
No. 26-338

IN THE
Shawnee Supreme Court

October 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 Court of Appeals for the
Second District**

BRIEF FOR RESPONDENT

**The Advocates for Care
ATTORNEYS FOR RESPONDENTS**

QUESTION PRESENTED

- I. Whether a healthcare system—which provides care to a rural medically underserved community through a telehealth platform—can be held vicariously liable, under the doctrine of apparent agency, when their integrated artificial intelligence software repeatedly misdiagnoses patients.
- II. Whether the repose periods are tolled or extended, by express statutory exceptions, for the continuous treatment of a patient and undiscoverable product defects when:
 - A. the AI is conducting and recommending a repeated affirmative surveillance protocol for the same high-risk respiratory status; and
 - B. the latent algorithmic defect was only discoverable by those with both knowledge and access to the AI's proprietary cloud infrastructure.

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OPINIONS BELOW

The unreported opinion of the Shawnee Court of Appeals for the Second District appears in the record at pages 16-28. The Court of Appeals REVERSED the Circuit Court of Simmons County's GRANT of defendants' motions for SUMMARY JUDGEMENT. The Circuit Court decision appears in the record at pages 1-15.

STATUTORY PROVISIONS AND RULES INVOLVED

This case involves three provisions of the Shawnee Revised Statutes, §§ 12-402, 12-404, and 12-410.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about a patient from a rural community who died after obtaining negligent medical treatment from a large healthcare network's telehealth platform.

Respondent Evelyn Miller ("Mrs. Miller") sued Petitioners Metropolitan Health System, Inc. ("MHS") and Cyber-Care Solutions, LLC ("CCS") following the death of her husband, Elias Miller ("Mr. Miller"), from stage IV lung adenocarcinoma. (R. at 2).

Mr. Miller was a husband, a retired machinist, and a life-long resident of Shawnee County. (R. at 3). For nearly fifty years, Mr. Miller worked at the Shawnee Steel Company Cartersville plant handling asbestos-insulated machinery, often without the appropriate respiratory equipment. (R. at 3). He was a life-long non-smoker, not asthmatic, and had no documented or family history of respiratory

disease. (R. at 3). In 2012, a radiologist read his last employment-sponsored chest screening as “unremarkable.” (R. at 3).

Simmons County has limited healthcare options. Between 2016 and 2025, Cartersville's population dropped to nearly 7,500 residents, while Simmons County lost over 75% of its healthcare professionals. (R. at 4). The local hospitals closed in 2015 following bankruptcy, leaving no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices in Simmons County. (R. at 4). The nearest facility providing in-person radiology consultations and CT scans was a seven-hour roundtrip to an MHS facility nearly 400 miles away. (R. at 4). The limited healthcare options prompted state and federal authorities to officially designate Simmons County as a Health Professional Shortage Area and a Medically Underserved Area. (R. at 4).

MHS contracted with CCS to design and host a telehealth platform. MHS is a large healthcare network based in Goshen. (R. at 4). In 2012, MHS contracted with CCS, a digital health infrastructure provider, to design and host a proprietary telehealth platform. (R. at 4). MHS exclusively controlled the platform's patient-facing interface. (R. at 4). MHS required that its corporate logo be displayed throughout the platform, while strictly prohibiting CCS from using its own marks on patient-facing pages. (R. at 4).

Patients could access the platform by navigating through MHS's primary domain (<https://www.mhs.com/telehealthplatform>). Underneath the user login, the following words appeared:

“By entering the portal, I accept the MHS Terms and Conditions.”

(R. at 4). The text "Terms and Conditions" was blue, underlined, and hyperlinked. Users are not required to click on the hyperlink, but clicking the hyperlink directs users to a standalone page. (R. at 4). The page displays 34 lines of single-spaced, unformatted black text on a plain white background. (R. at 4). The text was noticeably smaller than the rest of the website. (R. at 4). The following clause appeared nearly three quarters down the page:

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

MHS contracted with CCS to host Cyber MD on the telehealth platform. CCS obtained FDA clearance for Cyber MD, a diagnostic AI system, in February 2017. (R. at 5). CCS provided the FDA with the verification studies and data used to train Cyber MD but did not disclose this information to the public. (R. at 5).

Cyber MD allows patients to input symptoms via text or voice, solicits patient history, asks follow-up questions, and orders diagnostic tests. (R. at 5). Cyber MD also generates differential diagnoses and interprets diagnostic tests. (R. at 5). MHS integrated Cyber MD into its telehealth platform on March 1, 2017. (R. at 5). The initial software was trained on a 40,000-image dataset and achieved a 97% overall

accuracy rate in classifying lung lesions. (R. at 5). In October 2022, however, CCS discovered Cyber MD's diagnostic accuracy dropped to 85% when evaluating images of patients with prior occupational asbestos exposure due to pleural shadowing masking underlying tumors. (R. at 6). CCS retrained Cyber MD, released the updated version to clients on December 1, 2023, but did not disclose this information to the public. (R. at 6).

Mr. Miller sought treatment from MHS's telehealth platform. On April 9, 2018, Mr. Miller experienced shortness of breath and sought medical care from MHS through its remote telehealth platform. (R. at 5). Digital audit logs confirm he visited the MHS domain, accessed the telehealth platform, and clicked the hyperlinked Terms and Conditions one time. (R. at 5). He remained on the terms for four seconds. (R. at 5). He never visited or opened the Terms and Conditions page again. (R. at 5).

Once inside the MHS portal, Mr. Miller participated in a virtual intake session with Cyber MD. (R. at 6). Before every chat session, users must click "accept" from a pop-up box that states in 16-point red font:

"Cyber MD is not a licensed healthcare professional.

It is an artificial intelligence software program."

(R. at 5). Mr. Miller detailed his occupational asbestos exposure with Cyber MD during his first intake session. (R. at 6). Cyber MD ordered a chest X-ray and CT scan with a mobile radiology service. Cyber MD evaluated Mr. Miller's scans and reported "zero evidence" of malignancy. (R. at 6).

After which Cyber MD diagnosed Mr. Miller with adult-onset asthma and began an affirmative surveillance protocol. (R. at 6). Cyber MD recommended Mr. Miller continues his virtual follow ups and referred him to a local practitioner for inhaler management. (R. at 20). Ultimately, Mr. Miller was treated by Cyber MD in May 2019 and again in 2020. (R. at 6). His final visit took place on June 2021, during which Cyber MD once again reiterated that he showed zero evidence of disease, and advised Mr. Miller he no longer needed to be evaluated. (R. at 20).

However, more than two-years later, on October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax, collapsing his lung. (R. at 20). At the hospital scans revealed a 6.4 cm malignant mass, in his left lung which was extensively metastasized. (R. at 20). Subsequently, retrospective imaging showed established that a clearly visible—7mm lesion—was clearly visible as early as his 2018 scans. (R. at 20). Over the four years, the lesion grew nearly seven times in size, appearing to be 47 mm on Mr. Miller’s 2021. (R. at 20). Less than a year later Mr. Miller died, on April 14, 2024. (R. at 21).

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County. Mrs. Miller brought action against Petitioners, MHS and CCS, in July 2024. (R. at 2). She alleged her husband’s wrongful death was caused by a design defect, failure to warn, and vicarious liability by the apparent agency doctrine. (R. at 2). After the completion of discovery, both Petitioners moved for summary judgement. (R. at 2). The Circuit Court granted

summary judgment for both parties, finding no genuine issue of material fact remained. (R. 2-3).

The Court of Appeals. Mrs. Miller appealed the Circuit Courts order granting summary judgment. (R. at 16). Specifically, she appealed the Circuit Courts finding that no apparent agency existed between MHD and CCS, and the finding that the relevant statutes of repose bared her claims. (R. at 16). The Court of Appeals reversed and remanded. (R. at 16). Finding that a genuine dispute of material fact existed concerning whether the underlying agreement was unconscionable and whether Mr. Miller assented to the provision denying an agency relationship. (R. at 16). Additionally, the Court of Appeals found that the statutes of repose did not bar Mrs. Miller's claims. (R. at 16).

SUMMARY OF THE ARGUMENT

This case is about ensuring that vulnerable patients, like those in rural communities, are not deprived from seeking recovery when they receive negligent medical treatment, merely because of one click of an inconspicuous digital disclaimer or because of a statute of repose.

This Court should AFFIRM the Court of Appeals' judgment.

I.

The Court of Appeals correctly reversed the Circuit Court's grant of summary judgment. There are genuine disputes of material fact regarding whether MHS may be held vicariously liable under the doctrine of apparent agency for Cyber MD's diagnostic errors, which resulted in Mr. Miller's death.

A medical network may be held vicariously liable for the medical malpractice of its independent contractors or third-party providers under the doctrine of apparent agency. Here, the record reflects that there are genuine disputes of material fact regarding whether MHS may be held vicariously liable.

First, MHS cloaked Cyber MD with the authority of MHS. MHS's public manifestations—including integrating Cyber MD into the MHS-branded telehealth platform—created an objective appearance of an agency relationship. Moreover, Mr. Miller turned to MHS for integrated healthcare, not Cyber MD. Yet it was MHS that facilitated Mr. Miller's treatment by Cyber MD via MHS's telehealth platform.

Second, whether Mr. Miller assented to a digital agency disclaimer is a question of fact that must be brought before a jury. The digital disclaimers are unenforceable because the Terms and Conditions agreement did not give Mr. Miller reasonably conspicuous notice that Cyber MD was not an agent of MHS. Next, the pre-session pop-up notice is an unenforceable disclaimer of agency as the text did not explicitly inform Mr. Miller that MHS was disclaiming all legal responsibility for any diagnostic errors Cyber MD committed.

Finally, even if this Court finds that Mr. Miller assented to a digital agency disclaimer, the disclaimer was procedurally unconscionable. As an elderly, high risk patient seeking medical care in a rural community, Mr. Miller had no meaningful choice but to assent to MHS's agency disclaimer.

II.

The Court of Appeals correctly reversed the Circuit Court's grant of summary judgment. The Record presents genuine issues of fact concerning the timeliness of both Mrs. Miller's medical malpractice and strict products liability claim.

Mrs. Miller's medical malpractice claim was timely and should have been a question for the jury. Medical malpractice claims are subject to a four-year statute of repose but only begin to run once a patient is no longer receiving continuous treatment from their provider. Under any interpretation of the continuous course of treatment doctrine, Cyber MD's treatment of Mr. Miller was within this exception. Because Cyber MD's misdiagnosis was of a symptom of Mr. Miller's actual condition. His shortness of breath was the reason for the four-years of annual visits, during which Cyber MD missed a lesion growing in Mr. Miller's left lung. Because of the relationship between his incorrectly diagnosed condition and his actual condition all four visits were for the same condition. Additionally, because Mr. Miller's yearly visits were all for the same illness or condition and were at the advice and recommendation of Cyber MD the yearly gaps between visits cannot destroy the continuous nature. This is further supported by Cyber MD's referral of Mr. Miller to a local practitioner for inhaler management, who also reinforced the continuous nature of Mr. Miller's treatment. Furthermore, Mrs. Miller's malpractice claim is within the required statute of limitations, because Mr. Miller's injury was undiscoverable until his pneumothorax.

Similarly, Mrs. Miller's strict products liability claim was timely. Shawnee's products liability statute sets a four-year statute of repose; however, it is subject to many exceptions. Most relevantly here are the exceptions found in Sn. Rev. Stat. § 12-410(b)(3), which extinguishes the repose period when the injury cause aspect of a product cannot be discovered by a reasonably prudent person until more than four-years after the products delivery. Mrs. Miller's claim falls clearly within this exception. Neither Mrs. Miller nor Mr. Miller had the knowledge or access to discover the inherent flaw that existed in the original 2017 Cyber MD algorithm. Only employees of CCS had that access. Moreover, it took CCS until October 2022, about five-years, before they discover the harmful flaw. So, the Millers would not, with any amount of prudence, reasonably been able to discover this flaw within four-years.

Additionally, Mrs. Millers claim is well within the personal injury and wrongful death statute of limitations. All claims under Sn. Rev. Stat. § 12-402 must be filed with two years of the claim accruing. It is undisputed that Mrs. Miller's wrongful death claim was within the required period. Mr. Miller passed on April 14, 2024, and Mrs. Miller filed July 2024. Moreover, Mrs. Miller was within the personal injury filing period, because it did not begin to until she had actual or constructive knowledge Mr. Miller's injury. Which she only discovered after Mr. Miller's sudden hospitalization in October of 2023. Therefore, her July 2024 period is timely.

Because both Mrs. Miller's claims are tolled and extended by the express statutory exceptions this Court should AFFIRM the Court of Appeals' judgment.

ARGUMENT

Standard of Review. The Circuit Court resolved the dispute by granting Petitioners’ motion for summary judgment. (R. At 2-3). The Court of Appeals reversed. (R. At 16). Summary judgment is proper only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018). This Court will deny summary judgment if fair-minded individuals could differ as to the inferences drawn from the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As pure questions of law, the issues before this Court are review de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

I. MHS MAY BE HELD VICARIOUSLY LIABLE, UNDER THE DOCTRINE OF APPARENT AGENCY, FOR CYBER MD’S MISDIAGNOSIS OF MR. MILLER’S CANCER

This Court should affirm the Court of Appeals. The Court of Appeals correctly held that a genuine dispute of material fact exists as to (1) whether MHS created the appearance of an agency relationship with Cyber MD, (2) whether Mr. Miller assented to a digital agency disclaimer, which would foreclose a finding of vicarious liability, and (3) whether the underlying agreement was unconscionable. Accordingly, the trial court’s grant of summary judgment was improper.

A medical center may be held vicariously liable for the negligence or malpractice of an independent contractor or third-party provider if a patient reasonably believes, based on the medical center’s manifestations, that the independent contractor or third-party provider is an agent of the medical center.

Webster v. CDI Ind., LLC, 917 F.3d 574, 577-78 (7th Cir. 2019) (citing *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142 (Ind. 1999)).

Under Shawnee law, an apparent agency relationship exists when:

(1) the principal acts in a manner that would lead a reasonable person to conclude that the entity or practitioner alleged to be negligent was an employee or agent of the hospital; (2) the principal had knowledge of and acquiesced in the acts creating the appearance of authority; and (3) the plaintiff acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence.

Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 795 (Ill. 1993) (citing *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 855 (Wis. 1988)).

It is undisputed that Mr. Miller, an elderly patient in rural Cartersville, a Medically Underserved Area¹ and Health Professional Shortage Area², sought medical care from MHS after experiencing shortness of breath. (R. at 22). Mr. Miller placed his faith in MHS every time he accessed Cyber MD through MHS's website and branded telehealth platform, hoping he would quality healthcare services. Instead, Cyber MD consistently failed to identify a clearly visible lung lesion, which later progressed into stage IV lung adenocarcinoma. This ultimately resulted in Mr. Miller's untimely death. (R. at 20-21). And now that Mrs. Miller is seeking accountability for Mr. Miller's wrongful death, MHS is asking this Court to find that

¹ Medically Underserved Areas are geographic areas with a lack of access to primary care. <https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation#mups>.

² A geographic Health Professional Shortage Area is an area with a shortage of primary, dental, or mental health providers. <https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation#hpsas>.

one click on an obscure digital interface can provide medical networks with an impenetrable barrier against vicarious liability.

This Court should affirm the Court of Appeals' holding that MHS may be held vicariously liable for Cyber MD's harmful errors that cost Mr. Miller his life. First, MHS's branding and integration of Cyber MD created an objective appearance of agency. Second, the Terms and Conditions agreement is an unenforceable digital disclaimer of agency because it did not give Mr. Miller reasonably conspicuous notice that Cyber MD was not an agent of MHS. Third, the pre-session pop-up notice is an unenforceable digital disclaimer of agency because it did not inform Mr. Miller that MHS was disclaiming all legal responsibility for any diagnostic errors Cyber MD committed. Finally, even if Mr. Miller assented to a digital agency disclaimer, the disclaimer was procedurally unconscionable as Mr. Miller had no meaningful choice to assent to the terms.

A. MHS's Public Manifestations Created a Strong, Objective Appearance of an Agency Relationship with Cyber MD

MHS, through its exclusive corporate branded telehealth platform, held itself out as a provider of integrated healthcare to the rural community in Simmons County. MHS cloaked Cyber MD with their authority.

"Holding out," the first element of apparent agency, is satisfied if a medical center presents itself as a provider of care without sufficiently informing the patient that the care is provided by independent contractors or third parties. *Gilbert*, 622 N.E.2d at 796 (citations omitted). Courts evaluate this element under the totality of the circumstances, and the central question is whether the patient sought care

directly from the medical center rather than a specific individual. *Id.*; *Pamperin*, 423 N.W.2d at 857 (finding apparent agency doctrine applied when a patient turned to the hospital for healthcare and the hospital selected the physicians and staff).

Here, MHS's manifestations to the public—integrating Cyber MD into its MHS-branded telehealth portal—created a strong, objective appearance of agency. (R. at 22). MHS contracted with CCS to design and host a proprietary telehealth platform on MHS's own domain website: <https://www.mhs.com/telehealthplatform>. (R. at 4). MHS retained *exclusive* control of the telehealth platform's patient-facing interface. (R. at 18) (emphasis added). MHS required the telehealth platform to display MHS branding and strictly prohibited CCS branding on the platform's patient-facing interface. (R. at 4). From creation to execution, MHS controlled the public appearance of the telehealth platform that Mr. Miller accessed to obtain medical care from Cyber MD.

Further, MHS's actions led Mr. Miller to believe he was obtaining medical care from MHS when he used Cyber MD. Identically to *Pamperin*, where the patient turned to a hospital to receive emergency care but instead received care by independently contracted physicians, here, Mr. Miller turned directly to MHS for care via its integrated telehealth platform. *Id.* at 208; *see* (R. at 6). The court in *Pamperin* ruled that a patient who seeks care from a hospital and unknowingly obtains treatment from a third-party provider should be allowed to seek compensation from the hospital which offered the emergency room. *Id.* at 207-08.

It is undisputed that after experiencing shortness of breath, Mr. Miller turned to MHS for medical care. (R. at 6). He visited MHS's website, logged onto the MHS-branded telehealth platform, and only then did he conduct an intake with Cyber MD. (R. at 6). Mr. Miller did not seek care from Cyber MD as an independent provider. (R. at 22). He sought care from only MHS, which then presented him with Cyber MD. (R. at 6). And Cyber MD consistently failed to identify a lesion in Mr. Miller's left lung, which later progressed to stage IV lung adenocarcinoma and resulted in his untimely death. (R. at 2, 6).

In *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, a patient sued a hospital under the apparent agency doctrine after suffering a spinal injury from a surgery performed by an independent contractor anesthesiologist. 854 N.E.2d 635, 637 (2006). The Illinois Supreme Court concluded that the hospital did not place the patient on notice that the anesthesiologist was an independent contractor because the anesthesiologist wore hospital-branded scrubs and lab coat and the consent form failed to specify that independent contractors could provide care to patients. *Id.* at 661. Similarly, here, MHS hosted Cyber MD and contractually required that Cyber MD wear the equivalent of MHS's lab coat—the MHS corporate logo on the telehealth platform. (R. at 4).

Because MHS created such a strong appearance of an agency relationship with Cyber MD, more than a simple consent form was required for MHS to put Mr. Miller on notice that Cyber MD was not an agent of MHS. *See York* at 663-64 (upholding vicarious liability via apparent agency doctrine when consent form failed to inform

patient that third parties may provide care on behalf of the hospital); *see Martin v. Layman*, 278 N.E.3d 616, 650 (2025) (explaining that an ID badge worn by the independent contractor and bearing the hospital’s name created a question of material fact despite the patient signing a consent form disclaiming agency).

B. Whether Mr. Miller Assented to a Digital Disclaimer of Agency is a Question of Fact that Must be Brought Before a Jury

The Court of Appeals correctly reversed the trial court’s grant of summary judgment because whether Mr. Miller manifested assent to be bound to MHS’s digital agency disclaimer is a question of fact.

The “holding out” element may be defeated, foreclosing a finding of vicarious liability, if the patient had actual or constructive notice that the third-party provider was not an agent of the medical facility. *Gilbert*, 622 N.E.2d at 795. Actual or constructive knowledge is a question of fact for the factfinder. *Id.*

Here, MHS wrongly argues that it may not be held vicariously liable for Cyber MD’s misdiagnosis of Mr. Miller’s cancer because MHS’s hyperlinked Terms and Conditions and pre-session pop-up boxes gave notice to Mr. Miller that there was a lack of an agency relationship between MHS and Cyber MD, thus defeating the “holding out” element as a matter of law. (R. at 22). But, as the Court of Appeals correctly noted, MHS’s argument relies on an improper application of digital contract law. (R. at 22).

Although digital contracts take different forms, such as sign-in wrap and clickwrap agreements, the fundamental principles of contract formation apply with equal force. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022).

Generally, terms in digital contracts are enforceable, even if the consumer never read or saw the terms, when: (1) the website provided reasonably conspicuous notice of the terms to which the consumer will be bound and (2) the consumer unambiguously manifested assent to be bound to the terms. *Id.* (rejecting arbitration clause in a clickwrap agreement because the content and design of the website failed to call users' attention to existence of the terms); *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 (striking arbitration clause in sign-in wrap agreement, in part, because the font was gray and noticeably smaller on a black background) (1st Cir. 2018). The reasonableness of a notice is a fact-intensive inquiry. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).

Here, MHS's Terms and Conditions agreement is an unenforceable digital disclaimer because the buried hyperlink did not provide Mr. Miller with reasonably conspicuous notice that Cyber MD was not an agent of MHS, nor did it compel his unambiguous manifestation of assent to be bound by the terms. Further, the pre-session pop-up notice is not reasonably conspicuous because although it informed patients of the software's nature, it did not explicitly state that MHS disclaimed all legal responsibility for any diagnostic error generated by Cyber MD. Accordingly, Mr. Miller's use of Cyber MD cannot be considered an unambiguous manifestation of assent to disclaim agency.

1. An Obscure Hyperlink in an Unformatted Design Could Not Provide Mr. Miller, an Elderly Patient, with Reasonably Conspicuous Notice that MHS was Disclaiming an Agency Relationship with Cyber MD

The Terms and Conditions agreement, which was hyperlinked underneath MHS's portal login and buried deep within a separate document, could not have provided Mr. Miller, an elderly patient, with a reasonably conspicuous notice that Cyber MD was not an agent of MHS.

Reasonable conspicuous notice depends on whether a reasonable person in the position of the parties would have known about the terms and the conduct that would be required to assent to the terms. *Meyer*, 868 F.3d at 77. For digital contracts, the design and content of a digital interface are relevant in determining whether the contract is conspicuous. *Id.* at 75 (finding blue hyperlinked terms conspicuous); *Cullinane*, 893 F.3d at 62 (finding terms in dark gray, small font on black background not conspicuous).

In *Cullinane*, plaintiffs in a class action suit against Uber challenged the mandatory arbitration clause included in the terms and conditions of Uber's mobile application. *Id.* at 57. Uber's terms and conditions were available to the application's users during sign-up via a hyperlink. *Id.* at 59. The hyperlink appeared in a gray box with white text. *Id.* at 63. Upon clicking the hyperlink, a new screen appeared with a button displaying "Terms & Conditions." *Id.* Clicking that button would then prompt a second document to appear, which included a mandatory arbitration clause. *Id.* Importantly, users were not required to click on the terms and conditions button to complete the registration process. *Id.* The First Circuit struck down Uber's

arbitration provision, reasoning that the terms did not provide reasonably conspicuous notice to a user that creating the account would bind them to the hyperlinked terms because the terms were not distinguishable. *Id.* at 64.

Similarly to *Cullinane*, MHS’s digital interface (“By entering the portal, I accept the MHS Terms and Conditions”) is a classic sign-in wrap agreement. (R. at 23). The phrase “Terms and Conditions” was hyperlinked, underscored, and in blue font below the user login of MHS’s telehealth portal. (R. at 3). Like in *Cullinane*, MHS’s interface did not require prospective users to access the terms before completing the registration process, nor did the interface compel users to click an independent box accepting the terms. 893 F.3d at 59; (R. at 23). MHS’s agency disclaimer appeared on a standalone page just as the arbitration clause appeared on a separate page in *Cullinane*. 893 F.3d at 59; (R. at 23).

During the four years that Mr. Miller obtained treatment via MHS’s branded telehealth platform, he clicked the Terms and Conditions agreement only once—April 9, 2018—the same day he sought treatment for his shortness of breath (R. at 5). Mr. Miller clicked the hyperlink, was redirected to a separate page with the Terms and Conditions agreement and remained on the terms for only four seconds. (R. at 5). An impossibly short amount of time to read the agreement before proceeding to a virtual intake session with Cyber MD. (R. at 5).

While failure to read a contract before agreeing to it will generally not render a contract unenforceable, it is the website owners—here, MHS—that bear the burden of putting users on notice of the terms they seek to bind them. *See Sellers v.*

JustAnswer LLC, 289 Cal. Rptr. 3d 1, 25 (Cal Ct. App. 2021) (citing *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 11,71, 1179 (9th Cir. 2014)).

In this case, MHS failed to meet its burden. “[A] disclaimer is not conspicuous...when it is the same size and font as the terms around it.” *Stevenson v. TRW, Inc.*, 987 F.2d 288, 296 (5th Cir. 1993). In short, nothing is conspicuous if everything is conspicuous. The MHS Terms and Conditions agreement appeared on a standalone webpage, displaying 34 single-spaced lines of unformatted black text on a white background in a font size significantly smaller than the rest of the website. (R. at 4). The agency disclaimer appeared three-quarters down the page—hardly conspicuous. (R. at 4).

Because the agency disclaimer was shrouded in a wall of text, it is unlikely that a reasonable person in Mr. Miller’s position—a rural patient seeking critical medical care—would understand that he was using an independent third-party software application. Accordingly, the MHS Terms and Conditions agreement did not provide Mr. Miller with sufficiently conspicuous notice to make the agency disclaimer enforceable. Thus, Mr. Miller did not have actual or constructive notice that MHS lacked an agency relationship with Cyber MD.

2. Mr. Miller Did Not Assent to MHS’s Disclaimer of Agency Because the Pre-Session Pop-Up Notices Did Not Provide Reasonably Conspicuous Notice that MHS Disclaimed all Legal Responsibility for Cyber MD’s Diagnostic Errors

The pre-session pop-up notices that appeared before every Cyber MD session are not enforceable digital disclaimers of agency because the clickwrap agreement failed to explicitly warn Mr. Miller of the legal significance of clicking “Accept.”

In clickwrap agreements, a user must take a distinct, affirmative action, such as checking a pop-up box to indicate assent to the terms, provided that the website provides reasonably conspicuous notice of the terms to which a consumer will be bound. *Berman*, 30 F.4th at 856. In other words, lack of reasonably conspicuous notice precludes an unambiguous manifestation of assent in clickwrap agreements.

In *Feldman v. Google, Inc.*, the plaintiff signed up for an advertising program with Google through an online clickwrap agreement. 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007). The plaintiff argued the forum selection clause included in the clickwrap agreement was unenforceable because he did not have notice or knowledge of the clause, precluding any “meeting of the minds.” *Id.* at 236. The district court enforced the terms, concluding that users had reasonably conspicuous notice of the clause because (1) the agreement was immediately visible to the users, (2) there was a prominent admonition in boldface to carefully read the terms and conditions, and (3) users could not create an advertising account until they clicked a box that stated, “Yes, I agree to the above terms and conditions.” *Id.* at 237.

Here, unlike *Feldman*, the pre-session pop-up notices failed to provide reasonably conspicuous notice to Mr. Miller that the terms were a disclaimer of agency. The pre-session pop-up notices appear after a user visits MHS’s website and clicks on MHS’s telehealth portal. (R. at 5). While the notices appear before every Cyber MD session, there is no prominent admonition to carefully read the terms and conditions as in *Feldman*. The pre-session pop-ups state in 16-point red font, “Cyber MD is not a licensed healthcare professional. It is an artificial intelligence software

program.” (R. at 24). Nothing in the notice informs users that Cyber MD is not an agent of MHS. The pop-up notices only inform users of the nature of Cyber MD, but fail to inform the user—here, Mr. Miller—that clicking “Accept” was acknowledging that MHS disclaimed all legal responsibility for the diagnostic errors Cyber MD generated. Because the language in the pop-up notices fails to explicitly inform users that MHS disclaimed vicarious liability, Mr. Miller’s use of Cyber MD cannot be considered an unambiguous manifestation of assent to the digital disclaimer. Thus, the disclaimer cannot defeat holding out as a matter of law and must be brought before a jury.

3. A Single Click, lasting no Longer than Four Seconds, Cannot be an Unambiguous Manifestation of Assent When Access to Essential Healthcare is Coupled with a Passive Assent to a Separate, Obscure Legal Document

A party may manifest assent to an agreement by written or spoken word or through conduct. *Berman*, 30 F.4th at 855. A party’s conduct is effective as manifestation of assent only if the party intended to engage in the conduct and had actual or constructive knowledge that the other party may infer that the conduct is assent. *Id.* (citing *Restatement (Second) of Contracts* § 19(2) (1981)). Specifically, for sign-in wrap agreements, a user may unambiguously manifest assent to be bound to the terms by clicking a designated button, so long as the user was explicitly advised that clicking would constitute assent. *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 29-30 (2d Cir. 2002); *Chabolla v. ClassPass Inc.*, No. 4:23-cv-00429-YGR, 2023 U.S. Dist. LEXIS 122616, at *10 (N.D. Cal. June 22, 2023).

Here, MHS's interface did not compel Mr. Miller to click an independent box accepting the Terms and Conditions. *See* (R. at 23). Instead, it coupled his access to essential healthcare with passive assent to a separate legal document. (R. at 20). Even if Mr. Miller assented to the agency disclaimer in the Terms and Conditions agreement when he signed onto the MHS portal, this written notice did not meaningfully notify him that MHS was disclaiming all potential liability. A hospital may generally avoid vicarious liability by providing *meaningful* written notice. *Sword*, 714 N.E.2d at 152 (emphasis added). However, written notice is insufficient to disclaim apparent agency where a patient does not have an adequate opportunity to make an informed decision, such as in medical emergencies. *Id.* For elderly individuals in rural communities, like Mr. Miller, telehealth often serves as the only accessible healthcare. It is undisputed that Mr. Miller accessed the Terms and Conditions agreement one time: April 9, 2018 – the same day he sought healthcare from MHS for shortness of breath. (R. at 6).

C. Even if this Court Finds that Mr. Miller Assented to MHS's Digital Agency Disclaimer, this Court Should Affirm the Court of Appeals Because the Underlying Agreement is Procedurally Unconscionable

In the alternative, this Court should affirm the Court of Appeals as MHS's digital agency disclaimer is procedurally unconscionable. Procedural unconscionability addresses the contract formation process. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1195 (11th Cir. 2023); *See also Nec Techs. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996) (“unconscionability is a flexible doctrine

designed to allow courts to directly consider numerous factors which may adulterate the contractual process”).

A contract is procedurally unconscionable, and thus unenforceable, when gross disparities in bargaining power, age, education, and intelligence that deprive a party is of meaningful choice. *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025) (citation omitted). Additionally, whether a contract is an adhesion contract is a relevant factor of procedural unconscionability. *Feldman*, 513 F. Supp. 2d at 240.

Here, the record reflects that even if Mr. Miller assented to a digital agency disclaimer, the contract formation process was so oppressive and one-sided that it was procedurally unconscionable and unenforceable. MHS had superior bargaining power, the language was incomprehensible and oppressive, and Mr. Miller lacked meaningful choice. Moreover, finding that MHS’s digital disclaimer is not procedurally unconscionable ignores the realities of rural healthcare and would leave rural patients with no meaningful choice: (1) obtain access to critical telehealth services but lose the ability to recover for negligent treatment or (2) forego access to healthcare.

1. The Digital Agency Disclaimer is an Adhesion Contract Because Mr. Miller Had no Choice but to Accept the Terms or Forgo Necessary Healthcare

MHS’s digital agency disclaimer is a contract of adhesion because MHS had superior bargaining power and presented the disclaimer in a “take it or leave it” manner. A contract of adhesion is a standardized contract offered by a party with superior bargaining power and presented to another party who can only agree or

reject it, without an opportunity to negotiate or bargain. *Feldman*, 513 F. Supp. 2d at 240 (citations omitted).

It is undeniable here that MHS had bargaining power far superior to Mr. Miller. MHS, a large healthcare network, presented Mr. Miller, a retired machinist in a MUA and HPSA, seeking necessary medical care, with the opportunity to access healthcare via its telehealth platform but only after Mr. Miller assented to a digital disclaimer—a disclaimer that would insulate MHS from any type of liability for Cyber MD’s harmful medical errors. (R. at 3-6).

Moreover, contract provisions that are incomprehensible may be procedurally unconscionable. *See Nec Techs.*, 478 S.E.2d at 773 (finding a warranty exclusion was not procedurally unconscionable because the language adequately informed consumers the absolute language may not apply to them and provided a contact source for consumers to reach if they wanted more information or clarification). Here, the language in MHS’s Terms and Conditions agreement and pre-session pop-up notices was neither conspicuous nor comprehensible. The Terms and Conditions agreement, which was shrouded in a 34-line wall of text on a separate page, was hardly conspicuous. (R. at 5).

In addition, the pre-session pop-up notice language, while the language, “Cyber MD is not a healthcare professional,” may be conspicuous in terms of format, but it is not comprehensible contract language. The language failed to inform Mr. Miller that Cyber MD—which MHS hosted and branded—was a third-party provider and that MHS could not be held liable for any negligent treatment Cyber MD provided.

Further, Mr. Miller lacked meaningful choice to assent to the digital agency disclaimer. Mr. Miller, a retiree in a Medically Underserved Area and Health Professional Shortage Area, turned to MHS for diagnostic healthcare after experiencing shortness of breath. (R. at 4, 6). MHS was Mr. Miller's only option for healthcare as there were no local hospitals, urgent care facilities, or permanent diagnostic imaging centers in rural Simmons County. (R. at 4). The nearest facility that provided in-person radiology consultations and CT scans was MHS's flagship hospital in Goshen. (R. at 4).

If Mr. Miller wanted in-person care for his shortness of breath, he would have to make a burdensome round-trip journey nearly 400 miles and seven hours away. (R. at 4). For an elderly patient experiencing shortness of breath and at high risk of respiratory disease, delaying healthcare is not an option; neither was undertaking such a burdensome journey. *See Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165, 1173 (N.D. Cal. 2002) ("The existence of alternatives does not undercut the existence of an adhesion contract").

Under these circumstances, the agency disclaimer must be procedurally unconscionable. Mr. Miller lacked meaningful choice. If he wanted healthcare, Mr. Miller could only accept MHS's disclaimer and forgo the opportunity to seek recovery for any medical malpractice he suffered at the hands of Cyber MD. For nearly fifty years, Mr. Miller worked at a steel mill insulated with asbestos and regularly handled asbestos-riddled machinery. (R. at 3). His shortness of breath could have easily turned into an emergency. But Mr. Miller was faced with the choice to (1) obtain

access to critical healthcare by accepting the digital disclaimer, losing his right to seek accountability for medical malpractice, (2) incur burdensome expenses to access in-person healthcare, or (3) delay medical treatment until it was too late. This put Mr. Miller between a rock and a hard place, forcing him to choose between necessary treatment without any legal protection, an immense financial burden, or no treatment at all. Therefore, procedural unconscionability must apply.

2. Finding that the Digital Disclaimer is Enforceable would Create an Impenetrable Barrier to Recovery; Healthcare Networks could Insulate Themselves from all Liability for Providing Negligent Treatment to Rural Communities

Rural communities in the United States include some of the most vulnerable populations, such as elderly individuals, individuals with disabilities, and individuals from low socioeconomic backgrounds.³ Those living in rural communities, like Simmons County, face barriers to healthcare access, which contribute to health outcome disparities.⁴ *See* (R. at 4).

For the 7,500 residents in rural Simmons County, MHS was their only practical healthcare option. *See* (R. at 4). MHS held itself out to the residents in Simmons County as a provider of healthcare services. It was MHS that contracted with CCS to create a telehealth platform. (R. at 4). It was MHS that hosted the platform on the MHS domain. (R. at 4). It was MHS that required the telehealth platform to be wrapped in the exclusive MHS corporate logo. (R. at 4). It was MHS

³ Michael Butzner & Yendelela Cuffee, *Telehealth Interventions and Outcomes Across Rural Communities in the United States: Narrative Review*, 23 J. Med. Internet Res. e29575 (2021).

⁴ Sanjay Basu et al., Association of Primary Care Physician Supply with Population Mortality in the United States, 2005–2015, 179 JAMA Internal Medicine 506, 506–14 (2019).

that integrated Cyber MD to its telehealth portal two years after the local hospitals in Simmons County closed. (R. at 4, 5). It was MHS that benefited from providing healthcare to vulnerable patients in Simmons County. But it was Mr. Miller, an elderly, high-risk patient in a rural community, who paid the ultimate price—his life.

Mr. Miller repeatedly placed his life in MHS's hands, hoping Cyber MD would provide him with quality healthcare through MHS's telehealth platform. And MHS profited from hosting Cyber MD on its telehealth platform. But now that Mr. Miller has died at the hands of Cyber MD's negligence, MHS wants to wipe its hands from all liability. That goes against our public policy. It is a fundamental principle of our justice system that health organizations are accountable for their tortious actions and those of their agents. *Petrovich v. Share Health Plan*, 719 N.E.2d 756, 764 (Ill. 1999) (concluding health management organizations may be held vicariously liable under apparent authority doctrine for the negligence of its independent contractors); *see also Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985) (reasoning that it would be an anomaly for the hospitals to escape liability if third party providers delivered care below minimally acceptable standards).

Telehealth services are undoubtedly a critical tool for addressing healthcare disparities in rural areas. But access to healthcare should not hinge on vulnerable populations losing their ability to seek recovery if they receive negligent medical treatment merely because of one click of an obscure agency disclaimer.

This Court should AFFIRM the Court of Appeals judgment, holding that MHS may be held vicariously liable for the repeated diagnostic errors of Cyber MD, which cost Mr. Miller his life.

II. MRS. MILLER’S CLAIMS WERE TIMELY UNDER THE PROPER LEGAL INTERPRETATIONS OF EXPRESS STATUTORY EXCEPTIONS

This Court should affirm the Court of Appeals. The Court of Appeals correctly held that Mrs. Miller’s claims were timely filed—at the earliest reasonable date—because both relevant statutes of repose provide express exceptions, tolling⁵ the statutory filing periods.

Statutes of repose are tolled by explicit statutory exceptions. *See Calif. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 506, 507 (2017); *see also Wilson v. Durrani*, 173 N.E.3d 448, 455-56 (Ohio 2020). An express exception is a clear indication that the legislature anticipated circumstances where an “absolute bar” would affect a substantial unfairness and chose to alter the statutory period. *See ANZ Sec., Inc.*, 582 U.S. at 507. Statutes of repose are tolled for the reasonable and diligent plaintiff who otherwise would have been without recourse—like Mrs. Miller. *See id.*

As express legislative directives statutes of repose and their exceptions require traditional canons of statutory interpretation. *See Elliot v. Durrani*, 216 N.E.3d 641, 644 (Ohio 2022). We presume that the legislature plainly means what it says. *BedRoc Ltd., L.L.C. v. United States*, 541 U.S. 176, 183 (2004) (citation omitted). Giving

⁵ Tolling, when used in the context of a limitations period, means “to suspend or stop temporarily” the running of a statutory timeframe. *Artis v. District of Columbia*, 538 U.S. 71, 80 (2018) (quoting *Tolled*, Black’s Law Dictionary (6th ed. 1990)).

common terms their common meaning. *Feliciano v. Dept. of Transp.*, 605 U.S. 38, 45 (2025). And reading the statute in context. *Golden v. Floyd Healthcare Mngmt., Inc.*, 904 S.E.2d 359, 364 (Ga. 2024). Therefore, this Court begins its analysis of the timeliness of each claim with the statutory text. *BedRoc Ltd., L.L.C.*, 541 U.S. at 183.

A. The Repose Period for Mrs. Miller’s Malpractice Claim Was Extended Because Mr. Miller Received Continuous Treatment Until 2021 and His Harms Were Undiscoverable

The Court of Appeals correctly held that because Mr. Miller received continuous affirmative surveillance protocol from Cyber MD until 2021, and because the misdiagnosis was undiscoverable until 2023, Mrs. Miller’s malpractice claim was timely. *See* (R. at 25).

Medical malpractice claims in Shawnee are governed by Sn. Rev. Stat. § 12-404, which establishes two distinct filing periods: a longer statute of repose and a shorter statute of limitations. Sn. Rev. Stat. § 12-404; *see ANZ Sec., Inc.*, 582 U.S. at 507 (explaining it as “a common feature of statutory time limits.”). Although both periods produce similar results, they begin from different points and are tolled by different circumstances. *See* § 12-404; *Waldburger*, 573 U.S. at 7.

Shawnee’s medical malpractice statute provides a four-year repose period. Sn. Rev. Stat. § 12-404(b). Beginning “after the date on which occurred the act or omission or occurrence” alleged to have caused the injury or death. Sn. Rev. Stat. § 12-404(b). But this is not an absolute statute of repose. Shawnee’s legislature also proscribed that “such period shall *not* bar an action where the defendant healthcare provider engaged in a continuous course of treatment” for the same illness or condition

underlying the claim. Sn. Rev. Stat. § 12-404(b) (emphasis added). Accordingly, a malpractice claim must be brought within 4 years of its occurrence, except where the plaintiff received continuing treatment from the defendant. Sn. Rev. Stat. § 12-404(b).

The statute of limitations, however, sets forth a two-year period to file suit. Sn. Rev. Stat. § 12-404(a). Beginning only after “the claimant knew, or . . . should have known, of the injury or death.” Sn. Rev. Stat. § 12-404(a). Thus, the limitations period begins once the plaintiff has actual or constructive knowledge of the facts giving rise to the cause of action. *See* Sn. Rev. Stat. § 12-404(a); *see also Russell Packard Dev., Inc. v. Carson*, 108 P.3d 741, 747 (Utah 2005) (detailing identical statutory discovery rule).

In sum, a malpractice claim is timely if the defendant continued treating the plaintiff, within the past four years, and the plaintiff subsequently discovered the injury within two years of filing their claim. *See* Sn. Rev. Stat. § 12-404.

Here, Mrs. Miller’s malpractice claim, brought in July of 2024, was timely under the requirements of both the statute of repose and limitations. First, because Mr. Miller received continuing treatment from Cyber MD from 2018 to 2021, the statute of repose began in 2021 and ended in 2025. Even if the regular visits with Cyber MD did not constitute a continuous course of treatment, Mrs. Miller’s claim is still timely. Because Mr. Miller’s final visit, and misdiagnosis, occurred in 2021. As such, a jury reasonably could have found the claim to be reasonably within the period required by the statute of repose.

Second, Mr. Miller’s malignant mass was inherently undiscoverable until his spontaneous pneumothorax in October of 2023. Before this sudden hospitalization, he had no reason to be skeptical. Mr. Miller reasonably trusted Cyber MD misdiagnosing his cancer as adult on-set asthma, for five years. Thus, the two-year statute of limitations began in October 2023, making Mrs. Miller’s July 2024 claim fall squarely within the medical malpractice statute of limitations.

1. Mrs. Miller’s Claim is Timely Under any Interpretation of the Continuous Course of Treatment Doctrine

Beginning with the statutory text of Sn. Rev. Stat. § 12-404(b), the existence of the four-year repose period and its continuous treatment exception is undisputed and clear. *See* Sn. Rev. Stat. § 12-404(b); *Mullins v. Box Butte Cnty.*, 13 N.W.3d 67, 73-74 (Neb. 2024) (construing legal terms of art according to their legal meaning); *see also Calaway v. Schucker*, 193 S.W.3d 509, 516 (Tenn. 2005) (recognizing that legislatures may create avenues to commence suit despite absolute repose by clearly stated exceptions). However, courts around the country have commonly adopted two distinct variations of the continuous course of treatment doctrine. *Contrast Forshey v. Jackson*, 671 S.E.2d 748, 758 (W. Va. 2008) (requiring only one negligent act), *with Cunningham v. Huffman*, 609 N.E.2d 321, 325 (Ill. 1993) (requiring “continuous negligent medical treatment.”) (emphasis in original). So, it is less clear which version the legislature intended when it referenced the tolling doctrine. *Mullins*, 13 N.W.3d at 74 (“[a] statute is ambiguous if . . . susceptible of more than one reasonable interpretation”); *see* Sn. Rev. Stat. § 12-404(b).

The broader variation, the continuous course of treatment doctrine, requires: (1) a wrongful act or omission (2) occurred during a continuous and unbroken course of treatment (3) that is related to the illness or condition which was the original reason for beginning treatment. *Young v. New York City Health & Hospitals Corp.*, 693 N.E.2d 196, 199 (N.Y. 1998); *see also Forshey*, 671 S.E.2d at 758.

The continuous negligent treatment doctrine, distinctly, requires: (1) “a continuous and unbroken course of *negligent treatment*” (2) that is sufficiently related to constitute a single continuing wrong. *Cunningham*, 609 N.E.2d at 325 (emphasis in original); *see also Med. Liability Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 475 (8th Cir. 2008).

Mrs. Miller’s malpractice claim was timely, regardless of which version of the doctrine applies, because the exception tolled the statute of repose until June 2021. Mr. Miller received annual evaluations from Cyber MD and, in the interim, was referred to a local practitioner by Cyber MD. (R. at 20). Additionally, at every visit, Cyber MD missed a “clearly visible” seven-millimeter lesion which grew to forty-seven millimeters—the size of a golf ball—by his final visit. (R. at 6). Yet Cyber MD still gave Mr. Miller a clear report, even discharging him from his annual visits explaining they were “no longer necessary.” (R. at 6).

i. Cyber MD’s Yearly Chest X-Rays were a Continuous Treatment of Mr. Miller’s High-Risk Respiratory Status, After Decades of Asbestos Exposure

The care Mr. Miller received from Cyber MD satisfies all requirements of the continuous treatment doctrine. Cyber MD misdiagnosed his shortness of breath, a

symptom of his lung cancer, as adult-onset asthma. (R. at 20). From 2018 to 2021, Mr. Miller received care for his high-risk respiratory status only from Cyber MD and a doctor specifically referred by Cyber MD. (R. at 20).

a. Treating Symptoms of an Undiscovered Underlying Condition Triggers the Continuous Course of Treatment

For the continuous course of treatment doctrine to serve its purpose, a clear connection must exist between the condition and the doctor's negligent treatment. *See Nykorchuck v. Henriques*, 577 N.E.2d 1026, 1028 (N.Y. 1991). Absent the doctor's continuing efforts to treat a specific condition, the policy reasons for delaying a claim typically do not apply. *Cooper v. Kaplan*, 585 N.E.2d 373, 374 (N.Y. 1991). Therefore, failing to establish a course of treatment generally cannot, itself, be considered a course of treatment. *Nykorchuck*, 577 N.E.2d at 1029.

Nevertheless, when a condition goes undiagnosed but its underlying symptoms are being treated, the continuous treatment doctrine once again applies. *See Chestnut v. Bobb-McKoy*, 94 A.D.3d 659, 660-61 (1st Dep't 2012). In *Chestnut*, for example, the decedent sought treatment from their doctor, on multiple occasions, for knee pain, leg swelling, finger clubbing, and high alkaline phosphatase levels. 94 A.D.3d at 661-62. All symptoms suggestive of lung cancer. *Id.* The court reasoned that because the symptoms treated were traceable to the underlying condition, the misdiagnosis was part of the continuous treatment. *Id.* at 662; *cf. Nykorchuck*, 577 N.E.2d at 1029 (finding doctrine inapplicable where “plaintiff’s breast condition and endometriosis treatment” were unrelated).

Here, identically to the decedent in *Chestnut*, Mr. Miller’s misdiagnosis and subsequent treatment were for an underlying symptom of his lung cancer—shortness of breath. (R. at 20); *Chestnut*, 94 A.D.3d 660-61. A symptom experienced by between fifty and seventy-five percent of patients.⁶ Furthermore, at his intake session, Mr. Miller detailed his history of long-term asbestos exposure. (R. at 20). Most relevantly, that he worked for forty-six years in a steel mill that was heavily insulated with asbestos. (R. at 3). Considering Mr. Miller’s shortness of breath and his high-risk respiratory status,⁷ his asthma diagnosis and Cyber MD’s subsequent treatment were reasonably linked. (R. at 3, 20); *Chestnut*, 94 A.D.3d 660-61. Therefore, Cyber MD’s misdiagnosis is sufficiently related to Mr. Miller’s illness that a jury could find a continuous course of treatment.

b. Cyber MD’s Annual Affirmative Surveillance Protocol Over Mr. Miller was a Continuous Course of Treatment

Additionally, for the doctrine to apply, the treatment must be ongoing. *Lohnas v. Luzzi*, 94 N.E.3d 892, 894 (N.Y. 2018) (citing *Massie v. Crawford*, 583 N.E.2d 935, 937 (N.Y. 1991)). No per se period between treatments exists that would render them noncontinuous. *Lohnas*, 94 N.E.3d at 894 (finding that “more than 30-month period between visits” is not dispositive). Treatment is ongoing and continuous when an existing doctor-patient relationship exists and “there is something more to be done.”

⁶ *Dyspnea with Advanced Cancers*, Yale Med. (Sept. 20, 2026, at 14:19 CT), <https://www.yalemedicine.org/conditions/dyspnea-advanced-cancers>.

⁷ *See Asbestos*, American Lung Ass’n, (Sept. 20, 2026, at 15:02 CT), <https://www.lung.org/clean-air/indoor-air/indoor-air-pollutants/asbestos>.

Cefaratti v. Aranow, 138 A.3d 837, 845-46 (Conn. 2016). So long as the visits are not “discrete and complete.” *Nykorchuck*, 577 N.E.2d at 1029.

Although Mr. Miller’s visits occurred yearly, they cannot be classified as discrete or complete treatments. *See Martinelli v. Fusi*, 963 A.2d. 640, 651 (Conn. 2009) (emphasizing doctrines focus “on plaintiff’s reasonable expectation that the treatment . . . will be ongoing.”). Instead, they were part of an ongoing treatment for his shortness of breath by Cyber MD. (R. at 20, 25); *see Cefaratti*, 138 A.3d at 849 (holding that appointments for tracking progress of condition constitute continuing treatment). Annual evaluations, that was ongoing at Cyber MD’s advice. (R. at 6); *see cf. Nykorchuck*, 577 N.E.2d at 1028 (explaining “isolated breast examinations . . . [do not] establish” continuous treatment). Because Mr. Miller’s yearly visits with Cyber MD between 2018 and 2021 were to monitor his respiratory status, and at Cyber MD’s recommendation, his treatment was continuous. (R. at 25); *see Justice v. Natvig*, 238 S.E.2d 8, 10 (Va. 1989) (applying doctrine for treatments a year apart because they were for the same condition).

Moreover, Cyber MD's referral of Mr. Miller to a local practitioner further supports a finding of continuous course of treatment. *See* (R. at 6). Although the doctor-patient relationship is a relevant aspect of the underlying policy for the continuous treatment doctrine, the doctrine still applies when other doctors are involved in the treatment. *See Castillo v. Emergency Med. Assoc., P.A.*, 372 F.3d 643, 649 (4th Cir. 2004). To be consistent with the doctrine, the second doctor must be (1)

referred by the original doctor, and (2) the original doctor continues to treat the patient for the same condition. *Id.*

Both elements are satisfied here. After his 2018 referral to a local practitioner, Mr. Miller was treated by Cyber MD three more times. (R. at 6); *Justice*, 238 S.E.2d at 10 (finding that second doctor treating plaintiff did not destroy the doctor-patient relationship). Cyber MD provided specialized monitoring of his condition, while Mr. Miller saw the local practitioner for inhaler management. (R. at 6). This referral, by Cyber MD, did not break the continuity of treatment. *Justice*, 238 S.E.2d at 10. In fact, it reinforced it. *See id.*

Therefore, whether Mr. Miller's treatment was continuous, under the single-act interpretation, was a question for the jury—not for the Circuit Court to decide on summary judgment. *See* (R. at 6, 12-13).

ii. Every Evaluation of Mr. Miller's condition was an Additional Negligent Act Within Cyber MD's Continuous Course of Treatment

Even under the continuous negligent treatment doctrine, the statute of repose was tolled until June of 2021, as Cyber MD was negligent in every evaluation of Mr. Miller. *See Cunningham*, 609 N.E.2d at 325 (requiring entire course of treatment to be negligent). Year after year, Cyber MD failed to spot a “clearly visible” lesion. For four years, Cyber MD failed spot the lesion as it grew nearly seven times in size before his treatment ended while evaluating X-Rays and CT scans at every appointment. (R. at 20).

Courts applying the continuous negligent treatment doctrine, like those applying the continuous treatment doctrine, apply the doctrine for misdiagnoses only under certain circumstances. *See Bogue v. Gillis*, 973 N.W.2d 445, 349 (Neb. 2022) (reaffirming that “doctrine applies only when there has been a misdiagnosis upon which incorrect treatment is given”); *see also Pledger v. Carrick*, 208 S.W.3d 100, 105 (Ark. 2005) (allowing plaintiff opportunity to develop facts linking misdiagnosis to treatment for application of the doctrine). Specifically, providing the wrong continuing treatment because of a misdiagnosis would satisfy the test's requirements. *Bogue*, 973 N.W.2d at 349.

Across four visits, Cyber MD missed “clearly visible” signs of cancer, but only treated Mr. Miller for adult-onset asthma. (R. at 20). At every visit, Mr. Miller provided new chest scans, which, after review, Cyber MD continually reiterated, showed zero signs of disease. (R. at 20). This, along with his inhaler management, gave Mr. Miller a false sense of security that Cyber MD was diligently monitoring his high-risk respiratory status. (R. at 20); *see McCullough v. United States*, 607 F.3d 1355, 1362 (11th Cir. 2010) (explaining one rationale for the doctrine is the unreasonable expectation of a patient to discover a doctor’s negligence while being treated). But Cyber MD’s treatment fell far short of diligence.⁸ (R. at 20). It was a blatant misdiagnosis, followed by continuous negligent treatment, considering his history with asbestos and growing lesion on each of the four scans. (R. at 20); *see*

⁸ When a lung lesion, or pulmonary nodule, is discovered, treatment is guided by the probability of malignancy, determined by its size and the patient's risk factors. *See Mazzone, P. J., & Lam, L., Evaluating the Patient With a Pulmonary Nodule: A Review*, JAMA, 327(3), 264–273 (2022).

Comstock v. Collier, 737 P.2d 845, 849 (Colo. 1987) (“[f]ailure to rectify mistakes constitutes continuing negligence.”).

iii. Regardless of Where the Continuous Course of Treatment Doctrine Applies Mrs. Miller’s Has a Timely Claim

Alternatively, if this Court finds that Mr. Miller’s treatment was not continuous, Mrs. Miller still had a timely malpractice claim for his final visit with Cyber MD in June 2021. (R. at 6). The Court of Appeals properly reversed the trial court’s grant of summary judgment. (R. at 24).

At its core, the continuous treatment doctrine is a tolling mechanism that allows plaintiffs, under certain circumstances, to bring a claim that otherwise would have been time-barred. *Marshall v. Dodds*, 827 S.E.2d 570, 574 (S.C. 2019). Plaintiffs may bootstrap an act or omission that would otherwise be untimely with those that are still within the repose period. *See Caughell v. Grp. Health Co-op. of Puget Sound*, 876 P.2d 898, 905 (Wash. 1994) (characterizing the continuous treatment doctrine as a last occurrence rule).

It is undisputed here that, regardless of the doctrine’s applicability, Mr. Miller’s final visit falls within Shawnee’s four-year repose period. *See* (R. at 6) (final visit was in 2021); *see also* Sn. Rev. Stat. 12-404(b) (repose period ending in 2025). So, Mrs. Miller has a timely medical malpractice claim for the negligence occurring during that visit. *See Comstock*, 737 P.2d at 849 (explaining that doctors have a continuing duty to rectify any mistakes made during treatment). Not only did Cyber MD repeatedly miss clear indications of a growing lesion in Mr. Miller’s chest—Cyber MD also failed to note a forty-seven-millimeter lesion at his last visit. (R. at 6). They

then informed Mr. Miller that treatment was “no longer necessary.” (R. at 6). A clear disregard of a medical provider’s duty. *See Bednarz v. Eye Physicians of Cent. Connecticut, P.C.*, 947 A.2d 291, 299 (Conn. 2008) (discussing defendants’ duty to continue treating or monitoring plaintiffs’ condition if they had reason to know of need).

Therefore, dismissing Mrs. Miller's medical malpractice claim falls within the statute of repose, whether applied to all treatments under the continuous treatment doctrine or only to the final visit.

2. The Statute of Limitations Began to Run in 2023 Only After Mr. Miller Discovered Cyber MD had Misdiagnosed his Cancer

Mrs. Miller’s malpractice claim was timely because it was filed within the required statute of limitations. The Millers had no means of knowing Cyber MD’s misdiagnosis and negligent treatment until October 2023, once Mr. Miller suffered a spontaneous pneumothorax. *See* (R. at 20).

As a clear statutory discovery rule, the two-year period runs only when the plaintiff has actual or constructive knowledge of their injury. Sn. Rev. Stat. § 12-404(a); *see e.g., Moon v. Rhode*, 67 N.E.3d 220, 18-19 (Ill. 2016) (discussing § 13-212 an Illinois medical malpractice statute with identical language). The only question is when the Millers knew or should have known of their injury. Sn. Rev. Stat. § 12-404(a); *see Berenda v. Langford*, 914 P.2d 45, 51 (Utah 1996).

This standard, importantly, requires that a plaintiff had actual or constructive knowledge of both the occurrence of an injury and that it was wrongfully caused. *Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 868 (Ill. 1981). Where it

reasonably appears that an injury was wrongfully caused, a party may not delay. *Id.* But plaintiffs are not expected to know the “inherently unknowable.” *Id.* (citing *Urie v.*

Thompson, 337 U.S. 163, 169 (1949)); see also *Parr v. Rosenthal*, 57 N.E.3d 947, 961 (Mass. 2016) (explaining challenge plaintiffs face in discovering doctors’ negligence). So, the two-year statute of limitations runs once the Millers possessed sufficient information concerning their injury and its cause that a reasonable person would investigate. *Moon*, 67 N.E.3d at 18-19.

Typically, the factfinder makes this determination as a disputed question of fact. See *Witherell v. Weimer*, 421 N.E.2d 869, 874 (Ill. 1981). But when it is readily apparent from the record that only one conclusion can be reached—as is the case here—the question is for the court. *Moon*, 67 N.E.3d at 19.

i. The Miller’s Only Discovered Their Injury After Mr. Miller’s Spontaneous Pneumothorax in October 2023

In the Millers case, they had no reason to investigate, nor a way to discover Cyber MD’s negligence and the injury it caused until it was too late. (R. at 20). At every visit with Cyber MD, it was reiterated repeatedly that Mr. Miller’s scans revealed zero signs of disease. (R. at 6). Mr. Miller reasonably relied upon these assurances because he had neither the ability to diagnose his X-Rays, nor was he ever given the opportunity to see his scans. (R. at 6); cf. *Ingram v. United States*, 443 F.3d 956, 963 (8th Cir. 2006) (finding that once medical record detailed how patient was afflicted by irreversible brain damage the statute of limitation accrued). Scans which, following an expert review, were found to have clearly visible lesions that grew,

nearly seven times in size, from seven to forty-seven millimeters. (R. at 20). Thus, the Millers did not have actual knowledge until his spontaneous pneumothorax and a retrospective expert review of his scans in October 2023. (R. at 20).

ii. Cyber MD Failed to Inform Those Exposed to Its Defective Algorithm or that They Released an Updated Version

Additionally, Cyber MD never publicized the dangerous flaw in its 2017 baseline algorithm and its consistent failure to identify lesions. (R. at 20). After CCS discovered this flaw in October 2022, it made no effort to inform those potentially affected. *See* (R. at 19-20). The only indication of the flaw, which went unnoticed between 2017 and 2022, was the release of an updated version of Cyber MD in December 2023. (R. at 20). By then, Mr. Miller had already discovered Cyber MD's flaw and its failure to identify and properly inform him of his growing lung lesion. (R. at 20). Therefore, at the earliest, the Millers could not have known or discovered their claim against Cyber MD until October 2023. (R. at 20). This makes Mrs. Miller's July 2024 lawsuit fall within the two-year statute of limitations. (R. at 21); *see* Sn. Rev. Stat. § 12-404(a).

Because Mrs. Miller's claim falls both within the statute of repose and statute of limitations, set forth by Sn. Rev. Stat. § 12-404, Her claims were timely.

B. Mrs. Miller's Products Liability Claim Was Timely Under Both the Statute of Repose and Limitations

Mrs. Miller's strict products liability claim was timely under both the statute of repose and the statute of limitations. The Court of Appeals correctly held that Cyber MD's defective proprietary algorithm was undiscoverable by the ordinary

reasonably prudent person. *See* (R. at 27). In addition, Mrs. Miller’s filed her claim within two years of discovering Mr. Miller’s injury and his death. (R. at 20-21).

Shawnee’s strict products liability statute establishes a four-year repose period beginning on the date of first delivery to its initial consumers. Sn. Rev. Stat. § 12-410(a). Subject to explicit exceptions, it permits claims to be brought well after the period has ended. *See* Sn. Rev. Stat. § 12-410; *see also Koch v. Shell Oil Co.*, 52 F.3d 878, 884 (10th Cir. 1995). The statute expressly instructs that the four-year period “shall not apply” when exceptions are satisfied. Sn. Rev. Stat. § 12-410(b).

Moreover, Sn. Rev. Stat. § 12-410(a) includes a statute of repose by reference to § 12-402. It sets a two-year statute of limitations for both personal injury claims, subject to the discovery rule, and wrongful death claims. Sn. Rev. Stat. § 12-402.

Mrs. Miller’s products liability claim was timely; first, the statute of repose does not apply because no prudent person could have discovered the flaw in Cyber MD. (R. at 26-27). Second, since their injury became discoverable in October 2023, Mr. Miller passed in April 2024, and Mrs. Miller filed her claim two months later. (R. at 20-21).

1. The Fundamental Coding Defect Embedded within Cyber MD’S Algorithm was Only Discoverable with Knowledge and Access to its Infrastructure

Mrs. Miller’s products liability claim was timely filed in July 2024 because it is exempt from the statute of repose.

The products liability statute of repose includes three exceptions that permanently toll the four-year filing period. Sn. Rev. Stat. § 12-410(b); *see Koch*, 52

F.3d at 884. Relevant here are only the exceptions found within Sn. Rev. Stat. § 12-410(b)(3). It applies, among others, when (1) the injury-causing aspect was present at delivery, and (2) it was not discoverable by reasonably ordinary prudence until more than four years after delivery. *See* Sn. Rev. Stat. § 12-410(b)(3).

As the Record indicates, no dispute exists concerning the first element, since Cyber MD's 2017 baseline algorithm had lower accuracy when diagnosing certain patients. (R. at 5, 19). Which CCS never publicly admitted. *See* (R. at 19-20); *see also Pate v. Columbia Mach., Inc.*, 930 F.Supp. 451, 459 (D. Idaho 1996) (defining "defective product" in strict liability, as a product giving defendant an anticipation of danger for users but never warns of it). The only remaining question is whether a reasonable person could have discovered the flaw in Cyber MD. *See* Sn. Rev. Stat. § 12-410(b)(3).

The exception at issue in *Kerns v. G.A.C., Inc.*, is identical to the exception here. 875 P.2d 949, 957 (Kan. 1994). In *Kerns*, the product at issue was a mesh fence used to enclose a pool, and Kansas' Supreme Court found that the exception did not apply. *Kerns*, 875 P.2d at 957. They reasoned that because the hazard was open and obvious, "it should have been realized by a reasonable user." *Id.*

Unlike *Kerns*, the Millers had no way to detect the hidden danger Cyber MD posed. 875 P.2d at 957. The harmful aspect was not open nor obvious. *See* (R. at 27). No amount of reasonable prudence by the Millers would have been sufficient to discover the design defect in Cyber MD. *See Bauman v. Excel Industries, Inc.*, 845 P.2d 65, 73-74 (Ka. 1993) (defining discoverable, prudent, and reasonable). The

flawed code existed in only one place, CCS's proprietary source code. (R. at 26); *cf. Kerns*, 875 P.2d at 957. The Millers would never have been granted access to it. (R. at 26-27); *cf. Kerns*, 875 P.2d at 957. Even if they had been granted this exclusive access, neither the Millers nor the software expert had the medical or software expertise to recognize or understand that a flaw existed in the code. *Cf. Kerns*, 875 P.2d at 957. This is evidenced by the fact that CCS, the only ones with access to the source code, could not discover this flaw in their algorithm for its first five years. *See* (R. at 5-6); *see also Pate*, 930 F.Supp. at 459.

Furthermore, Sn Rev. Stat. § 12-410(b)(3) also applies when the product caused harm within four years of delivery but did not manifest itself until after that time. Cyber MD was integrated into MHS's telehealth portal in 2017. (R. at 5). A year later, Mr. Miller began treatment with Cyber MD, which ended in 2021 at Cyber MD's medical advice. (R. at 20). While Mr. Miller was exposed to the harmful aspects of Cyber MD, its flawed code, his injury did not manifest itself until 2023. (R. at 6). Because it was the year Mr. Miller suffered a spontaneous pneumothorax and the year Cyber MD's update was released. (R. at 5-6). Cyber MD's assurances that his scans showed "zero signs" of malignancy gave Mr. Miller no reason to seek other treatment, or a second opinion. *See* (R. at 6). Treatment which would have greatly increased his survival rate.⁹

⁹ Studies find that identifying tumors when they are less than ten millimeters could significantly improve survival rates, decreasing mortality from fast-growing tumors by up to eight percent. Patricia Weiser, *Incidental Lung Nodule Detection May Help Save Lives, Study Finds*, Managed Healthcare Executive, (Sept. 23, 2026, at 10:30 CT), <https://www.managedhealthcareexecutive.com/view/incidental-lung-nodule-detection-may-help-save-lives-study-finds>.

Therefore, the exception found in Sn. Rev. Stat. § 12-410(b)(3) extinguishes the statute of repose. (R. at 27).

2. Mrs. Miller’s Products Liability Claim was Timely Because She Brought the Claim Within Two-Years of Discovering the Injury and Wrongful Death

Mrs. Miller’s brought her products liability claim within the statute of limitations under Sn. Rev. Stat. § 12-402. Because Mr. Miller passed away in 2024 and she did not discover the injury Cyber MD caused until 2023, her July 2024 claim was timely. (R. at 6-7).

First, addressing the undisputed statute of limitations, wrongful death claims must be filed within two years from the decedent’s death. Sn. Rev. Stat. § 12-402(b). Mr. Miller passed on April 14, 2024. (R. at 21). Mrs. Miller filed her claim only two months later, in July of 2024. (R. at 21). Therefore, she filed her strict products liability claim well within the statute of limitations for wrongful death claims.

Strict products liability claims are subject to the two-year personal injury statute of limitations. Sn. Rev. Stat. § 12-402(a). This period begins only after the “cause of action accrues.” *Id.*; see *O’Brien v. United States*, 155 F.4th 50, 59 (1st Cir. 2025) (occurring once the plaintiff has sufficient information to “reasonably know they were injured.”). However, if the injury is not immediately discoverable, the statutory discovery rule tolls the period until a claimant knows or reasonably should have known. See Sn. Rev. Stat. § 12-402(c); see e.g., *Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, 22 F.3d 248, 251 (10th Cir. 1994) (describing how most states adopted the discovery rule in products liability cases). Application of the exception ultimately

requires that, even with a diligent investigation, a plaintiff would still be unable to discover the cause of their injury. *Martinez v. Showa Denko, K. K.*, 964 P.2d 176, 181 (N.M. Ct. App. 1998).

Here, because the Millers could not have known of Cyber MD’s defective algorithm, the discovery rule exception applies. (R. at 27). The trial court below also erred in finding that the personal injury statute of limitations had expired in April 2022. (R. 12-13). This finding supposes that the Millers, had they diligently investigated, would have discovered a latent defect within CCS’ proprietary algorithm—eighteen months before CCS did. *See* (R. at 5-6). Disregarding how unlikely CCS would be to allow others access to its proprietary cloud infrastructure, this finding also stretches the reasonable meaning of a diligent investigation. *See Martinez*, 964 P.2d at 181. Expecting the Millers to have the expertise of both a healthcare professional and software engineers, who themselves struggled to discover the defect for five years.¹⁰

Therefore, Mrs. Miller’s claim was within the required statute of limitations because her products liability claim did not accrue until October 2023.

Conclusion

This Court should AFFIRM the Court of Appeals judgment in all respects.

Respectfully submitted,

¹⁰ Discussing further need for “rigorous performance error analysis” of AI medical devices to identify flaws in algorithmic encoding and specific failure modes which lead to patient harm. *See Kale, Aditya U et al. “Detecting Algorithmic Errors and Patient Harms for AI-Enabled Medical Devices in Randomized Controlled Trials: Protocol for a Systematic Review.” JMIR vol. 13 (2024).*

APPENDIX

STATUTORY PROVISIONS

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.