

NO. 26-338

IN THE

Shawnee Supreme Court

NOVEMBER TERM 2026

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

Petitioners,

—versus—

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

Respondent

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

BRIEF FOR PLAINTIFF-RESPONDENT

Team Apparent Agents

Attorneys for Plaintiff-Respondent

QUESTIONS PRESENTED

- I. Whether Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC should be held vicariously liable under the Shawnee doctrine of apparent agency for their failure to diagnose Mr. Miller via Cyber MD, the artificial intelligence platform providing telehealth to its patients.

- II. Whether Evelyn Miller's claims were tolled under the exception in Shawnee Revised Statutes §§ 12-404 and 12-410 because of Elias Miller's "continuous course of treatment," the latent, undiscoverable nature of the gross error in Cyber MD's software, or manifestation of injury beyond the statute of repose period.

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OPINIONS BELOW

The unreported opinion of the Simmons County Circuit Court for the State of Shawnee in *Evelyn Miller v. Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC*, No. 25-L-24601 (Mar 6, 2025), is included in the Record of Appeal from pages 2-15. Defendants Metropolitan Health System, Inc. and Cyber-Care Solutions, LLC's combined Motion for Summary Judgment was GRANTED by the Circuit Court, pursuant to Shawnee Rule of Civil Procedure 56. The Circuit Court entered judgment in favor of Defendants and DISMISSED WITH PREJUDICE Plaintiff Evelyn Miller's Motion for Summary Judgment. Following an appeal from the Plaintiff-Appellant, the Shawnee Court of Appeals for the Second District REVERSED and REMANDED the lower court's judgment in favor of the Defendants-Respondents' Motion for Summary Judgment. The unreported opinion of the Shawnee Court of Appeals for the Second District in *Miller v. Metropolitan Health System, Inc. et. al.*, No. 25-123 (Feb. 24, 2026) is included in the Record of Appeal from pages 16-28.

STATUTORY PROVISIONS INVOLVED

The subsequent provisions are applicable to this proceeding: Shawnee Revised Statutes §§ 12-402, 12-404, and 12-410 and Shawnee Rule of Civil Procedure 56. The Shawnee statute for apparent agency is also referenced and applicable to these issues (no citation provided in record).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case stems from Metropolitan Health System, Inc. (“MHS”) and Cyber-Care Solutions, LLC’s (“CCS”) failed administration of CCS’s artificial intelligence (“AI”) telehealth platform, Cyber MD, that resulted in the continuous misdiagnosis of Mr. Elias Miller (“Mr. Miller”). R. at 5-6.

MHS is the only healthcare facility serving Cartersville, a rural community in Simmons County, Shawnee and Mr. Miller’s hometown. *Id.* at 3-4. In the mid-2010s, the town suffered a debilitating economic downfall which resulted in both hospitals closing and the town’s designation as a Medically Underserved Area. *Id.* at 4. Due to the lack of healthcare resources, residents seeking medical care were forced to endure a long, three and a half hour (190 miles) drive to MHS’s main hospital in Goshen. *Id.*

In 2012, MHS contracted with CCS to bring telehealth to MHS’s patients. *Id.* The patient-facing platform was exclusively controlled and branded by MHS, using MHS’s logos and likeness throughout the site. *Id.* at 5. The use of CCS’s logo or references to the company were “strictly prohibited.” *Id.* at 4. MHS marketed Cyber MD as an all-encompassing telehealth platform under the slogan “Cyber MD: Care Everywhere.” *Id.* at 5.

The telehealth platform was only accessible via MHS’s primary webpage and included a message stating, “By entering the portal, I accept the MHS Terms and Conditions.” *Id.* at 4. The text “Terms and Conditions” was underlined in blue and hyperlinked to a webpage with thirty-four lines of single-spaced, unformatted black

text on a white background in a noticeably smaller font than the main website. *Id.* Hidden about three-quarters of the way down the page; the Terms and Conditions stipulated that telehealth visits were performed by independent contractors or software from another company. *Id.* at 4-5. It did not stipulate which company provided the contractors or software, only that MHS had no control over the third parties' actions. *Id.*

In February 2017, CCS was cleared by the FDA to operate Cyber MD, a diagnostic health platform powered by AI. *Id.* at 5. On March 1, 2017, MHS began offering Cyber MD to its telehealth patients. *Id.* Before accessing Cyber MD's chat feature, patients were presented with a pop-up window that advised them in red, sixteen-point font that "Cyber MD is not a licensed health care professional. It is an artificial intelligence software program." *Id.*

Originally, MHS believed Cyber MD had a ninety-seven percent success rate at identifying lung lesions. *Id.* However, when identifying lung lesions in patients with prolonged asbestos exposure, Cyber MD's accuracy drastically decreased to only 85 percent. *Id.* at 5-6. This startling fact was not uncovered until October 2022. *Id.* at 5. CCS eventually corrected this startling oversight by retraining Cyber MD, but the updated version was not available to the public until December 13, 2023—over a year after the mistake was initially discovered—and neither CCS nor MHS notified the public about this grievous error. *Id.* at 6.

Mr. Miller worked for the Shawnee Steel Company in the maintenance department from 1970 to 2016. *Id.* at 3. The steel mill, which first opened in 1950,

used machinery insulated with asbestos. *Id.* Unfortunately, safety was not a high priority and Mr. Miller regularly worked without respiratory protection. *Id.* Prior to the health problems that led to this case, Mr. Miller did not smoke, have asthma, or any family or personal history of respiratory disease. *Id.* In 2012, a radiologist stated his chest scan was “unremarkable.” *Id.*

On April 9, 2018, after experiencing shortness of breath, Mr. Miller consulted Cyber MD *Id.* at 6. MHS and CCS confirmed that Mr. Miller clicked on the terms and conditions page but only glanced at it for four seconds before following the platform’s instructions, “Users must click ‘Accept’ to proceed.” *Id.* at 5. During the appointment, Mr. Miller disclosed his extensive history of working closely with asbestos insulated machinery. *Id.* at 6. Cyber MD instructed Mr. Miller to obtain a chest X-ray and CT scan from the mobile radiology service in Cartersville, which he did. *Id.* At his follow-up appointment two weeks later, Cyber MD informed Mr. Miller that there was “‘zero evidence’ of malignancy” in his scans and diagnosed him with asthma. *Id.* It was recommended that he follow up annually with Cyber MD. *Id.* Mr. Miller religiously attended his annual appointments in May 2019, May 2020, and June 2021. *Id.* These follow up visits procured the same results, “‘zero evidence’ of disease.” *Id.* After another clean bill of health in 2021, Cyber MD discharged Mr. Miller, notifying him that annual visits were no longer needed. *Id.*

Unfortunately, on October 30, 2023, Mr. Miller suffered a likely preventable spontaneous pneumothorax and was airlifted to the hospital in Goshen. *Id.* Once admitted Mr. Miller’s chest scans revealed that a 6.4 cm tumor in his left lung had

metastasized to his pleura and spine. *Id.* An expert reviewed Mr. Miller’s scans from his Cyber MD appointments and noted that there was a “clearly visible” 7 mm lesion in 2018. *Id.* By 2021, that lesion had grown to 47 mm. *Id.* Cyber MD failed to identify the lesion in multiple scans and on multiple occasions. *Id.* Mr. Miller passed away on April 14, 2024. *Id.* at 7. He is survived by his wife, Evelyn (“Mrs. Miller”), who filed this action in July 2024 on his behalf. *Id.*

II. NATURE OF PROCEEDINGS

The Simmons County Circuit Court. In July 2024, Plaintiff Mrs. Evelyn Miller filed suit on behalf of the decedent in the Simmons County Circuit Court in Shawnee alleging that MHS is vicariously liable for the grave errors of CCS’s Cyber MD telehealth system. R. at 7. MHS and CCS both filed motions for summary judgment at the close of discovery. *Id.* at 2. MHS argued it cannot be held vicariously liable under apparent agency for Cyber MD’s diagnostic failures because Cyber MD was a third-party vendor which MHS disclaimed in its Terms and Conditions. *Id.* Moreover, both MHS and CCS contend that the statutes of repose, codified in the Shawnee Revised Statutes §§ 12-404 and 12-410, bar the Mrs. Miller’s claims as a matter of law. *Id.* at 2-3. In response to the motions for summary judgment, the Circuit Court GRANTED MHS and CCS’s combined motion for summary judgment and DISMISSED WITH PREJUDICE the Mrs. Miller’s motion for summary judgment, holding that there was no genuine issue of material fact related to the statute of repose or the doctrine of apparent agency. *Id.* at 13.

The Shawnee Court of Appeals for the Second District. In response, Mrs. Miller appealed the order from the Circuit Court. *Id.* at 16. After reviewing the proceedings *de novo*, the Shawnee Court of Appeals for the Second District REVERSED and REMANDED the Circuit Court's findings, holding that healthcare systems and telehealth developers cannot use unassuming Terms and Conditions to circumvent vicarious liability or claim immunity while simultaneously continuing to monitor patients. *Id.* at 21, 27-28. In accordance with the second question at hand, the Court held that the Circuit Court interpreted the Shawnee statutes of repose too narrowly and incorrectly granted summary judgment in favor of MHS and CCS. *Id.* at 27.

Following the Court of Appeal's ruling, the Shawnee Supreme Court GRANTED MHS and CCS's petition for leave to appeal. *Id.* at 29. The Court limited the appeal to two questions: (1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for a third-party AI telehealth platform's failure to properly diagnose patients and (2) whether Mrs. Miller's claims are barred by the four-year statute of repose or whether the repose was tolled by a continuous course of treatment or the latent, un-discoverable nature of Cyber MD's flawed software. *Id.* at 29.

SUMMARY OF THE ARGUMENT

This case seeks to answer (1) whether a healthcare system can be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of an autonomous AI software tool integrated into its branded telehealth platform, and (2) whether a Respondent's claims can be barred by Shawnee's four-year statute of repose, specifically examining tolling and extensions under Shawnee Revised Statutes § 12-404 and § 12-410.

I.

MHS was the apparent agent of CCS and Cyber MD according to the requirements of the Shawnee Revised Statute Apparent Agency (No Citation Provided in Record). Under Shawnee law, apparent agency is established 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, consistent with ordinary care and prudence. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993); *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019).

MHS presented and advertised Cyber MD as an all-encompassing service of MHS, intentionally branding the patient-facing platform and prohibiting association with CCS. MHS maintained exclusive control over the Cyber MD platform. Additionally, Cyber MD behaved like a medical care provider by asking

extensive medical questions, recommending tests, and analyzing the aforementioned tests to provide a diagnosis. MHS failed to provide sufficient notice to patients regarding their providers and did not notify the patients of exactly who would be treating them, nor did they give patients an opportunity to consent to treatment from that provider.

II.

Accompanied with facts demonstrating that MHS was the apparent agent of CCS and Cyber MD, Mr. Miller's claims may also proceed under the tolling and extension exceptions under Shawnee Revised Statutes §§ 12-404 and 12-410. Shawnee Revised Statutes §§ 12-404 and 12-410 allow for a statute of repose to be tolled if there exists a: (1) continuous course of treatment; or (2) a latent defect undiscoverable by a reasonable, ordinary person, or the injury-causing aspect of the product causes the injury to manifest, or display, itself beyond the repose period. R. 14-15. A continuous course of treatment occurs over a span of time and exists for as long as a physician administers care for the injuries that cause the claim. *Conner v. St. Luke's Hosp., Inc.* 996 F.2d 651, 653 (4th Cir. 1993).

Mr. Miller's annual treatment with Cyber MD for the same condition meets the definition of a continuous course of treatment. Mr. Miller established a doctor-patient relationship with MHS by way of CCS and Cyber MD. He checked into virtual appointments and received medical service, akin an in-person doctor's office visit, every twelve months from 2017 to 2021 for the same condition, and without intervention from another physician.

In addition, Cyber MD's gross error was a latent defect, undiscoverable by a reasonably prudent person. Cyber MD did not discover their own diagnostic failure until well beyond Mr. Miller's initial check-up date in 2017 which required a system recalibration with additional data. Due to this, the harm caused by Cyber MD's latent defect did not manifest, or display Mr. Miller's condition until after the repose period.

The Shawnee General Assembly in creating Statute of Repose exceptions, clearly "anticipated the extension of the statutory period under certain circumstances." *Bierly v. Kettering Health Network*, 250 N.E.3d 1239, 1247 (Ohio Ct. App. 2024). Mr. Miller's case meets those circumstances, and the exceptions should be properly in this case. Because of Mr. Miller's continuing course of treatment, the latent defect discovery, and the manifestation of injury exceptions under Shawnee Revised Statutes §§ 12-404 and 12-410, MHS and CCS are not entitled to immunity from Mr. Miller's claims under the statute of repose.

ARGUMENT

Standard of Review. The specific deference given in a case is based on the standard of review on appeal, which is driven by whether there is a question of law or a question of fact. *Bufkin v. Collins*, 604 U.S. 369, 372 (2025). The Court must "review[] legal issues *de novo* and factual issues for clear error." *Id.* Since the present issues presented embody questions of law that encompass the doctrine of apparent agency and the tolling of statute of repose, a *de novo* standard of review applies here.

Further, a reversal of summary judgment is proper when the “movant shows 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. To show a genuine issue for material fact, the nonmoving party must illustrate specific facts which show that there is a “genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Courts are required to draw inferences reasonably and in light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 654-55 (1962)). If any evidence is “susceptible of different interpretations or inferences by the trier of fact,” then it is not suitable for disposition at the summary judgment level. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

With this standard of review, these issues can be reviewed on their merits.

I. CSS AND CYBER MD WERE APPARENT AGENTS OF MHS BECAUSE A PRINCIPAL THAT ALLOWS AN ENTITY TO ACT AS AN AUTHORIZED AGENT IS ITS APPARENT AGENT AND THUS VICARIOUSLY LIABLE.

This Court should deny MHS and CCS’s combined Motion for Summary Judgment according to Shawnee Rule of Civil Procedure 56 and hold MHS and CCS vicariously liable under the doctrine of apparent agency. Shawnee law dictates that an apparent agency relationship is formed when: (1) the principal¹ acts in a manner that would lead a reasonable person to conclude that the entity or practitioner

¹ A *principal* is “someone who authorizes another to act on his or her behalf as an agent.” *Black’s Law Dictionary* (12th ed. 2024).

alleged to be negligent was an employee or agent² 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, consistent with ordinary care and prudence. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. N.E. 2d 511, 525 (Ill. 1993); *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). MHS's marketing, control, and lack of meaningful notice to patients regarding Cyber MD's care all weigh in favor of apparent agency.

A. MHS held out CCS's Cyber MD as a direct service via marketing and public presentation.

Apparent agency is established when the principal's actions “makes some sort of manifestation causing a third party to believe that the alleged agent had authority to act for the benefit of the principal.” *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371 (S.D. Fla. 2005). The principal must hold out the agent as authorized to act on the principal's behalf. *Hofherr v. Dart Indus., Inc.*, 853 F.2d 259, 262 (4th Cir. 1988).

In *Franza v. Royal Caribbean Cruises, Ltd.*, the court held that it was plausible that a cruise line was the apparent agent and vicariously liable for medical negligence because it held its staff out as employees of the cruise line. *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1254 (11th Cir. 2014). A deceased passenger's estate brought a negligence suit against the cruise ship after she suffered a head injury. *Id.* at 1227. Despite the injury, a nurse discharged her,

² An *agent* is “someone who is authorized to act for or in place of another; a representative.” *Black's Law Dictionary* (12th ed. 2024).

stating she had no injuries. *Id.* As a result of the nurse's carelessness, the deceased succumbed to her injuries and ultimately passed away. *Id.* at 1228. The court ruled that because the cruise line (1) promoted, presented, and advertised its medical staff as employees; (2) billed passengers directly for onboard medical services; and (3) required medical staff to wear uniforms bearing cruise line's logo and name, the cruise line held out the medical staff as members of the crew. *Id.* Because of this, passengers justifiably relied on the medical staff as employees of the cruise ship. *Id.* Therefore, the court found in favor of the deceased's estate. *Id.* at 1253-54.

Similarly, in *Webster v. CDI Indiana, LLC*, the court found that a medical facility was liable for a doctor's malpractice because the patient reasonably relied on the facility's apparent authority over the doctor. *Webster*, 917 F.3d at 577–78. A patient filed suit against a diagnostic imaging facility and alleged that a radiologist hired as an independent contractor failed to timely diagnose the patient's cancer. *Id.* The facility argued the physician was not its apparent agent because it did not employ or contract for the doctor's services. *Id.* at 576; *see also Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999). All aspects of medical testing were performed by the facility except the interpretation of the tests. *Webster*, 917 F.3d at 577–78. The court held, “[A] medical [agency] cannot hold itself out to the public as offering health care services—and profit from providing those health care services—[and] escape liability by creating a complex corporate arrangement of interrelated companies.” *Id.* at 577. The appellate court affirmed the lower court's finding of liability. *Id.* at 578.

Here, like in *Franza* and *Webster*, MHS's actions like directing the navigation link and branding the platform while prohibiting CCS branding would cause a reasonable person to believe CCS had the authority to act on behalf of MHS. Firstly, to access the Cyber MD site, patients went to MHS's main webpage. When navigating to the patient portal, MHS failed to indicate patients had exited the MHS site nor did it differentiate between MHS, CCS, or Cyber MD. Secondly, MHS marketed and branded the patient-facing site with its logo and "strictly prohibited" any CCS markings. Additionally, the Cyber MD slogan was marketed alongside a fully branded MHS website. This created the appearance of a single entity, fully controlled by MHS. A patient visiting the site would reasonably and justifiably believe they were directly engaging with MHS and not a separate, unspecified party.

While MHS may argue that it added a linked disclaimer and pop-up banner to differentiate between MHS and other entities, those disclaimers were small and unbranded, one-time explanations that were drowned by the intentional and restrictive actions of MHS to present and promote CCS's Cyber MD as MHS's medical service to patients. Like in *Franza* and *Webster*, MHS held out CCS and Cyber MD as part of its company. MHS promoted, presented, and advertised CCS's Cyber MD as MHS's service. These manifestations would cause a reasonable person, like Mr. Miller, to believe that Cyber MD was a direct service of MHS and authorized to provide accurate healthcare information on its behalf. Therefore, the Court should find in favor of Mr. Miller's estate.

B. MHS held exclusive control over the CCS's patient-facing platform and MHS benefitted from that control.

An agency relationship exists when a principal manifests assent “that the agent shall act on the principal's behalf and is subject to the principal's control.” *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659–60 (4th Cir. 2019) (quoting *Restatement (Third) of Agency* §1.01 (2006); see also *Bradley v. DentalPlans.com*, 617 F. Supp. 3d 326, 342 (D. Md. 2022). When assessing control related to agency, determination should be “the right to control” rather than the contractual relationship or actual control. *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842, 853 (Fla. 2003); *Gradia v. Baptist Hosp., Inc.*, 345 So. 3d 385, 387 (Fla. Dist. Ct. App. 2022).

In *Villazon v. Prudential Health Care Plan*, the Florida Supreme Court overturned a summary judgment, ruling that the totality of the circumstances demonstrated evidence of an issue of material fact regarding agency. *Villazon*, 843 So. 2d at 844. In this case, the deceased filed a wrongful death suit against a provider for a misdiagnosis. The court stated that the independent contractor designation in the contract was not enough to determine the legal relationship between the parties. *Id.* at 854. The court assessed factors such as the provider's right to control the means of medical service administration, the right to control important aspects of patient care, and the provider's intentional inclusion of a disclaimer that the doctors were independent contractors proved the relationship was beyond the contractual description. *Id.* The court stated that the totality of the circumstances demonstrated the provider had the right to control as a principal

would and it understood the inferred liability because it was intentionally included in the disclaimer language. *Id.* at 855. As a result, the court ruled that summary judgment was not proper. *Id.* at 856.

Similar to the provider in *Villazon*, MHS's relationship with CCS is beyond what it claimed in the terms and conditions. MHS likely sought out a contract with CCS and then, controlled the integration of Cyber MD into its system. MHS exclusively controlled the patient-facing interface. This included controlling what patients read and saw when on the site. MHS restricted patients from seeing CCS's logo and name.

Like the right to control the Cyber MD platform, MHS also likely had the right to audit the system and control its function. MHS was aware of the diagnostic failures of Cyber MD and subsequent training required to accurately diagnose lung lesions related to prolonged asbestos exposure, like in Mr. Miller's case. MHS failed to audit or review patients whose lung scans were previously assessed by Cyber MD. MHS could have required patients like Mr. Miller to require a second opinion or an in-person follow-up appointment. MHS controlled the entire platform and was able to see how long Mr. Miller was on the site but failed to verify if the medical information and diagnosis was accurate, as Cyber MD was contracted to do.

In addition, like the provider in *Villazon*, MHS intentionally identified the doctors and Cyber MD as independent contractors and non-licensed professionals, demonstrating that it was aware of potential liability. While MHS may have

intended for this information to just inform the patient, it also showed MHS was aware of the potential liability of its contract with CCS and Cyber MD.

Moreover, MHS, as the medical service provider, also benefitted from its control. Patients engaged with the site the same manner as with a human medical doctor. Presumably, MHS likely billed for medical services provided by Cyber MD. Mr. Miller's initial appointment, scans, analysis, and follow-up appointments all have costs associated. It is reasonable to conclude that since MHS had control over the contract, branding, and patient-facing tools, it would also have control over billing and payment. MHS held CCS's Cyber MD out to patients as part of its medical services and was likely receiving compensation for the services provided by Cyber MD.

Therefore, because MHS had the right to control and exercised that control to its benefit, this Court should find there is evidence of an issue of material fact regarding apparent agency and affirm the reversal of summary judgment.

C. MHS did not provide meaningful notice to patients about their relationship and connection to CCS and Cyber MD.

If a principal is not an employee or agent of the hospital, the principal must give patients meaningful notice of the principal's status. *Sword*, 714 N.E.2d at 152. Meaningful notice is insufficient if it is an online disclaimer disavowing association. *Audi AG v. D'Amato*, 469 F.3d 534, 546 (6th Cir. 2006).

In *Sword v. NKC Hosps., Inc.*, the Indiana Supreme Court found that the hospital was liable for its independent contractor physician, because it did not give the patient meaningful notice of the physician's independent contractor status.

Sword, 714 N.E.2d at 153. An obstetrical patient brought a malpractice suit against the hospital following the negative effects of an epidural which was administered by an independent contractor anesthesiologist. *Id.* The hospital motioned for summary judgment on the grounds that the doctor was an independent contractor which exempted them from liability. *Id.* The court explained that because the hospital held itself out as an all-encompassing medical facility, including obstetrics, and did not put the patient on notice about the special relationship between the hospital and the doctor, the patient reasonably believed that the contractor was a direct employee of the hospital. *Id.* at 152-53. The court further explained that sufficient notice could include a consent-to-treatment form or a detailed explanation informing the patient exactly which third party was responsible for the patient's care. *Id.* at 152. This gave the patient the opportunity to knowingly consent to treatment by that provider. *Id.* The Indiana Supreme Court reversed the summary judgment and found there were issues of material fact in the case. *Id.* at 153.

In *Audi AG v. D'Amato*, the Sixth Circuit found the defendant's website disclaimer disavowing association with Audi, a recognized brand, provided insufficient notice to consumers because it presented itself as an official agent of a car brand. *Audi AG*, 469 F.3d at 546. The defendant used a domain name and website with Audi logos to sell unaffiliated goods. *Id.* The defendant argued that because he provided a disclaimer on his website repudiating association with the recognized brand, consumer confusion was remedied. *Id.* The court explained that "such a disclaimer does not absolve [the defendant] of liability" *Id.* The court

went on to explain that intent is irrelevant if consumers remain confused by an infringing logo. *Id.*

Here, MHS did not provide Mr. Miller with meaningful notice. As in *Sword*, MHS held out Cyber MD as an all-encompassing medical service of MHS. As previously explained, MHS advertised Cyber MD under the slogan “Cyber MD: Care Everywhere” alongside MHS’s exclusive logos. Thus, a reasonable consumer, like Mr. Miller, was led to believe Cyber MD was a direct service provided by MHS.

MHS argues, to inform patients, it had a hyperlink to terms and conditions and a pop-up box that warns that “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” R. at 5. However, as in *D’Amato*, the presentation of the information created consumer confusion. First, the hyperlinked disclosure was a smaller, single-spaced font that did not disclose independence from Cyber MD until users scrolled down near the end of the page. Secondly, neither disclosure names CCS or any other partners or owners of Cyber MD as the providers for users’ medical care services.

As the court explained in *Sword*, meaningful notice should have explained to Mr. Miller the relationship between the hospital and CCS and exactly who would be responsible for his medical care. Mr. Miller should have also had the opportunity to consent to treatment by the named medical care provider. MHS’s use of a pop-up box stating that Cyber MD is not a licensed healthcare professional does not adequately identify the healthcare professional responsible for providing the actual

services or establish that the patient knowingly consented to treatment by that provider.

In addition, the disclaimers were presented once during engagement with the patient-facing platform. Mr. Miller spent four seconds on the terms and conditions page which means he likely did not read or see MHS disavowing association with Cyber MD further down the page. While one of the disclaimers states Cyber MD was not “a licensed professional,” presenting the platform on an exclusively MHS branded site, providing medical services, would appear to a reasonable user that the information shared is managed by the hospital and serviced by one of their licensed healthcare professionals. A user would also reasonably believe that the diagnosis and feedback from the platform would be accurate.

MHS offered and marketed Cyber MD as an all-encompassing medical service, like in *Sword*, available to patients. MHS created customer confusion and did not give patients sufficient notice about the services or an opportunity to properly consent. Considering the limited availability of doctors and coverage in Mr. Miller’s area, MHS was obligated to do more than provide a one-time disclaimer or a pop-up box repudiating association. As the appellate court stated to the defendant in *D’Amato*, disavowing association is insufficient notice and does not absolve MHS of liability.

After reviewing MHS’s actions through its marketing, operational control, and insufficient notice to patients, a reasonable person would conclude that: (1) CCS and Cyber MD were agents of MHS; (2) MHS had knowledge of that appearance

and acquiesced through intentional exclusivity; and (3) because of that, a patient like Mr. Miller would justifiably rely on CCS's Cyber MD.

As the Seventh Circuit stated in *Webster*, “[A] medical [agency] cannot hold itself out to the public as offering health care services—and profit from providing those health care services— [and] escape liability by creating a complex corporate arrangement of interrelated companies.” *Webster*, 917 F.3d 574, 577–78 (7th Cir. 2019). Therefore, the Court here should find there is sufficient evidence to show MHS and CCS is the apparent agent of Cyber MD and affirm the reversal of summary judgment.

**II. MR. MILLER QUALIFIES FOR THE STATUTE OF REPOSE
EXCEPTIONS BECAUSE CYBER MD PROVIDED CONTINUOUS CARE
FOR THE SAME TREATMENT AND THE GROSS ERROR WAS
UNDISCOVERABLE CAUSING DELAYED MANIFESTATION OF HARM.**

This Court should affirm the Court of Appeals' decision to reverse CCS and MHS's combined Motion for Summary Judgment because Mr. Miller's case meets the exceptions qualifications for the statute of repose. The Rules Enabling Act grants defendants the right to a repose if there is a substantive right to it. *See S.E. Pennsylvania Transportation Auth. v. Orrstown Fin. Services Inc.*, 12 F.4th 337, 351 (3d Cir. 2021); *see also* 28 U.S.C.A. § 2072(b) (stating that the federal rules of civil procedure cannot “abridge, enlarge, or modify any substantive right”). Since a statute of repose is substantive, a plaintiff's right to bring a cause of action against a defendant is removed, despite an action's accrual. *Augustis v. U.S.*, 732 F.3d 749, 753 (7th Cir. 2013) (*quoting Boggs v. Adams*, 45 F.3d 1056, 1060 (7th Cir. 1995)). Thus, statutes of repose typically run on the last date of the defendant's act or

omission, unless tolling is permitted. *Calif. Public. Emps. Ret. v. ANZ Sec.*, 582 U.S. 497, 506 (2017).

However, a state’s general assembly can provide exceptions to a statute of repose that allows an action to commence. *Etheridge v. YMCA of Jackson*, 391 S.W.3d 541, 546 (Tenn. Ct. App. 2012). If an exception is stated within a statute of repose, “it is either found with the *language* of the statute itself, or in another part of the code specifically referencing the particular statute of repose.” *Id.* (emphasis added). Statute of repose exceptions must showcase an “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.” *Bierly* 250 N.E.3d at 1247.

By the explicit language stated in Shawnee Revised Statutes §§ 12-404 and 12-410, the Shawnee General Assembly clearly intended exceptions to its statute of repose. *Etheridge*, 391 S.W.3d at 546. Shawnee’s express exceptions “demonstrates the requisite intent to *alter* the operation of the statutory period.” *Calif. Public. Emps. Rev.*, 582 U.S. at 506 (2017) (emphasis added). Through these exceptions, Shawnee General Assembly did not intend to provide absolute repose in all circumstances, but anticipated causes of action, such as this present matter, that would extend the statute of repose. *Bierly*, 250 N.E.3d at 1247.

Express exceptions are straightforwardly given within § 12-404 in the continuing course of treatment exception, and §12-410 in the latent defect exception. R. at 14-15. This case qualifies for statutory exceptions in two ways, first,

Mr. Miller’s medical appointments with Cyber MD constituted continuous ongoing treatment. Second, Cyber MD’s complex algorithmic flaw, which failed to diagnose Mr. Miller’s terminal illness, constituted an undetectable, latent defect that could not be discovered by a reasonable, ordinary person.

A. CCS’s AI Telehealth System, Cyber MD, Provided a Continuous Course of Treatment, Which Tolloed and Extended the Statute of Repose.

The continuous course of treatment exception occurs when a doctor continuously treats a patient over a span of time. *Conner v. St. Luke’s Hosp., Inc.*, 996 F.2d at 653. This exception is applicable “so long as the patient remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action.” *Id.* at 653 (*quoting Ballenger v. Crowell*, 247 S.E.2d 287 (1978)). In some states, to successfully raise the continuous course of treatment exception, “the plaintiff must show both that (1) there was a continuous, unbroken course of negligent treatment and (2) that treatment was so related as to constitute one continuing wrong.”³ *Kollross v. Goldstein*, 191 N.E.3d 39, 46 (Ill. Ct. App. 2021); *see also Jones v. Dettro*, 720 N.E.2d 343, 346 (Ill. Ct. App. 1999). This exception is contained within professional malpractice claims and may be applied to determine when a defendant’s last negligent act prompted a period of repose. *Fulmore v. Johnson & Johnson, et al.*, 581 F.3d 752, 758 (E.D.N.C. 2022). When a doctor misdiagnoses a patient, the injury is traced back to the original date of the

³ Shawnee Revised Statute § 12-404 does not specify that even “negligent treatment” is required, but rather, “continuous course of treatment.” See Shawnee Revised Statute § 12-404.

negligent diagnosis. *Kaminer v. Canas, et al.*, 653 S.E.2d 691, 696 (Ga. 2007) (internal citations omitted). Like this court, other jurisdictions have adopted the continuous course of treatment exception to the statute of repose. *See generally Bixler v. Bowman*, 614 P.2d 1290, 1290-91 (Wash. 1980); *see also Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55, 65-66 (Wis. 1982).

In *McDermott v. Torre*, the plaintiff's visits with her doctors, from the date of misdiagnosis to the termination of treatment, were within a two-year period and constituted continuous treatment which raised a genuine issue of fact. *McDermott v. Torre*, 441 N.Y.S.2d 445, 445-47, 450-52 (N.Y. App. Div. 1981). A dark mole on plaintiff's ankle was initially misdiagnosed as not malignant. *Id.* at 446. Plaintiff continued to experience symptoms until years later when the tumor was correctly diagnosed as malignant. *Id.* at 446-47. The court ruled that a patient's relationship with the defendant doctor is continuous so long as she is receiving care for the "same or related illnesses or injuries." *Id.* at 450. If the care is continuous, the statute of repose is tolled until treatment ceases."⁴ *Id.* As a result, the court found a genuine issue of fact on when the plaintiff's treatment lost continuity. *Id.*

Mr. Miller's initial visit and annual exams from 2018 to 2021 with Cyber MD were analogous to *McDermott*. These treatment dates were not distinct and separate because they were related to the same respiratory issues. Furthermore,

⁴ This Court also noted in prior case *Borgia v. City of New York*, that the basis of its adoption of the continuous course of treatment doctrine is that "it would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent." *Id.* at 160.

Cyber MD, like the human doctor in *McDermott*, misdiagnosed Mr. Miller with “zero evidence’ of disease,” which caused a tremendous delay in necessary treatment. Mr. Miller was continuously treated, with the same condition, and by the same physician (Cyber MD). R. at 6. Consequently, a genuine issue of fact exists. Like in *McDermott*, this Court should find that Mr. Miller was continuously treated by Cyber MD and should affirm the lower court’s reversal.

Similarly, in *Comstock v. Collier*, the court determined that the plaintiff received continuous treatment for his skull injury from 1967 to 1982 because he attended regular doctor’s appointments during that time. *Comstock v. Collier*, 737 P.2d 845, 850 (Colo. 1987). The plaintiff underwent a skull removal and discovered the erroneous diagnosis sixteen years later. *Id.* As a result of the continuous medical treatment, the plaintiff’s medical malpractice claim was tolled by the three-year statute of repose. *Id.*

Following *Comstock*, Mr. Miller diligently pursued annual virtual follow-up exams with Cyber MD; however, Mr. Miller’s follow-up visits were over the course of an even *shorter* period of time (twelve months apart from 2018 to 2021). These treatment dates spanned over the course of three years and resulted in the same misdiagnosis that ultimately led to Mr. Miller’s death. Based on the alignment of facts, Mr. Miller’s treatment dates constituted a continuous course of treatment, as emphasized in *McDermott* and *Comstock*. Thus, court should affirm the lower court’s reversal.

B. Cyber MD's Algorithmic Flaw, Which Caused the Injury, Was Not Discoverable by a Reasonably Prudent Person, and Mr. Miller's Harm Did Not Manifest Itself Until After the Four-Year Limit.

Per Shawnee Revised Statute § 12-410(b)(3), a defendant cannot enjoy immunity under the statute of repose if: (1) there is an injury-causing aspect of a product at the time of delivery which is undiscoverable to the reasonable person; or (2) if the harm caused by the injury-causing aspect of the device manifests itself beyond the repose period. R. at 14-15. The facts in this present case apply directly to both scenarios because Cyber MD's gross error is a latent defect and harm did not manifest until after the statute of repose period.

A latent defect is a defect that is not readily observable or discoverable through a reasonable inspection. *Lawrence v. NVR, Inc.*, 823 F. Supp. 3d at 780; *see also Dickerson v. Land Developers Const. Co., Inc.*, 882 So.2d 291, 300 (Ala. 2003) (emphasizing a person in the plaintiffs' position would not have the ability to inspect a latent home defect without additional assistance). In the context of a statute of repose, the latent defect exception contains "exceptions . . . where the harm is caused by prolonged exposure to a defective product and where the injury-causing aspect of the product was not discoverable by a reasonably prudent person within ten years of the time of delivery of the product." *Koch v. Shell Oil Co.*, 52 F.3d 878, 883 (10th Cir. 1995).

An injury may be "unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). In the manifestation of an injury, it is described

that “the afflicted employee can be held to be ‘injured’ only when the accumulated effects of the deleterious substance manifest themselves.” *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (quoting *Associated Indem. Corp. v. Indus. Acci. Com.*, 12 P.2d 1075, 1075-76 (Cal. Ct. App. 1932)).

1. Cyber MD’s complex algorithmic flaw is a latent defect that was not discoverable by an ordinary, reasonably prudent person.

In *Winans v. State Farm Fire and Cas. Co.*, a home’s hidden cracks and separations only discovered through an expert’s post-failure examination constituted latent defects subject to an insurance policy’s latent defect exclusion. *Winans v. State Farm Fire and Cas. Co.*, 968 F.2d 884, 887 (9th Cir. 1992). The possibility of negligence in the home’s design was not apparent until after an investigation, because there was no evidence that the damage could be seen on a “reasonable inspection.” *Id.* at 887. Due to the substantial evidence given by the expert investigation, there was no genuine dispute of fact that the home’s design represented a latent defect. *Id.*

Parallel to the home’s defect in *Winans*, Cyber MD’s failed algorithmic flaw was only apparent when CCS attempted to retrain it in October 2022, which was too late for Mr. Miller. Like in *Winans*, CCS’s examination of Cyber MD was the only way to discover the gross error in the diagnostic algorithm. Since this defect was only made apparent after a reasonable inspection by an expert (CCS) the algorithmic flaw was undoubtedly a latent defect. A genuine issue of material fact existed, and the lower court’s reversal should thus be affirmed.

2. Mr. Miller's injury, which occurred within the four-year statute of repose, did not manifest until after the four-year limit, and thus constituted another exception under § 12-410(b)(3).

In *Baughn v. Eli Lilly and Co.*, plaintiff's exposure to a prescription drug that led to future complications outside of the repose period constituted an injury that later manifested itself. *Baughn v. Eli Lilly & Co.*, 356 F. Supp. 2d 1166, 1173 (D. Kan. 2005). The defendants did not dispute that the plaintiff "sustained injuries when her mother ingested DES, i.e. at the time of product delivery; and [] plaintiffs did not know of these injuries until more than ten years later." *Id.* The *Baughn* court ruled that the plaintiffs established "a genuine issue of material fact" and the defective product that was delivered ten years prior caused harm that did not manifest until later. *Id.*

Similar to *Baughn*, Mr. Miller's terminal condition was caused within four years of the time of delivery, because the algorithmic flaw failed to properly diagnosis him during his first visit. This lag in time that stemmed from the failed algorithm operating in 2018 to the retraining of Cyber MD in 2021 caused the discovery of Mr. Miller's terminal condition to manifest outside of the repose period. Like *Baughn*, this court must find that Cyber MD's algorithmic flaw caused Mr. Miller's terminal condition to manifest itself after the repose period. Defendants cannot enjoy immunity from the manifestation of Mr. Miller's injury, which falls squarely within the exception of Shawnee Revised Statute § 12-410 (b)(3).

This case falls within the exception, barring summary judgment. The Court, therefore, should affirm the appellate court's reversal.

C. The Shawnee General Assembly Clearly Intended for §§ 12-404 and 12-410 to be Express Exceptions and Interpreted in their Ordinary Meaning.

The Shawnee General Assembly clearly intended for Shawnee Revised Statutes §§ 12-404 and 12-410 to grant an exception for the statute of repose when it included the phrases “continuous course of treatment,” “latent defect,” and “manifestation of injury.” R. at 14-15. A statute of repose’s express exception “demonstrates the requisite intent to *alter* the operation of the statutory period.” *Calif. Public. Emps. Rev.*, 582 U.S. at 506 (emphasis added).

Exceptions to the statutes of repose are found in the language of the statutes. *Etheridge*, 391 S.W.3d at 546. Coupled with the obvious language in Shawnee Revised Statute § 12-404, the terminology in § 12-410, must also be read with ordinary meaning. “Continuing” means “uninterrupted; persisting” and “not requiring renewal; enduring.” *Black’s Law Dictionary* (12th ed. 2024). The definition of “latent” is “concealed; dormant,” and “hidden defect” is “a product imperfection that is not discoverable by a reasonable inspection and for which a seller or lessor is generally liable if the flaw causes harm.” *Id.* These terms should be assigned its ordinary meaning in Shawnee Revised Statute § 12-410, because of the unmistakable language illustrated within the exceptions. The Shawnee General Assembly clearly intended to provide explicit exceptions as to disallow Defendants from enjoying absolute immunity.

Medical malpractice has a strong public policy incentive to acknowledge statutes of repose exceptions. The Seventh Circuit explored a continuing violation

rule in *Rodrigue v. Olin Employees* when a doctor's employee stole and converted checks. *Rodrigue v. Olin Emps. Credit Union*, 406 F.3d 434, 434-35 (7th Cir. 2005). The Seventh Circuit stated that a statute of repose in medical malpractice cases should not begin until "the last date of negligent treatment" because patients would suffer "unjust results." *Rodrigue*, 406 F.3d at 442 (quoting *Cunningham v. Huffman*, 609 N.E.2d 321, 325 (1993)); see also *Med. Liability Mut. Ins. Co. v. Alan Curtis, LLC*, 519 F.3d 466, 475 (8th Cir. 2008) (emphasizing that Arkansas has not implemented the continuous course of treatment exception for any claim except medical malpractice).

Analogous to the principles mentioned in *Rodrigue*, Mr. Miller's claim consists of the risk of "unjust results" if the continuing course of treatment rule is not applied. In relying on Cyber MD's technology, there was no other methodology for Mr. Miller to discover Cyber MD's misdiagnosis until he was airlifted October 30, 2023. It was then that Mr. Miller learned that he had a growing mass because the emergency room doctor stated the tumor was clearly visible.

Unlike the act of conversion in *Rodrigue*, it was impossible for Mr. Miller to know about his misdiagnosis. Due to the lack of awareness, Cyber MD, acted as a tool used by the defendants and was relied upon by Mr. Miller when it reported "zero evidence" of malignancy, diagnosed him with asthma, referred him for inhaler management, and gave recommendations for annual follow-ups. These actions created a patient-doctor relationship. Pursuit of Mr. Miller's medical malpractice claim relies on the "cumulative nature" of MHS, CCS, and Cyber MD's actions in

April 2018, May 2019, May 2020, and June 2021. The congruence of the acts together is required to evade the risks of “unjust results” inherent in a medical malpractice claim such as this. To rule otherwise would cause the results to be unjust in the disallowance of the statutory exceptions. A genuine issue of material fact arises in this instance, and the statute of repose does not preclude this claim as a matter of law. Therefore, the Court should affirm the lower court’s reversal of MHS and CCS’s combine Motion for Summary Judgment.

CONCLUSION

For the aforementioned reasons, Mrs. Miller respectfully requests this Court deny MHS and CCS’s combined Motion for Summary Judgment. As Mrs. Miller plausibly alleged in her complaint, CCS and Cyber MD were apparent agents of MHS because MHS held out CCS and Cyber MD as part of its company, exercised control over the patient-facing platform, and MHS failed to provide meaningful notice about the third-party relationship to its patients. Additionally, the statute of repose exceptions should be applied under Shawnee law because Cyber MD provided continuous care and the gross error in misdiagnosis was undiscoverable, causing late manifestation of harm. Therefore, because there exist questions pertaining to the material facts, MHS and CCS’s combined Motion for Summary Judgment should be denied.

Respectfully submitted,

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