

CASE NO. 26-338

IN THE
Shawnee Supreme Court

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

Petitioners,

— *versus* —

EVELYN MILLER, individually and as special administrator for the estate of
ELIAS MILLER, deceased,

Respondent

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

BRIEF FOR PETITIONER

SUBMITTED BY:
Subpoena Colada
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Under the doctrine of apparent agency, a healthcare system is vicariously liable only when it holds another out as its agent and a patient reasonably relies on that apparent relationship. MHS expressly disclosed that Cyber MD was developed by another company and was not its agent, and required users to accept a conspicuous warning identifying it as artificial intelligence and not a healthcare professional before each use. Does MHS avoid vicarious liability for Cyber MD's diagnostic errors when these disclosures negate any reasonable belief that Cyber MD acted as MHS's apparent agent?
2. Under Shawnee statutes, claims for wrongful death arising from healthcare and products liability are subject to a four-year period of repose.
 - a. Section 12-404(b) provides an exception to the four-year period when a provider is engaged in a "continuous course of treatment for . . . the same illness." Do the annual diagnostic evaluations constitute discrete episodes of care that break continuity, such that the initial April 2018 date is the operative date for the statute of repose?
 - b. Section 12-410(b)(3) provides an exception for when the injury causing aspect of a product was not discoverable by an ordinary reasonably prudent person within four years of the date of delivery. Even if the defect in the algorithm was an injury-causing aspect of that product, was it nonetheless discoverable prior to March 2021 such that the statute of repose exception does not apply?

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STATUTORY PROVISIONS INVOLVED

The following statutory provisions are relevant to this proceeding: Sn. Rev. Stat. §§ 12-402, 12-404, and 12-410.

STATEMENT OF THE CASE

SUMMARY OF THE FACTS

A. Elias Miller's Background and Healthcare Environment of Cartersville

Mr. Elias Miller was born on January 12, 1950. R. at 2. There is no evidence that Miller was mentally unable to read, understand, or assent to Metropolitan Health System's Terms and Conditions. R. at 10. When he was twenty years old, he became employed by the Shawnee Steel Plant in Cartersville, Shawnee. The plant, opened in 1950 as well, was "heavily insulated with asbestos" as was the industry standard at the time. New mills being made during the 1970s were no longer being made with asbestos, but existing facilities, like the one Miller worked at, were not forced to replace the original insulation. He worked at that plant for forty-six years, until his retirement—and the plant's closure—both in 2016. R. at 2.

During his career, he regularly handled the asbestos-insulated machinery. Safety protocols were loosely enforced, and he frequently worked without respiratory protection. Miller was a lifelong non-smoker. He was not asthmatic. He had no family history of respiratory disease. And prior to the April 2018 instance that brought on the present case, he had no documented respiratory disease. R. at 2.

In 2015, both hospitals in Simmons County closed due to bankruptcy. Simmons County lost more than 75% of its healthcare professionals. During this time, the population in the county fell to about 7,500. Now, the county has no urgent care, no permanent diagnostic imaging center, and only three primary-care practices. The nearest in-person radiology/CT facility is in Goshen, 190 miles or 3.5 hours away. R. at 3.

B. Metropolitan Health System, Cyber-Care Solutions, and Cyber MD

In 2012, while Mr. Miller was still employed at the Shawnee Steel Plant, Metropolitan Health System (MHS) contracted with Cyber-Care Solutions, LLC (CCS) a digital health infrastructure provider, to design and host an online telehealth platform. The platform was exclusively branded with MHS's branding—CCS's was in fact explicitly prohibited from branding the platform—and MHS exclusively controlled the interface. R. at 3.

To access the platform, users navigate to a MHS domain, and below the login, the webpage stated "*By entering the portal, I must accept the MHS Terms and Conditions.*" R. at 3. The words 'Terms and Conditions' appeared in customary blue, underlined text, indicating that they were clickable, and Mr. Miller opened the hyperlink and viewed the Terms and Conditions before proceeding into the portal. The Terms and Conditions identified that the physicians and software are not employees or agents of MHS, and that MHS has "no operational control over the clinical judgement or diagnostic methods" used by either the physicians or software. The Terms and Conditions specified that all diagnostic opinions provided through the portal were performed by independent-contractor physicians or automated software

applications developed by another company. R. at 4. The Terms and Conditions appeared on a standalone webpage containing thirty-four lines of single-spaced, unformatted black text on a plain white background in a font noticeably smaller than the rest of the website, with the agency disclaimer appearing approximately three-quarters of the way through the text. R. at 3–4.

CSS created a conversational AI diagnostic system called Cyber MD. It allowed users to talk or text with it, asked follow-up questions, compiled clinical history, generate diagnostics, and could order or interpret diagnostic test. It received FDA clearance in 2017. R. at 4.

MHS integrated Cyber MD into its larger telehealth portal that year. It was trained on a dataset of 40,000 images and achieved an overall accuracy rating of 97% in classifying lung lesions. *Id.* By 2022, the accuracy rating of the tool had fallen to 85% at identifying occupational asbestos exposure. R. at 4–5. CSS corrected this by feeding the program 10,000 more asbestos-exposed images and increases the accuracy rate of the program. R. at 5.

C. Miller’s Use of Cyber MD

In April 2018, Mr. Miller experienced shortness of breath. He was not seeking emergency medical care when he accessed the MHS portal. R. at 5. He logged on to the MHS portal, opened the hyperlink containing the Terms and Conditions, viewed them for four seconds, and proceeded into the portal. Before initiating a chat session with Cyber MD, Mr. Miller encountered a pop-up stating in red, 16-point font: ‘*Cyber MD is not a licensed health care professional. It is an artificial intelligence software program,*’ and was required to click ‘Accept’ before proceeding. R. at 4. He detailed

his occupational history with asbestos and was ordered receive a chest x-ray and CT scan. After receiving those tests, Cyber MD evaluated the results and reported “zero evidence” of malignancy, instead diagnosing him with adult-onset asthma. It referred Mr. Miller to a local practitioner for inhaler management and advised annual follow-up imaging. R. at 5.

Mr. Miller continued those annual follow-ups with Cyber MD. His use of the portal for annual follow-up care continued from 2019 through 2021, providing him repeated opportunities to review MHS’s Terms and Conditions. Before each subsequent Cyber MD session, Mr. Miller was again presented with the AI disclaimer and was required to click ‘Accept’ before proceeding. Following the 2021 report, Cyber MD advised that annual imaging was no longer necessary. R. at 4–5.

D. Subsequent Discovery and Diagnosis

In October 2023, Mr. Miller suffered a spontaneous pneumothorax and was airlifted to MHS’s flagship hospital in Goshen. Scans found a 6.4-centimeter malignant mass in his lung with extensive metastases to the pleura and spine. An expert doctor established that a 7-millimeter lesion was visible on his 2018 scan, although it was partially obscured by pleural changes. It had grown to 47 millimeters by 2021. R. at 5. Mr. Miller died on April 14, 2024. R. at 6.

NATURE OF THE PROCEEDINGS

The Circuit Court of Simmons County. In July 2024, Respondent Evelyn Miller, individually and as Special Administrator of the Estate of Elias Miller, filed

suit against Metropolitan Health System (“MHS”) and Cyber-Care Solutions, LLC (“CCS”). Respondent asserted that MHS was vicariously liable under the doctrine of apparent agency for Cyber MD’s diagnostic errors and that CCS was strictly liable for design and warning defects in the Cyber MD software. Following discovery, MHS and CCS jointly moved for summary judgment. R. at 6. MHS argued that Cyber MD was not its apparent agent because MHS expressly disclosed Cyber MD’s independent status, while both Petitioners argued that Shawnee’s applicable statutes of repose barred Respondent’s claims. R. at 2–3.

The Circuit Court GRANTED summary judgment in favor of both Petitioners and DISMISSED Respondent’s complaint with prejudice. R. at 2, 13. The court held that no genuine issue of material fact existed as to apparent agency because MHS’s Terms and Conditions disclosed that Cyber MD was not its employee or agent, the pre-session warning identified Cyber MD as artificial intelligence rather than a licensed healthcare professional, and Mr. Miller manifested his assent before using the platform. R. at 8–10. The court further held that Respondent’s claims were barred by Shawnee’s four-year statutes of repose. It concluded that Cyber MD’s annual evaluations did not constitute a continuous course of treatment under Shawnee Revised Statute § 12-404 and that Respondent could not maintain an independent product-liability claim against CCS under § 12-410. R. at 10–13.

The Shawnee Court of Appeals for the Second District. Respondent timely appealed. R. at 20. On February 24, 2026, the Court of Appeals REVERSED the Circuit Court’s grant of summary judgment and REMANDED for further

proceedings. R. at 15, 28. On the apparent-agency claim, the court held that genuine disputes of material fact remained as to whether MHS's digital Terms and Conditions provided reasonably conspicuous notice, whether Mr. Miller meaningfully assented to the agency disclaimer, and whether the agreement was unconscionable. R. at 22–24. The court also concluded that the pre-session warning identifying Cyber MD as artificial intelligence did not resolve apparent agency as a matter of law because it did not expressly disclaim MHS's legal responsibility for Cyber MD's diagnostic errors. R. at 24.

The Court of Appeals also reversed the Circuit Court's application of the statutes of repose. R. at 24–27. It held that Cyber MD's annual diagnostic evaluations constituted a continuous course of treatment under § 12-404 because Cyber MD continued to monitor the same underlying health condition from 2018 through 2021. R. at 24–25. The court further held that § 12-410(b)(3)'s latent-defect exception applied because Cyber MD's alleged algorithmic defect was not discoverable by an ordinarily prudent person within four years of the software's initial delivery. R. at 26–27.

The Shawnee Supreme Court. MHS and CCS petitioned the Shawnee Supreme Court for leave to appeal. The Court GRANTED the petition pursuant to Shawnee Supreme Court Rule 315. R. at 29. The Court limited review to two questions: (1) whether a healthcare system may be held vicariously liable under the doctrine of apparent agency for diagnostic errors made by autonomous AI software integrated into its branded telehealth platform; and (2) whether Respondent's claims

are barred by Shawnee's four-year statutes of repose or instead fall within the continuous-course-of-treatment exception under § 12-404 or the latent-defect exception under § 12-410. *Id.*

SUMMARY OF ARGUMENT

This case asks the Court to determine how established principles of vicarious liability and statutory repose apply when healthcare is delivered through artificial intelligence. The Court of Appeals reversed summary judgment for Petitioners on two grounds: first, that a genuine dispute of material fact exists as to whether MHS may be held vicariously liable for Cyber MD's diagnostic errors under the doctrine of apparent agency; and second, that Respondent's claims are not barred by Shawnee's statutes of repose. The Court should reverse on both issues and reinstate the Circuit Court's grant of summary judgment.

I.

First, MHS cannot be held vicariously liable for Cyber MD's diagnostic error under the doctrine of apparent agency. Apparent agency requires manifestations that would cause a patient reasonably to believe that the negligent actor was acting as the hospital's agent, and the doctrine does not impose liability where the patient knew or should have known of the actor's independent status. Although Cyber MD appeared within MHS's branded telehealth portal, MHS expressly disclosed that diagnostic services provided through the portal could be performed by automated software developed by another company and that such software was not an employee or agent of MHS. Before using Cyber MD, Mr. Miller opened the Terms and Conditions

containing that disclosure and proceeded into the portal. He was also required before every Cyber MD session to affirmatively accept a separate, conspicuous warning identifying Cyber MD as artificial intelligence and not a licensed healthcare professional. These undisputed disclosures defeat the holding-out element of apparent agency.

The Court of Appeals erred by treating the enforceability of MHS's Terms and Conditions as dispositive of whether those disclosures provided notice of Cyber MD's independent status. The Terms provided reasonably conspicuous notice under ordinary principles governing online agreements: the login page expressly informed users that entering the portal constituted acceptance of hyperlinked Terms and Conditions, and Mr. Miller actually opened those Terms before proceeding. Nor does the disparity in bargaining power created by Simmons County's limited healthcare resources render the agreement unconscionable. But even if the Terms were unenforceable as a contract, that would not erase the information communicated to Mr. Miller. Apparent agency asks whether MHS's manifestations reasonably created the appearance of an agency relationship, not whether MHS successfully contracted away liability. The express agency disclaimer, together with the separately accepted warning identifying Cyber MD as artificial intelligence rather than a licensed healthcare professional, precludes a reasonable finding that MHS held Cyber MD out as its agent.

This Court therefore need not decide whether an artificial-intelligence system can ever constitute an apparent agent. Even assuming the doctrine can extend

beyond its traditional application to human healthcare professionals, it cannot impose vicarious liability where, as here, the healthcare system expressly disclosed facts inconsistent with the asserted agency relationship. Extending apparent agency despite those disclosures would shift the basis of liability from MHS's manifestations to its selection and integration of Cyber MD: a theory more closely resembling enterprise liability than apparent agency. Because Respondent cannot establish apparent agency on the undisputed facts, the Court of Appeals erred in reversing summary judgment for MHS.

II.

Second, Respondent's claims are barred by Shawnee's four-year statutes of repose. Statutes of repose establish a legislatively determined period after which a defendant is protected from liability, regardless of when an injury accrues or is discovered. Respondent filed this action in July 2024, more than four years after both Cyber MD's delivery in March 2017 and the initial diagnostic error in April 2018. Respondent's claims therefore survive only if they fall within Shawnee's express statutory exceptions.

Respondent's healthcare claim does not fall within § 12-404(b)'s continuous-course-of-treatment exception. Continuous treatment requires more than a general healthcare relationship or disconnected encounters; it requires continuing diagnosis and treatment for the same or related condition. Mr. Miller's encounters with Cyber MD occurred approximately one year apart and involved separate diagnostic screenings. Cyber MD referred treatment of the condition it diagnosed to a local

practitioner, and the annual imaging ended in June 2021. These discrete encounters do not constitute the continuous course of treatment necessary to displace the statute of repose. Furthermore, the essential nature of the physician-patient relationship which is the cornerstone of the continuity of care is not present with an AI tool like Cyber MD. These scans go out to a multitude of providers and software programs that each contribute to Mr. Miller's care.

Nor does § 12-410(b)(3) preserve Respondent's product-liability claim. Section 12-410 generally bars product-liability actions more than four years after first sale, lease, or delivery, subject only to its enumerated exceptions. Cyber MD was delivered in March 2017, and Respondent did not file suit until July 2024. Respondent has not established that the injury-causing aspect of Cyber MD existing at the time of delivery satisfies the statutory conditions necessary to displace that repose period. Accordingly, neither statutory exception saves Respondent's otherwise untimely claims.

ARGUMENT

STANDARD OF REVIEW AND QUESTIONS OF FIRST IMPRESSION

Standard of review. This Court reviews a grant of summary judgment *de novo*, applying the same legal standard as the trial court. Summary judgment is appropriate where "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." Sn. R. Civ. P. 56. A genuine dispute in a material fact exists if a reasonable jury could return a verdict for the nonmoving party. *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88,

94 (2018). In conducting this review, the Court views the evidence and draws all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). R. at 21.

Questions of first impression. The questions presented represent matters of first impression in Shawnee. R. at 7. Accordingly, in the absence of controlling Shawnee precedent, decisions applying comparable state law provide persuasive guidance in determining the appropriate rules governing apparent agency and the application of Shawnee's statutes of repose. See, e.g., *City of Erie v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156, 159 (3d Cir. 1997); *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8th Cir. 2004); *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 944 (9th Cir. 2004).

I. THE COURT OF APPEALS ERRED IN REVERSING SUMMARY JUDGMENT BECAUSE MHS CANNOT BE HELD VICARIOUSLY LIABLE FOR CYBER MD'S DIAGNOSTIC ERROR UNDER THE DOCTRINE OF APPARENT AGENCY.

This Court should reverse the appellate court's holding and reinstate the district court's grant of summary judgment for MHS. Simply put, a hospital can only be held liable for the malpractice or negligence of an independent contractor if the plaintiff raises a triable issue of fact that a patient reasonably believes, based on the provider's manifestations, that the contractor is an agent of the provider. *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). In most cases, agency can be established where (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent

was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and in acquiesced 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.*, 156 Ill. 2d 511, 525 (1993) (quoting *Pamperin v. Trinity Mem'l. Hosp.*, 144 Wis. 2d 188 (1988)).

When a hospital patient knows, or should have known, that a treating physician is an independent contractor, the hospital will not be liable for acts of negligence committed by the agent. *Gilbert*, 156 Ill. 2d at 522. Here, MHS presented uncontradicted evidence showing that Mr. Miller navigated a portal containing an explicit click-wrap disclaimer confirming that the medical software and the remote providers were independent contractors. R. at 3–4. Additionally, before each AI-chat session, users were required to accept a pop-up box stating in red, 16-point font that Cyber MD was an artificial intelligence program and not a licensed health care professional. R. at 4. The software's multiple disclaimers, coupled with Mr. Miller's affirmative assent to the terms, defeat the Respondent's claim of apparent agency as a matter of law.

In any event, the doctrine of apparent agency should not extend to the AI software in this case because of the express agency disclosures. In the fast-paced, ever-evolving world of technology, extending the doctrine of apparent agency to an AI tool integrated into a company's software would improperly stretch the doctrine beyond its traditional use. Based on case precedent, the disclosure of the software's

independent status and nature to Mr. Miller would likely be sufficient if this were a human healthcare provider. Instead of stretching the existing, well-defined doctrine of apparent agency to impose liability, courts should consider other doctrines, such as enterprise liability, to address the growing concern of medical-AI injuries.

A. MHS did not hold out Cyber MD as its agent because its Terms and Conditions and pre-chat warning put Mr. Miller on notice of Cyber MD's independent status.

When determining a hospital's liability through the apparent agency doctrine, an essential question is whether the hospital "held itself out" as the provider of care. This element is satisfied if the hospital "holds itself out" as a provider of care without informing the patient that services are provided by independent contractors. *Gilbert*, 156 Ill. 2d at 525 (quoting *Pamperin v. Trinity Mem'l. Hosp.*, 144 Wis. 2d 188 (1988)). Naturally, unless a patient is put on notice of the independent status of the professionals with whom they may come into contact, it would be reasonable to assume those professionals are employees of the hospital. *Gilbert*, 156 Ill. 2d at 521 (quoting *Arthur v. St. Peters Hosp.*, 405 A.2d 443, 447 (N.J. Super. Ct. Law Div. 1979)).

Accordingly, significant weight is placed on notice of an agent's independent status when evaluating apparent agency. Holding out is not based on branding alone, but rather on a totality of the circumstances. When a hospital provides a doctor for a patient, and the totality of the circumstances created by the hospital's action and inaction would lead a patient to reasonably believe the physician's care is rendered on behalf of the hospital, the hospital has held out that physician as its agent. *Est. of*

Cordero ex rel. Cordero v. Christ Hosp., 958 A.2d 101, 103 (N.J. Super. Ct. App. Div. 2008).

In *Webster*, the court considered the medical center's actions, inactions, and manifestations to the patient regarding the independent status of her care providers in determining that the medical center held itself out as the provider of care. 917 F.3d at 577. In that case, the patient testified that "she had no idea about the relationships among [the healthcare providers]" and that she "was never provided information or written notice about the different entities." *Id.* In contrast, MHS provided Mr. Miller express, written notice of the independent nature of the contractor physicians and automated software conducting evaluations on the portal. R. at 4. Taking the disclosures one step further, MHS expressly stated the portal physicians and automated software were neither employees nor agents of the hospital. R. at 4.

Additionally, when analyzing the totality of the circumstances, courts consider whether the plaintiff sought care from the hospital itself or from a specific physician. *Gilbert*, 156 Ill. 2d at 525. In *Gilbert*, the patient sought treatment from a hospital and was not informed that the emergency room physicians were independent contractors. 156 Ill. 2d at 526. In fact, the hospital treatment consent forms expressly stated that the patient would be treated "by physicians and employees of the hospital." *Id.* Although Mr. Miller sought care through MHS's healthcare portal, and by extension from MHS, rather than from an independent physician, he assented to the Terms and Conditions and the pre-chat pop-up box, both of which notified him of Cyber MD's independent status before he received diagnostic services.

Sign-in wrap agreements bind users to hyperlinked terms merely when users execute a separate action, such as clicking “Enter Portal.” *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024). These agreements are enforceable only if the user interface provides reasonably conspicuous notice of the agreement and unambiguously warns the user of the binding legal consequences. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 55 (1st Cir. 2018). A user is not required to click and review the terms before proceeding. *Keebaugh*, 100 F.4th at 1014. Here, however, Mr. Miller chose to click on the linked Terms and Conditions before closing them four seconds later and proceeding to the health portal. R. at 4. Mr. Miller’s failure to stay on the page long enough to fully review the Terms and Conditions does not, on its own, establish that MHS failed to provide reasonable notice of its terms or render the agreement unenforceable.

1. *MHS’s hyperlinked Terms and Conditions adequately informed Mr. Miller that Cyber MD was not an MHS employee or agent.*

The elemental principles of contract formation apply with equal force to contracts formed online. *Berman v. Freedom Fin. Network*, 30 F.4th 849, 855–56 (9th Cir. 2022). As mentioned previously, sign-in wrap agreements such as MHS’s portal agreement are enforceable when the user interface provides reasonably conspicuous notice of the agreement and warns the user of binding legal consequences. *Cullinane*, 893 F.3d at 55. An enforceable online agreement will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those

terms. *Berman*, 30 F.4th at 856. In the context of a webpage, a notice must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it. *Id.* Website users are entitled to assume that important provisions will not be buried in fine print. *Id.* at 857. While it may be the case that many users will not bother reading additional terms, that is the choice the user makes; the user is still on inquiry notice. *Meyer v. Uber Tech., Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

In *Meyer*, the court concluded that although the plaintiff's assent to arbitration was not express, his assent was unambiguous in light of his objectively reasonable notice of the terms. 868 F.3d at 79. The interface in that case did not require a user to assent explicitly to the contract terms; instead, the user was required to click a button marked "Register" to proceed to the app's content. *Id.* at 76. Underneath the "Register" button, the screen states "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the respective information. *Id.* The defendant's website registration process allowed the plaintiff to review the Terms of Service before registering. *Id.* at 80. Additionally, the court determined the hyperlinked terms were reasonably conspicuous despite their length because they were straightforward and the important terms were emphasized in bold. *Id.* at 79.

Here, MHS's Terms and Conditions create an enforceable contract under *Berman*'s two-step test. Courts often analyze whether the reasonably prudent Internet user would recognize a phrase as a hyperlink when it lacks the common

appearance of one. *See Cullinane*, 893 F.3d at 63 (determining that Uber’s hyperlinked terms in dark-gray, non-bolded font against a black background failed to provide the user reasonable notice); *see also Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014) (“[T]he hyperlinks were not hidden but visible in the customary manner, that is, by being embedded in blue, underlined text.”). The MHS website presents no such issue, because the phrase “Terms and Conditions” appeared as a conspicuous, customary blue, underlined hyperlinked text. R. at 3.

When navigating the MHS online platform, Mr. Miller encountered the login page, which stated, “*By entering the portal, I accept the MHS Terms and Conditions.*” R. at 3. Any contention that Mr. Miller was unaware of the hyperlinked terms is undermined by the undisputed evidence that he opened and viewed the terms for four seconds before proceeding. R. at 4. MHS allowed Mr. Miller the opportunity to review the Terms and Conditions, of which he was clearly aware, before completing his registration. Additionally, the website made it clear that by entering the portal, the user accepts the Terms and Conditions. R. at 3. Whether or not four seconds was sufficient for Mr. Miller to read the Terms does not negate the fact that he was on inquiry notice. *See Meyer*, 868 F.3d at 78. By entering the portal and using MHS’s services, Mr. Miller’s conduct manifested his agreement to the Terms and Conditions. *See Restatement (Second) of Contracts* § 19 (Am. L. Inst. 1981).

The placement and formatting of the agency disclaimer within the Terms and Conditions do not negate that Mr. Miller had notice of and assented to the agreement. The notice inquiry does not turn on whether Mr. Miller, based on his individual age

or circumstances, actually read the provision. Instead, the analysis is based on whether the Terms were presented in such a way that the reasonably prudent Internet user would have seen the notice. *Berman*, 30 F.4th at 856. In *Meyer*, the terms were reasonably conspicuous, even though the agreement was lengthy and accessible only through a hyperlink. 868 F.3d at 79. The court determined that the location of the arbitration clause within the Terms and Conditions was not a barrier to reasonable notice. *Id.*

In the present case, the hyperlinked Terms and Conditions brought the user to a standalone webpage. The webpage displayed 34 lines of single-spaced, unformatted black text on a plain white background in a font size noticeably smaller than the rest of the website. R. at 3. The agency disclaimer appeared approximately three-quarters of the way through the text. R. at 3. Although the text was noticeably smaller than the rest of the website, the record identifies no competing visual elements that would draw the user's attention away from the critical information. *See Berman*, 30 F.4th at 856-57. Therefore, presenting the agency clause on a standalone, uncluttered webpage supports the conclusion that MHS provided Mr. Miller adequate notice of the Terms and Conditions, including the agency clause, before proceeding to the portal.

Mr. Miller unambiguously assented to MHS's Terms and Conditions, which expressly informed him of Cyber MD's independent status. When a patient knows, or should have known, that a treating physician is an independent contractor, the hospital will not be liable for acts of negligence committed by the agent. *Gilbert*, 156

Ill. 2d at 522. Unless a patient is put on notice of a professional’s independent status, it is reasonable for him or her to assume that the professionals are employees of the hospital. *See Gilbert*, 156 Ill. 2d at 521 (quoting *Arthur*, 405 A.2d at 447). Here, MHS informed Mr. Miller that all diagnosis opinions provided through the portal were performed by independent contractor physicians or automated software applications developed by another company. R. at 4. In addition, the clause stated that “physicians and software are *not employees or agents* of Metropolitan Health System.” R. at 4 (emphasis added). Although Cyber MD appeared within MHS’s branded telehealth portal, the holding-out inquiry considers the totality of the circumstances, including whether the patient was informed that the provider was not an employee. Therefore, MHS gave Mr. Miller adequate notice of Cyber MD’s independent status, dispelling any reasonable appearance of agency.

2. *The agency disclaimer was not unconscionable because Mr. Miller was not deprived of a meaningful choice and voluntarily assented to the standardized Terms and Conditions.*

Unequal bargaining power does not, on its own, create an unconscionable contract. Procedural unconscionability “concerns the formation of the agreement and occurs when one party has such superior bargaining power that the other party lacks a meaningful choice to enter into the contract.” *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025) (quoting *Thomas v. Hyundai*, 154 N.E.3d 701, 709 (Ohio Ct. App. 2020)). One must show that the individualized circumstances surrounding the contract were so unfair that there was “no voluntary meeting of the minds.” *Hines*, 140 F.4th at 328 (quoting *Schafer v. Jim Brown, Inc.*, 33 N.E.3d 96, 100 (Ohio Ct.

App. 2015)). For example, under Georgia law, an unconscionable contract is one that “no sane man not acting under a delusion would make and that no honest man would take advantage of, one that is abhorrent to good morals and conscience, and one where one of the parties takes a fraudulent advantage of another.” *Payne v. Savannah Coll. of Art and Design, Inc.*, 81 F.4th 1187, 1196 (11th Cir. 2023) (quoting *Innovative Images, LLC v. Summerville*, 848 S.E.2d 75, 83 (Ga. 2020)). Typically, courts look to factors such as age, education, intelligence, business acumen, and experience in similar transactions to assess the relative bargaining power of the contracting parties. *Hines*, 140 F.4th at 328.

Mere inequality of bargaining power is insufficient to invalidate an otherwise enforceable agreement. *Id.* at 330. There is no doubt that the medical landscape in Simmons County is grim. The nearest facility providing in-person radiology consultations and CT scans was a 190-mile, 3.5-hour drive from Cartersville. *R.* at 3. However, while the limited health care options in Cartersville demonstrate Mr. Miller’s unequal bargaining circumstances, they do not establish that MHS coerced Mr. Miller’s assent or legally deprived him of a choice. Respondent must show that, as a consequence of the imbalance in bargaining power, Mr. Miller was coerced into the agreement, or he lacked the capacity to contract in order to render the agreement unconscionable. *See Hines*, 140 F.4th at 330. In other words, Respondent must show that Mr. Miller’s limited circumstances actually deprived him of a meaningful choice.

In *Hines*, the plaintiff failed to show that her weaker bargaining position deprived her of a meaningful choice when entering an agreement. *Id.* at 331. The court was

unpersuaded by the argument that Hines's feeling rushed into signing rendered the agreement procedurally unconscionable. *Id.* at 329. In fact, the court noted that even if the waiver was presented to Hines on a standardized, take-it-or-leave-it basis, she remained free to walk away from the contract, thus leaving her with a meaningful choice. *Id.* at 330.

Similarly, Mr. Miller was presented with a standardized agreement to access the MHS portal. R. at 3–4. The standardized, take-it-or-leave-it nature of the Terms and Conditions does not automatically render it unenforceable. *See Hines*, 140 F.4th at 330. The Restatement of Contracts states that a party who manifests assent to a standardized writing generally adopts the terms contained within it. Restatement (Second) of Contracts § 211 (A.L.I. 1981). The fact that Mr. Miller's alternative healthcare options were less convenient because of the distance does not establish that he lacked the meaningful choice to exercise those options. Mr. Miller was not seeking emergency care that required his immediate acceptance of MHS's Terms and Conditions to access the portal. Instead, he returned to the portal annually from 2019–2021 for follow-ups on his initial scan. R. at 5. His non-urgent status and multiple follow-ups provided Mr. Miller with ample time to review MHS's Terms and Conditions. Additionally, while MHS sympathizes with the healthcare options in Cartersville, MHS did not create the geographic or economic barriers that limited Mr. Miller's options, nor did it compel him to use its platform. To that end, the disparity in bargaining power did not render the agreement procedurally unconscionable.

Hines also discusses an individual's age and capacity to contract when considering procedural unconscionability. *Hines*, 140 F.4th at 330–31. The *Hines* court discussed *Wascovich*, in which a 72-year-old man with Alzheimer's disease signed an agreement immediately after being transferred from a hospital to a nursing home. *Hines*, 140 F.4th at 331 (discussing *Wascovich v. Personacare of Ohio*, 943 N.E.2d 1030 (Ohio Ct. App. 2010)). There, the nursing home resident lacked a meaningful choice in signing because there was no information indicating that he expressed both an understanding and willingness to sign the agreement, especially in light of his Alzheimer's disease. *Id.* Our case differs because, as discussed previously, Mr. Miller unambiguously assented to the Terms and Conditions by proceeding to the health portal. No evidence shows that Mr. Miller was mentally unable to read, understand, or assent to the Terms and Conditions. Because he had a reasonable opportunity to understand the plain, non-hidden Terms and Conditions, the procedural unconscionability argument fails.

Likewise, MHS's agreement was not substantively unconscionable. A contractual term is substantively unconscionable when it is so one-sided as to oppress or unfairly surprise a party. *Hines*, 140 F.4th at 331. In other words, substantive unconscionability concerns whether an agreement's terms are fair or commercially reasonable. *Id.* Nothing about the MHS clause at issue "shocks the conscience" or is unfair. *See Payne*, 81 F.4th at 1194. Rather, the clause unambiguously states that all evaluations on the portal are performed by independent contractor physicians or automated software developed by another company, neither of which is an employee

or agent of MHS. R. at 4. As previously discussed, MHS conspicuously identified the Terms, which Mr. Miller accessed, and separately required him to accept a red, 16-point font warning identifying Cyber MD as artificial intelligence. Such circumstances are fair, commercially reasonable, and did not unfairly oppress Mr. Miller.

Therefore, the Court of Appeals improperly interpreted unequal bargaining circumstances as unconscionability. Mr. Miller undoubtedly had less bargaining power than MHS, but that does not invalidate an otherwise enforceable agreement. The standardized digital format and Mr. Miller's healthcare access do not create a genuine dispute that the agency disclaimer was unconscionable.

3. Even if the Terms and Conditions were unconscionable, their enforceability does not negate MHS's disclosures regarding Cyber MD's independent status.

Even if the Court of Appeals correctly determined that the Terms and Conditions raise a question of fact regarding unconscionability, that dispute would not erase the notice MHS gave to Mr. Miller before he utilized Cyber MD's diagnostic services. Under the doctrine of apparent agency, a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is a hospital employee, unless the patient knows, or should have known, that the physician is an independent contractor. *Gilbert*, 156 Ill. 2d at 524. Thus, the enforceability of the Terms and Conditions is separate from whether Mr. Miller knew or should have known that Cyber MD was not an MHS employee or agent.

The agency disclaimer in the Terms and Conditions was not on a visually distracting page or hidden by abstruse legal terms. Instead, the clause appeared in black text on a white background and expressly stated that the software was not an employee or agent of MHS. The clause's language could not have conveyed Cyber MD's independent status more directly. Mr. Miller clicked the Terms and Conditions, demonstrating his awareness of the Terms, and unambiguously assented to them by entering the portal. Even though he viewed the webpage for only four seconds, a contracting party is presumed to know the reasonable import of the contents of a signed agreement. *See Hines*, 140 F.4th at 330.

Mr. Miller received additional notice of Cyber MD's status separate from the Terms and Conditions in the form of a pop-up box. The pre-session pop-up stated in red, 16-point font that Cyber MD was an artificial intelligence program, not a licensed health care professional. R. at 4. Cyber MD users must click "Accept" before each chat session. R. at 4. The Court of Appeals incorrectly disregarded the warning because it did not explicitly state that MHS disclaimed all legal responsibility for diagnostic errors of the tool. R. at 21. That determination improperly applies apparent agency principles.

The apparent agency doctrine does not require a patient to understand that the hospital has disclaimed all liability for the agent. Rather, the relevant question is whether the patient knew or should have known that the agent was independent of the hospital. *See Gilbert*, 156 Ill. 2d at 524. Apparent agency principles consistently emphasize the importance of the principal's action or inaction in creating third-party

belief and reliance on actors. *See* Restatement (Third) of Agency § 2.05 (Am. L. Inst. 2006). Therefore, the pop-up warning remains relevant because it expressly identified Cyber MD as artificial intelligence and not a licensed healthcare professional. At a hospital, a patient ordinarily expects medical advice to come from licensed healthcare professionals. The disclaimer further distinguished Cyber MD from MHS's licensed healthcare professionals. Mr. Miller was required to "Accept" the warning before every chat session. Therefore, regardless of whether the Terms and Conditions actually bound him, Mr. Miller repeatedly acknowledged information inconsistent with a reasonable belief that Cyber MD was an MHS licensed healthcare professional. In other words, Mr. Miller knew or should have known that Cyber MD was independent of MHS because it was not a licensed healthcare professional.

B. The doctrine of apparent agency should not be expanded beyond its traditional boundaries to impose vicarious liability on MHS for an AI software program that was expressly disclosed as independent.

Apparent agency is a well-defined doctrine that imposes liability on a principal who represents another as its servant or agent and causes a third party to justifiably rely on the skill of its apparent agent. *See* Restatement (Second) of Agency § 267 (Am. L. Inst. 1958). Thus, the doctrine ties liability to appearance and notice rather than to a party's direct involvement in providing the agent, product, or service that caused the injury.

Cases discussing apparent agency in the medical context share one common feature: they all address whether the *human* healthcare professional who provided care was adequately disclosed as an independent contractor. *See Gilbert*, 156 Ill. 2d

511; *Webster*, 917 F.3d 574; *Pamperin*, 423 N.W.2d 848. A patient who relies on a hospital for care, rather than a specific physician, may reasonably assume they will encounter licensed healthcare professionals. *See Gilbert*, 156 Ill. at 525. That assumption does not automatically transfer to an online platform. The reasonably prudent Internet user does not assume that, merely because a service appears on a company's branded website, the system is a professional or agent of the company. MHS's integration of Cyber MD into its branded platform does not create the same appearance of agency as typically recognized in the hospital-patient context.

MHS did not present Cyber MD as a licensed healthcare professional, which distinguishes it from the hospitals in traditional apparent agency cases. In fact, before each chat session, Mr. Miller was required to click and accept the disclaimer that Cyber MD was an artificial intelligence program, not a licensed healthcare professional. Additionally, the apparent agency doctrine is improper here because MHS expressly disclosed that Cyber MD was not its agent. Extending the traditional hospital apparent agency doctrine to these cases would impose liability on MHS for choosing to provide care through an artificial intelligence service. If Cyber MD were an independent, in-person human physician, MHS's explicit disclosures would provide sufficient notice of the physician's independent status. The same disclosure should not carry less weight because Cyber MD is artificial intelligence. Such an application would shift the basis for liability away from apparent agency and to the healthcare establishment's role in selecting, using, and regulating the software.

The authors of *Locating Liability for Medical AI* consider multiple approaches for how best to deal with cases where medical AI causes an injury. W. Nicholson Price II & I. Glenn Cohen, *Locating Liability for Medical AI*, 73 DePaul L. Rev. 339 (2024). Ultimately, the authors suggest placing default liability for medical-AI injuries on the healthcare system that utilizes the technology, which closely resembles enterprise liability. *Id.* at 359. Imposing enterprise liability on the hospitals that select and integrate AI into their healthcare platforms would not only simplify who is liable for AI malfunctions but would also prompt hospitals to use heightened care when deciding to utilize AI for medical advice. Using enterprise liability as a distinct framework for medical-AI injuries demonstrates that stretching the doctrine of apparent agency is improper to hold hospitals responsible merely for the technologies they employ.

The Court need not determine at this stage which liability framework, if any, should hold hospitals responsible for injuries caused by medical-AI software. However, the Court should resolve the current issue of apparent agency in favor of MHS because the Respondent failed to show that MHS “held out” Cyber MD as its agent. MHS expressly stated in the Terms and Conditions that Cyber MD was not an agent or employee of the hospital. Furthermore, the pre-chat pop-up box warned users that Cyber MD was not a licensed healthcare professional. These disclaimers dispel any appearance of agency, regardless of website branding. Therefore, this Court should reverse the Court of Appeals and reinstate the district court’s grant of summary judgment.

II. THE COURT OF APPEALS ERRED IN REVERSING SUMMARY JUDGMENT BECAUSE RESPONDENT'S CLAIMS ARE BARRED BY SHAWNEE'S FOUR-YEAR STATUTES OF REPOSE.

The District Court rightfully granted Petitioner's motion for summary judgment, finding that Respondent's claims are barred by Shawnee's four-year statutes of repose, and this Court must restore that. A statute of repose bars suits brought after a specified time since a defendant acted, even if this period ends before a plaintiff suffers a resulting injury and thus may preclude a defendant's liability before any actionable harm even occurs. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8, 17 (2014); see *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017) [hereinafter *Cal. Pub.*]; see also *Sch. Bd. of City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325 (Va. 1987) (conceptually distinguishing statutes of limitations from statutes of repose, though often treated as interchangeable).

As per Shawnee Revised Statutes § 12-404, Respondent was entitled to file a healthcare malpractice claim against MHS within two years of knowing, or having reason to know through reasonable diligence, about the alleged injury to Mr. Miller. Sn. Rev. Stat. § 12-404(a). Respondent was not authorized to bring such an action more than four years after the date on which the act or omission alleged to have been the cause of Mr. Miller's injury or death occurred. Sn. Rev. Stat. § 12-404(a). Further, Respondent was permitted to file a strict liability claim against CCS under Shawnee Revised Statutes § 12-410, so long as it did not arise more than four years from the date of first sale, lease, or delivery of possession to its initial user or consumer. Sn. Rev. Stat. § 12-410(a).

Here, the initial diagnostic act or omission—introducing the defective Cyber MD algorithm to Mr. Miller—occurred in April 2018, and Respondent did not file their action until July 2024. R. at 7. Respondent’s filing undeniably exceeded the four-year time bars set out in § 12-404 and § 12-410, as the product liability repose window expired in 2021, and the healthcare malpractice repose window expired in April 2022. R. at 11.

Respondent retorts that continuous-course-of-treatment exceptions under Shawnee’s statutes of repose apply. However, repose statutes are rooted in the legislative judgment that “a defendant should be free from liability” after a legislatively determined amount of time following their last culpable act or omission. *Waldburger*, 573 U.S. at 9. The legislative purposes of statutes of repose are unaffected by extraordinary circumstances that may prevent a plaintiff from timely filing, thus equitable tolling does not apply. *Id.* at 9–10; *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (finding that tolling principles do not apply because the purpose of a 3-year limitation is to serve as a cut off).

Nonetheless, courts have held that where a statute of repose contains an express exception, it is legislatively intended to alter the statutory period “based on equitable principles.” *Cal. Pub.*, 582 U.S. at 507; *see Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014). Tolling is permitted “only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances.” *Cal.*

Pub. 582 U.S. at 507. While Respondents believe that the statutes of repose do not apply given the express exceptions contained in Shawnee’s four-year statutes of repose, case law makes clear that Respondent’s claims must remain barred.

A. There was not an established physician-patient relationship between Cyber MD and Mr. Miller; thus, there was not a continuous course of treatment such that the continuous-course-of-treatment exception under Shawnee Revised Statutes § 12-404(b) would apply.

While Respondent’s claims are barred under Shawnee Revised Statutes § 12-404, the statute provides a continuous-course-of-treatment exception for instances where a defendant healthcare provider engages in a continuous course of treatment with a patient for the same illness, injury, or condition that gives rise to the negligence claim. Sn. Rev. Stat. § 12-404(b). Respondent asserts that because Mr. Miller returned to Cyber MD’s platform annually from 2018 to 2021, a diagnostic timeline was created and should be viewed as a single course of treatment falling under § 12-404(b)’s continuous-course-of-treatment exception. R. at 12. This argument is incompatible with what constitutes a continuity of care between a healthcare provider and patient, leaving the exception under Shawnee Revised Statutes § 12-404(b) unavailable to Respondent. Considering this, the Trial Court’s grant of summary judgment should be reinstated by this Court.

Case law explicitly emphasizes the requirement of a *physician*-patient relationship when determining whether there is a continuum of care between a healthcare provider and patient. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648–49 (4th Cir. 2004). Going a step further, this is not a “general physician-

patient relationship,” rather the relationship must include “diagnosis and treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice.” *Farley v. Goode*, 252 S.E.2d 594, 600 (Va. 1979); *Castillo*, 372 F.3d at 649–50; *Miller v. United States*, 932 F.2d 301, 304 (4th Cir. 1991); *see also Grubbs v. Rawls*, 369 S.E.2d 683, 687 (Va. 1988) (a physician-patient relationship existed where the patient was treated for the same or related ailments over a continuous and uninterrupted course and could wait until the end of that treatment to complain of negligence occurring during treatment); *see also Med. Liab. Mut. Ins. Co. v. Alan Curtis, LLC*, 519 F.3d 466, 475 (8th Cir. 2008) (the continuous treatment doctrine tolled the statute of limitations for medical malpractice actions until the medical treatment is discontinued).

In *Miller v. United States*, the patient’s estate claimed medical malpractice by government physicians caused the patient’s death. 932 F.2d at 302. The patient’s estate alleged that the government physicians failed to diagnose breast cancer in a timely manner, leading to the patient’s death, and that the continuous course of treatment theory provided an exception to their otherwise time-barred wrongful death action. *Id.* The government asserted that the plaintiff’s claim could not be saved by a theory of continuous treatment and was, in fact, time-barred, and motioned for summary judgment, which the trial court granted. *Id.* In its analysis, the appellate court maintained that the application of the continuous treatment doctrine is only permitted “when the treatment at issue is for the same problem and by the same doctor, or that doctor’s associates or other doctors operating under his direction.” *Id.*

at 305. The appellate court applied this rationale to the facts, finding that the patient sought treatment from multiple physicians within the same healthcare entity, however the physicians “whose ‘continuous treatment’ [was] relied upon were not acting ‘at the advice’ or ‘under the direction’ of [the original physician sought out for treatment].” *Miller*, 932 F.2d at 305–06 (quoting *Otto v. Nat’l Inst. of Health*, 815 F.2d 985 (4th Cir. 1987)). In light of this, the appellate court found that a continuity of care did not exist because the government physicians’ separate instances of providing the patient with care were disconnected in nature from the advice or direction of the original physician that the patient consulted. *Miller*, 932 F.2d at 306. Thus, there was not a physician-patient relationship to establish a continuum of care. The appellate court held that the estate’s wrongful death claim based on the government doctor’s failure to diagnose breast cancer in a timely manner was time-barred because the continuous treatment exception did not apply. *Id.*

Similarly in this case, Respondent asserts that an exception to the four-year statute of repose applies because a continuous course of treatment was established by Mr. Miller’s annual return to the Cyber MD platform from 2018-2021. R. at 12. The timeline in question begins April of 2018 when Mr. Miller disclosed to the Cyber MD program that he was experiencing shortness of breath and detailed his occupational history with asbestos. R. at 6. In response Cyber MD ordered an initial chest X-ray and CT scan for Mr. Miller through a mobile radiology service. *Id.* The artificial intelligence program stated that “once [it] had [Mr. Miller’s] scans, [it would] analyze them closely, and go over the results with [Mr. Miller].” *Id.* The mobile

radiology unit later uploaded Mr. Miller’s raw imaging files to Cyber MD’s platform. R. at 6. Cyber MD reported “‘zero evidence’ of malignancy, diagnosed Mr. Miller with adult-onset asthma, referred him to a local practitioner for inhaler management, and recommended annual follow-up imaging.” *Id.* Mr. Miller’s follow up evaluations consisted of Cyber MD reviewing new scans from the mobile radiology service and reiterating that there was “zero evidence” of disease. *Id.* The timeline ended in June of 2021, when the Cyber MD program advised Mr. Miller that annual imaging was no longer necessary. *Id.*

Respondent contends that the aforementioned timeline establishes a basis for a continuum of care, though contrary to the guidelines set out in case law. The appellate court in *Miller* held that there is no continuous course of treatment where there is not the same doctor, or doctor’s associates, or other doctors operating under the doctor at bar’s direction. *Miller*, 932 F.2d at 305. It was clearly set out in Cyber MD’s Terms of Agreement—to which Mr. Miller assented—that “all clinical evaluations, imaging reviews, and diagnostic interpretations provided through this digital portal are performed by independent contractor physicians or automated software applications by another company.” R. at 5. This means that Mr. Miller’s care was being provided by separate, sometimes unhuman, entities housed under Cyber MD’s “roof.” Furthermore, the program took care to emphasize that “Cyber MD is not a licensed health care professional” in itself, but rather “an artificial intelligence software program” each time Mr. Miller used the program. *Id.*

While the timeline in question certainly resembles various instances of imaging, evaluation, and diagnosis, it is not enough to demonstrate the physician-patient relationship component of a continuum of care. Mr. Miller did not establish a physician-client relationship with Cyber MD because Cyber MD explicitly made clear to anyone using its program that it was not a physician. Even in the event that Cyber MD constituted as a physician, Mr. Miller's imaging evaluations were performed by independent contractor physicians and automated software applications from another company. Under *Miller*, these independent contractor physicians and automated software applications would need to "act at the advice" or "under the direction" of Cyber MD for there to be continuing relationship between Cyber MD and Mr. Miller. *Miller*, 932 F.2d at 305. However, Cyber MD is not a physician that gives medical advice or direction to the independent contractor physicians and automated applications but rather is a vehicle that connected Mr. Miller to independent instances of healthcare from various sources housed within Cyber MD through its platform.

Respondent cannot establish that a physician-client relationship existed between Cyber MD and Mr. Miller and is consequently unable to assert that there was a continuity of care to satisfy the continuous-course-of-treatment exception under Shawnee Revised Statute § 12-404(b). Case law finds it critical for there to be a physician-client relationship, and Respondent is unable to demonstrate such a relationship between Mr. Miller and an artificial intelligence program. Therefore,

this Court should rehabilitate the Trial Court’s granting of Summary Judgment for Petitioners.

B. Even if Cyber MD’s algorithmic defect was an injury-causing aspect of the healthcare provided to Mr. Miller, it was discoverable prior to March 2021, making the statutory exception under Shawnee Revised Statute § 12-410(b)(3) inapplicable.

Respondent’s product liability claim against Petitioner is barred by Shawnee’s four-year Product Liability statute of repose found in § 12-410, however they still argue that an exception under the statute would toll the repose period. Shawnee Revised Statute § 12-410(b)(3) provides the exception:

The four year period of repose shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four years after the time of delivery, or if the harm, caused within four years after the time of delivery, did not manifest itself until after that time.

Sn. Rev. Stat. § 12-410(b)(3). Respondent asserts that this exception applies because of the undiscoverable nature of what they allege to be the injury causing aspect of Petitioner’s product, that being the algorithmic flaw that failed to detect tumors in Mr. Miller’s asbestos-exposed lungs. R. at 12.

While the § 12-410(b)(3) statutory exception is unambiguous, clarifying its legislative intent would serve to demonstrate its inapplicability to Respondent’s argument. *Koch v. Shell Oil Co.*, 52 F.3d 878, 881 (10th Cir. 1995). The Shawnee Legislature did not further define what might constitute “an ordinary reasonably prudent person,” or “prolonged exposure,” but courts find that “such terms can be

interpreted as taking their ordinary, contemporary, or common meaning.” *Pate v. Columbia Mach., Inc.*, 930 F. Supp. 451, 466 (D. Idaho 1996). This Court must apply the facts to each aspect of § 12-410(b)(3) in a manner that interprets legislative intent through ordinary, contemporary, or common meaning. *Id.*

Statutes of repose are established to bar suits brought after a specified time since a defendant acted, precluding a defendant’s liability. *Waldburger*, 573 U.S. at 8, 17; *see Cal. Pub.*, 582 U.S. at 505. When the Shawnee Legislature enacted its four-year product liability statutes of repose, it intended for defendants in product liability cases to be free from liability after a legislatively determined amount of time following their last culpable act or omission. *See Waldburger*, 573 U.S. at 9.

The exception under § 12-410(b)(3) happens “if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four years after the time of delivery.” Sn. Rev. Stat. § 12-410(b)(3). CCS did not discover the algorithmic defect until four-and-a-half years after Mr. Miller’s initial session with Cyber MD, so this Court must determine whether an ordinary reasonably prudent person would have discovered the defect before CCS’s discovery. R. at 5–6. The Shawnee Legislature did not specify whether the prudent person must be the plaintiff or defendant. However, the facts show that Mr. Miller had sufficient knowledge that Cyber MD was merely artificial intelligence and not a physician, and that he frequently worked without respiratory equipment in a steel mill he knew to be heavily insulated with asbestos. R. at 3–5. As a patient with his history who was experiencing respiratory symptoms, Mr. Miller

had reason to act prudently and inquire about Cyber MD's algorithmic verification procedures. R. at 6. This Court must recognize that a history such as Mr. Miller's creates an ordinary, reasonable, and prudent patient, out of what might otherwise be an ambivalent one. Further, even if the latent algorithmic defect fell under the § 12-410(b)(3) exception, a product liability suit must still be commenced within the underlying personal injury or wrongful death limitations under § 12-402. R. at 12. Additionally, the underlying diagnostic injuries stem from Respondent's claim that that is already proven to be time-barred under § 12-404. *Id.* Therefore, because the nature of the situation encourages a patient to be prudent, the defective algorithm was discoverable during the four-year period after Mr. Miller's first encounter with Cyber MD and the tolling exception under § 12-410(b)(3) does not apply.

It is in this Court's interest to restore the Trial Court's grant of summary judgment for the Petitioner. The Respondent's claims are barred by Shawnee's four-year statutes of repose and do not fall within any of the exceptions from statute. Thus, there is no genuine dispute of material fact, and Petitioner is entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals and reinstate the Circuit Court's grant of summary judgment in favor of MHS and CCS. MHS cannot be held vicariously liable for Cyber MD's diagnostic errors under the doctrine of apparent agency, and Respondent's claims are barred by Shawnee's applicable statutes of repose because

neither the continuous-course-of-treatment exception under § 12-404(b) nor the statutory exceptions under § 12-410(b)(3) apply. Accordingly, the Circuit Court properly dismissed Respondent's claims with prejudice.

APPENDIX

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

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

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

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

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

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

(b) *Repose Period.* In no event shall such action be brought more than four (4) years after the date on which occurred the act or omission or occurrence alleged to have been the cause of such injury or death. However, such period shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence.

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

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

(b) *Exceptions to Statute of Repose.* The four (4) year period of repose shall not apply if:

1. The product seller expressly warrants that its product can be utilized safely for a period longer than four (4) years;
2. The product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it; or
3. The harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four (4) years after the time of delivery, or if the harm, caused within four (4) years after the time of delivery, did not manifest itself until after that time.