
No. 25-140

IN THE
Shawnee Supreme Court

NOVEMBER TERM 2026

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

Petitioners

v.

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

Respondent

ON WRIT OF CERTIORARI TO THE
SHAWNEE SUPREME COURT

BRIEF FOR THE RESPONDENT

pl-AI-ntiffs
Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether a healthcare system is vicariously liable under the doctrine of apparent agency for the errors of an AI diagnostic tool fully integrated into its branded telehealth platform when a patient relies on its diagnosis and treatment plan.
2. Whether Shawnee's four-year statutes of repose bar Respondent's claims, or whether, through express statutory exceptions, the repose periods were tolled when:
 - (a) Cyber MD suggested multiple follow-up diagnostic evaluations for Mr. Miller's respiratory disease that constituted a "continuous course of treatment" under Shawnee Revised Statute § 12-404; or
 - (b) The algorithmic defect and subsequent retraining were latent and undiscoverable to a reasonably prudent person under 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, *Miller v. Metropolitan Health System, Inc.*, Case No. 25-L-24601 (Mar. 6, 2025), is contained in the Record of Appeal at pages 1–15, where the Circuit Court GRANTED Defendants’ motions for summary judgment. The unreported Opinion of the Shawnee Court of Appeals for the Second District, *Miller v. Metropolitan Health System, Inc.*, Case No. 25-123 (Feb. 24, 2026), is contained in the Record of Appeal at pages 16–28. The Appellate Court REVERSED the Circuit Court’s decision and REMANDED for further proceedings.

STATEMENT OF THE CASE

This case arises from Petitioner representing itself as a full-service medical provider with telehealth diagnostic capabilities reaching remote parts of the state and reaping the benefits of that representation—then denying liability when vulnerable patients relied on those representations.

Respondent asks this Court to affirm the Shawnee Court of Appeals’ order reversing the judgment of the trial court and finding that summary judgment for Petitioner is inappropriate here. The issues before this Court are (1) the applicability of apparent agency to an AI diagnostic system that misdiagnosed, mistreated, and ultimately led to the premature death of Elias Miller; and (2) whether a large hospital system can shield itself from accountability for its inaccuracies under Shawnee’s statutes of repose, despite express statutory exemptions where the hospital is

engaged in a continuous course of treatment or latent defects are undiscoverable within four years of delivery.

A Medical Desert Where Patients Have No Meaningful Choices

During a period of economic turmoil, Simmons County, a rural county in Shawnee, experienced a mass exodus of healthcare professionals. R. at 18. Local hospitals closed their doors, leaving Simmons County in dire straits with no urgent care facilities or diagnostic centers—authorities designated the county as a Health Professional Shortage Area and a Medically Underserved Area. R. at 18. To receive in-person radiology treatment, the Millers would be forced to travel 190 miles to a facility in Goshen. R. at 18.

MHS Created the Impression that Cyber MD was its Own Diagnostic System

Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC (“MHS”), a large regional healthcare network, contracted with Cyber-Care Solutions, LLC (“CCS”) to design and host MHS’s remote telehealth platform. R. at 18. MHS exclusively controlled the platform’s patient-facing interface, displayed only MHS branding, and expressly prohibited any CCS marks from appearing on patient-facing pages—the hospital did not indicate that an entity outside MHS was involved. R. at 18.

In 2017, MHS integrated Cyber MD into its telehealth portal. R. at 19. Cyber MD is an AI diagnostic system that allows patients to interact online as they would with a human doctor: patients tell it their symptoms and Cyber MD asks questions, tracks medical history, provides diagnoses, orders medical tests, and interprets those

tests—everything a physician would do. R. at 19. CCS, the creator of Cyber MD, markets the system under the slogan “Cyber MD: Care Everywhere.” R. at 19.

The version of Cyber MD that MHS integrated into its telehealth system had been trained on a set of 40,000 images and purportedly classified lung lesions with 97% accuracy. R. at 19. However, by 2022, the system’s accuracy had declined to only 85% when evaluating patients with asbestos exposure—a significant decline from what was originally claimed when getting FDA approval. R. at 19–20. This discovery was made by the tool’s developer, CCS, who had the sole capability to review its algorithm and results. R. at 19–20. After learning of the latent defect, CCS retrained Cyber MD to restore its accuracy in diagnosing patients with pleural shadowing in the lungs from asbestos exposure. R. at 20. The discovery and retraining were not disclosed to the public.

With No Local Options Available, Elias Miller Trusted MHS

Because the Shawnee Steel Company was lax with its safety protocols, Mr. Miller was regularly exposed to the asbestos-insulated machinery without the proper respiratory protective equipment. R. at 3. Elias and Evelyn Miller, a married couple, lived together in the town of Cartersville in Simmons County. R. at 2–3. Elias worked locally at the Shawnee Steel Company, where he dedicated 46 years to the mill’s maintenance department from 1970 until 2016. R. at 3. Steel mill maintenance is a demanding and dangerous job, requiring Elias to handle plant machinery, which, at the time, was insulated with asbestos. R. at 3. Though new regulations prohibited newer mills from using asbestos, older plants like Shawnee were grandfathered in to

retain the original insulation. R. at 3. The company's decision caused Mr. Miller decades of dangerous asbestos exposure.

Despite being a lifelong non-smoker with no family or personal history of respiratory disease, Mr. Miller was nonetheless vulnerable to serious respiratory disease due to his extended asbestos exposure. R. at 3, 20. As a high-risk patient who was otherwise healthy, Mr. Miller depended on accurate diagnostic healthcare. Living in Simmons County, a medical desert, he had few realistic options for treatment—it was a 190-mile trek just for a chest scan. R. at 18.

MHS's System Gave False Assurances Leading to Mr. Miller's Death

In 2018, Elias Miller began experiencing shortness of breath, a condition that necessitated access to the type of healthcare facilities no longer available in Cartersville. R. at 20. This is when Mr. Miller, for whom a 190-mile journey to get a chest scan would be difficult, sought a more reasonable alternative. R. at 20. Mr. Miller then went down a path—logging into the MHS portal and getting medical treatment through the MHS platform Cyber MD—that would ultimately lead to a fatal misdiagnosis. R. at 20.

In 2018, Elias Miller, hoping to find medical treatment for his breathing issues, navigated to MHS's primary domain, www.mhs.com/telehealthplatform, which was exclusively controlled by MHS and contained only MHS branding. R. at 4. On the website, Mr. Miller saw a user login icon, under which was written: "By entering the portal, I accept the MHS Terms and Conditions." R. at 4. The words "Terms and Conditions" were hyperlinked. R. at 4. When Mr. Miller clicked the hyperlink, a

separate page appeared containing a thicket of dense legal terms in fine print—34 lines of single-spaced, unformatted text in much smaller font than the rest of the website. R. at 4–5. A clause noting that independent contractors perform diagnostics provided through the platform without MHS’s operational control was buried three-quarters down the page, surrounded by other provisions and in the same small, unformatted text. R. at 5. Notably, this term’s dense text contains no mention of its legal significance or binding nature. R. at 5. Mr. Miller exited this page after four seconds and never returned. R. at 5.

After logging in, Mr. Miller sought help from MHS’s diagnostic tool Cyber MD. As he started a chat with Cyber MD to help with his shortness of breath, a pop-up appeared on Mr. Miller’s screen, stating in red, 16-point font, “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” Notably, the pop-up did not disclaim agency over the system or state that MHS cannot be held responsible for a misdiagnosis. R. at 5. To proceed with the Cyber MD session and gain access to critical healthcare, Mr. Miller had to click “accept” to proceed. R. at 5.

Mr. Miller’s initial virtual intake session with Cyber MD resembled a standard doctor’s appointment: after Miller explained his symptoms and extended history with asbestos, Cyber MD ordered further testing in response to these symptoms, and the system promised to analyze the results and discuss them with Mr. Miller. R. at 6. Two weeks later, Cyber MD diagnosed Mr. Miller with adult-onset asthma, referred him to a local doctor, and recommended annual follow-up imaging. R. at 6. Cyber MD

reported “zero evidence” of malignancy. R. at 6. Mr. Miller had no reason to think otherwise—as a non-smoker with no history of respiratory illness, so he reasonably relied on the diagnosis that he was cancer-free. R. at 6, 20. Because his last chest screening in 2012 was “unremarkable” and the 2018 Cyber MD screening proclaimed “zero evidence” of malignancy, Mr. Miller felt comfortable with simply complying with MHS’s telehealth recommendation to follow up yearly. R. at 3, 20.

Mr. Miller, having been diagnosed with asthma, dutifully completed his virtual evaluations with Cyber MD in 2019, 2020, and 2021, each time being reassured by Cyber MD that there was no evidence of disease. R. at 20. After reiterating that Mr. Miller had a clean bill of health, Cyber MD stated that annual imaging was no longer necessary; Mr. Miller heeded this advice and never returned to MHS’s telehealth platform for treatment. R. at 20. Two years later, Mr. Miller was airlifted to MHS’s facility in Goshen after suffering a spontaneous pneumothorax. R. at 20. There was a 6.4 cm malignant mass in his left lung with extensive metastases to the pleura and spine—devastating news for a person previously diagnosed with “zero evidence” of malignancy. R. at 20. Experts reviewing the 2018 Cyber MD scans found a 7 mm lesion clearly visible, though partially obscured by pleural changes. R. at 20. By 2022, the lesion had grown to 47 mm. R. at 20. Cyber MD consistently failed to identify the lesion throughout the course of treating Mr. Miller’s respiratory illness resulting from asbestos exposure. R. at 20.

Elias Miller died in April, 2024. R. at 21. His wife, Evelyn—recognizing that MHS’s telehealth platform repeatedly misdiagnosed Elias’s condition, misread the

scans that it ordered, and reassured Elias that he was clear of serious disease—filed this suit in July 2024. R. at 21.

The Court of Appeals Correctly Rejected Summary Judgment

Evelyn Miller filed this suit in the Circuit Court of Simmons County. Following discovery, the trial court granted summary judgment to the defendants, dismissing the complaint with prejudice. R. at 21. Plaintiff timely appealed to the Shawnee Court of Appeals for the Second Circuit. R. at 21. The court of appeals reversed, holding that genuine issues of material fact persist as to the disclaimer’s conspicuousness, the contract’s procedural unconscionability, and the applicability of statutory exemptions for continuous course of treatment and latent defect. R. at 27–28. The court of appeals particularly noted that “Healthcare networks and digital health developers cannot hide behind inconspicuous web disclaimers to avoid vicarious liability, nor can they claim absolute repose immunity while maintaining cloud-based, continuous diagnostic surveillance over vulnerable patients.” R. at 27.

Respondent asks the Court to affirm the ruling of the Court of Appeals, finding that the doctrine of apparent agency applies to MHS’s telehealth platform Cyber MD, and that the statutes of repose were tolled through continuous course of treatment and latent undiscoverable product defects. At minimum, genuine issues of material fact persist, making summary judgment inappropriate.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Shawnee Court of Appeals. The Court of Appeals correctly held that summary judgment is improper here because

genuine issues of material fact persist as to vicarious liability and tolling the Shawnee statutes of repose. For the reasons below, this Court should affirm on all grounds.

I.

The Court of Appeals correctly held that MHS could be held responsible for the actions of its AI diagnostic system. MHS is vicariously liable for the behavior and errors of CCS and Cyber MD, the AI diagnostic tool MHS integrated into its telehealth platform—exclusively presenting MHS branding. Vicarious liability extends to independent contractors and third parties where the principal’s conduct leads a reasonable person to believe that the actor is the principal’s agent. To assess vicarious liability, courts apply the three-prong test, focusing primarily on the principal’s manifestations and patient reliance. Each factor is satisfied here.

MHS did not merely imply that Cyber MD was its agent; it intentionally held out that Cyber MD was its own diagnostic system. The interface—solely controlled by MHS—only displayed MHS branding and expressly prohibited any other marks. Neither Elias Miller nor any reasonable patient had reason to believe Cyber MD was not MHS’s agent. Mr. Miller reasonably relied on MHS’s conduct, placing his trust—and his life—in MHS’s representations.

Neither the pop-up nor the terms and conditions provide sufficient disclaimer of an agency relationship or the legal ramifications therein to avoid liability. The terms were concealed, inconspicuous, and contained in unenforceable sign-in wrap. The clause was hidden on a separate page in small, unformatted text, and a reasonably prudent reader would not have understood its legally binding

consequences. The pop-up only notified users that the telehealth system was AI; it did not disclaim agency or make any reference to the terms and conditions.

Inconspicuousness aside, the purported terms, as constructed, are unconscionable and unenforceable. MHS wielded enormous bargaining power, while Mr. Miller lacked meaningful choice due to his health conditions and lack of medical services in Simmons County.

Finally, MHS cannot use the AI nature of Cyber MD to evade liability. Whether the AI system is a tool or an autonomous agent, MHS expressly contracted with CCS to use Cyber MD for medical diagnostics, and its use fits neatly within the doctrine of vicarious liability. MHS intentionally created the appearance that Cyber MD was its own diagnostic tool, and the hospital reaped financial and reputational benefits from that appearance. MHS cannot now avoid liability for the disastrous results caused by that very system.

II.

The Court of Appeals correctly held that statutory exemptions tolled Shawnee's statutes of repose. Although statutes of repose generally cannot be tolled, legislatures can show their intent that tolling be allowed through statutory exceptions. The Shawnee legislature expressed such intent by enacting express tolling exceptions to sections 12-404 and 12-410.

Under § 12-404, a medical malpractice claim may be tolled if there is a continuous course of treatment related to the same illness or condition. MHS treated Mr. Miller by assessing symptoms, imaging, analyzing images, monitoring, and

consistently misdiagnosing the same condition for which he first sought treatment—respiratory issues, including shortness of breath, resulting from extended asbestos exposure. Cyber MD scheduled subsequent appointments, and Mr. Miller dutifully returned each year. This continuous course of treatment satisfies the express statutory exemption to toll repose under § 12-404.

A continuous course of treatment exception encourages trust in treatment and prevents the need to stop treatment to pursue litigation. These policies are especially important for those, like Mr. Miller, in medical deserts that have very limited options in medical providers.

Section 12-410 provides an exception to the repose period for product defects that are undiscoverable by a reasonably prudent person. The underlying algorithmic defect in Cyber MD’s image diagnostics tool could be detected by a reasonably prudent person—or, for that matter, anyone other than CCS. Because this defect was undiscoverable, the statute of repose does not apply here. Miller must only satisfy the two-year limitation period for wrongful death provided by § 12-402. Mr. Miller died in 2024, and this suit was filed that same year, easily within the two-year period.

MHS cannot avoid liability through inconspicuous, unconscionable, and unenforceable terms; nor can it use the statutes of repose as a shield. The hospital cultivated the perception that, under its healthcare network, it provides treatment to the sick and vulnerable through its telehealth system. Under this system, it provided Mr. Miller continuous treatment for his severe lung condition—treatment which resulted in repeated misdiagnoses from a latent, undiscoverable defect in the system’s

algorithm. MHS took advantage of Mr. Miller, reaping the benefits along the way, and now seeks to avoid the serious repercussions of its defective product. This cannot stand. When viewing the facts in the light most favorable to Respondent, the nonmovant, and drawing reasonable inferences in her favor, this Court should find that genuine issues of material fact exist, and this case must go to a jury. This Court should affirm the judgment of the Court of Appeals.

ARGUMENT

A. Standard of Review.

Federal Courts of Appeals review summary judgment orders de novo, giving no deference to the trial court's judgment. *See M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1992); *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 96 (2d Cir. 1994). Appellate courts examine the record to determine whether any genuine issue of material fact was in dispute and whether the law was correctly applied. *See Smith v. Maschner*, 899 F.2d 940, 943 (10th Cir. 1990); *Longo*, 25 F.3d at 96. State high courts apply the same standard. *Letsinger v. Drury Coll.*, 68 S.W.3d 408, 410 (Mo. 2002); *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 649 So. 2d 179, 181 (Miss. 1994).

In this case of first impression, this Court is asked to review Petitioner's summary judgment order granted by the trial court and reversed by the court of appeals. This requires de novo review, giving no deference to the trial court's judgment. Furthermore, all reasonable inferences are to be resolved in the light most favorable to the nonmoving party—Mr. Miller. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986) (holding that summary judgment “must be denied if fair-minded individuals could differ as to the inferences to be drawn from the undisputed facts”).

B. This Court Should Affirm as Questions of Material Fact Remain

Petitioners renew their argument that it is not vicariously liable for the errors of Cyber MD, an AI telehealth platform. Despite comprehensively holding out to the public that Cyber MD is an agent or actor of MHS, inviting patient reliance on the system, and failing to notify or warn patients that a third party controls Cyber MD, MHS seeks to avoid accountability for Cyber MD’s inaccuracies. Further, Petitioners revive their contention that Shawnee’s statutes of repose bar Respondent’s action, notwithstanding Cyber MD’s continuous course of treatment and the latent defect undiscoverable by any reasonably prudent person before 2022. Whether MHS’s conduct would lead a reasonable person to believe CCS and Cyber MD were MHS’s agents is a fact question; at minimum, reasonable jurors could conclude that such a belief is reasonable. The court of appeals correctly rejected both contentions because genuine questions of material fact remain. The same result is warranted here.

I. MHS Should be Held Liable for Cyber MD’s Failures because It Intentionally Manifested that Cyber MD is MHS’s Agent.

MHS is vicariously liable for Cyber MD’s diagnostic errors because MHS manifested that Cyber MD was MHS’s agent, and Mr. Miller reasonably relied on that manifestation. Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer’s behalf. *Niece v. Elmvie Group Home*, 929 P.2d 420, 425–26 (Wash. 1997). The doctrine of vicarious liability extends beyond traditional employment

relationships into the realm of independent contractors and other third parties acting on behalf of the employer when the employer's conduct causes the plaintiff to reasonably believe that the actor is an agent of the employer. *See* Restatement (Second) of Agency § 267 (1958); Restatement (Second) of Torts § 429; *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166 (4th Cir. 1988) (a party may create an agency relationship with another if the other holds out to the public in a way that reasonably induces reliance on the appearances).

Vicarious liability applies to the healthcare industry; courts hold that a healthcare facility need not have a direct employment relationship with an independent contractor to be held liable for acts of its apparent agent. *See Webster v. CDI Indiana, LLC*, 917 F.3d 574, 577 (7th Cir. 2019). To assess whether a hospital is liable under apparent agency, a plaintiff must establish that:

(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.

Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 795 (Ill. 1993); *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 856 (Wis. 1988).

In applying the three-prong apparent agency test to the particular conduct of a healthcare facility and its purported agent, the most important factors to consider are the medical center's manifestations and patient reliance on such manifestations—factors 1 and 3 in the *Gilbert* test. *See Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 151 (Ind. 1999) (stating that, while language and applicable statutes

may differ, courts hold hospitals liable for independent contractors by assessing principal manifestations and patient reliance); *Webster*, 917 F.3d at 576 (applying the *Sword* factors to hold a diagnostic imaging facility liable for a contractor’s conduct and failure to diagnose cancer).

Apparent agency and vicarious liability are more important now than ever before because hospital networks can hide behind new technology and organizational systems. The modern state of medical care involves more intricate and complex relationships between the facility and its physicians and between physicians and the highly sophisticated, expensive, and intricate tools used to diagnose and treat patients. This “complicated web of interrelated entities . . . illustrates the importance” of the streamlined and predictable *Sword* and *Gilbert* factors “in an increasingly complicated and opaque medical environment.” *Webster*, 917 F.3d at 578. In a world where large hospital networks partner with technology firms through voluminous contracts, courts should focus on medical center manifestations and patient reliance rather than corporate contractual formalities. *Id.* at 578; *Gilbert*, 622 N.E.2d at 794 (stating that most people seeking treatment in modern hospitals are unaware of the status of the professionals employed there) (citation omitted).¹

Respondent will show that MHS’s manifestations and Mr. Miller’s reliance on such manifestations created apparent agency such that CCS’s repeated misdiagnosis

¹ The *Gilbert* court expressly joined many courts in holding that, due to modern medical networks, hospital manifestations and patient reliance are key to determining vicarious liability. See *Gilbert*, 622 N.E.2d at 794 (citing *Kashishian v. Port*, 167 N.W.2d 277, 283 (Wis. 1992); *Brown v. Coastal Emerg. Servs., Inc.*, 181 354 S.E.2d 632, 636 (Ga. App. 1987); *Martell v. St. Charles Hosp.*, 523 N.Y.S.2d 342, 350 (Sup. Ct. 1987); *Pamperin*, 423 N.W.2d at 855).

of Mr. Miller's malignant lungs through Cyber MD image analysis can be directly attributed to MHS as the principal. Petitioner has not contested, at trial or on appeal, that MHS contracted with CCS for the express purpose of procuring Cyber MD as the system driving MHS's telehealth platform. MHS wanted to establish a virtual chat program that can perform the basic functions of a physician: listen to symptoms and medical history, order tests and imaging, analyze the results, and make a diagnosis. R. at 19. Cyber MD performed the function that MHS desired; thus, MHS knew of and acquiesced to the actions of its agent CCS. This knowledge and acquiescence satisfy the second prong of the *Gilbert* test.

A. MHS Purposefully Led Reasonable Patients to Conclude that CCS and Cyber MD Were Parts of MHS's Healthcare System.

MHS mandated that patients only saw MHS branding when accessing Cyber MD and expressly prohibited reference to CCS on the website. The first factor focuses on whether the hospital acted in such a way as to lead a reasonable person to conclude that the negligent individual was an employee or agent of the hospital. *Sword*, 714 N.E.2d at 151. This element, called "holding out," does not require the hospital to directly represent the negligent entity as an employee; rather, the element is satisfied if the hospital held itself out to the public as a provider of medical care without sufficiently informing the patient that an independent contractor actually provided the services. *Id.* at 151 (holding that only general and implied representations are necessary to establish agency, unless proper notice is given); *Pamperin*, 423 N.W.2d at 849. "Apparent authority is established through the acts of the principal rather

than those of the agent or through the perception of a third party.” *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 433 (Tenn. 2008).

In finding that apparent agency exists, courts find it persuasive when a hospital includes its branding on the facility and on paperwork but does not display signage or otherwise indicate that physicians are independent contractors. *Contreras v. City of Nogales*, No. CV 20-00199-TUC-DCB, 2022 WL 22885260 (D. Ariz. Oct. 25, 2022) (holding that having no signage indicating that medical providers are independent contractors and including the hospital letterhead on all paperwork are relevant to support agency). In *Butkiewicz*, the court held that the hospital held out a radiologist as its agent, focusing on several factors: the radiologist’s only address was at the hospital, all paperwork was on hospital letterhead, nothing indicated an independent contractor relationship, and no sufficient notice was given to patients concerning that relationship. *See Butkiewicz v. Loyola Univ. Med. Ctr.*, 724 N.E.2d 1037, 1040 (Ill. App. Ct. 2000) (finding vicarious liability failed based on a lack of reliance).

MHS’s manifestations concerning its relationship with CCS and Cyber MD were not merely general and implied—the perception that the AI telehealth platform was MHS’s agent was express and intentional. MHS wanted patients to believe that it operated the telehealth platform, establishing itself as a full-service healthcare provider and enticing patients who otherwise would not have chosen MHS. Modern hospitals have spent billions of dollars marketing to the public that they are full-service health facilities. *Kashishian v. Port*, 481 N.W.2d 277, 282 (Wis. 1992). This

enormous expenditure is designed solely to convince patients to choose a specific healthcare facility; modern hospitals operate as big businesses, competing with each other for consumer dollars. *Id.* By giving access to patients living as far as Cartersville, 190 miles away, MHS also stands to benefit from the telehealth services by creating a brand connection to these patients.

MHS designed its website to create the impression that Cyber MD was its agent. Patients logging into the telehealth platform would do so through MHS's primary domain and would not have seen anything along the way to indicate that anyone but MHS operated the site, the telehealth system, and Cyber MD. This is by design. MHS's agreement with CCS only allowed for MHS branding on patient-facing pages, expressly prohibiting CCS or any other entity from displaying its brand marks. Here, like *City of Nogales* and *Butkiewicz*, all pages contained MHS branding; the only address (URL) belongs to the hospital; and the website was designed to lead a reasonable patient to believe MHS controlled and operated the online diagnostic system.

MHS wanted clients to believe Cyber MD was its own AI diagnostic system, and it was successful in this endeavor. Elias Miller, like a reasonable patient, had no reason to believe that anyone but MHS was providing his lung scans, diagnostics, and feedback. MHS cannot intentionally create this impression through systematic conduct and then claim that it did not hold out that CCS and Cyber MD were its agents. Any reasonable internet user would believe that the Cyber MD system is an agent of MHS.

The first apparent agency prong is satisfied here, as MHS created an online environment to purposefully give patients the impression that it provides comprehensive healthcare, including its telehealth diagnostic program, Cyber MD. Even where a principal has held out that another entity is its agent, the principal may still avoid liability where it gives meaningful written notice to the patient, acknowledged at the time of admission. *Sword*, 714 N.E.2d at 152. Although MHS contends that its terms and conditions and a brief pop-up constitute notice, they do not waive vicarious liability. At minimum, whether MHS's conduct could lead reasonable patients to believe Cyber MD was MHS's agent, like in *Butkiewicz* and *City of Nogales*, is a question of fact best left to the jury; summary judgment would be inappropriate here.

B. MHS's Purported Disclaimers Were Not Meaningful, Adequate, or Sufficient to Provide Notice or Legally Bind Users.

MHS obscured its relationship with CCS and Cyber MD through inconspicuous terms, complex language, and sheer negligence in providing notice. Liability attaches to a principal holding out that another is its agent unless the patient knows, or should have known, that the provider is an independent contractor. *See Gilbert*, 622 N.E.2d at 794. Where a hospital cannot prove that a telehealth patient had actual knowledge of such contractual agreement posted on its website, a contract is only enforceable if the hospital can establish that: “(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, 856 (9th Cir. 2022). Website users are entitled to assume that important contractual terms will be prominently displayed, not “buried in fine print.” *Id.* at 857.

Even where a user performs some action to manifest assent—by entering the portal or clicking on a hyperlink—the user is “not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.” *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). Sign-in wrap agreements, used in many websites, do “not require users to review the Terms of Service and confirm their assent prior to accessing” the site, and instead bind users to terms when the user merely signs into or enters the portal. *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015) (stating that such agreements do not require users to click a box showing acceptance of the terms). Merely displaying a hyperlink in a prominent or conspicuous place without notifying consumers that the linked page contains binding contractual terms may have no meaning to many internet users. *Long v. Provide Com., Inc.*, 200 Cal. Rptr. 3d 117, 126–27 (Cal. Ct. App. 2016). MHS’s purported attempts at notice fall far short of binding users—the provisions were inconspicuous, reasonable users (like Mr. Miller) would not know of the provisions, and the contractual nature was not obvious. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

1. MHS's Inconspicuous Sign-in Wrap Terms Are Unenforceable to Bind Users to Inconspicuous Terms In a Separate Document Whose Legally Binding Nature is Unclear.

MHS makes no connection between the inconspicuous hyperlinked terms and the ultimate treatment provided through Cyber MD, including diagnostic lung scans and follow-up treatment. Entry to the MHS home platform does not require a user to click on, review, or interact with the terms and conditions in any way before allowing entrance to the portal. The site allows user entry by clicking a login icon and merely indicates below that entry into the portal signifies acceptance of the site's terms and conditions. The login icon and separately linked terms and conditions are located on the home page independent of where a user navigates the portal, locates the specific area of the site needed for their services, accesses Cyber MD, or makes any decision about whether to engage MHS to provide essential healthcare services.

The location and formatting of the terms and conditions create inconspicuity; a reasonable user would see the terms or know of their existence. MHS sends users who click on the terms to a separate, standalone page. There, the users encounter a block of unformatted, single-spaced, black text on a white background; the font is noticeably smaller than used for MHS's regular website. The relevant provision discussing the connection between MHS and its online diagnostics is buried three-quarters of the way down in the mass of fine print. With no headings, bold words, all caps, underlining, different coloring, highlighting, or any formatting to indicate important or binding terms, only the eagle-eyed user could locate this portion of the terms and conditions.

The binding legal nature of the terms is ambiguous, at best. A reasonable person who actually locates this section of the terms and conditions would struggle to understand that the described association between MHS and software or contractors could create a legally binding agreement protecting MHS from any negligence or malpractice resulting from medical treatment provided—despite the treatment being performed on MHS’s website and through MHS’s telehealth platform. The clause is obscured in jargon detailing operational control and automated software applications, which the reasonable user of these services would not be able to link to their ability to vindicate their rights if, for example, the healthcare provider makes repeated errors resulting in a non-diagnosis and hastening the patient’s death.

MHS’s unclear and inconspicuous terms do not relieve the hospital from liability for the Cyber MD misdiagnosis. Petitioner can only escape liability if they provide conspicuous notice of the terms to which they intend to bind Respondent and the legally binding nature of those terms is clear such that an acceptance unambiguously manifests assent to be bound by those terms. *Berman*, 30 F.4th at 856. The location and formatting of these terms strongly indicate that, not only were the terms inconspicuous, but that the inconspicuousness was an intentional decision by MHS. A clickwrap agreement requires affirmative assent by clicking a box located directly adjacent to the contractual terms—but MHS chose a sign-in wrap with no affirmative assent requirement located on a separate page from the contractual provisions purported to bind users. MHS used no form of textual formatting to

indicate binding contractual provisions and indeed made the terms more disguised and difficult to read by significantly decreasing the font size. The terms themselves are ambiguous at best, and in no way lead a reasonably prudent user to conclude that assent would bind them to the buried clauses, especially not for telehealth treatment undertaken much later.

Even if clicking the login icon were an indication of assent to the specific terms found within the hyperlink (it is not), the user is not bound by inconspicuous provisions of which they are unaware, contained in a document whose contractual nature is not obvious. *See Meyer*, 868 F.3d at 75; *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 123 (2d Cir. 2012) (“there must be evidence that the offeree knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound”).

Respondent contends, and the Court of Appeals agreed, that MHS seeks to enforce terms that are inconspicuous and ambiguous, and the legally binding nature of such terms would not be understood by the reasonably prudent user of telehealth services. Respondent does not dispute that Mr. Miller clicked the hyperlink and remained on the separate page for four seconds. Website users are entitled to assume that important contractual terms will be prominently displayed, not “buried in fine print.” *Berman*, 30 F.4th at 857. Few terms are more important than those discussed here, but MHS fell short of prominently displaying its purported disclaimer, opting instead to obscure its terms on a separate page like a textual needle within a legal jargon haystack. Absent conspicuous terms and unambiguous assent, the MHS sign-

in wrap agreement is unenforceable and cannot bind Mr. Miller or Respondent to its purported terms.

2. The Pop-Up is Insufficient Because It Does Not Inform Users of Binding Consequences, Disclaim Agency, or Make a Connection between Cyber MD’s evaluations and MHS Terms and Conditions.

Because the pop-up does not refer to the terms and conditions or disclaim agency, it is insufficient to bind Mr. Miller. As with the discussion above, the principles guiding whether a pop-up agreement binds users to contractual terms rely heavily on the conspicuousness of the terms and ambiguity in assent to such terms. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”). Where reasonably prudent online users would not have known of the terms to which the pop-up purportedly refers, and the user’s conduct (clicking “accept”) does not unambiguously indicate assent to be bound, a pop-up cannot purport to bind them. *Id.* at 33-35.

The pre-session message stating that Cyber MD is AI does not shield MHS from liability. Before a Cyber MD chat session, a pop-up states that Cyber MD is not a healthcare professional and is instead an AI program. The pop-up requires users to click “accept” to proceed with Cyber MD services. Respondent does not dispute that this pop-up clearly states its intended message (that the system is AI) nor that the message itself is conspicuous (large red font coupled with a requirement to click “accept”). Nevertheless, the pop-up message is insufficient to provide notice that no

agency relationship exists or to strip users of their right to bring suit against MHS for injury resulting from a Cyber MD misdiagnosis. Notably, the pop-up fails to (1) make any connection between the pop-up describing the AI system and the terms and conditions located within a hyperlink on the login screen; (2) unambiguously notify users that clicking “accept” binds them to important contractual terms located within the terms and conditions; (3) disclaim any agency relationship, or make any distinction, between MHS and Cyber MD to make it known to a reasonably prudent user that Cyber MD is not a direct agent of MHS; and (4) explain what, exactly, clicking “accept” means—whether the user is accepting that Cyber MD is an AI software or agreeing to completely separate terms with serious legal consequences.

MHS did nothing to provide a reasonably prudent internet user with the opportunity to understand that another entity beyond MHS was responsible for the medical advice and treatment provided by Cyber MD. When Mr. Miller encountered this pop-up before conducting a Cyber MD chat, he understood that this was an AI system, but MHS did not provide him with any reason to believe that this system is not directly under its control as an agent of the MHS hospital network. MHS did not mention CCS, nor did they allude to an independent contractor or other third-party company. Only MHS branding was allowed on the site, reinforcing the message that the AI described belonged to MHS. The site did not indicate that any other company was involved.

Furthermore, MHS did not indicate, in any way, that clicking “accept” would create legally binding consequences for users seeking medical treatment. The pop-up

merely serves to notify users that MHS uses AI for its telehealth platform but omits clarification as to the significance of that fact. There is no indication that this pop-up relates back to the terms and conditions found within hyperlinked, inconspicuous, and ambiguous terms and conditions located on the login page.

Given the facts established—that MHS did not refer to any terms to which Mr. Miller could be bound, make any representation that no agency relationship exists between MHS and Cyber MD, or indicate that the pop-up conferred any legal consequences on accepting parties—a reasonably prudent telehealth user would not have known of the legal implications of the pop-up. Clicking “accept” cannot be a manifestation of assent because MHS withheld all information about what assent would mean. The terms, being on a different page and hidden among layers of ambiguity, are inconspicuous, and Mr. Miller could not manifest assent to terms MHS never referenced. For the above reasons, this pop-up containing information about AI, and clicking the login button on the home page, are unenforceable to bind Mr. Miller and Respondent to the terms purported by Petitioner.

Mr. Miller reasonably relied upon MHS’s manifestations that Cyber MD was its agent, and he had no reason to believe otherwise. Courts approach the third prong of the apparent agency test, patient reliance, by asking: (1) whether, because of the hospital’s manifestations, the patient subjectively believed the hospital was providing treatment; or (2) whether the patient should have known that the agent, not the hospital, was responsible for treatment. Here, regardless of the chosen method, Mr. Miller indisputably acted in reliance upon the hospital’s manifestations. Subjectively,

he believed that MHS was providing treatment because MHS held out that it was doing so. Objectively, no reasonable patient could have known that CCS, not MHS, operated Cyber MD because the website obscured the terms and conditions and did not give notice of legally binding terms. With all three *Gilbert* factors satisfied, MHS should be held vicariously liable for the conduct of its integrated AI software.

C. MHS's Terms are Unconscionable Because They Are Inconspicuous, Incomprehensible, and Mr. Miller Was a Vulnerable Patient Without Meaningful Choice.

Elias Miller lived in a county with no reasonable medical options and lacked meaningful bargaining power—coupled with the MHS's inconspicuous terms and ambiguous language, the terms and conditions were unconscionable. Agreements are procedurally unconscionable when the disparity in bargaining power is so great that one party can be said to lack “meaningful choice” to enter the agreement. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 329 (6th Cir. 2025). When determining whether an agreement is procedurally unconscionable, Courts assess several factors, including the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, relative bargaining power, and the presence or absence of meaningful choice. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023) (other relevant factors include age, education, intelligence, and business acumen).

The contractual terms in *Hines* were formatted to be conspicuous—using headings, all caps, and font the same size as other text—and the text clearly explains the legal implications (that all disputes go to arbitration) in language a reasonably

prudent reader could understand. *Hines*, 140 F.4th at 328-29. By contrast, the terms here are hidden—in small font without headings or any conspicuous formatting—and the consequences are unintelligible to the reasonable reader. Additionally, there was an incredible chasm in bargaining power between Mr. Miller and MHS. Mr. Miller was an elderly man suffering from a lung ailment (later discovered to be a malignant mass) with no local access to viable healthcare to treat his condition. By contrast, MHS is a large hospital network with multiple locations and the ability to diagnose patients through its technologically advanced telehealth system. MHS, for all intents and purposes, did not need Elias Miller’s business, but Elias Miller desperately needed MHS. These are two parties with vastly unequal bargaining power in this interaction.

Finally, Mr. Miller lacked meaningful choice when choosing healthcare options and ultimately deciding to use Cyber MD. The trial court held that meaningful choice existed because Mr. Miller was advised of the agency relationship and contractual terms, and he could have simply chosen not to sign them. The Court of Appeals correctly disagreed with this notion, finding that there were major structural barriers for Mr. Miller in obtaining healthcare—such as the 190-mile distance from a facility with proper imaging technology—and that coupling essential healthcare with a hidden hyperlinked agency disclaimer in a non-negotiable format raises significant unconscionability concerns. Additionally, the trial court’s reasoning is erroneous because, when considering meaningful choice, it presumed that Mr. Miller had reasonable notice of the agency relationship and resulting legal consequences when

deciding to assent rather than make an in-person appointment. Not so. Because the terms were inconspicuous and incomprehensible to a reasonable telehealth user, Mr. Miller did not know that clicking “login” on the homepage, or “accept” in the pop-up, constituted assent to be bound to any legal terms, let alone terms that absolve MHS from liability. Without this information, Mr. Miller (or a reasonable internet user in his position) could not have made a meaningful choice to forgo online treatment because of the legal consequences.

Considering the inconspicuous (disguised) and incomprehensible terms and conditions, discrepancy in bargaining power, and lack of meaningful choice for Mr. Miller in making medical decisions, the terms here are unconscionable and unenforceable.

D. MHS Cannot Evade Liability by Hiding Behind Its AI Telehealth System Because Cyber MD Was Within MHS’s Scope of Authority and Performing the Tasks MHS Orderd.

The fact that Cyber MD is an AI software designed to analyze and respond to patient inquiries does not alter the liability incurred by MHS for the AI’s misdiagnosis. The foundational elements of vicarious liability described above are satisfied: MHS held out that CCS and Cyber MD are agents acting with apparent agency, and Mr. Miller relied on these representations when he sought medical care through the telehealth platform. The principal may be held liable for the acts of its agent when the acts are within the apparent scope of the agent’s authority, but there will be no liability where the agent’s actions are personal and unrelated to the scope of its authority. *Ultsch v. HTI Mem’l Hosp. Corp.*, 674 S.W.3d 851, 855 (Tenn. 2023);

Pyne v. Witmer, 129 N.E.2d 351, 1309 (Ill. 1989) (referring to actions unrelated to employment as a “frolic” and noting that when an agent is not on a frolic the principal is vicariously liable for the agent’s negligent actions).

Because Cyber MD was within the scope of MHS’s scope of authority and performing the tasks MHS ordered. Courts hold that where an agent uses electronic/virtual tools outside of the scope of authority, no liability will attach. *See generally Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376 (Cal. Ct. App. 2006) (threatening messages sent via email were outside the scope of authority and conferred no liability); *Bissett v. Verizon Wireless*, 401 F. Supp. 3d 487 (M.D. Pa. 2019) (nude photographs sent electronically were outside the scope of authority). But where conduct involving such tools falls within the agent’s scope of authority, courts are willing to confer liability on the principal. *Billiter v. SP Plus Corp.*, 329 F. Supp. 3d 459 (M.D. Tenn. 2018) (finding that an employee using a computer to gain access to another’s personal files was acting within his scope because he was authorized to access other computers, and this action could confer liability on the principal). These cases show that it is not the tool used that is at issue, but whether the agent is acting within the scope of its authority under the principal or is on a frolic.

Regardless of how the Cyber MD AI is perceived, MHS is liable for its conduct because Cyber MD was negligent in performing the tasks MHS expressly ordered. There are two ways to perceive AI systems: either as a tool like any other to be used to accomplish a task, or as a program that can think and act in a way similar to autonomous thinking. When viewed in the first sense, we see that liability attaches

to MHS because its agent, CCS, was acting within the scope of its authority. MHS contracted CCS to use the former's AI system to analyze images and diagnose disease. The injury here resulted from an error in analyzing images and diagnosing disease: the exact scope of CCS's authority in using its AI tools. Cyber MD was not on a frolic at all; it was performing the exact task that MHS authorized it to perform. MHS is liable for this action.

Even if we view AI telehealth systems as able to think autonomously, liability remains attached to MHS for the same rationale that there was no frolic. Where a principal hires a contractor, and the contractor then hires another (a subcontractor), the principal can be liable for the actions of the subcontractor. *See Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007). This is especially true where the principal retains control over the work of the subcontractor. *Kono v. D.R. Horton, Inc.*, 33 N.W.3d 852, 862 (Iowa 2026) (cleaned up) (explaining that the retained control doctrine applies when the principal or contractor has control over the operations of its agent).

CCS retained control over the Cyber MD diagnostic system. CCS actively monitored the accuracy and performance of Cyber MD. When CCS discovered inaccuracies, it stopped Cyber MD from performing any more medical treatments and retrained it until the accuracy improved once more. No greater level of control can be asserted than the ability to prevent another from working so that they can go through training to improve performance. CCS retains full control of Cyber MD, and MHS is liable for the conduct of CCS and those that CCS controls. If Cyber MD, and AI

systems generally, is to be considered more akin to a human employee than a tool, then MHS is still liable for Cyber MD's actions because CCS retained full control and the actions were within the scope of authority.

E. Hospitals Cannot Reap the Benefits of AI while Escaping Liability Through Crafty Contractual Loopholes or Legal Technicalities.

MHS is attempting to have its cake and eat it too. The hospital network wants to reap the benefits of its online AI telehealth platform—by cultivating a reputation as a full-service provider of medical care and using its new boundaryless reach to attract patients willing to pay—but MHS wants to disclaim all liability for injuries caused by the system. This attempt to double-dip cannot be allowed or encouraged. Without proper deterrence, like through action brought in civil court, hospitals will continue to integrate AI technology into various areas of medical practice with disregard for the accuracy and viability of the programs. These hospitals will boast that their AI is advanced, accurate, and safe, while claiming that costs are driven down due to low overhead and staffing needs; but when the human costs from misdiagnoses and malfunctioning algorithms accumulate, the same hospitals will point to their disguised terms and conditions to protect them from accountability.

This policy of holding medical providers liable when they represent a tool as part of the care it provides and derive competitive benefits from that tool has roots in tort law and corporate negligence. In tort law, courts hold that it is best to hold the party liable that created the risk of injury by placing the product onto the market and reaped the profit from doing so. *See Larosa v. Superior Ct.*, 176 Cal. Rptr. 224, 234 (Ct. App. 1981) (holding that this approach will provide incentive for companies to

impose fewer injurious products on the public). This reflects a social policy that the seller is best positioned to shoulder the costs of injury after having benefited from engaging in business. *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Green v. Montgomery Cnty., Ala.*, 784 F. Supp. 841, 846 n.10 (M.D. Ala. 1992) (cost should be borne by those “best positioned and motivated to avoid the harm in the future”).

If this practice of allowing medical providers to shield themselves from liability for injuries caused by AI diagnostic systems were approved, the burden would be hoisted squarely on the shoulders of the sick and poor while allowing vastly wealthy healthcare networks to derive all of the benefits. Society cannot stomach a policy that permits hospital executives to siphon money from sick people but leaves these patients with no recourse if the hospital entrusts treatment to faulty AI.

MHS had a duty to ensure Cyber MD performed adequately. Under the doctrine of corporate negligence, hospitals have certain nondelegable duties for which they owe a duty of care to patients, notwithstanding any other form of liability. *See Thompson v. Nason Hosp.*, 591 A.2d 703, 708 (Pa. 1991) (holding that one nondelegable duty is the duty to maintain adequate equipment). Here, MHS had a duty to ensure that all equipment used was adequate for its purpose. MHS employed Cyber MD, which misdiagnosed severe illnesses for several years. Under corporate negligence, MHS owed a duty of care to Mr. Miller and is liable to Respondent for failing to maintain basic standards in employing diagnostic equipment.

MHS held out that the Cyber MD system was its agent so that it could gain a financial and reputational advantage. Elias Miller relied on MHS’s manifestations,

and deficiencies in the product resulted in his premature death. MHS claims that it notified Mr. Miller that it is not responsible for actions of Cyber MD, but that notice is not sufficient for a reasonably prudent user of MHS's services because it was inconspicuous (or purposefully hidden), incomprehensible, and unconscionable. Further, CCS and Cyber MD were acting exactly within the given scope of authority, placing liability for their actions squarely with MHS.

II. Respondent's Claims Satisfy the Statutory Exceptions to Shawnee's Statutes of Repose Through Continuous Course of Treatment and Latent Undiscoverable Defects.

The Shawnee Legislature expressly provided statutory provisions to toll repose for the exact circumstances of this case. As opposed to statutes of limitations, which run from when the injury is discovered by the plaintiff, statutes of repose measure from the date of the defendant's last culpable act or omission. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (stating that statutes of repose bar lawsuits after a specified time from when the defendant acted, even if that period ends before the plaintiff has suffered the resulting injury). Under a statute of repose, "the injury need not have occurred, much less have been discovered". *Id.* Statutes of repose may be tolled where the legislature expresses intent that the statute does not provide complete repose and instead anticipates extending the statutory period under certain circumstances. *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017) (explaining that legislative intent provides an exception to the general rule that statutes of repose cannot be tolled). A clear example of such legislative

intent is where the statute of repose contains an express exception. *Id.* (citing 29 U.S.C. § 1113, which provides a repose exception for fraud).

Shawnee enacted § 12-404, a statute of repose for medical malpractice claims, capping liability at four years from the date of the action or omission claimed to have caused the injury. Shawnee Rev. Stat. § 12-404(b). But the Shawnee legislature carved out an express exception to toll the statute of repose when a healthcare provider “engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence.” *Id.*

Shawnee also enacted § 12-410, establishing a four-year repose period for product liability suits running from the date of first sale, lease, or delivery. Shawnee Rev. Stat. § 12-410(a). There is an express exception allowing for tolling when a reasonably prudent person could not identify the product defect within four years of delivery. Shawnee Rev. Stat. § 12-410(b)(3).

Shawnee does not provide complete repose for medical malpractice or product liability; the Shawnee legislature anticipated specific circumstances for which the statutory periods should be extended (tolled) and expressed its intent to allow for tolling by carving out express exceptions. Here, the Court of Appeals correctly held that repose was tolled because MHS established a continuous course of treatment and the algorithm’s harm-causing defect could not have been discovered by a reasonably prudent person.

Product liability and Malpractice are separate claims. If the Court determines that one claim is barred by a statute of repose or limitations, the other remains live to give respondent a cause of action against Petitioners.

A. Cyber MD’s Imaging, Diagnosis, Monitoring, and Follow-Ups Toll Repose Because They Constitute a Continuous Course of Treatment.

Under the continuous treatment exception, a statute of repose does not run for a medical malpractice claim if a patient remains under continuous treatment; a claim only accrues when the treatment ceases. *Miller v. United States*, 932 F.2d 301, 304 (4th Cir. 1991). This doctrine applies where there is a “series of negligent acts, or a continuing course of improper treatment.” *Lane v. Lane*, 752 S.W.2d 25, 27 (Ark. 1988). The Shawnee statutory exception tolls the statute of repose where the treatment is for the same “illness, injury, or condition that gives rise to the claim of negligence.” Shawnee Rev. Stat. § 12-404. The treated condition must be “related to” the same original condition or complaint. *Borgia v. City of New York*, 187 N.E.2d 777, 778 (N.Y. 1962) (cleaned up) (“The ‘continuous treatment’ we mean is treatment for the same or related illnesses or injuries”). A corporate or organizational healthcare provider can create a physician-patient relationship. See *Didato v. Strehler*, 554 S.E.2d 42, 46-47 (Va. 2001) (holding that the patient-client relationship is formed from a consensual transaction or contract and can be created with a corporation engaged in providing healthcare services); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 320 (Va. 1999) (corporations primarily rendering healthcare services are considered healthcare providers).

Courts have found that a continuous course of treatment only exists where there is a relation between the treated condition and the original complaint, or where treatment was performed at a time that would have prevented the resulting injury. *See Nykorchuck v. Henriques*, 577 N.E.2d 1026, 1027–29 (N.Y. 1991) (holding that treating a patient for breast cancer lumps is not related to treatment for endometriosis, and continuous course of treatment does not apply); *Miller v. United States*, 932 F.2d 301 (4th Cir. 1991) (holding that continuous treatment does not apply to doctors who could not have diagnosed the condition because the patient did not report relevant symptoms or to later treating physicians whose conduct had nothing to do with timely detection of cancer).

Where a patient seeks treatment for a condition, the physician repeatedly fails to diagnose the issue, and the injury is related to the treatment sought, the continuous course of treatment exception will apply. *See Comstock v. Collier*, 737 P.2d 845, 846-51 (Colo. 1987) (the treating physician diagnosed a patient’s condition as phlebitis and began treatment for that ailment, but years later the physician discovered it was cancer; continuous course of treatment applies); *Stallings v. Gunter*, 394 S.E.2d 212, 213-216 (N.C. 1990) (where a patient sought dental treatment for a tooth condition and the dentist repeatedly failed to diagnose the condition, continuous course of treatment applied).

Cyber MD repeatedly failed to diagnose Mr. Miller’s lung cancer, and his resulting death is directly related to the treatment sought. Mr. Miller, who has a high-risk respiratory status due to years of asbestos exposure, sought treatment after

experiencing shortness of breath. Mr. Miller accessed MHS's telehealth portal, relaying his symptoms and history with asbestos. MHS, through Cyber MD, diagnosed Mr. Miller with adult asthma. Cyber MD recommended that Mr. Miller see a local physician to get an inhaler, scheduled a recurring annual appointment to review the very symptoms that were reported in the first conversation, and ordered further imaging for comparison.

After Mr. Miller suffered a sudden and catastrophic medical emergency, experts discovered that MHS and Cyber MD repeatedly failed to diagnose signs of lung cancer visible in the imaging taken and analyzed by the online platform in 2018. Mr. Miller sought treatment for his persistent respiratory condition; MHS and Cyber MD performed imaging and analysis for that condition; and this same condition was monitored over the course of years through follow-up imaging and analysis scheduled by MHS and Cyber MD.

Mr. Miller's respiratory disease was not just related to the resulting injury, it was the same condition. Respondent's case follows the same pattern as *Comstock* and *Stallings*. Like *Comstock*, Mr. Miller presented specific symptoms (shortness of breath), and Cyber MD made a diagnosis (adult asthma) related to that condition. Cyber MD continued treating the same condition that Mr. Miller initially complained of—his respiratory issues resulting from asbestos exposure. Like in *Comstock*, Mr. Miller's medical provider, Cyber MD and MHS, consistently misdiagnosed his condition over the course of four evaluations in three years. In *Stallings*, the patient visited a dentist over the course of years for a tooth condition, and that dentist

repeatedly failed to make an accurate diagnosis. *See generally Stallings*, 394 S.E.2d 212 (It was the dentist’s responsibility to detect this condition like it was Cyber MD’s responsibility to accurately detect Mr. Miller’s condition). The *Stallings* court applied the continuous course of treatment doctrine to toll the repose period until the date the patient discovered her injury. *Id.* at 216 (the patient untimely filed despite the tolling). Here, like *Comstock* and *Stallings*, the treated condition was not merely “related to” the original condition; it was the same condition.

Mr. Miller, unlike the patients in *Nykorchuck* and *Miller v. United States*, used the same medical provider to treat the same condition, and Cyber MD’s medical errors directly caused the injury claimed in this case—undiagnosed lung cancer that, had it been caught and addressed sooner, would have allowed Mr. Miller a higher likelihood of survival. Where a patient switches physicians, requests treatment for different conditions, or seeks treatment that would not have mitigated or prevented the injury, courts are reluctant to apply the continuous course doctrine. None of those circumstances apply to Mr. Miller’s course of treatment through MHS and Cyber MD. The medical relationship formed between Mr. Miller and MHS, and the subsequent treatment for Mr. Miller’s respiratory issues align with how courts apply the continuous course of treatment doctrine to toll statutes of repose.

Furthermore, a holding that affirms the Court of Appeals would further the policy behind the continuous course of treatment exception. “The continuous treatment doctrine is based on a patient’s right to place trust and confidence in his physician.” *Otto v. Nat’l Inst. of Health*, 815 F.2d 985, 988 (4th Cir. 1987). A patient

must be able to trust that a medical provider is doing its best to improve the patient's condition. When a patient could not know of the injury, and the physician makes assurances that there is no serious ailment present, that patient places trust and confidence in the physician that this vitally important diagnosis is correct. See *Otto*, 815 F.2d at 988–89 (holding that, where the physician caused injury through surgery and gave assurances that there was no issue with recovery, the continuous course of treatment applied because of the trust Otto placed in the physician). Mr. Miller did not know of the malignant cells in his lungs, and Cyber MD repeatedly assured him that there was “zero evidence” of malignancy, finally giving him the ultimate assurance—stating that no further imaging to detect respiratory disease was necessary. Mr. Miller trusted MHS as a healthcare institution and relied on years of assurances from Cyber MD that he was cancer-free. MHS invited this trust, and a reasonable person would believe there was no need to seek a second opinion.

Additionally, the continuous course of treatment exception acknowledges that it is contrary to the patient's interest to require them to disrupt medical treatment to sue the medical provider. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1081 (2d Cir. 1988). This rationale applies to Respondent with extra force because Mr. Miller lived in a medical desert with no other reasonable options for treatment beyond Cyber MD. Patients in urban areas may be able to switch providers easily, but for those in a medical desert like Cartersville, disrupting treatment with one physician functionally means ending treatment altogether. Unlike other professional settings, ending a medical relationship is often a matter of life or death. It would be absurd

and cruel to force Mr. Miller to go without respiratory imaging—considering his high-risk asbestos exposure—to pursue litigation.

Hence, the Court should affirm the Court of Appeals’ holding because the relationship between Mr. Miller and MHS (through Cyber MD) satisfies the continuous course of treatment exception in § 12-404. The treated condition, injury, and initial condition complained of were the same. Cyber MD repeatedly failed to diagnose lung cancer where it was visible in the imaging performed by the system. Cyber MD compounded this error by repeatedly and explicitly assuring Mr. Miller that there was zero evidence of malignancy—assurances reasonably relied on by Mr. Miller, a lifelong non-smoker with no family history of respiratory illness. This is the precise scenario that the legislature anticipated when it expressly carved out the statutory exemption for a continuous course of treatment. To hold otherwise would dissolve the trust and confidence that patients, like Mr. Miller, put in medical providers.

B. Cyber MD’s Defective Algorithm Was Latent and Undiscoverable, Satisfying an Exception to Repose.

The Shawnee legislature expressly carved out an exception to the statute of repose in product liability claims for circumstances, like here, where a reasonable person could not have discovered the defect. In Shawnee, claims for product liability are constrained by a two-year statute of limitations provided in § 12-402, and a four-year statute of repose in § 12-410. Shawnee Rev. Stat. §§ 12-410(a), 12-402. Under the statute of limitations, lawsuits must be commenced within two years after the cause of action accrues. Shawnee Rev. Stat § 12-402(a). Generally, a cause of action

accrues when the injury happens, but in wrongful death cases it can accrue at the time of death. In situations where the injury is not immediately discoverable, the cause of action accrues when the claimant knew or reasonably should have known of the injury. Shawnee Rev. Stat § 12-402(b)–(c). The statute of repose runs “from the date of first sale, lease, or delivery of possession to its initial user or consumer.” Shawnee Rev. Stat. § 12-410(a).

To bring a valid claim under § 12-410, the claimant must file the lawsuit within the acceptable timeframes for both the statute of limitations and the statute of repose; if either has run its course, the action is barred. The Shawnee legislature carved out express provisions under which the statute of repose does not apply. Shawnee Rev. Stat. § 12-410(b). Relevant here is an exception where the “injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person” until after the four-year repose had expired. Shawnee Rev. Stat. § 12-410(b)(3). Respondent contends, and the Court of Appeals agrees, that the injury-causing aspect of Cyber MD, namely the defective algorithm, was not discoverable by an ordinary reasonably prudent person, and as such, the statute of repose does not apply in this case. No tolling is necessary here, as § 12-410 simply does not apply at all.

An AI system with chatbot features is a product for which defective features may be used to support a product liability claim where the defects proximately cause injury. *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1172–74 (M.D. Fla. 2025) (cleaned up) (Holding that Google could be held liable for its contributions to a

defective AI chatbot). To establish that a manufacturer of a product is liable for its defects, plaintiffs must show that “(1) the product was defective; (2) the defective aspect of the product was the proximate cause of the injury; and (3) the defective product was actually manufactured by the defendant.” *Yanovich v. Zimmer Austin, Inc.*, 255 F. App'x 957, 960 (6th Cir. 2007).

Petitioner does not dispute that CCS developed Cyber MD. It is also undisputed that Mr. Miller's injury, the delay in diagnosing his condition that hastened his death, was a result of Cyber MD mistakenly finding that there was no evidence of malignancy in the images of Mr. Miller's lungs. The only question remaining is whether Cyber MD can be considered defective. The answer is undeniably yes.

Cyber MD was a defective product because it failed to diagnose lung cancer at the rate purported by CCS. To determine whether a manufacturing defect exists, courts weigh the product against the manufacturer's production standards. *Prentis v. Yale Mfg. Co.*, 421, 365 N.W.2d 176, 182 (Mich. 1984) (stating that courts may weigh the production standards against the manufacturer's manifestations). Here, CCS boasted a 97% accuracy rate in classifying lung lesions. With that success rate, CCS contracted with MHS for the hospital to integrate the AI system into its telehealth platform. In 2022, CCS retrained Cyber MD after discovering that its accuracy rate was at 85%. CCS stated that an accuracy rate of 97% for Cyber MD was satisfactory for use, but lower accuracy did not meet those standards. This product is sold as an accurate and efficient tool that provides convenient medical imaging for patients. By

CCS's standards, delivering an inaccurate product to MHS makes it defective. This product misdiagnosed Mr. Miller every time it analyzed his scans—the initial scan and three regularly scheduled follow-ups—establishing further proof that this was not an accident or isolated situation; this error was contained within the diagnostic algorithm of the product itself. AI, at its core, is software designed to execute algorithms to perform tasks like recognizing patterns and reaching conclusions based on those patterns. Because Cyber MD failed to perform these functions, it was defective.

A technology company developing AI software writes the algorithms to perform certain functions, but, unlike physical products, when the AI is used in the open market, there is no wear and tear or opportunity for outside influence to damage it. This is important because Shawnee § 12-410 requires that a defect exist at the time of delivery, as opposed to one that arises later. Shawnee Rev. Stat. § 12-410(b)(3). This defect with Cyber MD's algorithm would not come about later as MHS integrated it into the telehealth platform. MHS operated the patient-facing portions of the site while CCS designed and hosted the platform. A defect in Cyber MD's algorithm must have been present at the time the product was delivered to MHS because there is no other way for deficiencies to occur outside of that initial coding process. Low sample size, inadequate training images, or another obscuring issue would explain perceived accuracies pre-delivery.

Compounding the issue, and satisfying the statutory exemption, is the fact that this manufacturing defect was undiscoverable by an ordinary reasonably prudent

person, such as Mr. Miller. A latent defect is one not readily observable and not discoverable outside the most searching inspections. *Scott v. Cont'l Ins. Co.*, 51 Cal. Rptr. 2d 566, 569 (Cal. Ct. App. 1996). To determine if an inspection is reasonable, courts look to the totality of the circumstances and the nature of the product being inspected. *Geertz v. Ausonio*, 4 Cal. App. 4th 1363, 1368 (1992) (holding that an inspection that only revealed the manifestation of a defect would not be sufficient).

No reasonably prudent consumer could have detected the Cyber MD defect. The inner workings of an AI diagnostic telehealth platform are complex, and it would take skill beyond that of a reasonably prudent person to identify a defect within the system. Unlike physical products, the reasonably prudent person does not even have access to inspect such algorithms, even if desired. Here, it is unclear if even MHS had access or ability to review the Cyber MD algorithm to determine whether there was a defect. It can safely be said that the reasonably prudent person, even with a desire to determine the accuracy of Cyber MD, could not have discovered the algorithmic defect that caused injury to Mr. Miller.

Because the injury to Mr. Miller was caused by a defect present at the time of delivery, and that defect could not have been discovered by the reasonably prudent person (or even a very knowledgeable person), § 12-410 does not impose a repose period for Respondent's lawsuit against MHS. The only restriction would be the statute of limitations under § 12-402.

Section 12-402 provides two distinct limitations periods, and Respondent's lawsuit was commenced before either expired. The Court of Appeals correctly held

that § 12-402(b) applies here because this wrongful death suit commenced within 2 years of Mr. Miller's death. This suit was filed in July, 2024, merely 3 months after Mr. Miller died in April, 2024. This fits squarely within the limitations period provided in § 12-402. Shawnee Rev. Stat. § 12-402(b) (providing for a two-year statute of limitations after the decedent's death.)

Additionally, § 12-402(c) tolls the limitations period if the injury or causal relationship is not discoverable, and the period begins running when the claimant knows or reasonably should have known of the injury and the tortfeasor's identity. Shawnee Rev. Stat. § 12-402(c). The earliest date that Mr. Miller could have reasonably known of the injury and the tortfeasor's identity is October 2023, when he was hospitalized, and doctors discovered the malignant mass in his lungs. Prior to that incident, Cyber MD told Mr. Miller that there was zero evidence of malignancy and that he did not need further treatment.

Even taking the earliest possible date, Respondent was still well within the limitations period. The malignant mass was found in October 2023, and the 2-year limitations period began running at that point. The suit in July 2024 was filed over a year before the limitation expired.

1. The Trial Court Erred in Applying § 12-404 to Limit a Product Liability Claim

The trial court incorrectly applied the limitations contained in § 12-404 (related to malpractice claims) to Respondent's separate product liability claim; the Court of Appeals properly reversed that incorrect application.

Product liability claims are governed by § 12-410, which contains its own express statutory exception to repose, including the latent defect exception discussed at length above. *See* Shawnee Rev. Stat. § 12-410(b)(3). The plain text of § 12-410 does not reference § 12-404's malpractice limitations. Shawnee Rev. Stat. § 12-410. Indeed, § 12-410 only serves to outline repose for product liability claims and provide exceptions to those claims—not malpractice. Shawnee Rev. Stat. § 12-410.

Additionally, § 12-402 provides the statute of limitations for personal injury and wrongful death claims, but these claims are not limited by § 12-404 where the claim is not for malpractice. For separate personal injury or wrongful death claims arising from product liability, only the limitations outlined in § 12-402 apply. A different reading would betray the legislature's express intention that the two claims have distinct limitations and repose. Even if this Court finds that § 12-402(a)'s reference to § 12-404 creates a limitation on personal injury claims, this reading could not import that limitation to § 12-402(b), which makes no such reference for wrongful death claims. Shawnee Rev. Stat. § 12-402(b). The legislature knows how to incorporate statutes by reference, as evidenced by § 12-402(a); thus, its decision to exclude that reference in § 12-402(b) must be given proper credence. Respondent, bringing suit for wrongful death resulting from a defective product, is only limited by the provisions in § 12-410 and § 12-402(b). The suit was brought within two years of Mr. Miller's death, satisfying the applicable statutes.

Because the Shawnee statute of repose does not bar a product liability claim under these circumstances, Respondent only needed to file this lawsuit before the

statute of limitations expired. This requirement was met with ease. Furthermore, the continuous course of treatment doctrine tolled Respondent's medical malpractice claim. Neither claim violates the statutes of limitations or repose; thus, both are valid claims brought by Respondent.

CONCLUSION

MHS expressly and intentionally held out to the public that its new AI telehealth platform, Cyber MD, was an agent under the control of MHS. The hospital network did so because the reputational effects of claiming to be a full-service and wide-reaching medical network are immense. The wider MHS casts its net into remote areas lacking healthcare, the more bill-paying customers MHS can attract. However, when one of those customers—an elderly man with no other options—is repeatedly misdiagnosed by Cyber MD, MHS claims that it is a separate entity with no responsibility for that treatment. Simply put, MHS wants to have it both ways: it wants to reap the benefits of treating patients remotely, but it disclaims liability for that same conduct.

MHS attempts to shield itself from liability with its terms and conditions. These terms disclaiming liability are specifically designed to be inconspicuous, unintelligible to the average internet user, and vague regarding their legal implications. The terms are disguised in sign-in wrap and are not located near where a patient would actually seek treatment. A pop-up, alleged to further this legal disclaimer, neither mentions the terms and conditions nor contains any indication that the AI system is not entirely controlled by MHS.

Legally, MHS is subject to vicarious liability for the actions of its AI telehealth platform. MHS purposefully created the image that Cyber MD is its agent, and it was reasonable for patients to take MHS at its word.

Finally, Petitioner claims that even if MHS is vicariously liable, Respondent filed her lawsuit outside of the applicable statutes of repose. Not so. MHS established a continuous course of treatment triggering an express exception provided by the Shawnee legislature to toll the statute of repose. Moreover, because the defective algorithm was undiscoverable by a reasonably prudent person, no statute of repose applies to Respondent's product liability claim.

At minimum, genuine issues of material fact remain for both issues. Summary judgment requires inferences to be viewed in the nonmovant's favor. Summary judgment is inappropriate in this case—Respondent should be given the opportunity to present these facts to a jury.

This case is of great importance for the healthcare industry to preserve trust in the healthcare system, prevent large hospitals from taking advantage of patients, and to restore a sense of morality to medical treatment. This Court should AFFIRM the ruling of the Shawnee Court of Appeals for the Second District.

Respectfully submitted

ATTORNEYS FOR RESPONDENT