

IN THE
Shawnee Supreme
Court

NOVEMBER TERM

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 THE PETITIONER

TEAM LAW AND MORDOR

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Under Shawnee law, can a healthcare system be held vicariously liable for an autonomous AI software tool integrated into its branded telehealth platform, if it did not hold out the AI as its agent?
2. Should Shawnee's four-year state of repose bar claims to be enforced considering there was neither a "continuous course of treatment" as specified under Shawnee Revised Statute § 12-404 nor an "undiscoverable defect at delivery" as defined under § 12-410?

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Elias Miller, the decedent, started working at the Shawnee Steel Company when he was 20 years old. He continued working there for 46 years until he retired in 2016. The area where Mr. Miller worked was insulated by asbestos and he regularly handled it. Around when Mr.

Miller started working, the industry started to cease the use of asbestos in factories but the one that Mr. Miller was working in continued. During those times, Mr. Miller often worked without respiratory protective equipment. Despite that choice, Mr. Miller was a lifetime non-smoker.

Mr. Miller lived in Cartersville which was a rural town in the state of Shawnee. This small town suffered economic issues resulting in closers, including the steel mill. Cartersville lost 7,500 residents and lost 75% of its healthcare professionals. Both local hospitals closed in 2015 as a result of bankruptcy. That closure resulted in no medical imaging centers in the county. The closest facility with in-person radiology and imaging was located 190 miles away at the flagship Metropolitan Health Systems, Inc. (“MHS”) hospital. MHS was three and half hours away from Cartersville. That resulted in Shawnee and the federal authorities officially designating Simmons County as a Health Professional Shortage Area and a Medically Underserved Area.

In response to the shortage of healthcare in Cartersville and Simmons county MHS contracted with Cyber-Care Solutions, LLC (“CCS”). CCS provided remote system to assist rural patients with their health issues. MHS controlled the software and placed their branding on the software. CCS branding was not allowed on patient-facing pages. A patient would access the remote software through a MHS webpage. Upon opening the software, the webpage displayed “By entering the portal, I accept the MHS Terms and Conditions.” When a user clicks on the “Terms and Conditions” blue hyperlink it takes you to a separate page that displays 34-lines of single-spaced, unformatted black text on a plain white background. The text is smaller than the rest of the website. The digital records indicated that Elias did click on the link for the terms and conditions. The terms and conditions included:

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.

In 2017, CCS received FDA clearance to implement Cyber MD. This software is an AI diagnostic system that allows the patients to input symptoms and receive diagnostics. The diagnostics made by the AI comply with past medical history and can answer follow up questions. Before a patient uses the software a pop-up box appears, stating in red, 16-point font:

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

In order to move forward the patient must click accept to continue. The software was trained with 40,000 images of scans to identify lung lesions. After the training the system was achieving 97% accuracy. However, the systems accuracy dropped to 85% when it looks at images of a person that was exposed to asbestos over time. CCS updated the system in 2023 which brought up the accuracy again.

Mr. Miller was experiencing shortness of breath and decided to log on to the MHS portal. After a virtual intake session where he disclosed his asbestos history, Cyber MD ordered a chest X-ray and CT scan through a mobile radiology service. Two weeks after the scan, Cyber MD reported that there was “zero evidence” of malignant lesions. Cyber MD diagnosed him with adult-onset asthma but ordered annual scans. Mr. Miller conducted annual follow-up scans in May 2019, May 2020, and June 2021. Each time Cyber MD reported no evidence and told Mr. Miller that the scans were no longer needed.

On October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax and was airlifted to the flagship MHS hospital. Scans revealed a 6.4 cm malignant mass in his left lung with extensive metastases to the pleura and spine. Retrospective experts reviewed the scans and reported that the 2018 scan clearly showed a 7 cm lesion. Cyber MD failed to identify the lesion with its 2017 initial software. Mr. Miller died at 74 on April 14, 2024. The plaintiffs filed this lawsuit in July 2024.

II. NATURE OF PROCEEDINGS

Plaintiff Evelyn Miller, herself and on behalf of the estate of Elias Miller, brings this suit against the defendants MHS and CCS. Both defendants in this case filed for summary judgment pursuant to Shawnee rule of Civil Procedure 56. Summary judgment was GRANTED by the Shawnee Circuit Court and the plaintiffs appealed. The Shawnee Court of Appeals REVERSED and REMANDED the case back to the circuit court for further proceedings. The defendants petitioned for leave to the Shawnee Supreme Court which was GRANTED.

SUMMARY OF THE ARGUMENT

This case addresses complex and novel issues of statutory interpretation and application in the context of the rising tide of Artificial Intelligence programs. The Shawnee Court of Appeals decision to reverse the district court's grant of summary judgment reflects the difficulty that courts all across the country currently face in applying traditional notions of tort law to programs and products that stand outside the realm of what was considered possible at the time of their inception.

At the heart of this case is the growing healthcare crisis impacting patients, communities, healthcare providers, and hospitals, both in Shawnee and beyond. Shawnee is far from unique in

the struggles that it's community members have faced over the past decade. This case is the result of the Defendant Metropolitan Health Services's attempt to fill the healthcare access gap left in Simmons County as a result of severe economic contraction and a reduction in population.

Broadly speaking, the questions before the Court today can be framed as a determination of the following question: how do we determine liability for mistakes made by Artificial Intelligence in the healthcare context? Within this context there are three questions under the Court's view. First, do different standards for agency, assent, and notice apply when a hospital uses Artificial Intelligence to supplement telehealth services for designated Medically Underserved Areas? Second, can the definition of a healthcare provider be extended to an AI model, or is the physician-patient relationship unique to real human interaction? Finally, do we define the cause of harm in the age of AI by the ones and zeros that make up the algorithm, or is it defined by the impact that it has in the real world?

STANDARD OF REVIEW

Whether a trial court erred in granting or denying a motion for summary judgment is a question of law that appellate courts review *de novo*. See Fed. R. Civ. Pro. 56(c). Summary judgment is proper when there exists no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Id.* The moving party has the burden to demonstrate that summary judgment is warranted, but the “mere existence” of an alleged factual dispute between the parties is insufficient to overcome an otherwise well supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). In order to overcome a motion for summary judgment there must be a genuine issue of material fact. *Id.* at 248. What facts are “material” are determined by the issues presented by the case and the governing law. *Id.*

ARGUMENT

I. Metropolitan Health System (MHS) cannot be held vicariously liable because the totality of the circumstances demonstrates that Mr. Miller either knew or should have known Cyber MD was autonomous Artificial Intelligence (AI) and not a MHS healthcare professional or agent.

i. MHS did not hold Cyber MD out as its agent because despite its branding, MHS's disclosures made it clear to a reasonable user that Cyber MD was not its agent.

Although MHS associated Cyber MD with its telehealth platform in its branding, MHS expressly disclosed Cyber MD's independent status before Plaintiff used the tool. Those disclosures clarified any potential misunderstandings that Cyber MD was an employee or agent of MHS.

Hospitals may be held vicariously liable for the negligence of an independently contracted provider under the doctrine of apparent agency. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 524 (1993). Apparent agency exists where: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Id.* at 525. "The element of holding out" on the part of the hospital does not require an express representation by the hospital that the person alleged to be negligent is an employee. Rather, the element is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors." *Id.* However, *Gilbert* clarifies that "liability attaches to the hospital only where the treating physician is the apparent or

ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable.” *Id.* at 522-523.

In *Gilbert*, the court found a dispute of facts regarding apparent agency where the hospital did not inform patients that the emergency room physician was an independent contractor and used a consent form suggesting that hospital physicians and staff would provide treatment. *Id.* at 526. The hospital internally categorized its emergency room physicians as independent contractors but patients were not made aware of this status. *Id.* at 516. Additionally, patients were required to sign a hospital consent form stating that the treatment and procedures would be administered by "physicians and employees of the hospital." *Id.* The patient did not choose the physician accused of negligence, as the doctor had never treated him before and was only on duty covering the emergency room that day. *Id.* at 516-517. The court held that a genuine issue of material fact existed as to whether the independent contractor physician was an agent of the hospital and reversed summary judgment for the hospital. *Id.* at 526.

Similarly, in *Webster v. CDI Ind., LLC*, the court affirmed apparent agency liability where the patient received care under CDI's without being aware of the different entities involved in providing that care. 917 F.3d 574, 577-578 (7th Cir. 2019). Medical Scanning Consultants (MSC) used CDI's trade name and trademarks. *Id.* at 576-577. The patient stated she was unaware of the relationship between MSC, the entity providing the radiologist, CDI, the diagnostic imaging facility, and the radiologist himself. *Id.* at 577. The court affirmed the judgment holding CDI vicariously liable because the patient had not been informed that the radiologist was not under CDI control or supervision. Therefore, the radiologist's status as an independent contractor was irrelevant unless the patient was aware of the relationship. *Id.* at 578.

Although MHS's branding could suggest an agency relationship with Cyber MD, MHS did not hold Cyber MD out as its agent. MHS expressly disclosed that the software was created by another company and was not an employee or agent of MHS. Unlike the hospital in *Gilbert*, which did not reveal its physician's independent contractor status and used a consent form implying the hospital physicians and employees would treat the patient, MHS clearly communicated Cyber MD's independent status. Similarly, in *Webster*, a patient received care under CDI identity without being informed about the relationships between CDI, MSC and the independent radiologist. MHS did what the providers in *Gilbert* and *Webster* failed to do. MHS explicitly informed users that the AI tool was not its agent. Therefore, because MHS clearly stated Cyber MD's independent status, its branding alone was not enough to suggest an agency relationship.

ii. MHS's electronic disclosures provided appropriate conspicuous notice of Cyber MD's status.

MHS provided Miller with conspicuous notice of Cyber MD's status through two electronic methods: a mandatory pop-up that showed Cyber MD's identity and required acceptance and sign-in-wrap terms that further explained Cyber MD's relationship to MHS. Electronic notice is sufficient if: "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853 (9th Cir. 2022). Checking a box or clicking 'I agree,' to continue are "the most straightforward" form of these principles because they display terms to the user and require affirmative action. *Id.* For notice to be conspicuous, it must be presented in a font size and format that a reasonably prudent user would

likely see. *Id.* When evaluating an inquiry notice, courts look at “the conspicuousness and placement” of the hyperlink, other notices provided to users and the overall design of the website. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

Courts routinely enforce electronic notice when it is clearly displayed and directly linked to the user’s affirmative action. In *Feldman v. Google, Inc.*, the court determined that reasonable notice was provided because the agreement was clearly visible, the user was prompted to read it and they could not continue without clicking the button that read, ‘Yes, I agree to the above terms.’ 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007). The court emphasized that requiring users to take explicit action before moving forward set the interface apart from those where contractual terms are hidden or can only be found through several hyperlinks. *Id.* The court concluded that a reasonably prudent Internet user would have known of the terms and that clicking “yes” indicated assent. *Id.* at 238.

In contrast, *Berman* found that notice was inadequate when the interface lacked both conspicuousness and manifestation of assent. *Berman*, 30 F.4th at 857-858. The notice was written in tiny grey font, which was smaller than the rest of the surrounding text, additionally the website’s other visual elements distracted the user from the notice. *Id.* at 856-857. Although the notice included hyperlinks to the terms, these links were in the same gray font as the rest of the text and were not underlined, capitalized or visually distinctive. *Id.* at 857. The interface failed to expressly inform users that clicking the green button meant agreeing to terms. *Id.* at 856-857. Therefore, the interface did not conspicuously display the terms nor clearly connect the user’s action to agreeing to them. *Id.*

The Ninth Circuit has used the same rules for terms accessible through hyperlink. In the case of *Keebaugh v. Warner Bros. Ent. Inc.*, notice was placed just below the ‘Play’ button, stating that clicking ‘Play’ meant agreeing to the Terms of Service. 100 F.4th 1005, 1020 (9th Cir. 2024). Moreover, the notice had a contrasting font color that stood out against the dark background, the Terms of Service link was "conspicuously distinguished from the surrounding text," and the sign in screen was free of clutter. *Id.* at 1020-1021. The court concluded that the notice was “conspicuous and put a reasonable user on notice that the user was agreeing to be bound by the Terms of Service.” *Id.* In contrast, *Nguyen* held that even a conspicuous Terms of Use hyperlink close to an active button was insufficient if the website did not inform users that clicking the button meant agreeing to terms. *Nguyen*, 763 F.3d at 1178.

MHS’s Cyber MD pop-up included the same features which supported conspicuous notice in *Feldman*. Immediately before Cyber MD was activated, a pop-up message in red, 16-point font notified Plaintiff that Cyber MD was an AI software and not a licensed healthcare provider. The pop-up focused solely on Cyber MD, devoid of any unrelated information or crowded webpage. Plaintiff could only move forward to Cyber MD after explicitly clicking ‘Accept.’ Like *Feldman*, the disclosure was shown to Plaintiff before he could access the service, and he took affirmative actions to accept terms before continuing. The disclosure was made interdependent to the action manifesting assent because the warning and acceptance process appeared immediately before Plaintiff used the tool.

The MSH Cyber MD pop-up significantly differentiates itself from the inadequate interface in *Berman* by using a clear and noticeable design. Unlike Berman’s tiny gray font and unclear button functionality, MHS placed its Cyber MD disclosure in a separate pop-up,

displayed the warning in red, 16-point font, and made it a prerequisite for Plaintiff to click “Accept” before proceeding. The interface had precisely what was required since it brought forth the relevant information to Plaintiff’s attention and included that information with a clear act of acceptance.

MHS’s sign-in-wrap provided additional notice regarding Cyber MD’s relationship to MHS. When the Plaintiff accessed the portal, a message clearly stated, “By entering the portal, I agree to the MHS Terms and Conditions,” with “Terms and Conditions” appearing as a blue, underlined link. Similar to *Keebaugh*, the interface clearly tied the Plaintiff’s action with acceptance of the associated terms. Unlike Nguyen, MHS did not just add a hyperlink near an active button and expect the Plaintiff to understand its importance. Instead, MHS clearly informed Plaintiff that accessing the portal meant agreeing to the terms.

The two disclosures worked together: the mandatory pop-up clearly informed the Plaintiff about Cyber MD and required his active acceptance, while the sign-in-wrap terms explained Cyber MD’s connection to MHS. Together, MHS’s electronic disclosures provided the Plaintiff with information about Cyber MD’s status before he choose to use the tool. Plaintiff should have read both disclosures as their conspicuous notice was visually apparent indicating they were not standard boiler-plate agreements.

In sum, MHS cannot be held vicariously liable because Plaintiff knew or should have known that Cyber MD was not a MHS healthcare professional or agent. Even though MHS branding associated Cyber MD with its telehealth platform, MHS clearly stated Cyber MD’s independent status prior to Plaintiff’s use of the tool. A mandatory pop-up conspicuously identified Cyber MD as an AI and required the Plaintiff’s active acceptance before continuing.

MHS's sign-in-wrap terms offered additional information about Cyber MDs relationship to MHS and explicitly designed access to the portal dependent on understanding those terms. Therefore, given the totality of the circumstances MHS did not hold Cyber MD out as its agent.

II. The statute of repose correctly barred the respondents from bringing any claims against the petitioners in this case because the continuous treatment exception does not apply.

The legislature of Shawnee recognized the rare instances where physicians escape liability despite their poor continuous treatment. In response, the same legislature created an exception to the four-year statute of repose which extends the start date of the clock starting. See Sn. Rev. Stat. § 12-404. For the exception to apply, the claimant must show that there was a continuous course of treatment for the same illness, injury or condition that the claim is based on. *Id.*

Due to this being a case of first impression, we will use case law from other jurisdictions that have adopted a similar exception. In New York, continuous treatment occurs when a patient is told that they no longer need treatment by a physician and the patient timely returns with more issues relating to the earlier visits. *McDermott v Torre*, 56 NY2d 399, 437 NE2d 1108, 452 NYS2d 351. Continuous treatment is a toll therefore the time of the first act of negligence is irrelevant. *Id.* The continuous treatment exception requires a relationship between the physician and the patient. *Id.*

The New York Southern District Court held that an AI such as Claude cannot be an attorney. *United States v. Heppner*, 820 F. Supp. 3d 292, 296 (S.D.N.Y. 2026). Further, the attorney client privilege requires a “trusting human” which AI cannot provide a user. *Id.* In addition to that human relationship, the attorney must be licensed and subject to discipline which

is not possible for an AI. *Id.* Lastly, AI has billions of inputs and outputs which makes the entire conversation accessible to others, therefore it is not a privileged conversation. *Id.*

The plaintiffs in this case were correctly barred from bringing claims against the defendants. Artificial intelligence cannot be a physician. Additionally, artificial intelligence cannot maintain a relationship with a patient. Further, artificial intelligence is not confidential because it is open to the public, especially the parent company. Lastly, the legislature did not intend to prevent artificial intelligence from assisting rural communities.

i. Artificial intelligence is a tool and cannot be classified as a physician.

Artificial Intelligence cannot be classified as a physician because it is neither licensed nor conscious in the field of medicine; AI is a tool. *McDermott* is different than this case. In *McDermott*, the plaintiff met with a physician for a dark mole on their foot that was causing pain. *McDermott*, 56 NY2d 399. The physician examined the mole and told the plaintiff that there was nothing to worry about. *Id.* A different doctor discovered that the mole was malignant, but it was past the statute of limitations for medical malpractice in New York. *Id.* The Court in *McDermott* held that the plaintiff's claim against the first physician was not barred by the statute of limitations because of the continuous treatment exception to the statute. *Id.* This case differs from *McDermott*. The physician in *McDermott* was a trained and licensed dermatologist in the state of New York. *Id.* In this case, however, the plaintiff claimed that an Artificial Intelligence tool was classified the same as the dermatologist in *McDermott*. That claim was unconvincing. The AI in this case was a helpful tool that made a mistake similar to humans but it did not go through the schooling, residency, training and testing to be classified as a physician. AI tools are used by physicians to make them more efficient but the AI tools are not conscious and cannot act

without oversight. That lack of consciousness separates them with humans because a human might double check their work because they know they can be wrong. That is not how an AI works, they analyze, predict, act, and move on. Therefore, the court in this case should hold differently than *McDermott* because AI error is far different from human error and should be treated differently. The lack of training and human nature separates professionals from AI, similar to the one in this case.

ii. Artificial intelligence cannot maintain a professional relationship with a human.

Artificial Intelligence cannot maintain a patient relationship because the software changes each time the patient uses the software. *Heppener* is analogous to this case. In *Heppener* the defendant was facing a possible indictment. *Heppner*, 820 F. Supp. 3d 292. Prior to any formal charges the defendant consulted AI platform “Claude” for a defense plan which included him revealing incriminating information. *Id.* The defendant claimed that the incriminating statements were privileged or work product and the prosecution should not be able to use that content collected by Claude. *Id.* The court in *Heppener* held that AI communication is not protected by attorney client privilege or the work product doctrine because the AI is not a licensed attorney and there is no client relationship. *Id.* *Heppener* is analogous to this case. In this case the continuous doctrine requires a physician patient relationship similar to the requirement for an attorney client relationship to have privileged documents. Further, in *Heppener* the court ruled that no attorney relationship can exist between an AI and an AI user. There are parallels between the professional relationships doctors and lawyers have with their patient or client. The relationship needed to establish continuous treatment requires a human. An AI bot is not a doctor, lawyer or any type of conscious being. Therefore, the court should hold similar to

Heppner because the requirement of a lawyer-client relationship is not present in this case. Artificial intelligence cannot do what humans can do in professional careers and should not be legally bound the same as professionals.

AI cannot have an exclusive relationship with a patient due to the amount of data being shared between users. *Heppner* is analogous to this case. In *Heppner* Claude was used for the “legal advice” which is subject to an open network and Anthropic reserves the right to share the information. *Heppner*, 820 F. Supp. 3d 292. See above for standard facts. *Id.* *Heppner* is similar to this case. Doctors, similar to lawyers, are responsible for keeping their patient’s statements and diagnostics confidential. This confidentiality is crucial to maintain a physician patient relationship. Attorney client privilege requires a continuous relationship between the Lawyer and the client. Similarly, the continuous treatment doctrine requires a continuous treatment between the physician and patient. This court should hold that the continuous exception does not apply in this case.

iii. Public policy supports the use of artificial intelligence in rural communities to fight the lack of healthcare.

Artificial intelligence in medicine, if classified correctly, can save lives and help medical professionals during the current shortages in rural communities. The Shawnee legislature did not intend to allow plaintiffs to toll the statute of repose for errors made by computer software systems. The legislature enacted this statute to soften the hard deadline of filing suit because in rare cases negligent treatment by a physician is continuous. However, a mistake by a computer software is not one of those rare cases. The computer software was mitigating a major issue in rural areas that have limited access to healthcare. The software makes mistakes; nevertheless, that software also saves lives. Artificial intelligence is a powerful tool that can assist doctors and

patients. In this case, the software made a mistake but that does not mean AI should cease to exist in the medical field. In Shawnee that medical asset will be barred if precedent is established making computer software liable for rare errors without any human oversight. The court should hold in favor of the petitioners in this case to continue saving lives in rural medical deserts like Cartersville. The implementation of AI in medicine was a step forward in treating patients; if the court holds in favor of the respondents it will be a step backward for Shawnee and especially Cartersville.

III. Respondent's claims are subject to Shawnee's product liability statute of repose because Cyber MD's failure to diagnose was discoverable at the time of delivery.

Assuming that the CyberMD software algorithm is a product¹, this Court should reverse the Court of Appeals' ruling that Respondent's claims were not barred by the four (4) year statute of repose. The lower Court's analysis was based on a misapprehension of what constitutes the "injury causing aspect" of CyberMD's AI assessment tool. This misapprehension reflects the unique challenges that arise when courts attempt to reconcile a traditional product liability framework with the complex novel challenges posed by Artificial Intelligence. Because CyberMD's failure to diagnose *was* discoverable by a reasonably prudent person, Respondent's claims against CCS for strict liability based on design defect are barred by Shawnee's statute of repose.

¹ Although outside the scope of the questions presented on appeal, Defendants maintain their position that Respondent's claims for product liability should be dismissed because Respondent's allegations target the service provided by CyberMD and not the functionality of the program itself. *See Rodgers v. Christie*, 795 F. App'x 878, 880 (3d Cir. 2020) (denying product defect claim related to an algorithm that used various factors to estimate a criminal defendant's risk of absconding or endangering the community); *Social Media Cases*, 2023 WL 6847378, at

i. The injury causing aspect of an AI model is defined by the interaction between the software and the user.

Product liability claims for interactive AI models pose significant challenges to judges, plaintiffs, and defendants alike. *See e.g. In re Uber Technologies, Inc., Passenger Sexual Assault Litigation*, 745 F.Supp.3d 869, 904 (N.D. Cal. 2024). Most recently, courts have used a “defect specific” approach in determining the threshold question of whether an application that utilizes an AI algorithm to provide a service (like the Uber rideshare app) falls under the auspices of strict product liability claims. *Id.* at 905. This approach asks whether the specific element of the software or application in question can be analogized to a tangible product. *See e.g. In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F.Supp.3d 809, 848-854 (N.D. Cal. 2023) (comparing defects in parental controls and age verification systems in social media apps to real-world products like physical parental locks on prescription medicines and software parental locks on televisions).

Though not specifically addressed in the *Uber* litigation, the defect specific approach provides a helpful framework for courts in determining what the “injury causing aspect” of a software product actually *is*. For example, in the *Uber* litigation cases, it was not the underlying algorithm that was sexually assaulting riders. Rather the court found it was the lack of certain safety features, like giving riders the option to choose a driver of the same sex, that allowed the plaintiffs’ product liability claims to survive the defendant’s motion for summary judgment. In other words, it was the *interaction* between the software and the consumer that constituted the injury causing aspect, not the underlying code itself.

Like the algorithms at issue in the *Uber* and *Social Media* litigations, CyberMD’s algorithm is a product insofar as it is comparable to a tangible item or traditional software (like

parental controls installed on a TV). Taking this framework into account, the injury causing aspect of the CyberMD AI program was not the underlying code, but rather the program’s failure to diagnose *in this specific instance*. As such, the question then becomes whether CyberMD’s failure to identify the lesion present on Mr. Miller’s scans in 2018 would have been discoverable by a reasonably prudent person within the next four years. For the reasons that follow, the Court should find that it was.

ii. Other jurisdictions provide a persuasive framework for analysis.

The exception to Shawnee’s Statute of Repose that is at issue in this case is codified in Shawnee Rev. Stat. § 12-410(b)(3). In relevant part, Subsection (b)(3) creates an exception to the statute of repose on the condition that, “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[.]” Although this is a matter of first impression for Shawnee, other jurisdictions have applied similar statutes based on the Model Uniform Product Liability Act (1979) that contain substantially the same language². The Kansas Product Liability Act, K.S.A. § 60-513 *et seq.*, is one such example. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 756 (1993) (stating the KPLA is based on the Model Uniform Products Liability Act).

Like Shawnee’s product liability statute, K.S.A. § 60- 3303(b)(2)(D) provides that the State’s ten year statute of repose for strict product liability claims does not apply “if ... the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than ten years after the time of delivery[.]” *See Arnold v.*

² Shawnee’s statute of repose for product liability appears to be based on the Model Uniform Product Liability Act. *See* 44 Fed.Reg. 62,714 at 62,732 (1979) (“The ten- (10-) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery[.]”).

Riddell, Inc., 882 F.Supp. 979, 988 (D. Kansas 1995). Because the language of K.S.A. § 60-3303(b)(2)(D) is substantially the same as Shawnee’s statutory repose exception, cases that interpret this section of the KPLA are instructional. See e.g. *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 396 (2008) (stating, “when confronted with matters of first impression involving Idaho statutes, this Court may glean insight from the interpretations of sister states concerning similar or identical statutes”); *Michaud v. Town of Campton Police Dept.*, 176 N.H. 542, 547 (2024) (looking to federal law applicable under an analogous FOIA exemption for guidance in resolving question regarding state Right-To-Know law); *Zaldivar v. Prickett*, 297 Ga. 589, 598-600 (2015) (interpreting a Georgia statute by looking to decisions in other jurisdictions with similar statutes, including California, Colorado, Florida, Kansas, Michigan, New Hampshire, and Wyoming).

iii. Applicability of the undiscoverable defect exception is defined by the interaction between the manufacturer, the product, and the consumer.

When determining whether a plaintiff’s claim falls under the exception to a statute of repose due to the undiscoverable nature of the alleged defect, the operative question is whether, “under the circumstances of this case, would a careful person, without placing himself or herself in danger, have been able to comprehend the danger and determine how to avoid the danger?” *Arnold v. Riddell, Inc.*, 882 F.Supp. 979, 988 (D. Kansas 1995) (quoting *Baumann v. Excel Indus., Inc.*, 17 Kan.App.2d 807, 819 (1993))

In *Baumann*, the plaintiff lost four fingers from his left hand when he attempted to manually prime the engine of his riding lawnmower while the machine was running. 17 Kan.App.2d at 809. To access the manual pump valve, the plaintiff reached between two moving parts of the engine. *Id.* In doing so, the plaintiff’s hand was pulled into the drive belt (the part

responsible for transferring engine power to the mower's transmission and blades) and against a moving pulley. *Id.* The plaintiff brought strict liability claims against the manufacturer of the mower, alleging that the proximity of the manual pump valve to the moving parts constituted a defect that was not discoverable until the time of the accident. *Id.* at 818. The Kansas Court disagreed, stating that:

A careful person would have read the manual, would have known where the manual valve was located, and would have seen the proximity of the valve to the moving belts and pulleys. Upon preliminary examination of the mower at the time of delivery, a reasonably prudent person would have seen that an attempt to use the manual valve when the mower's engine was running could result in injury.

Id. at 819. Although the manufacturer of the mower did not explicitly direct users *not* to attempt to prime the fuel pump when the engine was running, the plaintiff was unable to defeat the statute of repose under the undiscoverable defect exception. As demonstrated by the court in *Baumann*, the analysis for determining whether the “injury causing aspect” of a product is discoverable at the time of delivery takes a practical, common sense approach.

The Court's approach in *Baumann* considers the interplay of responsibility and reasonableness between the consumer and the manufacturer, taking into account the nature of the product at issue. For example, in *Arnold v. Riddell, Inc.*, 882 F.Supp. 979, the court applied the *Baumann* analysis to product liability claims brought by parents of an injured high school football player against the football helmet manufacturer. In this case, the player suffered a devastating neck injury when he collided head first with another player during a game. *Id.* at 986. The injury left the player a quadriplegic, and his parents sued the manufacturer of the helmet, alleging that the helmet's padding system (designed to support and protect the player's neck) was defective. *Id.* On appeal, the court asked the same question posed by *Baumann* to determine

whether the claim fell under the exception for undiscoverable defect; “under the circumstances of this case, would a careful person, without placing himself or herself in danger, have been able to comprehend the danger and determine how to avoid the danger?” *Id.* at 988. The court’s analysis was delivered in two parts.

First, the court found that the young athlete would not have been able to comprehend the danger, because unlike the proximity of the manual valve to moving parts in *Baumann*, the defect in the helmet’s padding system would not have been discoverable by ordinary observation or reading a user’s manual. *Id.* As grounds for this conclusion the court considered the evidence that the jury used in determining that the helmet was defective. *Id.* In order to determine that increasing the padding in the helmet even slightly could have prevented the injury, the jury heard extensive expert testimony, given by biomechanical engineers, who tested the functionality of the helmet, using “everything from sophisticated instruments, such as accelerometers (used to measure force levels), to cadavers (used for evaluating the effects on the human body of impacts to the top of the head).” *Id.* Because the defect (insufficient padding) was only observable using advanced scientific techniques, even the most cautious high school football player in the world would not have been able to comprehend the danger of the defective helmet.

Next, the court considered whether the player had the ability to avoid the danger posed by the defective helmet. *Id.* It was uncontested that young Arnold was well educated and well practiced in the playing techniques used to reduce spinal injury. *Id.* Although his head was lowered during the play that led to his injury, both parties agreed that he “did nothing wrong” in executing the play, and the position of his head was not intentional. *Id.* Additionally, the court considered the nature of the product at issue, stating

It is important to remember, in assessing J.R.'s ability to avoid the danger posed by the defect in the [helmet's] energy attenuation system, that a football helmet is a safety device. Its precise purpose is to protect players who are hit in the head. It would be no answer, then, to say that a reasonably prudent wearer of the [helmet] could have avoided quadriplegic injury by avoiding a blow to the top of the head like the one J.R. suffered.

Id. In sum, the court looked to the actions of the player, as well as the purpose of the defective product. Unlike the plaintiff in *Baumann*, who could have avoided the danger of moving parts by turning off the mower before accessing the fuel pump, the young athlete in *Arnold* could not have avoided the danger of playing football in a defective helmet by never getting hit in the head.

Returning to the case at hand, the question before the Court is whether (1) Mr. Miller, being aware of the health consequences of prolonged asbestos exposure, and having experienced symptoms consistent with early stage lung disease, (2) acted as a careful person would when he accepted the conclusions of an artificial intelligence software program, and (3) did not pursue additional care or a second opinion from a licensed health care provider.

A careful person in Mr. Miller's position would have read the pop-up disclaimer and understood that he or she was not interacting with a health care professional. A "diagnosis" from CyberMD is comparable to a "diagnosis" from the well known internet health website WebMD. Although CyberMD allows users to access more advanced features than a platform like WebMD, it is common knowledge that the results an individual receives from putting their symptoms into an internet resource is not a substitute for health care provided by a licensed professional. A careful person would

have perceived the danger of relying on the conclusions of a software program, especially given Mr. Miller's history of extensive asbestos exposure. A reasonably prudent person would have sought review of the scans by a licensed healthcare provider, and understood that the danger of misdiagnosis far outweighed the inconvenience and burden of travelling to the nearest hospital.

Because Mr. Miller could or should have perceived the danger of relying on a program that explicitly identified itself as "not a licensed health care provider," and because Mr. Miller could have avoided the danger without risk to himself by seeking care from an actual healthcare provider, the Court should find that the injury causing aspect (failure to identify) was discoverable once Mr. Miller received CyberMD's conclusions and referral for medication management. This result is supported by the fact that a retrospective review of Mr. Miller's 2018 scans show a lesion that would have likely been identified by a minimally competent healthcare provider. This Court should reverse the Court of Appeals and hold that Respondent's product liability claims are barred by Shawnee's four year statute of repose.

CONCLUSION

Any loss of life that occurs as the result of the ongoing healthcare crisis in Shawnee is a tragedy, including the loss of Mr. Miller. However, under the proper application of law, MHS cannot be held vicariously liable for his passing. While the application of strict product liability to AI systems may be available for other plaintiffs in the future, in this case, the statute of repose passed before any legal action was filed. Because the circumstances surrounding this case do not meet the requirements for either

the continuous course of treatment or the undiscoverable defect exceptions to the four year statute of repose, the holding of this Shawnee Court of Appeals should be reversed, and summary judgment should be granted.

Respectfully Submitted,

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