
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,

Respondent.

On Appeal to the Shawnee Supreme Court, from the Shawnee Court of Appeals for the Second District, there pending as a matter No. 25-123, and heard there on appeal from the Circuit Court of Simmons County, Shawnee, there pending as matter No. 25-L-24601.

BRIEF FOR RESPONDENT

HIPAA-crits

Attorneys for Respondent

QUESTIONS PRESENTED

- I. Whether a healthcare system can be held vicariously liable under the doctrine of apparent authority when its branded telehealth platform presents an autonomous AI diagnostic tool as part of its care, and the tool's diagnostic errors harm a patient?
- II. Are Respondent's claims timely under Shawnee statute § 12-404, otherwise known as the "continuous course of treatment" exception to its four-year statute of repose?
- III. Under the exceptions in Shawnee Revised Statute § 12-410, does the latent, un-discoverable nature of an algorithmic flaw and its subsequent retraining impact the applicability of Shawnee's four-year statutes of repose?

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OPINIONS BELOW

The opinion and order of the Circuit Court of Simmons County for the State of Shawnee appear at R. at 0001-0012, where the Circuit Court GRANTED the Defendants' motion for summary judgment pursuant to SN. R. CIV. P. 56. The opinion of the Shawnee Court of Appeals for the Second District appears in the record at pages 0013-0025, where the Second District REVERSED the circuit court's decision. The order of the Shawnee Supreme Court appears in the record at page 0026, where the Petitioners' petition for leave to appeal is GRANTED.

STATUTORY PROVISIONS

The following provisions of the Shawnee Revised Statutes are relevant in this proceeding: SN. REV. STAT. §§ 12-402(a)-(c); SN. REV. STAT. §§ 12-404(a)-(b); SN. REV. STAT. §§ 12-410(a)-(b)(3). These provisions are reproduced in Appendix A.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case depicts what happens when a community is stripped of its access to medical care due to steep population decline, forcing citizens to turn to non-regulated actors in the medical field for essential healthcare. Mr. Elias Miller ("Mr. Miller"), a citizen of Cartersville, Shawnee, lived in rural Simmons County, Shawnee. R. at 0002. In the mid-2010s, Simmons County experienced a severe population decline and a loss of over 75% of its healthcare professionals, causing the closure of both local hospitals in 2015 and the Shawnee Steel Company's mill in 2016. *Id.* As a result, the nearest radiology facility providing in-person consultations was over a three-and-a-half-hour drive at Metropolitan Health System, Inc.'s

(“MHS”) hospital in Goshen, Shawnee. R. at 0003. State and federal officials designated Shawnee a Health Professional Shortage Area and Medically Underserved Area. *Id.*

Mr. Miller worked at Shawnee Steel Company’s primary mill for forty-six years. R. at 0002. Despite federal standards, the factory where Mr. Miller worked retained its original insulation, resulting in prolonged asbestos exposure for its employees. *Id.* Notably, Mr. Miller was a lifelong non-smoker, not asthmatic, had no family history of respiratory disease, and, as of 2012, had an “unremarkable” reading of his then-most recent chest screening by a radiologist. *Id.*

MHS, a regional healthcare network, contracted in 2012 with Cyber-Care Solutions, LLC (“CCS”), a digital health infrastructure provider, to design and host a proprietary telehealth platform. R. at 0003. This platform’s patient-facing interface was exclusively controlled by MHS and only displayed MHS branding, strictly prohibiting CCS marks on all patient-facing pages. *Id.* Before patients accessed the platform, they could, but were not required to, click on a blue-underlined hyperlinked “Terms and Conditions” which opened thirty-four lines of single-spaced, unformatted black text on a plain white background of a noticeably smaller font. *Id.* Near the bottom of the hyperlinked legal document, in the same text, was the disclaimer clause, reading:

“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 MHS. MHS exercises no operational control over the clinical judgment or diagnostic

methods used by the independent contractor physicians or any automated software applications.”

R. at 0003-0004. In February 2017, the FDA notified CCS that it had cleared Cyber MD for patient use, an interactive conversational AI diagnostic system that allows patients to input symptoms via text or voice, asks follow-up questions, compiles clinical history, generates differential diagnoses, and both orders and interprets diagnostic tests. R. at 0004. CCS marketed Cyber MD under the slogan “Cyber MD: Care Everywhere.” *Id.* The initial software version was trained on a dataset of 40,000 images from three hospital systems, achieving a 97% overall accuracy rate in classifying lung lesions. *Id.* MHS integrated Cyber MD into its portal on March 1, 2017. *Id.*

Before interacting with Cyber MD, users must navigate a pop-up box stating in red, 16-point font: “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” *Id.* Users must click “Accept” to access Cyber MD’s chat feature. *Id.*

In October 2022, CCS discovered Cyber MD’s diagnostic accuracy dropped to 85% when evaluating images of patients with prior occupational asbestos exposure due to shadowing masking of underlying tumors because of pleural shadowing. R. at 0004-0005. CCS retrained Cyber MD using 10,000 asbestos-exposed image sets, restoring high accuracy, and released the updated version on December 13, 2023. *Id.* CCS did not alert the public regarding Cyber MD’s efficiency rates, initial training, or retraining. R. at 0005.

On April 9, 2018, Mr. Miller logged into MHS's portal, accessed the blue hyperlink for four seconds for the first and only time, and began a virtual intake session with Cyber MD. *Id.* Mr. Miller detailed his shortness of breath and occupational history of asbestos exposure. *Id.* Cyber MD ordered a chest x-ray and CT scan for Mr. Miller at a mobile radiology service visiting their town, and stated: "Once I have your scans, I will analyze them closely, and go over the results with you." *Id.*

Two weeks later, Cyber MD evaluated Mr. Miller's scans and reported "zero evidence" of malignancy, diagnosed Mr. Miller with adult-onset asthma, referred him to a local provider for inhaler management, and recommended yearly follow-up scans for diagnostic surveillance over his condition. *Id.* MHS and Cyber MD provided a mandatory annual follow-up protocol, subsequently ordering Mr. Miller new scans for the following three years. *Id.* During each appointment, Cyber MD reaffirmed its 2018 diagnosis of "zero evidence" of malignancies, and independently decided to end diagnostic surveillance in 2021. *Id.*

On October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax. *Id.* Scans revealed a 6.4 cm malignant mass in his left lung with extensive metastases to the pleura and spine. *Id.* Expert review confirmed that a 7 mm lesion was visible on his 2018 scans and had grown continuously to 47 mm by 2021. *Id.* Cyber MD's 2017 baseline coding algorithm had consistently failed to identify the lesion, leading Mr. Miller to believe he was healthy. *Id.*

Mr. Miller died on April 14, 2024, at age 74. R. at 0006. Evelyn Miller (“Ms. Miller”), filed this action in July 2024. *Id.*

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County Complaint. In July 2024, Ms. Miller (“Respondent”) filed a complaint in the Shawnee Circuit Court of Simmons County against Petitioners, MHS and CCS (collectively the “Petitioners”). R. at 0001. Ms. Miller, individually and as special administrator for the estate of Mr. Miller, alleged that MHS should be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of CCS’s AI tool, Cyber MD. *Id.* She also alleged that CCS’s design defect and failure to warn inherent in Cyber MD’s algorithm gave rise to claims of strict product liability. *Id.*

The Motions for Summary Judgment. The Petitioners moved for summary judgment following the close of discovery on two major assertions. R. at 0001-0002. First, MHS argued that the lack of an employee or agency relationship with Cyber MD precluded MHS from vicarious liability. *Id.* Second, the Petitioners argued that the statute of repose periods of §§ 12-404 and 12-410 must be an absolute bar to Ms. Miller’s Strict products liability claims. *Id.* After reviewing the motions, undisputed facts, and applicable statutes, the circuit court ruled in favor of the Petitioners, holding that there were no genuine issues of material fact on the issues of apparent agency or statute of repose periods. R. at 0002. The circuit court granted their motions for summary judgment and dismissed Ms. Miller’s complaint with prejudice in its entirety. *Id.*

The Second District Court of Appeals. The Respondent timely appealed the order of the circuit court granting summary judgment in favor of the Petitioners. R. at 0014. The court of appeals reviewed the circuit court's decision granting summary judgment de novo and viewing all evidence in the light most favorable to the nonmoving party. R. at 0018. The court of appeals found that the circuit court committed reversible legal errors and overlooked genuine issues of material fact on both key issues: (1) whether to hold MHS vicariously liable under the doctrine of apparent agency, and (2) whether the medical malpractice and product liability claims against the Petitioners were properly barred by the applicable statutes of repose. R. at 0014. On the first issue, the court of appeals ruled that a dispute of material fact existed whether reasonably conspicuous notice of MHS's agency disclaimer was apparent through its portal, and whether this disclaimer was procedurally unconscionable. R. at 0025. On the second issue, the court of appeals ruled that the circuit court ignored genuine issues of material fact due to its narrow interpretations of the statute of repose periods of §§ 12-404 and 12-410. *Id.* The court of appeals REVERSED the circuit court's order granting summary judgment on both issues, remanding the case to the circuit court for further proceedings. R. at 0014.

The Petition for Leave to Appeal. The Appellants timely filed a petition for leave to appeal pursuant to the Shawnee Supreme Court's Rule 315. R. at 0026. After reviewing the petition, this court granted the Appellants' request to review the court of appeals' decision. *Id.* This court limited this appeal to two primary

questions: (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 Respondent's claims are barred by Shawnee's four-year statutes of repose or whether the repose periods were tolled/extended by: (a) Cyber MD's annual diagnostic evaluations constituting a "continuous course of treatment" under SN. REV. STAT. § 12-404; or (b) the latent, un-discoverable nature of the algorithmic flaw and subsequent retraining under the exceptions in SN. REV. STAT. § 12-410. *Id.*

SUMMARY OF THE ARGUMENT

This court should affirm the holding of the Shawnee Court of Appeals for the Second District that there is a genuine dispute of material fact as to (1) whether to hold MHS vicariously liable under the doctrine of apparent agency, and (2) whether the medical malpractice and product liability claims against the Petitioners were properly barred by the applicable statutes of repose. This court should rule that, in Ms. Miller's medical malpractice and strict product liability claims, she pleaded sufficient factual material to survive the Petitioners' motion for summary judgment.

I.

CCS may have developed Cyber MD, but MHS presented Cyber MD to patients as its own. MHS placed Cyber MD behind an exclusively MHS-branded portal and controlled every aspect of the patient-facing interface. Rather than clearly disclose MHS's relationship with Cyber MD, MHS relegated that information to an optional disclaimer buried in dense online terms. On these facts, a jury could readily

conclude that MHS held Cyber MD out as its own provider and failed to give patients meaningful notice that they were dealing with a separate entity.

II.

This court should affirm the court of appeals' finding and toll the statute of repose under Shawnee's continuous course of treatment exception. The visits between 2018–2021 constitute one continuous course of treatment to toll the statute of repose. MHS alone ordered and reviewed the annual scans; moreover, both parties anticipated continuing visits. Every visit addressed the same asbestos-related lung condition, and Cyber MD repeatedly reaffirmed its same flawed baseline assessment. A flawed baseline assessment followed by multiple flawed follow-up assessments satisfies the continuous-treatment doctrine because the repeated diagnostic failures themselves gave rise to this negligence claim.

III.

The product-liability claims likewise presented factual questions because Mr. Miller could be considered Cyber MD's intended user, the coding defect existed at delivery but was hidden from an ordinary patient, repeated use prolonged the misdiagnosis, and the resulting harm did not manifest until the 2023 pneumothorax. Accordingly, the discovery rule, with the statutory exceptions for prolonged exposure, an undiscoverable defect, and delayed manifestation, render the claims timely to preclude summary judgment.

ARGUMENT

Standard of review. This appeal raises two issues: vicarious liability under the rule of apparent agency and tolling a statute of repose under one of the following statutory exceptions: continuous course of treatment doctrine and strict product liability exceptions. Both issues relating to the motion for summary judgment warrant de novo review, applying the same legal standards as the trial court. *See* SN. R. CIV. P. 56; *Vance v. Oakbridge Sys., Inc.*, 142 Sn.2d 88, 94 (2018).

I. MHS CANNOT EVADE VICARIOUS LIABILITY UNDER THE DOCTRINE OF APPARENT AUTHORITY BECAUSE ITS DIGITAL INTERFACE FAILED TO PROVIDE CONSPICUOUS NOTICE OF THE AGENCY DISCLAIMER, AND GENUINE DISPUTES OF MATERIAL FACT REMAIN AS TO BOTH THE ADEQUACY OF THAT NOTICE AND THE DISCLAIMER'S PROCEDURAL UNCONSCIONABILITY.

A. MHS Must Be Held Vicariously Liable Under the Doctrine of Apparent Agency Because (1) MHS Held Itself Out as the Provider and Did Not Sufficiently Inform Mr. Miller Otherwise; (2) MHS Had Knowledge of Acts that Furthered the Appearance of Control; and (3) Mr. Miller Reasonably Relied on MHS's Conduct.

This court should affirm the court of appeals' reversal. A hospital or healthcare network must be held liable for an independent contractor's malpractice when evidence shows the patient reasonably believed, based on the provider's representations, that the contractor was its agent. *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). Under Shawnee law, an apparent agency relationship is established where: (1) the hospital 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 hospital had knowledge of and supported acts creating the appearance of authority; and (3) the plaintiff acted in reliance

upon the conduct of the hospital. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 795 (Ill. 1993); *Webster*, 917 F.3d at 575; *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 856 (Wis. 1988). MHS's conduct satisfied all three elements; thus, this court must hold it vicariously liable under the doctrine of apparent agency.

1. Mr. Miller reasonably believed MHS provided his care because MHS held itself out as a full-service care provider and failed to provide notice that Cyber MD was an independent contractor.

A hospital or medical facility satisfies the holding out element when it presents itself to the public as a full-service care provider but fails to notify its patients that independent contractors provide their care. *Gilbert*, 622 N.E.2d at 795; *Pamperin*, 423 N.W.2d at 856. MHS never explicitly disclosed to Mr. Miller that Cyber MD provided his care. By failing affirmatively to state otherwise, MHS publicly presented itself as the provider, leading Mr. Miller reasonably to believe that MHS controlled and delivered his care.

i. MHS held itself out as a full-service provider of Mr. Miller's care.

Even without an express, affirmative representation by the hospital of a physician's employment status, it is reasonable for a patient to conclude their physician was an employee or agent of the hospital, based on how the hospital held itself out to the public. *Pamperin*, 423 N.W.2d at 854-55; *Webster*, 917 F.3d at 577. Mr. Miller acted on his reasonable belief that MHS was an integrated healthcare delivery system when seeking out its health services.

A healthcare facility may be liable for an independent contractor's negligence without directly employing the contractor. In *Webster*, CDI argued that MSC

employed the radiologists who performed the plaintiff's CT scan, insulating CDI from liability. 917 F.3d at 575-76. The court rejected that argument, holding liability does not require a direct employment relationship. *Id.* at 577. Otherwise, a facility could market and profit from healthcare services while evading liability by routing physician employment through independent-contractor organizations. *Id.*

Courts find apparent authority when a hospital presents itself as the provider, and patients reasonably rely on that representation. In *Boyd v. Albert Einstein Med. Ctr.*, the plaintiffs chose listed physicians based on the HMO's claims that it thoroughly vetted providers and offered competent care. 547 A.2d 1229, 1231 (Pa. Super. Ct. 1988). The court held a question of material fact existed as to whether the member physicians were apparent agents of the HMO. *Id.* at 1235. The court found the brochure constituted a holding out because it advertised HMO as "an entire health care system" and "assumes the responsibility for quality and accessibility." *Id.* In *Pamperin*, the plaintiff received care at Trinity's emergency room. 423 N.W.2d at 849. The court held Trinity could be liable under the doctrine of apparent authority because it held itself out as providing complete emergency room care without informing patients that independent contractors provided some services. *Id.* at 853. The court reasoned even though the plaintiff's x-rays were read by an employee of Lakeview Radiologist SC that contracted with Trinity to provide diagnostic radiology, the doctrine applies because the patient looked to hospital as care provider. *Id.* at 854; *See Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 258 (Ky.

1985) (concluding unreasonable to put duty on patient to inquire about employment status of each person who treats him).

The nuances in an entity's hiring structure are not enough to avoid liability. In *Webster*, CDI attempts to avoid liability by presenting the complexities of its structure, but the court rejected this argument. Just as CDI contracted with MSC to manage doctors for CDI's diagnostic imaging facility, MHS contracted with CCS to design and host a telehealth platform, Cyber MD. Furthermore, the patient was sent by a doctor for scans in *Webster*, and Mr. Miller was sent to Cyber MD through MHS's portal. Given these similarities, this court should reject MHS claim that its limited role in Mr. Miller's care shields it from liability. The record establishes Mr. Miller viewed MHS as a full-service care provider when he sought treatment, and in recognition of this reasonable belief, this court should rule that MHS was holding itself out as his provider.

MHS presented itself as a full-service provider, reasonably leading Mr. Miller to believe Cyber MD acted on its behalf. In *Boyd*, advertising an "entire health care system" constituted holding out. The record does not reflect how MHS advertised to Mr. Miller, but he acted typically, describing his symptoms as he would to any full-service provider. Likewise, *Pamperin* recognized that patients reasonably assume hospital physicians are employees and cannot be expected to understand complex provider relationships. Because lack of control did not defeat liability, MHS must be liable despite claims it did not have oversight or control over Cyber MD.

ii. MHS did not provide sufficient notice to Mr. Miller of its relationship with Cyber MD.

By holding itself out as a full-service provider, MHS had a duty to notify Mr. Miller that independent professionals provided his care. Unless a patient is notified that the professionals they may encounter are independent, the patient would naturally assume they are hospital employees. *Gilbert*, 622 N.E.2d at 795.

Apparent agency liability turns on whether a hospital notified patients that treating physicians were independent contractors. In *Sword v. NKC Hosps., Inc.*, the plaintiff gave birth at Norton's Children's Hospital ("Norton"), where Dr. Luna practiced as an independent contractor, treating Sword. 714 N.E.2d 142, 145 (Ind. 1999). The court held that under the doctrine of apparent agency, a hospital may be found vicariously liable for the negligence of an independent contractor physician. *Id.* at 149. Here, the record did not reflect action by Norton to alert Sword that her physician bore responsibility for her care. *Id.* at 153. Courts also analyze whether the hospital notified the patient of its relationship with the physician, as examined in *Gilbert*. 622 N.E.2d at 795. Emergency room patients were not informed that independent contractors treated them. *Id.* at 791. When the plaintiff arrived at the emergency room, he signed a consent form stating his treatment would be performed by "[p]hysicians and employees of the hospital." *Id.* The plaintiff died later after being released by the doctor, who found no sign of heart disease; however, autopsy revealed heart disease was present at the time of death. *Id.* at 792. The record established the hospital did not provide notice to patients that independent contractors were delivering care in the emergency room; because of the

lack of notice, the court held the hospital vicariously liable. *Id.* at 790-91, 796. In *Petrovich v. Share Health Plan of Ill.*, the court reaffirmed that apparent agency is a question of fact. 719 N.E.2d 756, 765-66 (Ill. 1999). Share’s handbook, received by all HMO members, promised “all your healthcare needs” and called physicians “your Share physician” and “our staff,” not independent contractors. *Id.* at 762. Although Petrovich disputed receiving it, Share cited a subscriber certificate disclaiming an employment relationship. *Id.* The court held that despite this fact, liability is still possible because a factual dispute remained whether Share notified Petrovich of the physicians’ employment status. *Id.* at 765, 767.

A hospital presenting itself as a full-service provider must disclose its relationship with physicians. In *Sword*, the patient relied on the hospital’s advertising, and no communication provided notice. Likewise, MHS cannot establish notice as a matter of law while obscuring its relationship with Cyber MD. In *Gilbert*, the record established the patients did not receive notice about the employment status of their physicians. The record is ambiguous as to whether Mr. Miller was given meaningful notice. Cyber MD’s statement that it would analyze his scans and review the results reinforced his reasonable belief that MHS provided his care. Viewing the record in his favor, a genuine issue of material fact exists as to notice.

Making information available—or supplying it at some point—does not defeat the holding-out element when the method of disclosure creates serious uncertainty about the hospital-physician relationship. In *Petrovich*, conflicting documents

created a factual dispute over meaningful notice. Though Mr. Miller was not provided with blatantly false statements about who would provide his care, he had to search a full page of small text in a hyperlinked legal document to discover the MHS-CCS relationship. Consistent with *Petrovich* and *Gilbert*, MHS's failure to explicitly disclaim providing his care means Mr. Miller lacked notice, satisfying apparent authority's holding-out element.

2. MHS knew that hosting on its own URL, using own corporate logo, and prohibiting CCS branding on the portal created the appearance of control.

An apparent agency relationship can be established when the principal has knowledge of and acquiesced in the acts creating the appearance of authority. *Gilbert*, 622 N.E.2d at 795; *Webster*, 917 F.3d at 575. MHS not only wrapped the portal in its own corporate logo and hosted it on its own URL, but also explicitly prohibited CCS branding on all patient-facing pages, manifesting itself to the public as the authority providing care.

Courts find that representation through branding contributes to a hospital's failure to put a patient on notice. In *Arrendale v. Am. Imaging & MRI, LLC*, Marion Open MRI entered into an agreement with radiologist Dr. Boutselis, who would read and review MRIs as an independent contractor. 183 N.E.3d 1064, 1067 (Ind. 2021). Reports conducted by Dr. Boutselis were delivered to patients on Marion Open MRI letterhead, providing no indication of his status as an independent contractor. *Id.* The court held that, because the *Sword* analysis applied to non-hospital diagnostic imaging centers like Marion Open MRI, genuine issue of

material fact existed whether Dr. Boutselis was its apparent agent. *Id.* at 1072, 1074. As explained by *Webster*, a medical center cannot profit by offering healthcare services while evading liability through a complex web of affiliated companies. *Id.* In *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, the plaintiff underwent surgery at Rush, where, despite their status as independent contractors, the anesthesiologists wore either scrubs with the Rush logo or a lab coat displaying the logo. 854 N.E.2d 635, 640 (Ill. 2006). The court concluded that the wearing of the Rush logo by both independent contractors and employees, along with the other evidence of what communications York received, demonstrated Rush failed to put him on notice. *Id.* Therefore, Rush could be held vicariously liable under the doctrine of apparent agency. *Id.*; cf. *Yarbrough v. Northwestern Mem'l Hosp.*, 104 N.E.3d 445, 453 (Ill. 2017) (concluding defendant did not hold itself out because it did not use disputed party's branding or marks).

Not only did MHS exclusively brand the telehealth platform, but MHS strictly prohibited CCS-marks on all patient-facing pages. As in *York*, where identical Rush-branded attire obscured providers' affiliations, MHS's branding failed to notify patients of Cyber MD's role. This court should apply the reasoning in *York* that representation through branding contributes to a hospital's failure to put a patient on notice. In *Arrendale*, the hospital's communications with patients were on hospital-branded letterhead. Similarly, all communications Mr. Miller received were within MHS's branded portal. This court should apply the rationale used in *Arrendale* that representation through branding demonstrates intention to project

full control over an apparent agent. Based upon these undisputed facts, this court should conclude that MHS had apparent authority over Cyber MD.

3. Mr. Miller's reliance on MHS was justified because he sought MHS as his general provider of care, not a specific physician.

The element of justifiable reliance is satisfied where a patient relies upon the hospital or medical center to provide services rather than seeking out a specific physician. *Gilbert*, 622 N.E.2d at 795; *Petrovich*, 719 N.E.2d at 768. Living in a designated "Health Professional Shortage Area and Medically Underserved Area," Mr. Miller did not have the luxury of choice, further highlighting his reliance on MHS to provide him with essential medical services.

Courts find an apparent agent relationship can be established where the plaintiff demonstrates reliance on the principal to provide care. *See York*, 854 N.E.2d at 661-62. In *York*, the plaintiff signed a treatment consent form authorizing, Rush to select physicians to perform his surgery. *Id.* at 663. Dr. El-Ganzouri administered anesthesia without York knowing he was an independent contractor. *Id.* The court held Rush liable under the apparent agent theory. *Id.* at 660. Rush denied York's claim he relied upon Rush to provide an anesthesiologist. *Id.* at 640. York decided to use Rush at his son's recommendation and knowledge of Rush's general reputation as an institution rather than specific knowledge about the individual providers. *Id.* at 664. In *Petrovich*, the plaintiff received health coverage from her employer; under the Share plan, only in-network physician care was covered. 719 N.E.2d at 761. Share moved for summary judgment, claiming none of the plaintiff's physicians were acting as Share's agents. *Id.* at 762-63. Share did

not directly hire physicians; it contracted with independent medical groups to render medical care. *Id.* at 762. The court stated “[u]nless a person seeks care from a personal physician, that person is seeking care from the HMO itself. A person who seeks care from the HMO itself accepts that care in reliance upon the HMO’s holding itself out as the provider of care.” *Id.* at 769. Because Petrovich had no choice but to enroll with Share, the court held that Petrovich’s reliance on Share was “literally compelled”. *Id.*

Mr. Miller reasonably relied on MHS as his care provider because he neither sought nor could choose a specific physician. In *York*, the court found reliance on Rush despite the patient’s research into individual physicians. Because courts have found reasonable reliance satisfied even when a patient researches physicians, there should be no question that in the present here because Mr. Miller solely relied on MHS. Like in *Petrovich*, where Share limited the selections of physicians from which the plaintiff could choose, Mr. Miller had a similar lack of choice, and any conflicting approach than that in *Petrovich* would therefore be especially unjust here. Faced with a critical lack of access to in-person care, then forced to turn to an online care provider, he had to wait for a mobile radiology service visiting Cartersville to get his scans. This court should follow *Petrovich* and rule that lack of choice does not diminish the reliance element but strengthens it because when a patient does not have the freedom of choice, they rely deeply on the available care. Therefore, Mr. Miller’s reliance on MHS as the provider of his care is justified, and the court should rule accordingly.

B. There was a Triable Issue of Fact as to Whether MHS’s Digital Interface Provided Reasonably Conspicuous Notice Because the Terms and Conditions Were Buried in a Hyperlink.

This court should affirm the court of appeals’ reversal. Although parties typically manifest assent orally or by written word, conduct can also be an effective manifestation of assent when the party “[i]ntends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.” *See Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855 (9th Cir. 2022). An enforceable online agreement is only formed when website offers contractual terms, and a user engages in conduct that represents their manifestation of assent. *Id.* at 856. A website may enforce online terms through inquiry notice only if the consumer received reasonably conspicuous notice of the terms and acted in a manner indicating assent. *Id.*; *see e.g. Myers v. Uber Tech., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014). However, this two-part inquiry is unnecessary if the consumer had actual knowledge of the agreement. *See e.g. Myers*, 868 F.3d at 75; *Berman*, 30 F.4th at 856; *Nguyen*, 763 F.3d at 1173. Here, the two-part inquiry is necessary because the record contains no evidence Mr. Miller knew of the “Terms and Conditions” (“Terms”).

Hyperlinked Terms and pre-session pop-ups do not conclusively defeat “holding out”; they raise a factual question whether the consumer received meaningful notice. *See Berman*, 30 F.4th at 853 (holding clickwrap agreements typically enforced because assent active and explicit); *Nguyen*, 763 F.3d at 1177 (holding browsewrap generally unenforceable because notice not reasonably conspicuous).

MHS's interface compelled passive assent from Mr. Miller that did not provide reasonably conspicuous notice of MHS's agency disclaimer. In *Berman*, the plaintiffs visited websites with hyperlinked Terms. 30 F.4th at 853. The webpage largely displayed information including a large green "continue" button and beneath the button were two lines of text in small, gray font, stating "I understand and agree to the Terms and Conditions which includes mandatory arbitration and Privacy Policy." *Id.* at 854. The court ruled that an enforceable agreement never formed, reasoning that the "design and content of the webpages" did not provide conspicuous notice of the existence of an agreement or by clicking "continue" they were agreeing to the terms and conditions. *Id.* at 854, 858; *see also Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 29-30 (2nd Cir. 2002) (explaining clicking button only represents unambiguous manifestation of assent if website explicitly advises users clicking constitutes assent). By contrast, the court in *Edmunson v. Klarna* upheld notice in Klarna's "uncluttered" interface. 85 F.4th 695, 705 (2nd Cir. 2023). The court distinguished it from other cases where it deemed an interface insufficient in its ability to provide notice. *Id.* at 706. Because of the location of the hyperlink, it is unlikely that the reasonably prudent internet user could avoid noticing the hyperlink when they select "Confirm and continue." *Id.* The statement "I agree to the payment terms" signals users to understand continued use manifests assent. *Id.* at 707; *compare with Soliman v. Subway Franchisee Advert. Fund. Tr., Ltd.*, 999 F.3d 828, 832 (2nd Cir. 2021) (finding vague references to Terms did not provide conspicuous notice).

An inconspicuous browsewrap hyperlink alone does not provide reasonable notice. In *Nguyen*, the plaintiff was never prompted to assent to Terms linked at the bottom left of each page and shown in green during checkout. 763 F.3d at 1173-74. Nguyen never clicked the hyperlink. *Id.* The court ruled no reasonable notice, explaining that browsewrap agreements generally require actual notice and that “[e]ven close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice.” *Id.* at 1173, 1176, 1179. The record showed neither actual nor inquiry notice to a reasonably prudent user. *Id.* at 1177; *see Specht*, 306 F.3d at 31 (holding lack of reasonably conspicuous notice where reasonably prudent users would not have known license terms existed).

When terms appear only by hyperlink, courts consider the notice language, link prominence, and surrounding circumstances. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018). In *Cullinane*, Uber’s Terms were available via hyperlink when users clicked the Terms button. *Id.* at 59. The court held the Terms were not conspicuous, despite the presence of some typical characteristics. *Id.* at 63-64. *See Stevenson v. TRW, Inc.*, 987 F.3d 288, 296 (5th Cir. 1993) (declaring if everything is conspicuous on page then nothing is conspicuous). Uber did not claim plaintiffs clicked the button, only that its presentation provided sufficient notice. *Id.* at 62. Massachusetts law defines “conspicuous” as a term displayed so a reasonable person “ought to have noticed it,” a question for the court. *Id.*; MASS. GEN. LAWS CH. 106, § 1-201(b)(10). Uber cited the gray box, large bold white type, contrasting colors, and

uncluttered screen. *Stevenson*, 987 F.3d at 62-63; see *Myers*, 868 F.3d at 78-80 (finding hyperlinks conspicuous because they were blue, underlined, high-contrast, and paired with explicit assent warning).

MHS cannot defeat apparent agency through a buried disclaimer that Mr. Miller lacked reasonable notice of before receiving care through its branded portal. *Berman* found a hyperlink inconspicuous when page design diverted attention from the linked text. Likewise, MHS provided no checkbox, agency heading, on-screen disclosure of Cyber MD's independence, or visual separation from the surrounding small, unformatted text.

Here, the account-creation process did not explicitly state what users accepted. Unlike the uncluttered interface and prominent Terms in *Edmunson*, MHS's login page merely stated: "By entering the portal, I accept the MHS Terms and Conditions." The operative disclaimer appeared only through that hyperlink, buried three-quarters down a standalone page with 34 lines of single-spaced, unformatted text in a noticeably smaller font. Mr. Miller opened the page once in April 2018 for four seconds and never returned. This presentation and brief access falls short under *Cullinane*, which rejected notice based on deemed assent and a hyperlink rather than affirmative agreement, and as in *Nguyen*, Mr. Miller was never required to check a box accepting the Terms. The court should therefore assess the hyperlink contextually and find that MHS's design failed to provide conspicuous notice.

The dispositive question is whether MHS’s interface gave Mr. Miller conspicuous notice of, and obtained his assent to, the Terms. It did not. The agency disclaimer appeared only on a dense standalone page he briefly opened once, not on the portal-entry screen, with a separate acknowledgment, or in conspicuous formatting. The court should rule that the disclaimer cannot defeat his reasonable belief that MHS provided his care.

C. Because Mr. Miller was Seeking Necessary Medical Care, the Court Should Rule There’s a Genuine Issue of Material Fact Whether Procedural Unconscionability Existed in the Contract-Formation Process.

This court should affirm the court of appeals’ reversal. Procedural unconscionability arises when superior bargaining power deprives a party of meaningful choice. *Hines v. Nat’l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025). Courts consider “age, education, intelligence, business acumen, and experience in similar transactions—whether the terms were explained to the weaker party, and who drafted the contract.” *Id.* at 328; *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023). The process was procedurally unconscionable because Mr. Miller’s age and inexperience prevented him from assessing unexplained terms he had no meaningful choice but to accept.

Unlike *Hines* and *Payne*, Mr. Miller’s vulnerability and limited healthcare options support a triable claim of procedural unconscionability. In *Hines*, the plaintiff signed agreements with her employer, National Entertainment Group, LLC (“NEG”) on three different occasions, and each included the same arbitration clause. 140 F.4th at 325. *Hines* argued she received no explanation or opportunity

to review, and her lack of business experience created an imbalance in the bargaining-power between herself and NEG. *Id.* at 328. The court held that under Ohio law, unless a party lacks contractual capacity, assumed to understand the implications of a signed agreement. *Id.* at 329. The court explained the terms were not hidden in fine print; it was not procedurally unconscionable, and Hines's failure to read the terms did not negate its enforceability. *Id.* at 328. In *Payne*, the plaintiff argued his employment agreement unconscionable because of the multiple provisions that are either indefinite or non-mutual. 81 F.4th at 1190, 1195. The court upheld the contract as not procedurally unconscionable. *Id.* at 1201. Under Georgia law the lack of mutuality of remedy does not render a contract unenforceable due to unconscionability, therefore, the non-mutual provision was not so extreme as to leave one party "essentially defrauded." *Id.* at 1999-1200.

Age, limited business experience, and lack of provider choice can create a triable issue of procedural unconscionability. In *Payne* and *Hines* involve employment contracts, so even though the employer typically has greater bargaining-power, the employee likely has relatively substantial understanding of the industry so the disparity in bargaining-power would not rise to the same level as it may between a patient and health care provider, like with Mr. Miller and MHS. Unlike *Payne* and *Hines*, where neither plaintiff was elderly, age is a big factor in the present agreement, as Mr. Miller already retired when he entered into the agreement. Mr. Miller's career suggests he was not an individual who regularly engaged in complex business negotiations. The court should acknowledge the vulnerable position of an

elderly man seeking necessary medical diagnostic services in a town lacking choice of provider. This court should rule procedural unconscionability to be a triable question of fact for the jury and not dismiss it as a matter of law.

III. THE FILING OF MS. MILLER'S CLAIMS WAS TIMELY UNDER SHAWNEE'S CONTINUOUS COURSE OF TREATMENT EXCEPTION BECAUSE CYBER MD AND MR. MILLER ENGAGED IN A CONTINUOUS COURSE OF TREATMENT DURING THEIR CLINICAL RELATIONSHIP, FOR THE SAME CONDITION, GIVING RISE TO THIS CLAIM.

This court should affirm the court of appeals' holding that Ms. Miller's claim is not time-barred by Shawnee's statute of repose because Mr. Miller engaged in a continuous course of treatment with MHS, giving rise to Cyber MD's negligent failure to diagnose Mr. Miller's cancer, thus tolling the statute of repose.

A statute of repose bars claims filed within a specified time after its arbitrary event giving rise to the claim occurred, which may expire even before the cause of action itself occurs. *See e.g., Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 142 (6th Cir. 1983). A statute of repose cannot be tolled unless any statutory exceptions apply as explicitly defined by a state legislature. *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017).

Shawnee law stipulates a two-year discovery limitation period and four-year absolute repose cap on medical malpractice claims. SN. REV. STAT. § 12-404(a). Shawnee's statutory exception tolls the limitation period and repose cap when a defendant-healthcare provider engages in a continuous course of treatment for their patient's same illness, injury, or condition giving rise to a claim of negligence. SN. REV. STAT. § 12-404(b). MHS engaged in a continuous course of treatment with Mr.

Miller by consistently treating his ongoing asbestos exposure condition. This continuous course of treatment gives rise to this claim of negligence because Cyber MD's baseline coding flaw failed to properly identify lesions on Mr. Miller's scans, ultimately leading to his death. Therefore, this court should affirm the decision of the court of appeals and apply the continuous course of treatment doctrine for the following reasons.

A. MHS Engaged in a Continuous Course of Treatment Over Mr. Miller, as Cyber MD (1) Maintained Exclusive Care and Control Over Mr. Miller's Diagnostic Surveillance; and (2) Both Parties Anticipated Further Clinical Visits Through 2021.

Jurisdictions adopting a continuous course of treatment exception analyze various factors when assessing applicability. Courts primarily assess two factors: (1) whether the defendant-healthcare provider maintained exclusive care and control over the treatment, and (2) whether both parties reasonably anticipated future appointments during the alleged continuous treatment. *See Wehrman v. U.S.*, 830 F.2d 1480, 1485 (8th Cir. 1987); *Blanchette v. Barrett*, 640 A.2d 74, 84 (Conn. 1994). This court should affirm the court of appeals' holding and conclude that the statute of repose was tolled.

1. MHS maintained exclusive care and control over Mr. Miller's diagnostic surveillance.

MHS maintained exclusive care and control over monitoring Mr. Miller's scans for lesions, because MHS was the only provider that ordered and reviewed Mr. Miller's scans. For the continuous course of treatment exception to apply and toll the statute of repose, the defendant-healthcare provider must have engaged in a continuous course of treatment with the patient, considering whether the

healthcare provider maintained exclusive care and control over the treatment relating to the claim of negligence. SN. REV. STAT. § 12-404(b); *Wehrman*, 830 F.2d at 1485 (8th Cir. 1987); *See, e.g., Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 651 (4th Cir. 2004).

When assessing continuous course of treatment, courts may consider whether the provider maintained exclusive care and control over the plaintiff's treatment. In *Wehrman*, the plaintiff received treatment from multiple physicians within the Minneapolis VA Medical Center ("Minneapolis VA"). 830 F.2d at 1482. The plaintiff alleged he was continuously subjected to harmful drug therapy by Minneapolis VA doctors during his treatment; the government responded that the claim was time-barred. *Id.* The Eighth Circuit explicitly rejected the notion that a relationship with a single physician is the only type of care sufficient to satisfy the continuing treatment theory. *Id.* at 1485. The Eighth Circuit held that the plaintiff was not alleging intermittent medical services but rather had sufficiently demonstrated a continuous course of treatment under the plan crafted by a team of doctors. *Id.*; *see also Ulrich v. Veteran's Admin. Hosp.*, 853 F.2d 1078, 1082 (2nd Cir. 1988) (holding claim not time barred when plaintiff under exclusive care of doctors); *cf. Miller v. U.S.*, 932 F.2d 301, 302 (4th Cir. 1991) (holding continuous course of treatment doctrine inapplicable because plaintiff's continued care not exclusively with defendant-healthcare provider).

Here, MHS maintained exclusive care and control over Mr. Miller's treatment, as the sole provider to review his scans and determine diagnosis. Like the Eighth

Circuit described the plaintiff's physician-patient relationship in *Wehrman*, where the plaintiff's care team of VA physicians maintained exclusive control over the treatment as to apply the continuous treatment doctrine, Mr. Miller's appointments with MHS via Cyber MD were in no way merely intermittent. As the court of appeals precisely described, Mr. Miller engaged with MHS via Cyber MD in a "single, continuous course of diagnostic surveillance for the same underlying health threat" between 2018 and 2021. During this continuous course of diagnostic surveillance, MHS was Mr. Miller's exclusive healthcare provider. Cyber MD ordered and reviewed Mr. Miller's scans, and reaffirmed its 2018 baseline diagnosis at every appointment until 2021. This court should rule that every appointment was a continuation of the prior appointment, and were each intrinsically linked to each other, constituting a single course of continuous treatment.

2. Both MHS and Mr. Miller continuously anticipated further care and treatment between 2018 and 2021, as scheduled annual visits with Mr. Miller occurred to monitor his lungs for signs of malignancies.

Jurisdictions adopting continuous course of treatment exceptions also assess if both the patient and provider anticipated future appointments. For example, Connecticut courts have stated:

"So long as the relation of physician and patient continues as to the particular injury or malady that the physician is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there is something more to be done by the physician in order to effect a cure, ... it cannot be said that the treatment has ceased."

Blanchette, 640 A.2d. at 84 (quoting *Schmit v. Esser*, 236 N.W. 622, 625 (Minn. 1931)); see also *Hillary v. Gerstein*, 114 N.Y.S.3d 440, 442-43 (App. Div. 2nd Dept.

2019) (establishing further treatment must be explicitly anticipated by both physician and patient to satisfy continuity requirement).

Here, MHS and Mr. Miller anticipated further treatment through June 2021, when MHS ended the clinical relationship. Therefore, this court should adopt the holdings as Connecticut and Minnesota supreme courts did in *Blanchette* and *Schmit*. In 2018, Mr. Miller logged into Cyber MD and established a clinical relationship with MHS. At his initial appointment, MHS ordered Mr. Miller's scans, subsequently reviewed the scans, issued a diagnosis, created his diagnostic surveillance plan, and maintained control over Mr. Miller's diagnostic surveillance from then on. This conduct indicates there was "something more to be done to cure" Mr. Miller's condition throughout the course of treatment, satisfying the holding in *Blanchette* and *Schmit* and sufficiently demonstrates Mr. Miller's reasonable anticipation of future appointments with MHS. Contrary to the Shawnee Circuit Court's opinion, this court's adoption of the argument at hand would not "expand the doctrine as to encompass automated annual check-ups" because the clinical relationship Mr. Miller had with Cyber MD was not just annual check-ups. Preparation for these appointments required Mr. Miller to maintain care for his asthmatic condition and schedule ahead to accommodate receiving new scans every year prior to his visits with Cyber MD. By adopting the interpretation of reasonable anticipation of future care, this court can establish important precedent that companies like MHS cannot sit idly behind its malfunctioning artificial intelligence agent providing medical care as it causes actual harm to Shawnee citizens, with no

legal ramifications after irreversible damage has been done. Therefore, the present demonstrates MHS and Mr. Miller maintained a continuous clinical relationship throughout the period at issue, and this court should affirm the court of appeals' ruling.

B. Cyber MD Continuously Monitored and Treated Mr. Miller for One Condition Throughout the Course of Their Clinical Relationship.

Throughout the course of their clinical relationship, MHS continuously treated Mr. Miller's ongoing condition—his breathing issues stemming from asbestos exposure—from 2018 through 2021. The continuous course of treatment statutory exception applies and tolls the statute of repose when a defendant-healthcare provider treated the plaintiff for the same illness, injury, or condition. *See* SN. REV. STAT. § 12-404(b); *Hall v. Bolognese*, 2022 NY Slip Op 06692 *1 (App. Div. 2nd Dept. Nov. 20, 2022).

In *Hall*, the plaintiff initially sought care from the defendant-healthcare providers for recurrent head and neck pain; however, the plaintiff was misdiagnosed, resulting in five years of improper care. 2022 NY Slip Op 06692 at *1-2. When the plaintiff brought a medical malpractice suit asserting timeliness under the relevant continuous course of treatment doctrine, the defendant healthcare provider argued it was time-barred. *Id.* at *1. The New York Supreme Court Appellate Division reversed the lower court's grant of summary judgment, holding "continuous treatment may be found when a plaintiff 'returns to the doctor because of continued pain in that area for which medical attention was first sought'" *Id.* at *2. ("[i]ncluded within the scope of 'continuous treatment' is a timely return

visit instigated by the patient to ... seek treatment for a matter related to the initial treatment.”) (citing *McDermott v. Torre*, 437 N.E.2d 1108, 1111 (N.Y. 1982)); *see also Schwelnus v. Urological Assoc. of L.I., P.C.*, 943 N.Y.S.2d 141, 143 (App. Div. 2nd Dept. 2012) (holding continuous treatment doctrine did not apply because plaintiff’s initial reason for visiting doctor different from reason he sought treatment for later).

The present case bears strong similarities to *Hall*, where the plaintiff continuously returned to the defendant-healthcare provider to receive treatment for the same condition that caused him to establish care. Mr. Miller initiated contact with MHS via Cyber MD in 2018 due to experiencing shortness of breath, detailing his occupational history of asbestos exposure at his lifelong place of work during this appointment. In response, MHS initiated an ongoing clinical relationship. Moreover, the facts of the present case sufficiently demonstrate Mr. Miller’s subsequent appointments with MHS via Cyber MD were for the sole purpose of ongoing clinical monitoring over his updated imaging of his lungs on a continuous yearly basis until the conclusion of the clinical relationship in 2021. Because Mr. Miller’s care was continuously for the same condition for which he initiated treatment, this court should affirm the court of appeals’ holding as to toll the statute of repose.

C. MHS’s Repeated Failures to Detect Mr. Miller’s Lesions on His Scans Give Rise to the Claim of Negligence at Issue.

MHS’s repeated failure to detect Mr. Miller’s lesions on his 2018, 2019, 2020, and 2021 lung scans led to a lack of proper treatment, resulting in his

pneumothorax and subsequent death. For the statutory exception of continuous course of treatment to apply and toll the statute of repose, the defendant-healthcare provider's continuous treatment of the plaintiff must give rise to the claim of negligence. *See* SN. REV. STAT. § 12-404(b); *Cefaratti v. Aranow*, 138 A.3d 837, 847 (Conn. 2016).

To toll the statute of repose, the continuous course of treatment must give rise to the plaintiff's claim of negligence. In *Cefaratti*, the court determined a defendant-provider's act or omission may give rise to a plaintiff's claim of negligence. 138 A.3d at 844. The *Cefaratti* court relied on *Miccio v. Gerdis*, which held, "the failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has not been treatment." 990 N.Y.S.2d 863, 864 (App. Div. 2nd Dept. 2014). The *Miccio* court furthered, "a physician ... cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where it treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition." *Id.*; *see also Chestnut v. Bobb-McKoy*, 943 N.Y.S.2d 461, 463 (App. Div. 1st Dept. 2012) (applying *Miccio* reasoning to constitute tolling under relevant continuous care doctrine); *Chkhartishvili v. Volovoy*, 844 N.Y.S.2d 137, 138 (App. Div. 2nd Dept. 2007) (holding plaintiffs raised triable issues of fact regarding continuous course of treatment to evade summary judgment in alleging failure to diagnose).

Here, MHS's repeated failures to detect the malignancies on Mr. Miller's lung scans are the root cause of this claim for negligence, and this court is urged to look to the authorities as set forth in New York and Connecticut in interpreting this issue. In 2018, MHS via Cyber MD failed to properly read Mr. Miller's scans and did not detect his 7 mm lung lesion. MHS failed again in 2019; a third time in 2020; and a fourth and final time in 2021. By 2021, Mr. Miller's lesion had grown to 47 mm, nearly seven times its original size. Cyber MD's baseline coding algorithm consistently failed to identify the lesion and properly diagnose Mr. Miller. Arguably, had the lesions been identified, ascertaining whether Mr. Miller would have received care and if the care had been effective is speculative. This question of fact is for the jury's consideration, as it is irrelevant to the issue of summary judgment at hand. But still, the facts of this case highly contradict this notion and demonstrate how seriously Mr. Miller regarded his medical care. As Mr. Miller was unable to otherwise receive medical treatment due to a dire lack of accessible healthcare in Cartersville, he relied on MHS and Cyber MD to diagnose and treat his condition. Moreover, upon receiving recommendations from MHS, Mr. Miller established care with a local provider for management of his asthmatic symptoms, visited the mobile scan unit every year in advance of his scheduled appointments, and regularly returned to MHS and Cyber MD to review his scans and confirm his baseline diagnosis. If Mr. Miller had been granted the opportunity, he more likely than not would have sought proper care to treat the malignancies that went undetected in his lungs. But, because of MHS and Cyber MD's continuous negligent

treatment, Mr. Miller tragically never had the chance to know of his condition and was robbed of opportunity for treatment. This is a direct result of his years of misdiagnoses from MHS, giving rise to the claim of negligence as to satisfy the third element of the relevant statute.

This court should affirm the holding of the court of appeals and rule that the continuous course of treatment exception applies to toll the statute of repose, thus defeating the request for summary judgment.

IV. THE RESPONDENT'S PRODUCT LIABILITY CLAIMS ARE NOT BARRED BY SHAWNEE'S STATUTES OF REPOSE BECAUSE CYBER MD'S LATENT, UN-DISCOVERABLE ALGORITHMIC FLAW SATISFIED THE EXCEPTIONS UNDER § 12-410(b)(3).

This court should affirm the court of appeals' decision that Ms. Miller's strict product liability claim was timely under § 12-410. Under Shawnee law, a product liability claim in strict liability is timely when it is commenced within: (1) the limitations of actions periods of § 12-402 and (2) less than four years after the date of the first sale, lease, or delivery of the product to its initial user or consumer. SN. REV. STAT. § 12-410(a). As Ms. Miller brought her wrongful death action within three months of Mr. Miller's death and the injury caused by Cyber MD was not reasonably discoverable until 2023, Ms. Miller's claims against the Petitioners were fully timely.

A. Ms. Miller's Strict Product Liability Claims Were Commenced Within the Applicable Limitations Periods in § 12-402.

Ms. Miller's strict product liability claim was timely because the wrongful death claim was commenced within two years of Mr. Miller's death and the discovery rule

exception tolled the personal injury claim's limitation period. Shawnee law establishes that actions for personal injury and wrongful death must be commenced within two years of the wrongful act, neglect, or default giving rise to the cause of action, or the date of the decedent's death, respectively. SN. REV. STAT. §§ 12-402(a)-(b). The discovery rule exception in § 12-402 establishes that these limitations periods do not begin until the claimant discovers the injury and the tortfeasor's identity if the injury or its causal relationship to the conduct of another was not immediately discoverable through reasonable diligence. SN. REV. STAT. § 12-402(c). As Ms. Miller brought her wrongful death action within three months of Mr. Miller's death, and the injury was not reasonably discoverable before that time, this claim was timely under § 12-402.

1. Ms. Miller's wrongful death action was timely under § 12-402(b) because it was filed within two years of Mr. Miller's death.

Ms. Miller's wrongful death action was timely under § 12-402(b) because it was filed within two years of Mr. Miller's death. Mr. Miller died on April 14, 2024. Approximately three months later, in July 2024, Ms. Miller filed her wrongful death action in the Circuit Court. As her wrongful death action commenced well within two years of Mr. Miller's death, Ms. Miller's claim was timely under the limitations period in § 12-402(b).

2. Ms. Miller's personal injury action was timely under § 12-402(a) because the limitations period was extended by the discovery rule exception in § 12-402(c).

This court should affirm the court of appeals' holding that Ms. Miller's claims were timely under § 12-402 because Mr. Miller's injury was not immediately

discoverable. While Ms. Miller's personal injury action was not timely under § 12-402(a) because the Petitioners' wrongful act, neglect, or default occurred more than two years before the claims were filed, it was timely under the discovery rule exception in § 12-402(c). Shawnee's discovery rule exception establishes that, when the injury or its causal relationship to the conduct of another was not immediately discoverable through reasonable diligence, the limitations periods of § 12-402 do not begin until the claimant discovers the injury and the tortfeasor's identity. SN. REV. STAT. § 12-402(c). As the injury caused by Cyber MD and the causal connection between the Petitioners and Mr. Miller's injury were not reasonably discoverable, Ms. Miller's personal injury claim is afforded the discovery rule exception, thus delaying the date on which the statute of limitations began to run.

The discovery rule exception applies here because Mr. Miller did not reasonably discover the injury caused by Cyber MD's flaw until October 30, 2023. The limitations period of Ms. Miller's personal injury claim did not begin to run until this date, as Mr. Miller's injury and its causal relationship to the Petitioners' conduct were not immediately discoverable. CCS and MHS's prolonged failure to diagnose and treat Mr. Miller's malignant lung lesions, the injury here, resulted from Cyber MD's defective algorithmic flaw.

Mr. Miller's injury was not reasonably or immediately discoverable because he did not and could not have discovered it through his own diligence. While Mr. Miller's first misdiagnosis occurred on April 9, 2018, Mr. Miller did not discover this injury until after he suffered a pneumothorax on October 30, 2023. The

misdiagnoses were not immediately discoverable through reasonable diligence because Mr. Miller could not have discovered them on his own, and even his providers continuously failed to identify the lesions or correct their misdiagnoses throughout their care of Mr. Miller. Moreover, the record has not indicated that Mr. Miller had access to view or review his own scans at any point during his care under the Petitioners. As Mr. Miller could not access or evaluate his own scans, he could not have immediately discovered the injury until he was informed of the misdiagnoses and untreated malignant lesions in 2023. Mr. Miller, as a reasonable patient receiving care, should not have been expected to discover his provider's misdiagnosis of his internal lung lesions.

Mr. Miller had no opportunity to reasonably discover the injury caused to him until his medical emergency triggered the expert retrospective review of his prior scans. the Petitioners' diagnostic errors and failure to treat his lung lesions were reasonably discoverable only after experts performed retroactive reviews of his scans and determined that there was a clearly visible 7 mm lesion on his 2018 scans.

The injury's causal relationship to the Petitioners' conduct was not reasonably or immediately discoverable because Mr. Miller could not have discovered that CCS or MHS caused his misdiagnoses until as early as October 30, 2023. However, as evident in the very nature of this appeal's first question on review, there is a genuine dispute as to whether the Petitioners can be held vicariously liable for the diagnostic failures of Cyber MD. Further, this exception requires that the injury's

causal relationship to the conduct of another must have been immediately discoverable. It should not be concluded that the Petitioners' role in causing Mr. Miller's injury was immediately discoverable because this court has not yet ruled on the liability of each party in Ms. Miller's claims. This court should find that the Petitioners are vicariously liable, thus establishing their conduct's causal relationship to Mr. Miller's injury in this personal injury claim. As the causal relationship between the Petitioners' conduct and Mr. Miller's injury was not immediately discoverable, the discovery rule exception must apply.

The statute of limitations here has not yet begun to run because Ms. Miller has not discovered both the injury and the tortfeasor's identity for her personal injury claim. As Mr. Miller was unaware of his injury until October 30, 2023, he could not have discovered the identity of the tortfeasors until this date. However, until this court defines the Petitioners' identity as tortfeasors, Ms. Miller has not yet discovered the tortfeasor's identity in her personal injury claim. Therefore, the discovery rule exception must apply to the statute of limitations of Ms. Miller's personal injury claim. Thus, the statute of limitations for Ms. Miller's personal injury claim has not yet begun to run, and Ms. Miller's personal injury claim was timely under § 12-410(a).

As Ms. Miller's wrongful death and personal injury claims were timely under § 12-402, they satisfy § 12-410(a)'s first requirement that a product liability action must be commenced within the applicable limitation periods in § 12-402. SN. REV. STAT. § 12-410(a).

B. Ms. Miller's Claims Were Timely Because They Were Commenced Within Four Years of the Date of First Sale, Lease, or Delivery of Possession to Mr. Miller.

This court should affirm the court of appeals' holding that Ms. Miller's claims were timely according to § 12-410(a). However, this court should also hold that the court of appeals erred in its interpretation of the date of first sale, lease, or delivery of possession to its initial user or consumer and its initiation of the repose period. As Shawnee courts have not yet considered the meaning of "initial user or consumer" or "delivery," we look to existing applications of these terms from other courts. While some courts' interpretations differ, the controlling application is that the date of delivery occurs when the product is first sold, leased, or delivered to the possession of the initial intended user or consumer. *See Burroughs v. Strength of Nature Glob., LLC*, 922 S.E.2d 68 (Ga. 2025).

1. Mr. Miller was the initial user or consumer of Cyber MD because MHS acted as a vendor or consumer.

The court of appeals erred in holding that MHS was the initial user or consumer because MHS merely acted as a vendor or middleman by delivering Cyber MD to its initial intended users, MHS patients seeking telehealth services. The statute of repose period must begin on the date the product was first sold or delivered to an initial intended user or consumer, regardless of when it was first sold or delivered to a non-intended user entity. *See Kerns by & Through Kerns v. G.A.C., Inc.*, 875 P.2d 949, 956 (Kan. 1994) (determining first user or consumer as party not engaged in selling or using product as component or part of another product); *Burroughs*, 322 Ga. at 725 (recognizing exclusion of product dealers or 'chains of middlemen').

Although MHS appeared to act as the initial consumer of Cyber MD, it was not the initial intended user or consumer of Cyber MD. MHS contracted with CCS solely to design and host a proprietary telehealth platform, including Cyber MD's conversational AI diagnostic system, for its patients. In doing so, MHS acted as a vendor or other non-intended user entity because its sole purpose in purchasing Cyber MD was to provide it as an integrated component of its telehealth portal for its patients' use. Thus, the court of appeals erred in finding that MHS was the initial user or consumer.

Mr. Miller was the initial user or consumer here because he was an MHS patient who accessed Cyber MD through MHS's portal, exactly as an intended user would. As the portal was a "patient-facing interface" "controlled exclusively by MHS" that "MHS integrated Cyber MD into," the intended user of Cyber MD's AI diagnostic system integrated into MHS's portal was an MHS patient seeking diagnostic telehealth care. When Mr. Miller logged into MHS's portal and initiated a Cyber MD intake session, he became the initial user and consumer of Cyber MD. Therefore, this court should rule that Mr. Miller was the intended user or consumer of Cyber MD in analyzing when the statute of repose period began.

2. Cyber MD was first delivered to its initial user or consumer on April 9, 2018, the first date Mr. Miller accessed Cyber MD.

The court of appeals erred in determining that the date of delivery, and beginning of the repose period, occurred when CCS delivered Cyber MD to MHS on March 1, 2017. Although Cyber MD's first sale and delivery occurred when it was

delivered and integrated into MHS's portal, the repose period begins with the first sale or delivery to Cyber MD's initial intended user or consumer.

Mr. Miller, the true intended user of Cyber MD here, did not use or access Cyber MD until he logged into MHS's portal and initiated his first Cyber MD virtual intake session on April 9, 2018. Therefore, MHS could have first delivered Cyber MD and its defective baseline algorithm to Mr. Miller on April 9, 2018.

Although Ms. Miller's claims met the two-year statute of limitations periods in § 12-402, the claims were not timely under § 12-410(a) because Ms. Miller did not file her claims until July 2024. As Ms. Miller filed her claims over six years after Cyber MD was first delivered to Mr. Miller in April 2018, the four-year repose period in § 12-410(a) must apply. Therefore, Ms. Miller's claims must satisfy one of the three exceptions in § 12-410(b)(3).

C. Ms. Miller's Claims Were Timely Because the Three Exceptions Under § 12-410(b)(3) Tolloed the Four-Year Repose Period.

This court should affirm the court of appeals' holding that Ms. Miller's claim was timely under the exceptions to § 12-410(a) set forth in § 12-410(b)(3). Because Ms. Miller's product liability claim against CCS was not commenced until six years after Cyber MD was first delivered to Mr. Miller, the four-year repose bar under § 12-410(b)(3) must be applied. However, a plaintiff's product liability claim commenced more than four years after the date of delivery is permitted when: (1) the harm was caused by prolonged exposure to a defective product; (2) the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four years after delivery; or (3) the harm

was caused within four years after delivery and did not manifest itself until after that time. SN. REV. STAT. § 12-410(b)(3). As CCS's defective software caused Mr. Miller's fatal lung lesions to be left untreated for over three years, Cyber MD's failure to detect Mr. Miller's lesions was embedded into its 2017 baseline algorithm and undiscoverable by its own developers until five years after it was delivered to MHS, and its consistent misdiagnosis of Mr. Miller did not manifest until Mr. Miller suffered a medical emergency nearly six years later, Ms. Miller's claims are timely. Although a claim is timely when any one of the exceptions is satisfied, this court should rule Ms. Miller's claim successfully met the express statutory exceptions, thus tolling the statute of repose. SN. REV. STAT. § 12-410(b)(3).

4. Mr. Miller's prolonged exposure to Cyber MD's defective software caused his injury.

The court should rule that Mrs. Miller's claim against CCS is permitted under the first exception to § 12-410(a) because Mr. Miller's prolonged exposure to Cyber MD's defective algorithm and misdiagnoses caused his fatal lung condition to remain untreated for years. A plaintiff's product liability claim is permitted when the harm was caused by prolonged exposure to a defective product. SN. REV. STAT. § 12-410(b)(3); *Koch v. Shell Oil Co.*, 905 F. Supp. 960, 962-63 (D. Kan. 1995) (holding exposure must be prolonged and cause plaintiff's harm). As argued above and demonstrated by the facts, Mr. Miller was continuously exposed to Cyber MD's defective algorithm for three years. Mr. Miller's exposure caused the misdiagnosis of his fatal lung lesions, therefore, Ms. Miller's product liability claim is afforded the first exception under § 12-410(b)(3).

5. Cyber MD’s injury-causing aspect existed on April 9, 2018, and was not discoverable by an ordinary reasonably prudent person until more than four years later.

The court should rule that Ms. Miller’s claim against CCS was permitted under the second exception to § 12-410(a) because the algorithmic flaw embedded in Cyber MD’s baseline code was not reasonably discoverable within four years of delivery. A plaintiff’s product liability claim is permitted when the injury-causing aspect of the product that existed at delivery was not discoverable by an ordinary reasonably prudent person (“ORPP”) until more than four years after it was delivered. SN. REV. STAT. § 12-410(b)(3).

i. The injury-causing aspect of Cyber MD existed on April 9, 2018.

As Cyber MD’s diagnostic errors were present in the baseline coding algorithm and resulted from the initial training of the product, this injury-causing aspect of Cyber MD was present when it was delivered to Mr. Miller. Although CCS eventually retrained Cyber MD to improve its diagnostic accuracy rate well after Mr. Miller first used it, this retraining does not have any bearing on whether the flaw existed at delivery to Mr. Miller. Therefore, this exception should apply to Ms. Miller’s claims.

ii. Cyber MD’s defective algorithm was not discoverable by an ORPP within four years of delivery.

As the injury-causing aspect of Cyber MD’s flawed diagnostic capabilities was not reasonably discoverable by an ORPP within four years of delivery, the repose period exception must apply.

An ORPP could not have discovered Cyber MD's injury-causing aspect because its danger was not immediately recognizable. Where the plaintiff could not have discovered the defect by inspection or by normal, prudent use of the product, the injury-causing aspect was not discoverable. *Arnold v. Riddell, Inc.*, 882 F. Supp. 979, 988-89 (D. Kan. 1995). Courts often consider whether a careful person under the circumstances and without placing themselves in danger would have been able to comprehend the danger and determine how to avoid it. *See Baumann v. Excel Indus.*, 845 P.2d 65, 74 (Kan. Ct. App. 1993); *see also Zacharias v. Bucyrus-Erie Co.*, No. 92-0843-CV-W-6, 1996 U.S. Dist. LX 1943, at *19-21 (W.D. Mo. Feb. 21, 1996) (considering whether defect's danger was immediately recognizable); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922, 928-29 (10th Cir. 1992) (considering whether defect creates an unreasonably dangerous condition which is not readily apparent).

An injury-causing aspect is not discoverable when, through ordinary use or inspection, a reasonably prudent person would not have discovered it. In *Arnold*, the discoverability exception applied because the injury-causing aspect of the helmet's internal padding was not apparent to a reasonably prudent football player through normal use or inspection. 882 F. Supp. at 988. The court also held that because the defect in the padding system was only discovered based on expert testimony and complex testing procedures, it was not feasible for the reasonably prudent plaintiff to have discovered it. *Id.* Similarly, the *Oats* court held that it was indisputable that the injury-causing aspect of a car seat was discoverable because a typical full-sized adult could not sit in the seat normally without noticing the seat's

limited space. *Oats v. Nissan Motor Corp. in the U.S.*, 879 P.2d 1095, 1100 (Idaho 1994).

The injury-causing aspect is undiscoverable when a reasonably careful person could not have understood or avoided the product's injury-causing aspect because the danger was not observable. Additionally, although the plaintiff knew of football playing techniques that dramatically reduce injuries in *Arnold*, he did not have the ability to reasonably avoid the danger created by the helmet's defect. 882 F. Supp. at 988. The *Arnold* court also emphasized the importance of considering that the purpose of a football helmet is to protect players who are hit in the head. *Id.* The court held that a reasonably prudent wearer of a football helmet should not be expected to have avoided grave injury by avoiding a head collision. However, the discoverability exception did not apply in *Baumann*, where the plaintiff was injured by a defective lawnmower approximately ten years after delivery. 845 P.2d at 68. The court reasoned a reasonably careful person would have read the manual, learned how the mower's parts worked, and understood that the lawnmower's injury-causing aspect created a potential danger. *Id.* at 74. Similarly, in *Zacharias*, the evidence showed that a reasonably prudent person could have discovered the design defects shortly after observing the defective crane because observers immediately recognized a large danger zone around the crane. *Zacharias*, 1996 U.S. Dist. LEXIS 1943, at *20-21.

Cyber MD's defective diagnostic algorithm was not discoverable to an ORPP. Like how the helmet's injury-causing aspect in *Arnold* was not discoverable to a

reasonably prudent person when it was not discoverable through the football player's inspection or normal prudent use, Cyber MD's defective diagnostic algorithm was similarly undiscoverable through normal patients' use. Mr. Miller could not have discovered Cyber MD's defective diagnostic algorithm through inspection because "neither Mr. Miller nor his treating providers could inspect the source code." Mr. Miller's normal prudent use of Cyber MD as a patient seeking care would not require him to inspect or access the software's coding or test the algorithm's diagnostic accuracy. Just as the helmet's defective aspect was only discoverable after expert discovery and complex testing procedures in *Arnold*, Cyber MD's misdiagnoses were not discovered until experts retroactively reviewed Mr. Miller's scans for lesions. Moreover, just as the helmet's undiscoverable injury-causing complex padding system operated entirely within the helmet's padding design in *Arnold*, Cyber MD's diagnostic failures were undiscoverable to a reasonably prudent Cyber MD user because its coding operated entirely within CCS's proprietary cloud infrastructure.

Cyber MD's defective scan evaluation and diagnostic features were not immediately discoverable because they were not open and obvious, and CCS itself did not discover Cyber MD's diagnostic issues until it noticed a drop in its diagnostic accuracy. An ordinary reasonably prudent Cyber MD patient could not have and should not be expected to identify a complex diagnostic and algorithmic defect deep within their healthcare platform's software that Cyber MD's own creators did not notice. Further, Cyber MD's verification studies and training data

were only provided to the FDA, not released to the public, which prevented the diagnostic failures from being immediately discoverable not only by Mr. Miller, but by any user, at the time of delivery.

Additionally, Cyber MD's injury-causing aspect was not discoverable because its danger was not immediately recognizable or readily apparent to its users. Unlike how the lawnmower's defective part in *Baumann* and the crane's defective design in *Zacharias* created physically apparent "zones" of danger, Cyber MD's defective algorithmic coding did not create a physically apparent manifestation of danger to its patients. As Cyber MD existed and operated only within CCS's cloud infrastructure, it could not have created a physically noticeable or recognizable manifestation of danger for its users to discover. Additionally, Cyber MD ordered, received, analyzed, evaluated, and provided diagnoses on its patients' scans, and there is no indication that the patients had any access to view or review their own scans at any point during their care. Therefore, ordinary reasonably prudent Cyber MD patients could not have immediately recognized or discovered Cyber MD's injury-causing misdiagnoses without complex or expert intervention.

Additionally, the injury-causing aspect was undiscoverable because CCS did not notify the public of Cyber MD's diagnostic accuracy issues, its retraining, or the release of the updated version. Unlike how the lawnmower's dangerous aspect was discoverable because a reasonably careful lawnmower user would have known about and used the lawnmower in a manner consistent with the product's use, purpose, and safety concerns, Cyber MD's dangerous aspect was not discoverable here. While

it may be argued that a careful Cyber MD user would have read and understood the Terms and subsequent Cyber MD pop-up box that vaguely indicated Cyber MD was not a healthcare professional as providing notice of its diagnostic incapacities, this cannot overcome the contrasting evidence here. A reasonably careful Cyber MD patient would not have known that Cyber MD was defective or could misdiagnose them simply by reading the Terms or pop-up because they never provided specifics of how Cyber MD's diagnostic methods were conducted. These disclaimers showed that Cyber MD's diagnostic failures were not immediately disclosed to its users. Instead, Cyber MD visibly marketed itself using the slogan "Cyber MD: Care Everywhere," which an ordinary reasonably prudent Cyber MD patient would understand as an indication that Cyber MD would care for them, not continuously misdiagnose and fail to treat their lung lesions for years.

Lastly, Mr. Miller could not have avoided the danger caused by Cyber MD's defective algorithm. Similar to how the football player in *Arnold* was not expected to avoid the danger caused by the defective helmet because the helmet's purpose was to protect players who were hit in the head, Mr. Miller should not have been expected to avoid Cyber MD's dangerous defect, as the purpose of Cyber MD was to care for its patients. Mr. Miller should not have been expected to avoid Cyber MD's failure to diagnose and treat his deadly lung lesions by avoiding being exposed to cancer-causing asbestos in the first place, just as the football player was not expected to avoid the helmet's failure to protect him from quadriplegic injury by avoiding being vulnerable to head-on impacts while playing in *Arnold*.

Therefore, this court should find that Ms. Miller's claims meet the second exception because Cyber MD's injury-causing aspect was not discoverable until October 30, 2023.

3. Cyber MD caused Mr. Miller's harm, and the harm did not manifest until after April 9, 2023.

This court should rule that Mrs. Miller's claim against the Petitioners is permitted under the third exception to § 12-410(a) because Cyber MD's misdiagnosis and failure to identify Mr. Miller's lesions occurred almost immediately after delivery in 2018 and did not manifest itself until Mr. Miller suffered a pneumothorax. A plaintiff's product liability claim is permitted when the harm was caused within four years after the time of delivery and did not manifest itself until after that time. SN. REV. STAT. § 12-410(b)(3); *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 969 (Kan. 1992) (exception properly invoked when plaintiff's mesothelioma did not manifest until nearly a decade after it was caused).

Here, Cyber MD initially failed to identify and diagnose Mr. Miller's lesions in 2018. This initial diagnostic failure and the subsequent misdiagnosis provided by Cyber MD were harms inflicted on Mr. Miller by Cyber MD. Furthermore, Mr. Miller's misdiagnosis did not manifest itself until nearly five years later when he suffered a pneumothorax and his lung lesions were properly discovered and diagnosed. As Cyber MD caused Mr. Miller's harm nearly five years before it ever manifested itself, the first exception to the four-year absolute bar should apply. Therefore, Ms. Miller's claims were timely because the third exception applies, thus shifting the repose period.

For the foregoing reasons, Ms. Miller requests that this court affirm the reversal of summary judgment and hold that Ms. Miller's claims were not barred by § 12-410(a) as they successfully satisfied the exceptions under § 12-410(b)(3).

CONCLUSION

This court should affirm the court of appeals' judgment in favor of the Respondent. MHS must be held vicariously liable under the doctrine of apparent authority as it failed to provide conspicuous notice of its agency disclaimer. There is genuine dispute as to the material fact of the adequacy of MHS's notice of agency disclaimer and its procedural unconscionability that compel this court to remand the case. Moreover, this court should hold neither statute of repose applies, as Respondent's claims were timely filed, the care was continuous, and the algorithmic flaws were undiscoverable. This court should GRANT the Shawnee Court of Appeals' holding in all respects and REMAND this case for further proceedings.

Respectfully submitted,

HIPAA-crits

ATTORNEYS FOR RESPONDENT

APPENDIX A

Statutory Provisions

SN. REV. STAT. § 12-402(a), (b), (c). 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.

SN. REV. STAT. § 12-404 (a), (b). 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.

SN. REV. STAT. § 12-410. (a), (b). 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 delivery, or if the harm, caused within four (4) years after delivery, did not manifest itself until after that time.