
NO. 26-338

IN THE

Shawnee Supreme Court

NOVEMBER TERM 2026

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

Petitioners,

— *versus* —

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

Respondent.

*On Petition for Leave to the
Shawnee Court of Appeals
for the Second Circuit*

BRIEF FOR PETITIONERS

May it please the Algorithm

Attorneys for Petitioners

QUESTIONS PRESENTED

- I. Whether Metropolitan Health System can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors made by Cyber-Care Solutions' autonomous artificial intelligence software tool, Cyber MD.
- II. Whether Shawnee's four-year statutes of repose bar Respondent's claims or whether the repose periods were tolled/extended by:
 - (a) Cyber MD's annual diagnostic evaluations constituting a "continuous course of treatment" under Shawnee Revised Statute § 12-404; or
 - (b) The latent, undiscoverable nature of the algorithmic flaw and subsequent retraining under the exceptions in Shawnee Revised Statute §12-410.

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OPINIONS BELOW

The unreported opinion of the Circuit Court of Simmons County for the State of Shawnee in *Evelyn Miller, Individually and as Special Administrator for the Estate of Elias Miller, Deceased, v. Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC*, No. 25-L-24601 (Mar. 6, 2025), is contained in the Record of Appeal at pages 2-13. The Circuit Court GRANTED Defendant's motion for summary judgment under Shawnee Rule of Civil Procedure 56 and DISMISSED WITH PREJUDICE Plaintiff's complaint in its entirety. The unreported opinion of the Shawnee Court of Appeals for the Second District in *Miller v. Metropolitan Health System, Inc., and Cyber-Care Solutions, LLC*, No. 25-123 (Feb. 24, 2026), is contained in the Record of Appeal at pages 16-29. The Court of Appeals REVERSED the Circuit Court's judgment and REMANDED the case for further proceedings.

STATUTORY PROVISIONS INVOLVED

The following provisions of the Shawnee Revised Statutes are relevant to this proceeding: Shawnee Revised Statute § 12-404 and Shawnee Revised Statute §12-410. Also relevant is Shawnee Rule of Civil Procedure 56.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case arises out of the consequences of decedent Elias Miller's sole reliance on a new artificial intelligence tool, Cyber MD, to screen and diagnose his respiratory health concerns. Following Miller's death, his wife, Evelyn Miller (Respondent), brought vicarious liability and strict product liability claims against Metropolitan

Health System, Inc. (“MHS”) and Cyber-Care Solutions, LLC (“CCS”) (Petitioners). R. at 2. Respondent seeks to hold MHS liable for CCS’s independent conduct in creating Cyber MD and to hold CCS liable for Cyber MD’s past defects. *Id.*

Elias Miller was an employee of Shawnee Steel Company in Cartersville, Shawnee, in rural Simmons County, for forty-six years. R. at 3. During his employment, Mr. Miller consistently maintained asbestos-insulated machinery. *Id.* Despite the Occupational Safety and Health Administration’s updated standards calling for the termination of asbestos usage in mills, the Shawnee Steel Mill did not abide by these protocols, and Mr. Miller continued to work in asbestos-insulated environments without respiratory protective equipment. *Id.* Before Mr. Miller retired in 2016, he received an employment-sponsored chest screening in 2012, which a radiologist read as “unremarkable.” *Id.*

Simmons County is a healthcare desert and was officially designated as a Health Professional Shortage Area and Medically Underserved Area in 2016. R. at 4. The nearest in-person radiology facility was at MHS’s flagship hospital in Goshen, a 3.5-hour drive from Cartersville. *Id.* MHS is a large regional healthcare network, and it contracted with CCS in 2012 to create a remote telehealth platform, titled Cyber MD. *Id.* Mr. Miller turned to Cyber MD when he realized he could be at risk for respiratory disease due to his prolonged asbestos exposure. R. at 6. Upon experiencing shortness of breath in April 2018, Mr. Miller logged into MHS’s online portal and initiated a virtual chat session directly with Cyber MD. *Id.*

Cyber MD is an artificial intelligence diagnostic system used to assist patients with medical questions, compilation of their clinical history, and diagnostic testing based on medical information the patient inputs. R. at 5. Upon entering Cyber MD, Mr. Miller was presented with MHS's blue, underlined Terms and Conditions hyperlink. R. at 4. Clicking these terms opened a standalone webpage that presented 34 lines of text on a plain white background in a smaller font size. *Id.* Within these terms was a clause that explicitly stated that the physicians and software Cyber MD utilized were not employees or agents of MHS, and therefore, MHS exercised no operational control over clinical decision-making. R. at 4-5. Additionally, before initiating a chat session with Cyber MD, users such as Mr. Miller were required to navigate a pop-up box which stated in red, 16-point font that the software was not a licensed healthcare professional, but an artificial intelligence program. *Id.* To use Cyber MD, users were required to click "Accept" on the pop-up box. *Id.*

Cyber-Care Solutions received FDA clearance for Cyber MD in February 2017 and then marketed Cyber MD nationally under the slogan "Cyber MD: Care Everywhere." R. at 5. A month later, MHS integrated Cyber MD into its telehealth portal. *Id.* Although MHS exclusively controlled Cyber MD's patient-facing portal, displaying MHS branding, CCS had proprietorial control over Cyber MD's development and infrastructure, as it was responsible for training Cyber MD. *Id.* When CCS initially trained Cyber MD in 2017, it achieved a 97% accuracy rate in classifying lung lesions. *Id.* In 2023, CCS had to retrain Cyber MD following a 12% drop in accuracy but subsequently restored its high accuracy rate. R. at 5-6.

Mr. Miller's first encounter with Cyber MD was in April 2018. He initiated his intake with Cyber MD by both clicking MHS's hyperlinked Terms and Conditions and clicking "Accept" on Cyber MD's pop-up box. *Id.* During his intake, Mr. Miller took the time to detail his long occupational history with asbestos, after which Cyber MD ordered a chest X-ray and CT scan through a mobile radiology service visiting Cartersville, R. at 6. Mr. Miller had no family history or prior documented history of respiratory disease, was not asthmatic, and did not smoke. *Id.* He turned to Cyber MD when he experienced shortness of breath solely to survey a potential asbestos-related injury. R. at 6. Cyber MD stated that once it received the scans from the mobile clinic, it would analyze them and review the results with Mr. Miller. *Id.*

Cyber MD evaluated the scans and noted that Mr. Miller demonstrated zero evidence of malignancy. *Id.* Cyber MD diagnosed Mr. Miller with adult-onset asthma, referred him to a local practitioner for inhaler management, and recommended follow-up imaging. *Id.* Mr. Miller underwent periodic check-ins with Cyber MD, visiting the software four times over the course of four years. *Id.* In 2021, after his fourth visit, in which Cyber MD reported zero evidence of malignancy, it was determined that Mr. Miller no longer required annual imaging. *Id.* In October 2023, Mr. Miller suffered a spontaneous pneumothorax and was brought to MHS's flagship hospital. *Id.* Medical imaging revealed a 6.4-centimeter malignant mass in his left lung with extensive metastases to the pleura and spine. *Id.* Retrospective medical imaging review noted a 7-millimeter lesion was visible in Mr. Miller's 2018 scan, growing to 47-millimeters by 2022. *Id.* Mr. Miller passed away in April 2024. R. at 7.

Although Mr. Miller’s medical experience unfortunately resulted in his death, he was aware of the contractual relationship between MHS and Cyber MD. He was also aware of his prolonged exposure to asbestos and therefore, his high risk of respiratory disease. Nonetheless, Mr. Miller chose to rely on an artificial intelligence software program designed for preliminary diagnoses, and self-defined as lacking the licensure of a healthcare professional.

II. NATURE OF PROCEEDINGS

Circuit Court of Simmons County. On March 6, 2025, after her husband, Elias Miller, died, Plaintiff Evelyn Miller (“Miller”) filed this action in the Circuit Court of Simmons County in the state of Shawnee. R. at 2. Miller stated a vicarious liability claim under the doctrine of apparent agency against defendant Metropolitan Health System (“MHS”) for Cyber MD’s diagnostic errors. *Id.* Miller also stated a strict product liability claim against defendant Cyber-Care Solutions (“CCS”) based on design defect and failure to warn. *Id.* In response and after discovery, both MHS and CCS moved for summary judgment. *Id.* MHS contended it cannot be held vicariously liable under the doctrine of apparent agency because an apparent agency relationship did not exist between MHS and Cyber MD, as evidenced in the disclaimer in its Terms and Conditions. *Id.* MHS and CCS also asserted that Shawnee Revised Statutes §§ 12-404 and 12-410, the applicable statutes of repose, precluded Miller’s claims entirely as a matter of law. R. at 2-3.

After reviewing the undisputed facts and statutory provisions, the Circuit Court found no genuine issues of material fact and ruled that both Defendants were

entitled to judgment as a matter of law. R. at 3. Regarding the vicarious liability claim, the Circuit Court concluded that Mr. Miller knew of the nature of the software and the lack of an agency relationship. R. at 10. Regarding the strict product liability claim, the Circuit Court further concluded that the statutes of repose were not extended by an exception and thus barred. Accordingly, the Circuit Court GRANTED both Defendants' Motions for Summary Judgment pursuant to Rule 56 and DISMISSED Plaintiff's Complaint WITH PREJUDICE in its entirety. R. at 13.

Shawnee Court of Appeals for the Second District. Plaintiff-Appellant Miller appealed the Circuit Court's order granting summary judgment in favor of Defendants-Appellees MHS and CCS to the Shawnee Court of Appeals for the Second District. R. at 16. The Court of Appeals found the Circuit Court erred in holding that, as a matter of law, MHS could not be held vicariously liable under the doctrine of apparent agency because procedural unconscionability concerns regarding the agency disclaimer present a material factual dispute. R. at 14, 21. The Court of Appeals also found that the trial court erred in ruling that Miller's claims were barred by §§ 12-404 and 12-410, concluding that the "continuous course of care treatment" exception and the undiscoverable nature of Cyber MD's defect tolled/extended the repose limits for the malpractice and product liability claims, respectively. R. at 24-25, 27. Accordingly, the Court of Appeals REVERSED the Circuit Court's grant of summary judgment on both the vicarious liability and product liability claims and REMANDED for further proceedings consistent with this opinion. R. at 17, 28.

Petitioners MHS and CCS petitioned for leave to appeal pursuant to Shawnee Supreme Court Rule 315. R. at 29. This Court GRANTED the petition, but limited the appeal to the following two questions: (1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous artificial intelligence software tool; and (2) whether Shawnee’s four-year statutes of repose bar Respondent’s claims or whether the repose periods were tolled/extended by a “continuous course of treatment” exception or the latent, undiscoverable nature of the flaw. *Id.*

SUMMARY OF THE ARGUMENT

This case presents itself in an era of technological advancement, in which the healthcare industry is implementing emerging technologies, such as artificial intelligence software, into health care delivery. While achieving quality patient care and expanding access to care anchor technological advancements in healthcare, it is inevitable that these tools may make errors, as seen in the case before this Court. In navigating how modern algorithmic systems interact with the foundational legal principles of agency, contract formation, and tort liability, this case examines two issues: (1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI software tool and (2) whether the vicarious liability and strict product liability claims brought are barred by the State of Shawnee’s statutes of repose. However, in this case, neither issue presents a genuine dispute of material fact, therefore insufficient to overcome summary judgment. Accordingly, Petitioners respectfully ask this Court to reverse

the holding of the Shawnee Court of Appeals for the Second District and reinstate the Circuit Court of Simmons County's grant of summary judgment in favor of Petitioners Metropolitan Health System ("MHS") and Cyber-Care Solutions ("CCS") on both Respondent's vicarious liability and strict product liability claims.

I.

The Shawnee Court of Appeals for the Second District improperly found that there were material factual disputes regarding the vicarious liability claim sufficient to overcome summary judgment. Respondent solely relies on the doctrine of apparent agency to present her vicarious liability claim against MHS. To be held vicariously liable under the doctrine of apparent agency, an apparent agency relationship must exist between the principal and the third party; in this case, MHS and Cyber MD are the principal and third party, respectively. MHS cannot be held vicariously liable because no apparent agency relationship between MHS and Cyber MD existed, nor could such a relationship have reasonably manifested itself to Elias Miller based on the facts of this case.

There were clear indicators that an apparent agency relationship never existed between MHS and Cyber MD, namely, MHS's agency disclaimer and Cyber MD's warning that it was not a licensed health care professional. Both these warnings were also binding on Mr. Miller as they constituted enforceable electronic contracts. Both MHS's and Cyber MD's terms were presented through sign-in wrap and click wrap agreements, respectively, and following established contract law, Mr. Miller is bound to their terms because of their conspicuous notice and Mr. Miller's affirmative actions that manifested his assent.

Respondent attempts to extricate Mr. Miller from the binding terms of MHS's agency disclaimer in the Terms and Conditions specifically by asserting a procedural unconscionability defense. However, this defense also raises no material disputes of fact. In evaluating procedural unconscionability, Courts consider factors such as formatting, one-sided and oppressive terms, and bargaining power, all of which are absent in this case. MHS presented its terms clearly and conspicuously to Mr. Miller by explicitly stating its relationship with Cyber MD. Mr. Miller also had an opportunity to meaningfully review and assent to these clear and conspicuous terms. Furthermore, the Court of Appeals improperly extended issues beyond procedural unconscionability into contract law by treating a lack of rural healthcare access as evidence of legal unconscionability.

Respondent's attempts to impose liability on MHS through vicarious liability evade explicit and demonstrated knowledge that Mr. Miller was aware of the nature of the health care he sought out and received. It would be damaging to Petitioner MHS and future health systems in similar scenarios to improperly extend vicarious liability to autonomous artificial intelligence tools based on specious arguments. To protect health systems pursuing innovation to expand access to care, and for the foregoing reasons, the Court of Appeals should have found there were no material factual disputes regarding vicarious liability, entitling MHS to summary judgment.

II.

The Shawnee Court of Appeals for the Second District improperly found that Respondent's medical malpractice and product liability claims were not barred by the State of Shawnee's statutes of repose. Under §12-404, a medical malpractice claim

cannot be brought more than four years after the date on which the alleged negligent act or omission occurred. Similarly, under §12-410, a product liability claim cannot be brought more than four years after the date of first sale, lease, or delivery of possession to the first user or consumer of the allegedly defective product.

Respondent argues that, despite the strict four-year limitation on temporal liability for medical malpractice and product liability claims, this period is tolled by exceptions to the statutes of repose. The State of Shawnee offers relief in narrow instances for medical malpractice claims brought outside the repose period. §12-404(b) denotes that patients who engaged in a continuous course of treatment with their provider are exempt from the four-year bar on medical malpractice claims. Additionally, under §12-410(b), the period of repose for a product liability claim is inapplicable under few circumstances, including cases in which the defect that gave rise to the alleged injury was latent and undiscoverable.

Specifically, Respondent claims Mr. Miller pursued a continuous course of treatment with Cyber MD through annual chatbot visits over four years, thereby negating the four-year bar. However, Respondent fails on both grounds necessary to establish a continuous course of treatment because four isolated visits were neither continuous nor treatment. First, the continuous course of treatment exception was created to protect the patient-provider relationship, which does not exist between a patient and a chatbot. Second, Mr. Miller was not treated by Cyber MD, yet Respondent's entire claim is premised on the assertion that Cyber MD *failed to treat*.

Lastly, annual visits are not continuous, and treating such isolated encounters as continuous would extend the exception beyond its legislative boundaries.

Respondent also claims that Cyber MD's defect was latent and undiscoverable by an ordinary, reasonably prudent person, preventing Mr. Miller from bringing a product liability claim during the first several years. This claim is also unfounded. Cyber MD's defect that caused Mr. Miller's injury was discoverable through reasonable prudence on part of Mr. Miller; however, he voluntarily relied on the artificial intelligence chatbot's medical advice and abstained from exercising other treatment options. In this same reasoning, Cyber MD put Mr. Miller on express notice that Cyber MD was not a licensed health care professional, sufficient to demonstrate the discoverability of a defect. Respondent further asserts Mr. Miller was incapable of discovering the defect due to the medical knowledge required to decipher radiologic scans. However, this argument fails to recognize that the State of Shawnee applies an objective standard to defect discoverability, and thus whether Mr. Miller had professional medical experience is of no consequence.

In finding that the continuous course of treatment exception under §12-404(b) and the latent defect exception under §12-410(b)(3) apply to this case, the Court of Appeals improperly interpreted the statutes by expanding these exceptions. Exceptions to statutes of repose, which generally operate as strict limits on temporal liability, cannot be overextended to cases in which they are inapplicable. Otherwise, exceptions will swallow the whole, and statutes of repose will cease to exist.

ARGUMENT

Standard of review. This appeal raises two legal issues: 1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI software tool and 2) whether Respondent's claims are barred by Shawnee's four-year statutes of repose or whether the repose periods were tolled/extended by a "continuous course of treatment" exception or the latent, undiscoverable nature of the algorithmic flaw. Both questions presented in this appeal are questions of law. Accordingly, *de novo* is the appropriate standard of review for a grant of summary judgment on both issues. Sn. R. Civ. P. 56. Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018). On appeal, the Court must view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party, and summary judgment must be denied if fair-minded individuals could differ as to the inferences to be drawn from the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I. METROPOLITAN HEALTH SYSTEM CANNOT BE HELD VICARIOUSLY LIABLE FOR CYBER MD'S DIAGNOSTIC ERRORS BECAUSE AN APPARENT AGENCY RELATIONSHIP BETWEEN METROPOLITAN HEALTH SYSTEM AND CYBER-CARE SOLUTIONS DID NOT EXIST.

This Court should reverse the Court of Appeals' holding that there is a genuine issue of material fact as to whether an apparent agency relationship existed between Metropolitan Health System ("MHS") and Cyber MD. Under the doctrine of apparent agency, a hospital can only be held liable for the malpractice or negligence of an

independent contractor or third-party provider if the plaintiff raises a triable issue of fact showing that a patient reasonably believes, based on the provider's manifestations, that the actor is an agent of the provider. *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). In the case before this Court, the undisputed facts establish three grounds that unequivocally support a finding for summary judgment on the claim of vicarious liability: first, Mr. Miller could not have reasonably believed that Cyber MD was an agent of MHS; second, MHS's terms and conditions disclaimed an agency relationship between MHS and CCS through enforceable electronic contracts; and third, MHS's electronic contract was not procedurally unconscionable.

A. Elias Miller could not have reasonably believed that Cyber MD was an agent of MHS because MHS did not hold itself out as the provider of care.

For the vicarious liability claim, Respondent solely relied on the doctrine of apparent agency; however, Respondent cannot prevail under this doctrine because MHS and Cyber MD maintained a purely contractual relationship that never amounted to apparent agency. Moreover, neither MHS nor Cyber MD's actions ever indicated that Cyber MD was MHS's agent, and thus, Mr. Miller could not have reasonably believed that an agency relationship existed.

An apparent agency relationship exists where: (1) the principal acts in a manner that would lead a reasonable person to conclude that the negligent third party was an employee or agent of the principal; (2) the principal knew of and acquiesced in the conduct creating the appearance of authority; and (3) the plaintiff reasonably relied on the principal's conduct, consistent with ordinary care and prudence. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993); *Webster v. CDI*

Ind., LLC, 917 F.3d 574, 575 (7th Cir. 2019). In this case, element one, also referred to as “holding out,” was the primary element in dispute. R. at 22. The “holding out” element in this case is not satisfied because MHS’s Terms and Conditions disclaimed an agency relationship, its corporate branding was insufficient to establish apparent agency, and Mr. Miller did not seek out care specifically from MHS.

1. MHS’s Terms and Conditions explicitly disclaimed an agency relationship between MHS and CCS.

The fact that MHS explicitly disclaimed an agency relationship between MHS and CCS directly negates the assertion that MHS held itself out as the provider of care through Cyber MD. “Holding out” does not require the hospital to explicitly state that the third party is an employee. *Gilbert*, 156 Ill. 2d at 525. However, although not dispositive, it is worth noting when the principal has explicitly disclaimed that a third party is not its employee to support a finding of no agency relationship. See *Leon v. Caterpillar Indus.*, 69 F.3d 1326, 1336 (7th Cir. 1995) (referencing the language in entities’ sales agreement that “expressly disavows a relationship between Calumet and Caterpillar” to support its finding that there was no agency relationship). In this case, MHS clearly provided notice to Mr. Miller that Cyber MD was an independent contractor through the following clause in its Terms and Conditions:

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

R. at 16. (emphasis added).

MHS's Terms and Conditions explicitly disclaim the existence of an agency relationship between MHS and Cyber MD, disproving the existence of an agency relationship. Similar to *Cantrell*, this case involves a conspicuous display explaining Cyber MD's independent contractor status. *Compare Cantrell v. Ne. Ga. Med. Ctr.*, 235 Ga. App. 365, 368 (1998) (holding that conspicuous posted signage and forms revealing the doctor's independent contractor status was sufficient to negate apparent authority for a direct verdict) with *Gilbert*, 156 Ill. at 526 (holding that the hospital's failure to identify physicians as independent contractors, combined with consent forms stating patients would be treated "by physicians and employees of the hospital," created a factual dispute as to the holding out element). MHS's Terms and Conditions clearly and conspicuously disclaimed an agency relationship, supporting that Mr. Miller could not have reasonably believed MHS was the provider of care.

However, the Eighth Circuit has maintained that an agency disclaimer "only negates the existence of actual authority; it does not, however, affect the creation of an agency relationship through apparent authority." *Asa-Brandt, Inc. v. ADM Inv. Servs.*, 344 F.3d 738, 750 (8th Cir. 2003). Following the approach of evaluating the totality of the circumstances in this case in the inquiry of apparent agency, the Seventh Circuit has considered factors such as the provider's actions or inactions and the patient's knowledge of the provider's arrangements. *Webster*, 917 F.3d at 577. Although MHS's agency disclaimer on its own is insufficient to negate the existence of apparent authority, the facts of this case further demonstrate that MHS did not hold itself out as the provider of care.

Looking to Mr. Miller's knowledge of the relationship between MHS and Cyber MD, Mr. Miller was aware of the contractual nature of MHS and Cyber MD's relationship. Digital audit logs confirmed Mr. Miller opened MHS's hyperlinked Terms and Conditions in April 2018, R. at 19, and he indicated his assent to these terms by accessing Cyber MD through a sign-in wrap agreement that stated, "By entering the portal, I accept the MHS Terms and Conditions." The Court of Appeals asserted that because Mr. Miller opened the Terms and Conditions for only four seconds, he passively assented. R. at 20. However, Mr. Miller continued to use the Cyber MD platform for three more years without opening the Terms and Conditions again, *id.*, which could indicate he understood the Terms and Conditions and had no further questions regarding them. Because Mr. Miller accessed MHS's Terms and Conditions that clearly disclaimed the existence of an agency relationship, and accepted these terms by using Cyber MD, Mr. Miller could not have reasonably believed that he was receiving care from MHS.

2. The Cyber MD pre-session pop-up box stated that Cyber MD was not a licensed health care professional.

In addition to MHS's Terms and Conditions, users were required to accept the terms of Cyber MD's pop-up box that stated, "Cyber MD is not a licensed health care professional. It is an artificial intelligence software program." R. at 5. Following the same reasoning applied to MHS's Terms and Conditions, Mr. Miller could not have reasonably believed MHS was providing care if he was provided notice that he was not receiving care from a licensed health care professional. This pop-up appeared before each of the four chat sessions Mr. Miller had with Cyber MD, repeatedly

notifying Mr. Miller of the terms. His four acceptances support the inference that he understood he was receiving care from Cyber MD's independent software, not an MHS employee or agent. In fact, Cyber MD referred Mr. Miller for external care only twice: once for a chest X-ray and scan through a mobile radiology service and once to a local practitioner for inhaler management. R. at 6. Because MHS was located 3.5 hours away, a reasonable person would not believe that locally provided care was being provided by MHS. Cyber MD's disclosure that it was not a licensed health professional, coupled with Mr. Miller's awareness that no MHS employees were involved, negates any reasonable belief that he was receiving care from MHS.

However, the Court of Appeals countered that this pop-up box only informed users of Cyber MD's nature and failed to explicitly state that "MHS disclaimed all legal responsibility for diagnostic errors generated by the tool." R. at 24. The Court of Appeals therefore concluded that whether a reasonable patient in Mr. Miller's position would understand that MHS was disclaiming vicarious liability remained a triable issue of fact. *Id.* Nevertheless, the Court of Appeals' argument is misplaced under the doctrine of apparent agency. This doctrine focuses on the principal's affirmative conduct and the patient's reliance on these affirmative actions. *Webster*, 917 F.3d at 576. Indeed, courts have recognized that "a communication of authority by the agent (*or, inferentially, an agent's failure to disclaim authority*) is insufficient to create an apparent agency relationship." *Koval v. Simon-Telelect, Inc.*, 979 F. Supp. 1222, 1227 (N.D. Ind. 1997) (emphasis added). Thus, MHS's failure to disclaim all legal responsibility does not create an apparent agency relationship, especially when

MHS already affirmatively disclaimed any agency relationship in its Terms and Conditions. This disclaimer, considered with Cyber MD's pop-up box, informed Mr. Miller that MHS was not the provider of his care. Because apparent agency depends on the principal's manifestations, the absence of an additional disclaimer of "all legal responsibility" is immaterial to whether MHS created an appearance of an agency.

3. MHS's corporate branding on the Cyber MD interface is insufficient to establish apparent agency.

Also relevant to evaluating the totality of circumstances in an apparent agency analysis is the provider's actions. *Webster*, 917 F.3d at 577. To access Cyber MD, users navigated through MHS's primary domain, and Cyber MD's user interface was wrapped in MHS branding. R. at 18. Respondent argued that MHS's branding decisions created a genuine issue of fact as to whether MHS created a public impression of an integrated healthcare delivery system, and the Court of Appeals agreed. R. at 7-8, 22. However, this conclusion was improper.

In a recent decision, the Eleventh Circuit in *Pearce v. State Farm Florida* determined that branding such as logos and trademarks on booklets and agreement documents is insufficient to establish apparent agency on its own when it does not establish substantial control or representation. *Pearce v. State Farm Fla.*, No. 23-14081, 2026 U.S. App. LEXIS 11225, at 14 (11th Cir. 2026). MHS's branding on the Cyber MD portal is just like State Farm Florida's branding in *Pearce* because it fails to establish substantial control or representation of Cyber MD. The only *indicia* of control or representation Respondent offered are that users access Cyber MD through MHS's domain and that MHS's branding is on the Cyber MD portal, but these are

only two minimal features connecting MHS to Cyber MD. They are both only apparent to patients seeking to use Cyber MD, like how only State Farm policyholders would see State Farm Florida's branding.

In older decisions, the Third and Fourth Circuits determined that national advertising and shared logos can present a question of fact regarding apparent agency by creating an impression of authority. *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166-67 (4th Cir. 1988) (holding that using Holiday Inn's branding throughout the motel and advertising promoting a national system could lead a jury to reasonably conclude that Holiday Inn-Concord was owned by Holiday Inns, Inc.); *Gizzi v. Texaco*, 437 F.2d 308, 310 (3rd Cir. 1971) (holding that displaying Texaco's insignia and known slogan combined with its nationwide advertising creates a question of fact on apparent authority). This case is distinguishable from *Gizzi* and *Crinkley* because although MHS did use branding, it did not advertise Cyber MD. In fact, it was CCS that marketed Cyber MD nationally under its own slogan, "Cyber MD: Care Everywhere." R. at 5. Because MHS was not the party nationally advertising, it could not have created the "public impression of an integrated healthcare delivery system" that Respondent asserts. CCS's national marketing disassociates MHS from Cyber MD and rebuts the assertion that MHS would have any substantial ownership or control of the Cyber MD software platform.

In evaluating marketing and branding in an apparent agency analysis, *Gilbert* raised a concern about the reality of modern hospital care: hospitals are not only health care providers, but also businesses. *Gilbert*, 156 Ill. 2d at 520. Despite this,

Gilbert asserts hospitals should not use extensive marketing to compete for patients while escaping liability for any substandard care. *Id.* The Illinois and Wisconsin Supreme Courts agreed that hospitals cannot always escape liability if it was their independent contractors who provided negligent care, and a hospital's public representations and the perception they create must also be considered to determine liability. *Gilbert*, 156 Ill. 2d at 520-22; *Kashishian v. Port*, 167 Wis. 2d 24, 38 (1992). However, the marketing and branding used in this case are distinguishable from *Gilbert's* concerns. *Gilbert* sought to avoid hospitals using national marketing to persuade patients to choose them through an image of comprehensive, high-quality facilities. *Id.* However, in this case, CCS was the entity that marketed Cyber MD nationally, not MHS, thus averting itself from the concern that MHS intended to use Cyber MD to lure in patients but not take responsibility for any of Cyber MD's errors.

4. Mr. Miller was not seeking care specifically from MHS.

Another factor to consider in analyzing the totality of circumstances is whether the patient sought care from the hospital itself or whether the patient saw the hospital merely as a place for his or her personal physician to provide care. *Gilbert*, 156 Ill. 2d at 525. The Court of Appeals also improperly concluded that Mr. Miller sought care from MHS rather than Cyber MD. It reasoned that, because Simmons County was a designated Health Professional Shortage Area, Mr. Miller sought MHS's integrated healthcare system for diagnostic care, R. at 22, but the record contains no facts supporting this conclusion.

Although Mr. Miller logged into the MHS portal when he was experiencing shortness of breath, he chose to immediately initiate a virtual intake session directly

with Cyber MD. R. at 6. Considering MHS was the only major health system in Simmons County, it could be inferred that Mr. Miller simply used MHS as the only option he was aware of at the time, not because he was seeking care from MHS specifically. This is further corroborated by the fact that Mr. Miller turned to Cyber MD immediately upon logging into MHS's portal, as opposed to trying to receive care through MHS itself first.

Additionally, before Mr. Miller received his screenings through Cyber MD, his most recent chest screening was from an employment-sponsored chest screening in 2012. R. at 3. Mr. Miller's chest screening through Cyber MD took place in 2018. R. at 6. To assume that Mr. Miller was seeking diagnostic care specifically from MHS when he had never received scans from MHS prior stretches this assumption too far to make a sound argument that Mr. Miller sought out MHS. Further, Mr. Miller continued annual virtual follow-up evaluations with Cyber MD from 2019-2021, supporting that he was seeking care from Cyber MD, not MHS.

Accordingly, the conclusion that Mr. Miller was not seeking care from MHS further undermines the assertion that Mr. Miller believed he was receiving care from MHS, defeating any claim of apparent agency.

B. The Hyperlinked Terms and Conditions and Pop-up Box Constituted Enforceable Sign-In Wrap and Clickwrap Agreements, Binding Mr. Miller to their Content.

MHS's hyperlinked Terms and Conditions and Cyber MD's pop-up defeated the "holding out" element of a matter of law because they both refute an agency relationship between MHS and Cyber MD and rebut the assertion that Mr. Miller could have believed this relationship existed. Both the terms and conditions and pop-

up box also constituted enforceable electronic contracts that Mr. Miller was bound by: a sign-in wrap agreement and a clickwrap agreement, respectively.

1. MHS's Terms and Conditions was an enforceable sign-in wrap agreement because it was reasonably conspicuous and put Mr. Miller on notice.

A sign-in wrap agreement binds a user to hyperlinked terms when a user executes a separate action such as clicking a sign-in button or entering a portal, and it does not require users to review the contract terms. *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024). MHS presented a sign-in wrap agreement to Mr. Miller when he logged into Cyber MD because MHS's interface stated, "By entering the portal, I accept the MHS Terms and Conditions." R. at 23. Mr. Miller was neither compelled to click an independent box accepting the terms nor required to review the terms. *Id.* Petitioners agree with the Court of Appeals' conclusion that this constituted a sign-in wrap agreement; however, Petitioners contend that this sign-in wrap agreement was enforceable.

A sign-in wrap agreement is only enforceable if the user interface provides reasonably conspicuous notice and warns the user of binding legal consequences. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 55 (1st Cir. 2018). General characteristics courts use to evaluate conspicuousness include using larger and contrasting fonts, following the common template of a hyperlink, and the language used to direct users to find the terms, coupled with considering the entire context of the transaction. *Cullinane*, 893 F.3d at 63; *Keebaugh*, 100 F.4th at 1016. Essentially, for the electronic contract to have integrity, a reasonable person should have been able to notice it.

Cullinane, 893 F.3d at 62; *Keebaugh*, 100 F.4th at 1014. MHS met this standard in presenting its Terms and Conditions to Mr. Miller.

First, evaluating MHS's hyperlinked Terms and Conditions visually, the text followed a standard hyperlink format: blue-colored font and underlined typeface. Providing a common hyperlink appearance is not dispositive, but it does rebut concerns that a reasonable user would not have known it was a hyperlink. *Cullinane*, 893 F.3d at 63 (holding Uber's Terms of Service and Policy was not conspicuous, in part from its hyperlink deviating from a standard appearance as its text was white and bolded in a grey box). Moreover, MHS included language below the login that would put a user on notice by explicitly stating, "By entering the portal, I accept the MHS Terms and Conditions." Under *Keebaugh*, this type of language clearly explains that use of the service will constitute acceptance of the terms. *Keebaugh*, 100 F.4th at 1020-21 (holding that a mobile game app's terms of service visuals would put a reasonable person on notice because of text stating, "By tapping 'Play' I accept the Terms and Use . . ."). Considering the visual aspects of MHS's sign-in wrap agreement within the entire context of the transaction, it is undisputed that Mr. Miller was put on notice of the hyperlinked Terms and Conditions because he clicked on the hyperlink. Digital audit logs confirmed that Mr. Miller accessed the link on April 9, 2018. R. at 19. Mr. Miller's affirmative act of opening MHS's Terms and Conditions demonstrated that he was put on notice, as he encountered and understood the link sufficiently to click on it. Because MHS's Terms and Conditions were reasonably

conspicuous and put Mr. Miller on notice, these terms constituted an enforceable sign-in wrap contract to which Mr. Miller is bound.

2. Cyber MD's pop-up box was an enforceable clickwrap agreement because it was reasonably conspicuous and Mr. Miller manifested his assent through clicking "Accept."

A clickwrap agreement exists when a user is required to affirmatively click an "I agree" checkbox that is directly adjacent to the contractual terms to proceed. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853-56 (9th Cir. 2022). In this case, the pre-session pop-up box displayed before using Cyber MD was a conventional clickwrap agreement because after displaying the notice explaining the nature of Cyber MD's software, users were required to click "Accept" to proceed.

Clickwrap agreements are routinely enforced because they compel active, explicit consent, a requirement that puts users on notice of the terms being offered. *Berman*, 30 F.4th at 853-56. However, to ensure fairness of the contractual terms, courts determine if the user was put on notice of a contract by focusing on two factors: 1) if the website provided reasonably conspicuous notice of the terms and 2) if the consumer took action that unambiguously manifested his assent to the terms. *Id.* at 856. Regarding the latter, Mr. Miller affirmatively assented to the pop-up terms stating that Cyber MD was not a licensed healthcare provider. Users had to click "Accept" to proceed, and Mr. Miller did so each of the four times he used Cyber MD from 2018-2021. Repeated use of this interface through acceptance demonstrates Mr. Miller's assent to these terms.

To determine whether text is conspicuous, courts consider font size and formatting, and whether those features would have drawn the attention of a

reasonably prudent user. *Id.* at 854-57 (holding that the webpage was not reasonably conspicuous because the terms and conditions were printed in tiny gray font smaller than any other text on the page). Cyber MD's pop-up box is highly distinguishable from *Berman*, as Cyber MD's pop-up box printed its terms in red, 16-point font, and a reasonably prudent user would have noticed brightly colored font in a larger-than-average size. Like MHS's hyperlinked Terms and Conditions, Cyber MD's pop-up box provided information to Mr. Miller that rebutted any assertion that MHS was holding itself out as the provider of care, and because this information was presented through an enforceable clickwrap agreement, Mr. Miller is bound to its content.

C. MHS's Terms and Conditions Disclaiming an Agency Relationship between MHS and Cyber MD Presented through the Sign-In Wrap Agreement was not Procedurally Unconscionable.

Although MHS's Terms and Conditions were an enforceable contract to which Mr. Miller was bound, the Court of Appeals improperly concluded that this agreement was procedurally unconscionable. Procedural unconscionability concerns the formation process of a contract, evaluating factors such as disparities in bargaining power, age, education, and intelligence, to determine whether the signing party was deprived of a meaningful choice. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025); *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023). The Court of Appeals asserted the agency disclaimer in MHS's Terms and Conditions was procedurally unconscionable because of formatting, one-sided and oppressive terms, and the lack of reasonable alternative medical facilities in Simmons County. R. at 23-24. However, the Court of Appeals failed to consider whether Mr. Miller had a meaningful opportunity to understand and assent to these

terms and improperly extended issues outside procedural unconscionability into contract law to invalidate an otherwise enforceable agreement. No triable questions of fact regarding procedural unconscionability exist in this case before the Court, and Respondent's unconscionability arguments should be dismissed as a matter of law.

1. The agency disclaimer clause was not inconspicuous based on the formatting of MHS's Terms and Conditions.

As analyzed, MHS's hyperlinked Terms and Conditions was reasonably conspicuous to Mr. Miller because he accessed the linked agreement. As for the clause within the Terms and Conditions that disclaimed an agency relationship between MHS and Cyber MD, the formatting was not inconspicuous enough to render the terms procedurally unconscionable. The Court of Appeals relied on the fact that the agency disclaimer clause appeared three-quarters down a standalone page within 34 single-spaced lines of text and was in a black font smaller than the rest of the website. R. at 19. However, the clause's formatting was sufficiently conspicuous to preclude a finding of procedural unconscionability.

The Court of Appeals claimed that 34 single-spaced lines of text present an unconscionable format, but in a line-count analysis, 34 lines do not come close to unconscionability. The term formatting must be so difficult to find or read that one could not meaningfully understand it. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 22 (2006) (affirming the Illinois Appellate Court's ruling that an arbitration clause in 123 lines of "tiny single-spaced text" on an 8- by 14-inch page was procedurally unconscionable). The agency disclaimer's formatting in MHS's Terms and Conditions is highly distinguishable from the arbitration clause in *Kinkel*. MHS's Terms and

Conditions only has 34 lines of text, 89 fewer than *Kinkel*, and the disclaimer clause comprises 8 of those 34 lines, taking up a bit less than one-fourth of the line space. It would be unreasonable to conclude that a clause occupying a quarter of the Terms and Conditions was so difficult to find or read that its presentation rose to the level of procedural unconscionability.

Further, the Court of Appeals noted that the disclaimer clause was approximately three-quarters down the page. R. at 19. This fact is also highly distinguishable from *Kinkel*, in which the arbitration clause was one of five clauses within one paragraph. *Kinkel*, 357 Ill. App. 3d at 563. Rather than hiding the agency disclaimer clause within multiple other paragraphs, MHS placed the disclaimer in its own quarter of the standalone page, and simply because it was not first and foremost does not establish unconscionability. Additionally, in the 5th Circuit, CVS Caremark's arbitration agreement was not determined to be procedurally unconscionable. *Crawford Profl Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 265-66 (5th Cir. 2014) (reasoning that although CVS's arbitration agreement was in a 200-page provider manual, it was no less conspicuous than any other provision and plaintiff's failure to familiarize themselves with what they signed does not render the clause unconscionable). Following the 5th Circuit, MHS was not required to draw Mr. Miller's attention to the clause beyond how it did. If *Crawford* required plaintiffs to recognize an arbitration agreement in a 200-page manual, Mr. Miller should reasonably be expected to notice an agency disclaimer comprising one-fourth of the entire Terms and Conditions. This Court should follow the 5th Circuit to avoid

imposing burdensome expectations on healthcare providers that could shift their focus from patient care to avoiding liability. The agency disclaimer clause's formatting was not concealed or formatted in a way that Mr. Miller could not have reasonably noticed it, and thus, it was not procedurally unconscionable.

2. MHS's Terms and Conditions were not so one-sided and oppressive as to rise to the level of unconscionability.

The Court of Appeals also asserted that the agreement disclaiming agency contained one-sided and oppressive terms, however, the Court of Appeals failed to consider that Mr. Miller understood what he was assenting to, negating the assertion of procedural unconscionability. The agency disclaimer clause within MHS's Terms and Conditions was explicitly written and explained in plain language. There were no "abstruse legal terms" that could have confused a reasonably prudent user. *See Hines*, 140 F.4th at 329 (holding that a clause plainly stating, "[a]ny and all disputes or claims that arise out of this Agreement . . . shall be resolved by arbitration" was not procedurally unconscionable) (alteration in original). Similar to *Hines*, MHS did not attempt to hide the meaning behind its clause; it very clearly stated that Cyber MD was an independent software company and that the physicians and software were not employees or agents of MHS. MHS did its due diligence in writing this clause to ensure that a user would understand the relationship between it and Cyber MD.

Furthermore, Mr. Miller was not in a weaker position of bargaining power compared to MHS. The Court of Appeals asserted that Mr. Miller was an "elderly user seeking diagnostic care," R. at 23, and while both descriptions are true, neither supports procedural unconscionability. Age is considered in evaluating procedural

unconscionability, but it is insufficient on its own. *Compare Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 67-69 (2009) (holding the voluntary arbitration agreement executed was not procedurally unconscionable based solely on the resident's age) *with Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App. 3d 619, 627-29 (2010) (holding an arbitration agreement was procedurally unconscionable due to the combination of the plaintiff's elderly age, his Alzheimer's diagnosis, and his lack of legal experience). Like *Hayes*, no additional facts besides Mr. Miller's age could support that he was in a weaker position of bargaining power. Respondent could argue that Mr. Miller's health condition during the time he used Cyber MD is an additional factor to consider, but his condition was not serious enough to place him in a weaker position. When Mr. Miller first used Cyber MD, he was experiencing shortness of breath, and each visit after that was simply a follow-up evaluation. R. at 20. Health conditions that support a claim of unequal bargaining power include quickly declining health conditions that force a party to accept terms quickly, *E.g., Haydon v. Elegance at Dublin*, 97 Cal. App. 5th 1280, 1288 (2023); *Sosa v. Paulos*, 942 P.2d 357, 362 (Utah 1996), or health conditions that render a party mentally incapable of understanding the terms of the contract, *E.g., Martin v. Manorcare Health Servs., LLC*, 246 N.E.3d 598, 608 (Ohio 2024); *Wascovich*, 190 Ohio App. 3d at 627-29. Shortness of breath only fits into the former category of health conditions presenting procedural unconscionability, if any, and it still is insufficient. Multiple facts indicate that Mr. Miller was not rushed or pressured to receive care: first, Mr. Miller opened MHS's Terms and Conditions when he logged in; second, Mr. Miller took the time to detail his 35-year occupational

history with asbestos to Cyber MD; and third, Mr. Miller waited two weeks to receive his imaging results without any issues. Also, if Mr. Miller's condition was serious enough to pressure him into accepting contract terms, he likely would have been seeking emergency care from Cyber MD, not diagnostic care. Therefore, Mr. Miller was not in a weaker position of bargaining power than MHS.

The remaining plausible argument that Respondent could make to support that Mr. Miller did not meaningfully understand the terms of the agency disclaimer arises from the fact that he accessed MHS's Terms and Conditions for four seconds. Mr. Miller never claimed that he did not read the Terms and Conditions, but it could be inferred that four seconds is insufficient to fully read and understand them. However, considering Mr. Miller opened the Terms and Conditions and then subsequently closed them briefly after, it can be inferred that he simply chose not to read them. However, this does not establish procedural unconscionability either. Under Ohio law, "[a] person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *Hines*, 140 F.4th at 330 (alteration in original) (quoting *ABM Farms, Inc. v. Wood*, 692 N.E.2d 574, 579 (1998)). Ohio's law should be applied to this case because it would be unjust to rule that MHS provided Mr. Miller with an unconscionable contract simply because Mr. Miller may have chosen not to read the terms. The agency disclaimer was explicitly provided to Mr. Miller, yet Respondent seeks to place liability on MHS, despite Mr. Miller's decision to only open the terms for four seconds.

3. A lack of rural health care access does not establish legal unconscionability through an adhesion contract.

Lastly, Respondent argues, and the Court of Appeals agreed, that because rural Cartersville lacked reasonable alternative medical facilities, Mr. Miller was left with no realistic physical alternatives for care, making the contract with MHS a contract of adhesion. R. at 9, 24. An adhesion contract, also known as a “take-it-or-leave-it agreement,” often faces criticism for being one-sided and oppressive, leaving the consumer no room to negotiate. *Directv, Inc. v. Imburgia*, 577 U.S. 47, 69 (2015) (6-3) (Ginsburg, R., Sotomayor, S., Thomas, C., dissenting). However, the Supreme Court of the United States has ruled that standard-form consumer contracts should be placed on “equal footing with all other contracts. *Id.* at 59. The United States Circuit Courts of Appeals also follow that adhesion contracts are permissible, though construed strictly against the drafter, and an adhesion contract itself does not render a contract unconscionable *per se*. *E.g., Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 730 (4th Cir. 2025) (following West Virginia law); *Terpin v. AT&T Mobility LLC*, 118 F.4th 1102, 1113 (9th Cir. 2024) (following California law). In this case, the Court of Appeals claimed MHS’s Terms and Conditions were presented in a “non-negotiable digital format,” but following established precedent, a standardized contract on its own does not establish procedural unconscionability, even when considering the lack of reasonable medical alternatives in Simmons County.

Evaluating whether an adhesion contract is procedurally unconscionable does include whether there were alternative options. *Crawford Profl Drugs*, 748 F.3d at 264 (following Arizona law under *Maxwell v. Fidelity Fin. Servs.*, 184 Ariz. 82 (1995)).

Simmons County is a Health Professional Shortage Area and Medically Underserved Area with no in-person radiology services; however, this external factor does not form an adhesion contract on behalf of MHS. A lack of reasonable alternatives is one of many factors in evaluating procedural unconscionability, and the circumstances as a whole must be considered. *Id.* (holding the plaintiffs' evidence that Caremark is the largest PBM in the state and controls a significant portion of the state's business was insufficient to show the plaintiffs were prevented from contracting with another PBM or were forced to sign the contract with Caremark). Similar to *Crawford*, just because Cyber MD may have been the easiest and most realistic provider for Mr. Miller, this does not mean Cyber MD was his only option. Mr. Miller could have driven the 3.5-hour drive to MHS in Goshen for health care if he preferred or investigated other telehealth options since these have no distance barrier.

Further, Respondent's argument that Mr. Miller lacked reasonable alternatives and had to use Cyber MD is fallacious because Mr. Miller chose to use Cyber MD for three more years following his first visit. Mr. Miller's and Simmons County's access to health care struggles are recognized, but to impose liability on MHS for its role in introducing new and innovative telehealth options directly contradicts its goal to expand access to health care. MHS cannot control that it is the only health system in Simmons County, and expanding procedural unconscionability to adhesion contracts based on a lack of reasonable alternatives in this case will punish the one health system that is left in the county, further exacerbating the issue causing a lack of reasonable alternatives.

II. RESPONDENT'S CLAIMS ARE BARRED BECAUSE SHAWNEE'S STATUTES OF REPOSE WERE NEITHER TOLLED NOR EXTENDED BY A CONTINUOUS COURSE OF TREATMENT OR LATENT FLAW.

This Court should reverse the Court of Appeals' holding and find that Respondent's claims are barred by Shawnee's four-year statutes of repose. First, Respondent's medical malpractice claim is barred by the statute of repose because this cause of action was initiated after more than four years after the initial date of injury that allegedly gave rise to Mr. Miller's death, such that Respondent could prevail only under the continuous course of treatment exception. However, the continuous course of treatment exception is inapplicable to this period of repose. Second, Respondent's product liability claim is barred by the statute of repose because this cause of action was initiated after more than four years after the date of delivery. Again, Respondent could succeed on her product liability claim only via one of the three exceptions to Shawnee's product liability statute of repose, all of which are inapplicable in this case.

A. The Continuous Course of Treatment Exception to the Statute of Repose is Inapplicable.

The repose period for Respondent's medical malpractice claim is neither tolled nor extended by the continuous course of treatment exception. In the State of Shawnee, Sn. Rev. Stat. §12-404 establishes limitations on medical malpractice claims. R. at 14. Under §12-404(b), a cause of action concerning medical malpractice cannot be brought more than four years after the date on which the alleged injury occurred. *Id.* Mr. Miller first utilized Cyber MD in April 2018. R. at 6. However, Respondent did not bring this medical malpractice claim against MHS and CCS until

July 2024. R. at 7. For Respondent to pursue a valid medical malpractice claim under §12-404, she must have commenced this action by April 2022 to remain within the four-year period. R. at 14. By initiating this lawsuit in July 2024, Respondent far exceeded the claim's expiry date of April 2022.

Consequently, Respondent contends that the continuous course of treatment exception tolls the statute of repose under §12-404(b); however, this claim is unfounded. This exception notes that the repose period for medical malpractice claims can be tolled where a healthcare provider engages in a continuous course of treatment with a patient for the same injury that gave rise to the claim. R. at 14. The continuous course of treatment exception does not toll the repose period for Respondent's medical malpractice claim on three grounds: first, the exception was not created to protect the type of patient-provider relationship present between Respondent and Cyber MD; second, Respondent's diagnostic screenings did not constitute active treatment; and third, Respondent's annual visits with Cyber MD were discrete and isolated, and therefore not continuous.

1. Respondent's contact with Cyber MD was not the type of patient-provider relationship the continuous course of treatment exception was created to protect.

The continuous course of treatment exception was designed to maintain the integrity of the patient-provider relationship and has not been extended to the use of artificial intelligence chatbots in medicine. Generally, statutes of repose are an absolute bar on a defendant's temporal liability. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). Even in extraordinary circumstances, tolling is unlikely. *Id.* at 9. Their applicability is more rigid than that of statutes of limitations, as the injury to a

plaintiff need not have occurred, or even have been discovered, for the repose period to begin. *Id.* As such, statutes of repose were enacted to give “explicit and certain protection” to defendants. *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017). State legislatures have thus developed narrow circumstances under which these statutes do not provide such complete repose, including the continuous course of treatment exception. *Id.*

As a slim exception to that which typically constitutes a definitive bar on temporal liability, §12-404(b) is upheld by policy rationale. First, state legislatures found it unreasonable that a patient would expect their healthcare provider to be the cause of their injuries, particularly in the context of a patient-provider relationship. *Kelly v. United States*, 554 F. Supp. 1001, 1003 (E.D.N.Y. 1983). Providers already engaging in malpractice may deliberately conceal information from their patient, so the patient may be unaware of the alleged negligence until after the course of treatment. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988) (quoting *Ashley v. United States*, 413 F.2d 490, 493 (9th Cir. 1969)). Additionally, the protected, confidential relationship between the patient and the provider may deter the patient from questioning the provider. *Ulrich*, 853 F.2d at 1080 (quoting *Brown v. United States*, 353 F.2d 578, 580 (9th Cir. 1965)). Second, state legislatures found it unreasonable to expect a patient to interrupt their own medical care to initiate a lawsuit against their provider. *Ulrich*, 853 F.2d at 1081 (quoting *Borgia v. City of N.Y.*, 12 N.Y.2d 151, 156 (1962)). The patient-provider relationship is founded on trust, and serving a provider with a summons and complaint in this midst of

treatment would be “plainly contrary” to the patient’s own interests, i.e., to be able to rely on someone who will adequately care for them. *Ulrich*, 853 F.2d at 1081.

Mr. Miller was not engaged in this type of patient-provider relationship. There is no precedent to support an extension of the exception to those cases in which artificial intelligence chatbots replace healthcare providers. Cyber MD is an interactive, artificial intelligence diagnostic system, not a living being who has the capacity to intentionally conceal information. R. at 5. As such, despite the confidentiality of Mr. Miller’s medical records, the interactions between Mr. Miller and Cyber MD can hardly be described as a “relationship” at all. Mr. Miller detailed his occupational history and received a virtual output from Cyber MD with recommendations for care. R. at 6. This is not an intimate relationship of trust and confidence between a patient and a provider, but a source of electronic medical feedback. Mr. Miller would not be “serving a summons and complaint” to Cyber MD. *See Ulrich*, 853 F.2d at 1081. If Mr. Miller believed that he was not receiving adequate care from Cyber MD, he was in an appropriate position to seek legal aid without fear of repercussions from an agitated, human healthcare provider.

Further, Mr. Miller’s choice to pursue legal action against MHS and CCS within the four-year period would not have interrupted a course of medical care. Mr. Miller underwent diagnostic screening with Cyber MD once a year. R. at 6. Out of the approximately 1,095 days that passed from Mr. Miller’s first screening with Cyber MD to his last, he visited Cyber MD on only four days. *Id.* There was no course of care to interrupt. Had Mr. Miller pursued legal action on any of the 1,091 days that he

was not visiting Cyber MD, his virtual connection with Cyber MD would have remained uninterrupted.

Although Mr. Miller was using Cyber MD to undergo periodic medical evaluations, he was not in a patient-provider relationship of the kind that the continuous course of treatment exception is designed to protect.

2. Respondent was not undergoing active treatment with Cyber MD.

In addition to the clear lack of policy support, the exception does not apply on its face: a continuous course of *treatment* is required, and Mr. Miller was not being treated. The term “medical treatment” is unambiguous, with a generally accepted meaning. *Lebron v. Nat’l Union Fire Ins. Co.*, No. 20-20165, 2021 U.S. App. LEXIS 10488, at 6 (5th Cir. 2021). It is defined as “the action or way of treating a patient or a condition medically or surgically.” *Webster’s Medical Dictionary* (2026). To constitute “treatment” under the exception specifically, an ongoing patient-provider relationship with a “substantially uninterrupted course of treatment for the same ailment” must exist. *Castillo v. Emergency Med. Assocs., P.A.*, 372, F.3d 643, 648-49 (4th Cir. 2004). In further defining treatment, it is also important to note the distinction between the provider who prescribes a negligent course of treatment and subsequently fails to rectify it, versus a provider who never embarks on a necessary course of treatment in the first place. *Conner v. St. Luke’s Hosp.*, 996 F.2d 651, 654 (4th Cir. 1993) (holding that prescriptions for a course of medication, referrals for additional testing, and unscheduled emergency room visits did not demonstrate an ongoing relationship to advance treatment for asthma). When a provider fails to treat

in the first instance, malpractice has occurred and does not continue as when a provider persists in the negligent act of treating. *Id.*

Mr. Miller was not engaged in an uninterrupted course of treatment for an ailment through Cyber MD. *See Castillo*, 372 F.3d at 648-49. In fact, Cyber MD detected zero evidence of malignancy two weeks after Mr. Miller's first visit. R. at 6. Beyond annual surveillance of high-risk respiratory status, Mr. Miller did not receive a treatment plan from Cyber MD. R. at 6. He was instead referred to a local practitioner who was unaffiliated with MHS and CCS. *Id.* Further, annual follow-up imaging with Cyber MD was not encouraged, urged, or even strongly recommended. R. at 6. This follow-up imaging was merely "recommended." *Id.* Specifically, Cyber MD "ordered scans [and] evaluated them." R. at 22. Mr. Miller was not receiving medical treatment; he was undergoing optional diagnostic surveillance. "Treatment" is a solidified, unambiguous medical term, *Lebron*, 2021 U.S. App. LEXIS 10488, at 6, and Mr. Miller did not undergo medical or surgical acts with Cyber MD such that he was engaged in a course of treatment. He was referred to a mobile radiology service that was visiting Cartersville by Cyber MD for the only medical "acts" he underwent.

The malpractice alleged by Respondent is dependent on the claim that Cyber MD failed to identify the malignant lesion and therefore failed to treat. R. at 20. In pursuing a medical malpractice cause of action, Respondent effectively asserts that, had Cyber MD identified the lesion and *treated* Mr. Miller, he would not have suffered spontaneous pneumothorax. R. at 6. Had Mr. Miller received *treatment* for his respiratory condition, he may have survived. R. at 25. However, Cyber MD did not

treat Mr. Miller's condition; it offered recommendations and referrals. R. at 6. Cyber MD failed to treat in the first instance, such that malpractice occurred on April 9, 2018. *See Conner*, 996 F.2d 651 at 654. Cyber MD did provide Mr. Miller with medical instructions following a diagnosis, but "never embark[ed] on a course of treatment" at all. *See Id.* Mr. Miller was not actively treated by Cyber MD, and treatment is an integral component of the continuous course of treatment exception.

3. Respondent's visits with Cyber MD were discrete and isolated.

Mr. Miller's periodic patient care evaluations by Cyber MD do not constitute an uninterrupted course of medical care sufficient to demonstrate a continuous course of treatment. Interactions between patients and providers that are "discrete and isolated" are insufficient for establishing continuous medical treatment. *Castillo*, 372 F.3d at 650. The exception permits application when the treatment at issue is for the same problem by the same doctor. *Miller v. United States*, 932 F.2d 301, 305 (4th Cir. 1991). Where a single, isolated act constitutes the alleged malpractice, the continuous course of treatment exception does not apply. *Hobbs v. Naples*, 993 F.2d 173, 174 (8th Cir. 1993).

Mr. Miller's contacts with Cyber MD were "discrete and isolated." *See Castillo*, 372 F.3d at 650. Over the course of approximately three years, Mr. Miller utilized Cyber MD only once per year. R. at 6. There were no meetings reported between these check-ins. *Id.* Independent, annual diagnostic surveys with an artificial intelligence chatbot, during which no treatment was provided, do not demonstrate continuity. Furthermore, Mr. Miller was not treated for the same problem by the same doctor; in

fact, Mr. Miller was not treated by a doctor at all. Prior to entering the Cyber MD virtual portal, users must accept a set of conditions which explicitly state that Cyber MD is not a licensed healthcare professional. R. at 5. Again, the continuous course of treatment exception has not been extended to cover interactions between a patient and an artificial intelligence chatbot. Continuity implicates a sustained relationship between a patient and their same provider, *Miller*, 932 F.2d at 305, and Mr. Miller lacked a relationship with a provider to begin with.

The act that constituted the alleged malpractice was Mr. Miller's visit with Cyber MD on April 9, 2018. R. at 6. Per retrospective discovery, a seven-millimeter lesion was present on Mr. Miller's 2018 radiologic scans. *Id.* In 2018, Cyber MD failed to identify the lesion that led to Mr. Miller's death. *Id.* Mr. Miller's injury can thus be traced back to a specific instance of negligence: the first visit with Cyber MD. This visit was a single, isolated act of malpractice, which bars the application of the exception. Mr. Miller's isolated visits with Cyber MD do not demonstrate the form of prolonged treatment protected by the continuous course of treatment exception.

Therefore, the continuous course of treatment exception does not toll the statute of repose for Respondent's medical malpractice claim. The exception was created to preserve the integrity of continued treatment between a patient and a provider, and Mr. Miller's virtual visits to Cyber MD did not include a provider, continuity, or treatment. This Court should reverse the Court of Appeals' holding that Respondent's claim is not barred by §12-404.

B. The Statute of Repose is Neither Tolled Nor Extended Due to the Nature of Cyber MD's Algorithmic Flaw.

Cyber MD's algorithmic flaw was not latent, such that the repose period for Respondent's product liability claim should not be tolled. The State of Shawnee also establishes limitations on product liability claims under §12-410. R. at 14. Under §12-410(a), a cause of action concerning a product liability claim cannot be brought more than four years after the date of first sale, lease, or delivery of possession to its initial user or consumer. *Id.* §12-404(b) provides narrow exceptions to this statute of repose, stating that the four-year bar shall not apply if: 1) the product expressly warrants it can be used for longer than four years; 2) the seller intentionally misrepresents or fraudulently conceals facts about its product or; 3) the harm was caused by prolonged exposure to the product, the injury-causing aspect present at the time of delivery was not discoverable by an ordinary reasonably prudent person until after four years had passed, or the harm caused within four years, did not manifest itself until after four years had passed. R. at 14-15. Because CCS delivered Cyber MD to MHS in March 2017, Respondent must have commenced this action by March 2021 for a valid product liability claim under §12-410. R. at 26. By initiating this lawsuit in July 2024, Respondent also exceeds the product liability claim's expiry date.

Respondent contends that this statute of repose is tolled under §12-404(b). R. at 12. Specifically, Respondent relies on the alleged latency and non-discoverable nature of the algorithmic flaw in Cyber MD pursuant to §12-410(b)(3). *Id.* However, the algorithmic flaw was not latent and was "discoverable by an ordinary reasonably prudent person." R. at 14. As such, Respondent's product liability claim is subject to

the ordinary statute of repose under §12-410(a) for three reasons: first, the injury-causing aspect of Cyber MD was discoverable; second, Cyber MD expressly disclaimed being a licensed healthcare professional, thereby putting Mr. Miller on notice of potential flaws; and third, a defect is not deemed to be latent due to a lack of expertise by a party engaging with the product.

1. The injury-causing aspect of Cyber MD was discoverable by an ordinary and reasonably prudent person within four years of the date of delivery.

The injury-causing aspect of Cyber MD could have been discovered by an ordinary, reasonably prudent person by March 2021 and was not latent. The hidden defect exception applies if the injury-causing aspect of the product was not discoverable by an ordinary, reasonably prudent person until after the period had expired. *Pate v. Columbia Mach.*, 930 F. Supp. 451, 465 (D. Idaho 1996). Additionally, a latent defect is that which is not discoverable via the exercise of due care or reasonable diligence. *Farkas v. Addition Mfg. Techs., LLC*, 952 F.3d 944, 949 (8th Cir. 2020) (quoting *Edwards v. Springfield Coca-Cola Bottling Co.*, 495 S.W.2d 489, 497 (Mo. Ct. App. 1973).

Mr. Miller did not exercise “reasonable diligence” throughout his interactions with Cyber MD. He knew he had been exposed to asbestos for decades. R. at 3. The machinery at the Shawnee Steel Company is described as “heavily insulated with asbestos” and Mr. Miller “regularly handled asbestos-insulated machinery in the plant . . . without respiratory protective equipment.” *Id.* Even after the implementation of new federal safety standards for mills, older facilities such as the mill in Cartersville did not adhere to these regulations. *Id.*

Despite being aware of his significant health risks, Mr. Miller did not seek further inquiry regarding Cyber MD's initial intake session. R. at 6. At this session, Cyber MD determined that Mr. Miller's radiologic scans displayed "zero evidence of malignancy." R. at 5. However, Cyber MD referred Mr. Miller to a local practitioner. R. at 6. There is no evidence tending to demonstrate that Mr. Miller received subsequent medical aid from another physician, even with this explicit recommendation. It is both ordinary and reasonable to expect that a person with prolonged asbestos exposure would not have blindly relied on the opinion of an artificial intelligence chatbot. Considering Mr. Miller's knowledge of his high risk for respiratory disease, it is reasonable to have expected him to further investigate Cyber MD's outputs.

2. Cyber MD expressly disclaimed being a licensed healthcare professional, thereby putting Mr. Miller on notice of potential flaws with the algorithm.

Mr. Miller was put on notice that potential for injury existed when using Cyber MD, and this notice establishes the discoverable nature of a defect. Defects are especially discoverable when a combination of warnings and observations is present to put an individual on notice that the potential for an injury existed. *Pate*, 930 F. Supp. at 464. Further, notice of a specific defect is not required; notice of the "offending instrumentality" is sufficient to initiate the statute of repose. *Cutter v. Ethicon, Inc.*, No. 20-6040, 2021 U.S. App. LEXIS 25940, at 40 (6th Cir. 2021) (quoting *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60-64 (Ky. 2010)). The purpose of a §12-410(b)(3) exception is to provide an avenue of relief for those who develop a

“latent disease, the cause of which is not discovered” after the statute of repose has run. *Koch v. Shell Oil Co.*, 52 F.3d 878, 884 (10th Cir. 1995).

In its analysis of the latent defect exception, the Court of Appeals is silent on the warning administered by CCS regarding Cyber MD. R. at 26-27. Cyber MD puts users on notice that it is not a licensed health care professional, but an artificial intelligence software program. R. at 5. More so, before entering a Cyber MD session, “[u]sers must click ‘Accept’ to proceed” to the program. *Id.* Cyber MD also notifies its users that its medical opinions are not those of an actual practitioner but electronically manufactured. *Id.* Mr. Miller experienced prolonged asbestos exposure yet did not demonstrate any signs of lung problems upon meeting with Cyber MD. R. at 6. He chose to rely on Cyber MD’s opinion as though it was that of a licensed healthcare professional, proceeding without further medical insight. Mr. Miller did not develop a latent disease with an ambiguous cause. He was aware of his high-risk respiratory status before using Cyber MD and nevertheless chose to proceed and rely on artificial intelligence medical care.

“The “warnings” provided by CCS on Cyber MD disclaiming its position as a physician combined with the “observations” of Mr. Miller in explicitly accepting these terms were sufficient to put Mr. Miller on notice of the potential for injury. *Pate*, 930 F. Supp. at 464. This demonstrates the “especially discoverable” nature of the flaw. Mr. Miller need not be aware that Cyber MD had a foundational coding defect embedded in its baseline algorithm for the defect to be open and obvious, as the Court of Appeals argues. R. at 26. Rather, it is sufficient that Mr. Miller was put on notice

of the potential “offending instrumentality,” in that he elected to voluntarily receive medical advice from a non-human, non-licensed program. *See Cutter*, 2021 U.S. App. LEXIS 25940, at 40 (quoting *Fluke Corp.*, 306 S.W.3d at 60-64). Cyber MD’s lack of licensure disclaimer put Mr. Miller on sufficient notice of potential flaws, deeming them discoverable.

3. *Lack of expertise does not make a defect latent.*

Mr. Miller’s lack of knowledge about artificial intelligence and Cyber MD’s specific operations does not demonstrate that the defect was latent and therefore undiscoverable. A lack of understanding does not negate the obviousness of the danger for a product liability claim. *Leslie v. Daimler Trucks N. Am. LLC*, No. 24-11372, 2025 U.S. App. LEXIS 17373, at 17 (11th Cir. 2025). (holding the plaintiff’s lack of expertise with heavy truck design was irrelevant in determining whether defendant had a duty to warn plaintiff of the dangers of a heavy truck he designed). Rather, an objective standard is used when determining whether a design defect is discoverable, such that any delay of accrual does “does not linger until a claimant learns of actual causes and possible cures.” *Knapp v. Fag Bearings, LLC*, 69 F.4th 513, 518 (8th Cir. 2023) (quoting *Marcus v. Millichap Real Est. Inv. Servs. of Nev., Inc. v. Triex Tex. Holdings, LLC*, 659 S.W.3d 456, 462 (Tex. 2023)).

The Court of Appeals contends that Cyber MD’s diagnostic defect was not an open and obvious mechanical flaw. R. at 26. In its reasoning, the Court relies on the notion that the defect was not open or obvious because Mr. Miller would be incapable of discovering this flaw, as he cannot “inspect the source code.” R. at 26. However, it is not required that Mr. Miller be able to “inspect source code” or even that he

possessed any sort of nuanced medical understanding. Mr. Miller need not *be able to discover* the origin of the latent defect for the defect *to be discoverable*. The claim that Mr. Miller was unable to understand or obtain access to CCS's software infrastructure does not negate the potential discoverability of Cyber MD's flaw.

Governed by an objective standard, the complexity of medicine is of little relevance in determining whether the defect was latent. *Knapp*, 69 F.4th at 518 (quoting *Marcus*, 659 S.W.3d at 462). Rather, the defect must simply be discoverable by an ordinary and reasonably prudent person. R. at 14. The defect was not "discoverable only after . . . expert oncologists performed retrospective reviews of the baseline code," R. at 27, because Mr. Miller did not exercise reasonable prudence in ensuring that he was receiving adequate treatment via Cyber MD, particularly considering his medical history with asbestos. The Court of Appeals' claim that Cyber MD's algorithmic flaw was not discoverable due to its intricate medical nature is immaterial in determining whether the flaw was latent.

In sum, the statute of repose for Respondent's product liability claim is not tolled due to a latent or undiscoverable algorithmic flaw. Mr. Miller was put on notice of Cyber MD's potential for error, such that the algorithmic flaw resulting in his injury was discoverable by diligent action on his part, particularly considering his high risk for medical complications. Further, the Court of Appeals' reliance on Mr. Miller's inability to decipher radiologic scans does not support the claim that a latent flaw exists, as §12-410(a) is an objective standard. This Court should reverse the Court of Appeals' holding that Respondent's claim is not barred by §12-410(a).

CONCLUSION

This case evaluates what can go wrong at the intersection of artificial intelligence and healthcare and determines how it should be resolved for the first time in the State of Shawnee. As society expeditiously develops and utilizes artificial intelligence, this case could represent the first of many. To protect the one existing health system in rural Simmons County in the State of Shawnee, the Supreme Court of Shawnee should REVERSE the holding of the Shawnee Court of Appeals for the Second District and REINSTATE the Circuit Court of Simmons County's grant of summary judgment in favor of Petitioners Metropolitan Health System and Cyber-Care Solutions on both Respondent's vicarious liability and strict product liability claims. Respondent failed to present any genuine issues of material fact for either the vicarious liability claim or the strict product liability claim, and thus we ask this Court to find that Petitioners are entitled to summary judgment as a matter of law.

Respectfully submitted,

ATTORNEYS FOR PETITIONERS