studies and data that CCS used to train Cyber MD were privately provided to the FDA. R. at 4. In October of 2022, CCS

noticed Cyber MD's diagnostic accuracy was eighty-five percent when specifically evaluating images of patients with prior occupational asbestos exposure due to pleural shadowing masking underlying tumors. R. at 4-5. CCS restored higher accuracy in these instances by retraining Cyber MD using 10,000 asbestos-exposed image sets. R. at 5. It then released the updated version to clients on December 13, 2023, just 14 months following its discovery. R. at 5.

Patients accessed Cyber MD through MHS's website which displayed MHS (not CCS) branding throughout. R. at 3. Below the user login, the site clearly stated: "[b]y entering the portal, I accept the MHS Terms and Conditions," with "Terms and Conditions" hyperlinked and underlined in blue font. R. at 3. Clicking the hyperlink displayed thirty-four lines of black text on a plain white background, single-spaced. R. at 3. Although the record states this text was in a smaller font size than the rest of the website, the exact font size of either is not specified. R. at 3. The terms contained the following eight lines of text (approximately three-quarters down the page):

All clinical evaluations. . . are performed by independent contractor physicians or automated software applications developed by another company. *The physicians and software are not employees or agents of [MHS].* 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 3-4. (emphasis added).

Shawnee Steel Company of Simmons employed the decedent, Elias Miller (Miller), for forty-six years. R. at 2. Miller regularly handled asbestos-insulated machinery without protective equipment throughout this entire period. R. at 2. Notwithstanding Simmons' healthcare professional shortage, three primary care practices remained in the county and MHS was a 190 mile, three-and-a-half-hour drive away. R. at 3. Despite this, Miller chose to initiate a virtual intake session directly with Cyber MD (on April 9, 2018) after experiencing shortness of breath, detailing his occupational history with asbestos. R. at 5. To launch a session, users must review a pop-up warning stating in red, 16-point font: "*Cyber MD is not a licensed health care professional. It is an [AI] software program.*" R. at 4. (emphasis added). Users must click "Accept" to continue. R. at 4. Digital audit logs confirm that Miller clicked "Terms and Conditions" at one point (and remained on the page for four seconds) but never revisited them despite being presented with the opportunity to do so at every visit. R. at 4.

Cyber MD ordered scans through a mobile radiology service and stated it would analyze them and go over the results with Miller. R. at 5. The system further recommended annual follow-up imaging despite finding "zero evidence" of malignancy. R. at 5. Cyber MD then diagnosed Miller with asthma and referred him to a local provider for inhaler management. R. at 5. The record does not detail Miller's interactions with the mobile radiology service nor the local provider. R. at 5. Miller conducted annual follow-ups with Cyber MD and received the same results

until 2021, at which point Cyber MD advised annual imaging was no longer needed. R. at 5.

In 2023, Miller experienced a spontaneous pneumothorax and was airlifted to MHS's flagship hospital. R. at 5. Scans revealed a malignant mass in his lung with metastases to the pleura and spine. R. at 5. Miller was a lifelong non-smoker, was not asthmatic, had no family history of respiratory disease, and his chest screening in 2012 was "unremarkable." R. at 2-3. Retrospective review established that a lesion was visible on his 2018 scans (partially obscured by pleural changes) and had grown forty millimeters by 2022. R. at 6. Miller died from stage IV lung adenocarcinoma at seventy-four years old on April 14, 2024. R. at 2.

Procedural History

Evelyn Miller (Respondent), as special administrator of Miller's estate, brought this action in July 2024 asserting healthcare malpractice claims against MHS, and strict product liability claims against CCS. R. at 1, 7. Petitioners MHS and CCS filed a combined Motion for Summary Judgment pursuant to Shawnee Rule of Civil Procedure 56. R. at 1. The Circuit Court issued an order granting Petitioners' Motion for Summary Judgment and entered final judgment against Respondent on March 6, 2025, finding that no apparent agency relationship existed between MHS and CCS and that Respondent's claims were barred by the statutes of repose. R. at 12-13. Respondent appealed the order issued by the Circuit Court. R. at 13. The Shawnee Court of Appeals for the Second District reversed the order issued by the Circuit Court and remanded the case for a jury to decide whether

MHS's disclaimer provided conspicuous notice or was procedurally unconscionable. R. at 24-25.

Petitioners MHS and CCS petitioned for leave to appeal, pursuant to Shawnee Supreme Court Rule 315, which was granted by the Shawnee Supreme Court. R. at 26. The appeal is limited to the questions of: (1) whether MHS can be held vicariously liable under the doctrine of apparent agency; and (2) whether respondent's claims are barred by Shawnee's four-year statutes of repose or whether the periods were tolled by: (a) the continuous course of treatment exception; or (b) The latent defect exception. R. at 29.

SUMMARY OF THE ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE MHS'S AGREEMENT DEFEATS THE HOLDING OUT ELEMENT OF APPARENT AGENCY AND IS ENFORCEABLE

Respondent failed to show that MHS took any action that would make a reasonably prudent person believe CCS or Cyber MD were employees or agents of MHS. MHS took proper precautions to prevent the appearance of an agency relationship by informing patients of the lack of such a relationship in their terms and conditions located on their patient platform. Additionally, MHS exclusively used its logos throughout the platform and prohibited the use of CCS or Cyber MD logos to prevent any confusion. MHS did not hold itself out to be Miller's provider of care by expressly informing Miller that all evaluations, imaging reviews, and diagnostic interpretations provided through the digital portal were performed by independent contractors and the software application was developed by another company. MHS's terms further stated that it did not exercise operational control over the clinical judgment or diagnostic methods used by the independent contractor physicians or the software application.

Miller was provided constructive notice of MHS's terms via a sign-in wrap agreement on its patient portal and Miller manifested his assent to the same. The sign-in wrap agreement is enforceable because the notice was reasonably conspicuous. The notice included a blue hyperlink to MHS's terms and conditions, making it readily apparent. Additionally, the notice unambiguously warned Miller that by entering the portal, he agreed to the terms and conditions.

MHS's terms and conditions were also not unconscionable. The terms were explained to Miller, and Respondent did not allege that Miller lacked the capacity to contract. Miller was of the age of majority at the time he agreed to the terms and there is no indication he suffered from any mental incapacity which would put him in an unfair bargaining position. Additionally, Miller had the freedom to walk away from the agreement and seek healthcare elsewhere. Respondent therefore failed to meet its burden to establish procedural unconscionability. Accordingly, this Court should reinstate summary judgment in favor of MHS because there is no genuine dispute of material fact regarding whether a reasonable person in Miller's position would have understood that an agency relationship did not exist.

II. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE SHAWNEE'S STATUTES OF REPOSE BAR RESPONDENT'S CLAIMS AND NO EXCEPTIONS APPLY

The repose periods for Respondent's healthcare malpractice claims against MHS and product liability claims against CCS both expired before Respondent filed suit. Cyber MD first failed to identify Miller's lesion in April 2018, so the healthcare malpractice repose period expired in April 2022. CCS delivered Cyber MD to MHS in 2017, so the product liability repose period expired in March 2021. Because Respondent did not file suit until July 2024, its claims are barred unless the "continuous treatment" (CT) or "latent defect" (LD) exceptions apply, and neither does.

The CT exception does not apply because Miller's interactions with Cyber MD were separate, discrete, and independent diagnostic screenings spaced twelve

months apart without physician oversight. The CT exception is therefore inapplicable because Miller's use of Cyber MD did not establish a relationship with a physician or constitute continuous treatment of a condition underlying the claim. As such, MHS is entitled to summary judgment because Shawnee's statute of repose bars Respondent's healthcare malpractice claim, and the CT exception does not offer an extension.

The LD exception also fails because the record does not establish that the asbestos-specific defect existed when first delivered to MHS or that it remained undiscoverable for more than four years by an ordinary reasonably prudent person. Although Miller could not inspect Cyber MD's proprietary source code, an ordinary reasonably prudent sixty-seven-year-old experiencing respiratory symptoms would have sought review by another provider. Instead, Miller unreasonably relied on a repeated AI diagnosis after receiving a clear warning in large, red font that Cyber MD "is not a licensed health care professional." Given the absence of evidence establishing when the asbestos-specific limitation arose and when an ordinary reasonably prudent person would have discovered the diagnostic discrepancy, the LD exception is inapplicable. CCS is therefore entitled to summary judgment because Shawnee's statute of repose bars Respondent's product-liability claim and the LD exception does not offer an extension. This Court should therefore affirm summary judgment in favor of MHS and CCS because MHS is not liable under the doctrine of apparent agency, Shawnee's statutes of repose bar the claims, and no exceptions apply.

ARGUMENT

This Court should reverse the Court of Appeals' decision and affirm the Circuit Court's order for summary judgment in favor of MHS and CCS because there is no genuine dispute of material fact as to whether a reasonable person in Miller's position would have believed an agency relationship existed, Shawnee's statutes of repose bar the claims, and no exceptions apply. On appeal, this Court must determine whether there is a genuine issue of material fact, whether the law has been correctly applied by the lower court, and reverse the lower court's decision if it misapplied the law. Sn. R. Civ. P. 56; *Tippecanoe Valley Sch. Corp. v. Landis*, 698 N.E.2d 1218, 1220 (Ind. Ct. App. 1998). Applying this standard of review, this Court should find no genuine issues of material fact exist because a reasonable person in Miller's position would not have believed an agency relationship existed, Shawnee's statutes of repose bar Respondent's claims, and no exceptions apply.

MHS is not liable under the doctrine of apparent agency because MHS did not take any action to create the appearance of an agency relationship. MHS expressly notified patients via a sign-in wrap agreement that the providers were not employees or agents of MHS, and the automated software application was controlled by another company. MHS's sign-in wrap agreement is enforceable because the notice and hyperlinked terms and conditions were reasonably conspicuous and unambiguously warned Miller that by entering the portal he agreed to them. Additionally, MHS's terms were not unconscionable because Miller did not lack capacity to contract and he was not deprived of a meaningful choice.

The repose periods for Respondent's claims both expired years before Respondent filed suit. The CT exception does not apply because Miller's annual interactions with Cyber MD were discrete diagnostic screenings without physician oversight or treatment of the condition underlying the claims. The LD exception likewise fails because the record does not establish that the asbestos-specific defect existed at delivery or remained undiscoverable to an ordinary reasonably prudent person for more than four years. This Court should therefore reverse the Court of Appeals' decision and affirm the Circuit Court's order for summary judgment in favor of MHS and CCS because MHS is not liable under the doctrine of apparent agency, Shawnee's statutes of repose bar the claims, and no exceptions apply.

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE MHS'S AGREEMENT DEFEATS THE HOLDING OUT ELEMENT OF APPARENT AGENCY AND IS ENFORCEABLE

This Court should reinstate summary judgment in favor of MHS because there is no genuine dispute of material fact as to whether a reasonable person would believe Cyber MD and CCS are employees or agents of MHS. To establish vicarious liability against a hospital under the doctrine of apparent agency, a plaintiff must show: (1) the hospital or its agents acted in a way that would lead a reasonable person to believe the alleged negligent physician was an agent of the hospital; (2) the hospital knew of and acquiesced in the actions creating the appearance of agency; and (3) the plaintiff reasonably relied on such actions. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E. 2d 788, 795 (1993).

MHS did not take any actions that would make a reasonable person believe that Cyber MD and CCS were agents of MHS and it did not acquiesce in any such actions. MHS took affirmative steps to inform Miller of the exact opposite via a sign-in wrap agreement stipulating that Cyber MD and CCS were independent contractors and “not employees or agents of [MHS].” MHS clearly informed Miller that it did not exercise control over any judgment or diagnostic methods used by Cyber MD or CCS. The MHS portal provided conspicuous and constructive notice to Miller that entering the portal constituted assent to these terms. Miller clicked on the hyperlinked terms and entered the portal, manifesting his assent. Therefore, this Court should reinstate summary judgment in favor of MHS and CCS because MHS’s sign-in wrap agreement provided adequate notice of the lack of agency relationship and the terms were not unconscionable for the reasons detailed below.

A. MHS Is Not Liable Because It Did Not Hold Itself Out to Be Miller’s Provider of Care

The first element of the doctrine of apparent agency, known as “holding out,” is met only when a hospital’s actions create the appearance of an agency relationship despite one not existing. *Gilbert*, 622 N.E.2d at 795; see *Memorial Hospital System v. Sampson*, 969 S.W.2d. 945, 950 (Tex. 1998) (granting summary judgment in favor of a hospital where plaintiff failed to establish the hospital took affirmative actions that would make a reasonable person believe emergency room physicians were its employees). Courts must assess the reasonableness of the plaintiff’s belief of an agency relationship considering the

totality of circumstances. *Webster v. CDI Indiana, LLC*, 917 F.3d 574, 577 (7th Cir. 2019).

A reasonable person would not conclude that physicians were employees of a hospital after signing a consent stating the opposite. *Blanche v. United States*, No. 12 C 7332, 2015 WL 1396737 1, 5-6 (N.D. Ill. Mar. 24, 2015). In *Blanche*, the plaintiff attended several visits and received care by independently contracted physicians at a hospital. *Id.* at 1. The physicians' scrubs did not bear distinguishable logos from that of the hospital, and the physicians did not inform the plaintiff that they were independent contractors. *Id.* at 3. At each visit, the plaintiff signed a consent stating that all physicians were independent contractors, and the hospital was not responsible for any treatment ordered by the physicians. *Id.* at 1. During one visit, the plaintiff was in labor and did not read the consent before signing. *Id.* at 2, 5-6. The court granted summary judgment in favor of the hospital because the hospital did not take any actions to create the appearance of an agency relationship and the plaintiff signed consents stating the physicians were independent contractors. *Id.* at 6.

A medical facility is vicariously liable under the apparent-agency doctrine only when it holds itself out as providing services rendered by independent contractors without informing patients that those providers are not its agents. *Webster*, 917 F.3d at 577-78. In *Webster*, an imaging center (CDI) employed technicians to conduct patient imaging but the radiologists who interpreted the images were independent contractors employed by another company (MSC).

Webster, 917 F.3d at 575. MSC did business as CDI and used CDI's trade name to market its services as part of a national provider network. *Id.* at 576-77. The plaintiff underwent imaging at CDI and was never informed of nor provided written notice that the radiologists were not employees of CDI. *Id.* The court held that a reasonable person would believe the radiologist was an agent of CDI because it held itself out to the public as offering radiology services and failed to disabuse patients of the belief that an agency relationship existed. *Id.* at 577-78.

Like in *Blanche*, Miller attended several visits through MHS's patient portal and received care from Cyber MD and CCS. MHS's portal exclusively displaying its logos and prohibiting the display of Cyber MD or CCS's logos helped prevent patients from believing an agency relationship existed between them. While Respondent alleges these actions had the opposite effect, Miller assented to MHS's terms stating that Cyber MD and CCS were independent contractors and that MHS did not exercise control over its judgment or diagnostic methods. Additionally, Miller was not in any immediate pain or duress which could have prevented him from reading the terms. Miller had several opportunities to address any confusion or inquire about the lack of agency relationships at each visit. Whether Miller in fact read the terms is immaterial because all that is required to manifest assent is entering the portal.

Unlike *Webster*, all evaluations, imaging reviews, and interpretations provided through the platform were performed by independent contractors. MHS did not do business as Cyber MD or CSS nor did MHS use their trade names for

marketing purposes. MHS expressly notified Miller that all services were provided by independent contractor physicians or automated software applications developed by another company. MHS's terms further notified Miller that it did not exercise operational control over the physicians' or software's clinical judgment or diagnostic methods. Therefore, this Court should reinstate summary judgment in favor of MHS because a reasonable person in Miller's position would not have concluded that Cyber MD and CCS were employees or agents of MHS.

B. MHS's Agreement Is Enforceable Because It Provided Conspicuous Notice and Unambiguously Warned Miller That by Entering the Portal, He Agreed to the Terms

-in wrap agreements bind users to terms by requiring them to manifest their assent through a separate action. *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1013-14 (9th Cir. 2024). Like any contract, sign-in wrap agreements require actual or constructive notice and mutual assent. *Id.* at 1013-14. Sign-in wrap agreements are enforceable when they provide reasonable, conspicuous notice and unambiguously warn users of binding legal consequences. *Id.* Courts look at the design of the website and display of the terms to assess whether a reasonable person would have noticed the existence of a binding agreement. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018). Hyperlinked terms within sign-in wrap agreements are permissible when readily apparent and would put a reasonably prudent internet user on notice of their existence. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 857 (9th Cir. 2022); *see Meyer v. Uber Technologies, Inc.*, 868

F.3d 66, 78-79 (2d Cir. 2017) (holding a hyperlink is reasonably conspicuous when blue and underlined).

[REDACTED]-in wrap agreements with hyperlinked terms that are readily apparent to users are sufficiently conspicuous. *Keebaugh*, 100 F.4th at 1013, 1020-21. In *Keebaugh*, the Court found that a website satisfied the visual requirement to provide conspicuous notice because a reasonably prudent person would have seen the terms. *Id.* at 1020. Users were required to advance through a sign-in screen which notified them that by clicking “play,” they agreed to the terms located under the play button. *Id.* at 1014. The notice was displayed in a contrasting font color, making it legible on a dark background. *Id.* at 1020. Further, the notice unambiguously denoted that pressing play constituted acceptance. *Id.* at 1020-21. The [REDACTED] site screen lacked clutter and used customary design elements of a hyperlink by underlining and displaying the linked terms in blue font. *Id.* at 1021. The court held that the hyperlinked terms put a reasonable user on notice because they were readily apparent and [REDACTED]nambiguous. *Id.*

Like *Keebaugh*, MHS’s platform and display of its terms satisfied the visual requirements and provided reasonably conspicuous notice. Below the login, there was a notice which stated that by entering the portal, Miller accepted the hyperlinked terms and conditions. The hyperlink was underlined and in blue font, making it distinguishable from the remaining text. Miller saw the notice, as evidenced by digital audits which confirmed Miller clicked the hyperlinked terms. Upon clicking the hyperlink, Miller was taken to a separate page displaying the

terms and conditions. Although Miller remained on this page for only four seconds and may not have read the terms, this is not required to manifest assent. The notice unambiguously warned Miller that entering the portal constituted agreement to MHS's terms. Miller saw this and entered the portal. Accordingly, this Court should reinstate summary judgment in favor of MHS because a reasonable person in Miller's position would have been put on constructive notice of the binding agreement and the notice unambiguously warned Miller that by entering the portal he agreed to the terms. Further, MHS's terms are valid because Respondent failed to establish unconscionability.

C. MHS's Terms Are Not Unconscionable Because Miller Was Not Deprived of a Meaningful Choice to Contract.

Courts have discretion not to enforce an otherwise valid agreement if it is unconscionable. *Keebaugh*, 100 F.4th at 1022. The party asserting unconscionability bears the burden of showing the circumstances surrounding the agreement were so unfair that there was "no voluntary meeting of the minds." *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025). The [REDACTED] line of unconscionability is comprised of a procedural and substantive element; both must be met for a court not to enforce an agreement. *Keebaugh*, 100 F.4th at 1022 (quoting *Baltazar v. Forever 21, Inc.*, 367 P.3d 6 (2016)). [REDACTED] procedural element focuses on whether one party lacked a meaningful choice to enter the contract. *Hines*, 140 F.4th at 328. Factors such as whether terms were explained and the parties' age, intelligence, education, business and similar transactional experiences are weighed to assess bargaining power. *Hines*, 140 F.4th at 328; *Payne v. Savannah Coll. of Art &*

Design, Inc., 81 F.4th 1187, 1194 (11th Cir. 2023). The substantive element focuses on avoiding overly harsh results by assessing whether the terms are unreasonably favorable to the more powerful party or “shock[s] the conscience.” *Keebaugh*, 100 F.4th at 1022-23, quoting *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (2015).

Agreements are not procedurally unconscionable when a plaintiff maintains capacity to contract. *Hines*, 140 F.4th at 326. In *Hines*, the adult plaintiff entered into three agreements with her employer. *Hines*, 140 F.4th at 326. The agreements were identical and executed over a period of years. *Id.* Each agreement was one page in length, and the text was 11-point font. *Id.* The terms of the agreements were not orally explained to the plaintiff and on two occasions, she did not read them prior to signing. *Id.* at 328-29. The court held the agreements were not procedurally unconscionable because the plaintiff did not allege that she lacked capacity to contract, the employer did not force the plaintiff to sign the agreements, the terms were legible, and the plaintiff was presumed to have read and understood the terms she agreed to. *Id.* at 330-31.

Here, Miller had the opportunity to review MHS’s terms and inquire about them on four separate occasions. He had access to the hyperlinked terms each time he initiated a session through the portal. While the hyperlinked terms were smaller in size, the record does not indicate what the font size of the other text was or how much smaller the hyperlinked terms’ text was in comparison. Additionally, the terms were located on a separate page with a white background and in black

contrasting font, making them clearly legible. Miller was not under duress or attending an emergency-level visit that would deprive him of the ability to read the terms. Additionally, Respondent did not allege that MHS was unwilling to clarify any questions Miller had or that he lacked the capacity to contract. While the terms consisted of 34-lines of single-spaced text, whether Miller in fact read the terms is immaterial because he agreed to them and is thus presumed to have read and understood them.

Further, Miller did not lack a meaningful choice to enter the contract, he had the freedom to walk away and seek care elsewhere. Miller had the option to seek in-person care at MHS's flagship hospital or the other primary care facilities in Simmons over the course of his three-year treatment. While the hospital was located 190 miles away, a reasonable person in Miller's position would not let this deter them from seeking in-person medical care, especially after experiencing shortness of breath and being notified that Cyber MD is not a licensed healthcare professional.

For the foregoing reasons, the agreement was not procedurally unconscionable. Although it is unnecessary to analyze substantive unconscionability, MHS disclaiming liability for the actions of non-employees is not overly harsh nor does it shock the conscience. Therefore, this Court should reinstate summary judgment in favor of MHS because the doctrine of apparent agency does not apply, MHS's agreement is reasonably conspicuous, and Respondent failed to meet her burden to establish unconscionability. Further, even if the doctrine of

apparent agency were applicable, Respondent's claims are barred by Shawnee's statutes of repose, and no exceptions apply.

II. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE SHAWNEE'S STATUTES OF REPOSE BAR RESPONDENT'S CLAIMS AND NO EXCEPTIONS APPLY

Shawnee's four-year statutes of repose bar Respondent's claims unless a statutory exception applies because the repose period for the healthcare malpractice claims expired on April 9, 2022, the repose period for the product liability claims expired in March 2021, and Respondent did not file suit until July 2024. A statute of repose bars any suit that is brought after a specified time, "even if this period ends before the plaintiff has suffered a resulting injury." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). Statutes of repose generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control. *Id.* at 9. The Supreme Court of the United States confirmed that "the purpose of a statute of repose is to create an absolute bar on a defendant's temporal liability." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017).

The Supreme Court distinguished statutes of repose from statutes of limitations on the grounds that repose periods are fixed and their expiration cannot be delayed by estoppel or tolling. *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. at 508. A fixed endpoint allows healthcare providers and product developers to evaluate remaining liability, preserve evidence for a defined period, obtain insurance, and allocate resources without indefinite exposure arising from increasingly remote conduct. *See CTS Corp.*, 573 U.S. at 8-9; *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. at 507-08.

Although Respondent filed suit within two years of Miller’s death, compliance with the applicable limitations period does not satisfy Shawnee’s statutes of repose. Sn. Rev. Stat. §§ 12-402(b); 12-404(b); 12-410(a). Healthcare malpractice claims must be brought within four years of the act alleged to have caused death and product liability claims must be brought within four years of the date of first delivery to its initial user. Sn. Rev. Stat. §§ 12-404(b); 12-410(a). Although these statutes carve out “continuous treatment” (CT) and “latent defect” (LD) exceptions respectively, neither applies here. Sn. Rev. Stat. §§ 12-404(b); 12-410(b).

The repose period for the healthcare malpractice claim against MHS began no later than April 9, 2018, when Cyber MD first failed to identify Miller’s lesion. Although Cyber MD repeated that conclusion during annual evaluations through June 2021, those evaluations resulted in the same original diagnostic error and did not begin new repose periods. Therefore, the repose period for the healthcare malpractice claim expired April 9, 2022.

The repose period for the product liability claim against CCS began when MHS integrated Cyber MD into its telehealth platform in March 2017 and therefore expired in March 2021. CCS did not discover changes in its accuracy rating until October 2022 and did not release a retrained version until December 13, 2023. Miller's spontaneous pneumothorax did not occur until October 30, 2023, prior to his death on April 14, 2024. All these events postdate the expiration of the repose period.

Respondent did not file suit until July 2024, years after repose periods for all claims had expired. Respondent's claims could therefore survive only if Cyber MD's annual evaluations or its alleged algorithmic flaw satisfy the CT or LD exceptions to the relevant statutes of repose. However, neither exception applies. Accordingly, this Court should reverse the lower court's decision and reinstate summary judgment for MHS and CCS.

A. The Continuous Treatment Exception Does Not Apply Because Cyber MD Did Not Provide a Course of Treatment or Establish a Physician-Patient Relationship

Shawnee's statute of repose for healthcare malpractice claims creates a narrow CT exception when a provider engaged in a "continuous course of treatment" of a patient for the "same illness, injury, or condition that gives rise to the claim of negligence." Sn. Rev. Stat. § 12-404. A party invoking the CT exception must establish a continuous course of negligent treatment and show the "treatment was so related as to constitute one continuing wrong." *Cunningham v. Huffman*, 609 N.E.2d 321, 325 (1993). A patient's return for monitoring or evaluation does not establish CT when no additional treatment is provided. *See Hoffner v. Johnson*, 660 N.W.2d 909, 919 (N.D. 2003).

A provider's failure to diagnose and establish a course of treatment is not itself a "course of treatment." *See Young v. New York City Health & Hosps. Corp.*, 693 N.E.2d 196, 200 (1998). A course of treatment instead requires "affirmative and ongoing conduct by the *physician*." *Gomez v. Katz*, 874 N.Y.S.2d 161, 165 (2009); *see also Kaufmann v. Fulop*, 849 N.Y.S.2d 615, 618 (2d Dep't 2008) (finding the CT doctrine inapplicable to diagnosticians who render discrete, intermittent services).

Annual diagnostic exams therefore do not constitute CT. *Shiffman v. Harris*, 280 A.D.2d 752, 752 (2001). In *Shiffman*, the provider performed annual diagnostic examinations and made referrals to additional providers. *Shiffman* 280 A.D.2d at 753. The Court held that recommended annual diagnostic exams did not constitute CT, reasoning that the physician never actually “treated” the patient for the condition giving rise to the claim. *Id.*; see also *Vines v. New York City Health and Hospitals Corp.*, 150 N.Y.S.3d 267, 268 (1st Dep’t 2021) (emphasizing that diagnostics conducted repeatedly over time are not a course of treatment).

Here, Miller’s annual interactions with Cyber MD mirror the examinations in *Shiffman* and would not qualify as continuous treatment. Cyber MD reviewed new images once each year, reiterated its original conclusion that there was “zero evidence” of malignancy, and continued its asthma diagnosis. Neither Cyber MD nor MHS undertook corrective treatment for lung cancer, pleural disease, or any other continuously treated condition. Cyber MD instead referred Miller to a local practitioner for inhaler management and ultimately discontinued annual imaging after the 2021 evaluation. As in *Shiffman*, although these evaluations were recurring, recurrence alone did not establish them as a course of treatment.

The twelve-month gaps between Miller’s evaluations further demonstrate that they were separate and discrete diagnostic encounters, not components of a continuous treatment regimen. The continued existence of an AI platform does not transform annual patient-initiated interactions without physician oversight into continuous treatment. Further, Cyber MD’s warning in large, red font that it “is not

a licensed health care professional” makes clear that it cannot establish a physician-patient relationship or provide a course of treatment. Thus, even assuming Miller could establish some kind of ongoing relationship with Cyber MD, the annual screenings did not constitute continuous treatment of the condition underlying the claim.

Holding otherwise would impermissibly expand the narrow CT exception. If continued access to an AI platform or recommendations for annual screenings constituted continuous treatment, provider’s exposure could extend indefinitely with each use even in the absence of treatment. Providers offering recurring diagnostic services would consequently have no reliable endpoint to their liability (the very uncertainty that a statute of repose is designed to eliminate). This type of exposure might deter providers from ordering regular screenings, resulting in missed opportunities for early detection and delayed diagnoses or treatment. This would be particularly harmful to patients with underlying medical conditions that require ongoing screening to prevent severe injury and even death.

Because Cyber MD did not provide a course of treatment or establish a physician-patient relationship with Miller, the CT exception does not apply. Accordingly, Shawnee’s statute of repose bars Respondent’s healthcare malpractice claim, and MHS is entitled to summary judgment. Respondent’s product liability claim against CCS also fails because Cyber MD’s alleged algorithmic flaw does not satisfy the LD exception.

B. The Latent Defect Exception Does Not Apply Because Respondent Cannot Establish the Injury-Causing Defect Existed at Delivery or Remained Undiscoverable

Shawnee’s repose period for product liability offers an LD exception when: (1) an “injury-causing aspect” of a product (2) existed at the time of delivery and (3) was not discoverable by an “ordinary reasonably prudent person” until more than four years after the time of delivery to its initial user. Sn. Rev. Stat. § 12-410(b). The “injury-causing aspect” of a product refers to a specific design condition that renders a product “unreasonably dangerous.” *See Pate v. Columbia Mach., Inc.*, 930 F. Supp. 451, 459 (D. Idaho 1996). An aspect existed at the time of delivery only if the condition was present when the product left the manufacturer's control. *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 483 (6th Cir. 2008). An “ordinary reasonably prudent person” may be measured by asking what conduct would be expected of a person of ordinary prudence under the same circumstances. *Washington Hosp. Ctr. v. Butler*, 384 F.2d 331, 335 (D.C. Cir. 1967). Further, product modification does not restart a repose period. *See Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 834 (Ind. 2020).

Here, Respondent identifies the alleged injury-causing aspect as Cyber MD’s pre-training baseline coding that failed to identify Miller’s lesion. However, this baseline coding received FDA clearance, and the record does not conclusively establish that the asbestos-specific issue existed when Cyber MD was first delivered to MHS. CCS did not identify the twelve-percent decline in the program’s accuracy (specifically when evaluating patients with asbestos-exposure) until October 2022.

This identification does not reveal whether the limitation was embedded in the original program, developed through subsequent model degradation, resulted from post-delivery data or performance changes, or simply escaped earlier detection. Nor does CCS's 2023 retraining establish that the condition existed at delivery. At most, the retraining shows that CCS later detected diminished performance and modified the program. Because a post-delivery modification does not restart repose, Respondent cannot extend liability based on the 2023 retraining for a product delivered in 2017.

Even assuming the limitation existed at delivery, Respondent must also establish an ordinary reasonably prudent person could not have discovered it within four years. Miller did not need to inspect Cyber MD's proprietary source code for his misdiagnoses to be discoverable. The lesion was "clearly visible" on Miller's 2018 scan and grew continuously until 2021. Seeking review of his scans could therefore have revealed the diagnostic discrepancy without access to Cyber MD's code. Three primary care practices remained in Simmons, Miller received inhaler management from a local provider, a mobile radiology service produced the images, and MHS was accessible by car. Further, Cyber MD warned in large, red font that it "is not a licensed health care professional." An ordinary reasonably prudent sixty-seven-year-old with a multi-decade history of asbestos exposure experiencing shortness of breath would have made the efforts necessary to discover the diagnostic discrepancy by seeking professional review of the scans and AI-generated diagnosis. This is especially true considering Miller received an asthma diagnosis despite being a

lifelong non-smoker, being non-asthmatic for sixty-seven years, having no family history of respiratory disease, and an “unremarkable” chest screening in 2012. The recurring “zero evidence” of malignancy result does not provide any information about the scans themselves or affirmatively establish that they were benign or even non-malignant, only that the AI program did not detect evidence of disease. Miller’s long-term asbestos-exposure, symptoms, medical history, asthma diagnosis, vague and inconclusive results, and recommended annual follow ups would have prompted a responsible internet user to investigate further.

If source code was treated as automatically undiscoverable, modern software could escape repose simply because users cannot inspect it. Manufacturers would lose fixed endpoints that statutes of response are designed to provide, and LD exceptions would allow for any and all software limitations to be considered latent. The statute intentionally carves out a narrow exception for when the injury-causing aspect of a product could not reasonably have been discovered by ordinary prudent people, not when its exact underlying technical cause was only detectable by product experts.

Because Respondent cannot establish either that Cyber MD’s asbestos-specific limitation existed at delivery or that its resulting diagnostic failure remained undiscoverable for more than four years, the LD exception does not apply. Accordingly, Shawnee’s statute of repose bars Respondent’s product liability claim, and CCS is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's ruling and grant summary judgment for MHS and CCS because Respondent failed to show that MHS held itself out as Miller's provider of care under the doctrine of apparent agency, MHS's terms are enforceable, Shawnee's statutes of repose bar the claims, and the CT and LD exceptions do not apply. As such, no genuine issues of material fact exist and MHS and CCS are entitled to summary judgment as a matter of law.

APPENDIX A

1. Sn. Rev. Stat. § 12-402. Limitations of Actions: Personal Injury and Wrongful Death; Discovery Rule.

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

(b) Wrongful Death. An action for wrongful death shall be commenced within two (2) years from the date of the decedent's death.

(c) Discovery Rule Exception. If the injury or its causal relationship to the conduct of another is not immediately discoverable through the exercise of reasonable diligence, the limitation period shall not begin to run until the claimant knows, or reasonably should have known, of the injury and the tortfeasor's identity.

2. Sn. Rev. Stat. § 12-404. Limitations – Health Care Malpractice.

(a) Limitations Period. No action for damages for injury or death against any physician, hospital, or healthcare provider arising out of patient care shall be brought more than two (2) years after the date on which the claimant knew, or through reasonable diligence should have known, of the injury or death.

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

3. Sn. Rev. Stat. § 12-410. Statute of Repose – Product Liability.

(a) Repose Period. No product liability action based on strict liability in tort shall be commenced except within the applicable limitations period in Section 12-402, and in any event, within four (4) years from the date of first sale, lease, or delivery of possession to its initial user or consumer.

(b) Exceptions to Statute of Repose. The four (4) year period of repose shall not apply if: The product seller expressly warrants that its product can be utilized safely for a period longer than four (4) years; The product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it; or The harm was caused by prolonged exposure to a defective product, or if the

injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four (4) years after 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.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of Supreme Court Rule 24.1 because it contains 6,566 words, excluding the parts of the brief exempted by Rule 24.1. This brief has been prepared in a double-spaced typeface with 1” margins using Microsoft Word in Century Schoolbook 12-point for text and 10-point for footnotes.

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CERTIFICATE OF SERVICE

I certify that on October 1, 2026, I served this brief in Microsoft Word and PDF formats by email along with a copy of the brief certification form, in compliance with Moot Court Competition Rules 4(a) and 5(a).

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