

SHAWNEE SUPREME COURT

No. 26-338

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

Petitioners,

v.

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

Respondent.

Brief for Petitioner

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QUESTIONS PRESENTED

- I. Whether MHS can be held vicariously liable for Cyber MD's diagnostic errors under the doctrine of apparent agency, although MHS did not create the appearance of authority over Cyber MD.
- II. Whether Miller's claims are barred as a matter of law by Shawnee's clear and unambiguous four-year statutes of repose or whether the repose periods were tolled/extended by the exceptions set forth under
 - A. Cyber MD's isolated evaluations, which involved no diagnosis of, treatment for, or follow-up care, fall outside the "continuous course of treatment" required to toll the limitations period under Shawnee Revised Statute § 12-404.
 - B. The latent, discoverable nature of the algorithmic flaw and subsequent retraining under the exceptions in Shawnee Revised Statute § 12-410, despite the fact that the defect of Cyber-MD was apparent to a reasonably prudent person.

OPINIONS BELOW

Respondent Evelyn Miller, individually and on behalf of the estate of Miller, filed this action in July 2024 against Petitioners MHS and Cyber-Care in the Circuit Court of Simmons County. R0002. Miller asserts claim against MHS for vicarious liability under the doctrine of apparent agency, and Cyber-Care for strict liability under Shawnee Revised Statutes §§ 12-404 and 12-410. *Id.* Subsequent to the close of discovery, MHS and Cyber-Care both moved for summary judgment on the ground that MHS cannot be held vicariously liable under apparenecy agency because Cyber-MD is not an employee or agent of MHS or held out to be one, and the hyperlinked Terms and Conditions explicitly renounce any agency relationship between MHS and Cyber-MD. *Id.* Moreover, MHS and Cyber-Care maintain that under Shawnee Revised Statutes §§ 12-404 and 12-410, Miller's claims are barred as a matter of law. R0003.

After the Circuit Court reviewed the undisputed facts and statutory provisions, the court found no genuine issues of material fact, and as a matter of law ruled that petitioners are entitled to summary judgment on both claims. *Id.* Then, the Court of Appeals for the Second District which reversed the grant of summary judgment on both claims and remanded to the Circuit Court, finding that the trial court committed legal errors and disregarded genuine issues of material fact. R0017.

MHS and Cyber-Care filed this appeal to this Court as the Court of Appeals erroneously overturned the Circuit Courts' decisions as a matter of law.

STATEMENT OF THE CASE

III. Facts

C. Metropolitan Health System and Its Telehealth Platform

Metropolitan Health System (“MHS”) is a large regional healthcare network based in Goshen, Shawnee, where it operates its flagship hospital. R0004. In 2012, MHS partnered with Cyber-Care Solutions, a digital health infrastructure provider, to design and host a remote telehealth platform that would allow patients to receive care without traveling to a hospital. *Id.* Patients reached the platform through MHS’s website, and its patient-facing pages carried MHS’s branding. *Id.*

From the first screen, MHS informed patients that use of the platform was subject to its terms. R0004–5. Directly below the login field, the page stated: “By entering the portal, I accept the [Metropolitan Health System] Terms and Conditions.” R0004. The words “Terms and Conditions” appeared as blue, underlined hyperlinked text. *Id.* When clicked, the terms were short, thirty-four lines on a single page, and told patients plainly that care delivered through the platform was not rendered by MHS’s employees or agents:

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

R0004–5.

D. Cyber MD and Integration with MHS

Cyber MD is an interactive, conversational artificial intelligence (“AI”) diagnostic tool developed by Cyber-Care. R0005. It takes patient symptoms by text or voice, asks follow-up

questions, compiles clinical history, generates differential diagnoses, and orders and interprets diagnostic tests. *Id.* Before bringing Cyber MD to market, Cyber-Care submitted its verification studies and training data to the United States Food and Drug Administration, which cleared the product in February 2017. *Id.* The version of Cyber MD cleared that year had been trained on 40,000 images drawn from three hospital systems and achieved a ninety-seven percent overall accuracy rate in classifying lung lesions. *Id.* Cyber-Care marketed it under the slogan “Cyber MD: Care Everywhere.” *Id.*

Cyber-Care delivered Cyber MD to MHS, which integrated it into the telehealth platform on March 1, 2017. R0005. Every patient was told exactly what Cyber MD was before using it. Before any chat session could begin, a pop-up box appeared stating, in red, sixteen-point font: “Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.” R0005. The patient could not proceed without clicking “Accept.” *Id.*

Cyber-Care continued to evaluate and refine Cyber MD after delivery. In October 2022, more than five years after delivery, Cyber-Care identified that the tool's accuracy was eighty-five percent for patients with prior occupational asbestos exposure, because pleural shadowing could mask underlying tumors. R0005–6. Cyber-Care retrained the software on 10,000 asbestos-exposed image sets, restored its high accuracy, and released the updated version to its clients on December 13, 2023. R0006.

E. About Miller

Elias Miller (“Miller”) was born on January 12, 1950, and died on April 14, 2024, at age 74. R0003, R0007. He spent forty-six years working in the maintenance department of the Shawnee Steel Company's mill in Cartersville, from 1970 until his retirement in 2016. R0003.

The mill's machinery, installed when the plant opened in 1950, was insulated with asbestos, and Miller regularly handled it, often without respiratory protection. *Id.* Miller was a lifelong non-smoker with no history of respiratory disease, and his last employer-sponsored chest screening in 2012 was read by a radiologist as "unremarkable." *Id.*

On October 30, 2023, more than two years after his last session, Miller suffered a spontaneous pneumothorax and was airlifted to MHS's Goshen hospital, where scans revealed a 6.4-centimeter malignant mass in his left lung with metastases to the pleura and spine. R0006. Experts reviewing the images in hindsight later concluded that a seven-millimeter lesion, partially obscured by pleural changes, was visible on his 2018 scans and had grown to forty-seven millimeters by 2021. *Id.*

Cartersville is in rural Simmons County. R0003–4. After the county's two local hospitals closed in 2015, residents continued to have access to three primary care practices within the county, to mobile radiology services that traveled to Cartersville, and to full in-person radiology and computed tomography services at MHS's flagship hospital in Goshen. R0004, 6.

F. Miller's Use of the Platform

On April 9, 2018, Miller logged into the MHS virtual platform with shortness of breath. R0006. Before his session, he clicked the terms and conditions hyperlink and viewed the terms before closing the page. R0005. He then accepted the pop-up warning that Cyber MD was an artificial intelligence program and not a licensed professional, and he then still chose to begin an intake session directly with Cyber MD. R0005–6.

During the session, Miller described his asbestos exposure. R0006. Cyber MD ordered a chest X-ray and computed tomography scan through a mobile radiology service visiting Cartersville and told him it would analyze the scans and review the results with him. *Id.* Two

weeks later, Cyber MD reported no evidence of malignancy, assessed adult-onset asthma, referred Miller to a local practitioner for inhaler management, and recommended annual follow-up imaging. *Id.*

Miller returned for three separate evaluations, each roughly a year apart: May 2019, May 2020, and June 2021. R0006. Each involved a new set of scans and a new review, and because the pop-up warning appeared before every chat session, Miller affirmatively accepted it each time. R0005–6. After the June 2021 evaluation, Cyber MD advised Miller that annual imaging was no longer necessary. R0006. The record reflects no further interaction between Miller and Cyber MD after June 2021. *See id.*

SUMMARY OF THE ARGUMENTS

Summary judgment is appropriate where the movant demonstrates entitlement to judgment as a matter of law by showing that there is no genuine issue as to material fact. Sn. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party must then point to evidence in the record showing a genuine issue of fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A genuine issue of fact exists only where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Legal arguments unsupported by facts, or relying on allegations or speculations do not defeat summary judgment. *Anderson*, 477 U.S. at 248; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

The issues in this matter are issues of first impression. R0007. In matters of first impression, states may look to analogous cases to seek guidance. *City of Erie v. Guar. Nat'l Ins. Co.*, 109 F.3d 156, 159 (3d Cir. 1997). Comparable cases demonstrate that this Court should reverse the Court of Appeals decision, and affirm the Circuit Court's decision.

First, MHS cannot be held vicariously liable under the doctrine of apparent agency because MHS did not create the appearance of authority over Cyber MD. MHS explicitly disclaimed agency and control over the software implemented into its patient portal in an accessible terms and conditions page, which Miller affirmatively accessed and agreed to, and MHS did not otherwise engage in acts creating the appearance of authority. Further, Miller's claim of procedural unconscionability is defeated by his affirmative acceptance of the pop-up box disclaimer before he initiated each virtual intake session, which stated that Cyber MD is an artificial intelligence software program, and by the lack of evidence to support a finding of fraud or oppression influencing his agreement.

Next, the Court of Appeals erred in holding that Miller's malpractice claim survives Shawnee's four-year statute of repose. The alleged omission occurred in April 2018, so the repose period expired in April 2022, more than two years before suit, and the narrow "continuous course of treatment" exception in § 12-404(b) does not apply. First, the legislature borrowed a doctrine with a settled meaning from *Borgia* and its progeny, which protects patients receiving active, corrective care, not those who return for periodic checkups. Second, the record satisfies none of the exception's four requirements: four sessions a year apart were not "continuous"; reading scans and reporting no disease is not "treatment"; Cyber MD never addressed the cancer that gives rise to the claim; and no MHS provider ever treated Miller. Finally, extending the exception to routine annual screenings would keep repose from ever running for returning patients, rendering subsection (b) surplusage and overriding the legislature's judgment that providers deserve certainty after a fixed period.

Finally, this Court should also reverse the Court of Appeals finding that Miller's product liability claim was timely. Miller's claims are not timely. § 12-410(a) is clear and unambiguous, in

that claims of product liability must be commenced within four years of the date of first sale, lease, or delivery. Cyber MD was delivered in 2017 and its repose window expired in 2021. This suit was filed in 2024, three years after the repose period. Furthermore, because Cyber MD's danger and defect, under the circumstances of the case, was so open and obvious that it was discoverable by an ordinary reasonably prudent person like Miller, the Court of Appeals erroneously concluded that Miller meets the exceptions set forth in § 12-410(b).

Summary judgment should be granted with regard to both issues in this case. There are no issues of material fact, and as a matter of law, this court should reverse the Court of Appeals decision and reinstate the Circuit Court's decision. Miller's claims are not grounded in facts in the record; a reasonable jury therefore could not return a verdict in his favor.

ARGUMENT

I. MHS cannot be held vicariously liable for Cyber MD's diagnostic errors because miller has not established apparent agency.

Generally, a hospital can be held vicariously liable for the acts of a third-party independent agent by apparent agency if the plaintiff raises a triable issue of fact showing that the independent agent provided services in a manner which caused the patient to believe the services were provided by the hospital itself. *Restatement 2d of Torts*, § 429; *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). When determining if there is an apparent agency relationship, Shawnee law considers three elements used to determine if an apparent agency relationship is established. R0021. These elements are: (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. *Id*; *Pamperin v. Trinity Mem'l Hosp.*, 144 Wis. 2d 188, 203 (1988).

A. MHS has not held out Cyber MD as an agent of MHS.

The first element Shawnee considers is referred to as “holding out,” where “the element is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors.” *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993). The “holding out” inquiry focuses on the totality of circumstances rather than an express representation by the hospital that the third-party is an employee of the hospital. *Id.* Instead, the element is analyzed by the provider’s actions or inactions and the patient’s knowledge of the provider’s arrangements. *Webster*, 917 F.3d at 575.

In *Gilbert v. Sycamore Municipal Hospital.*, the court held that there was a genuine issue of material fact where the release form Plaintiff-patient signed upon admission to the hospital stated “treatment will be performed by physicians and employees of the hospital” when the treatment was administered by third-party agents rather than employees of the hospital, and where the hospital did not otherwise inform patients that physicians at the hospital were independent contractors. 156 Ill. 2d at 526. The court held that “if a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable” under the doctrine of apparent agency. *Id.* at 522.

Feldman v. Google, Inc., illustrates that the “holding out” element is not satisfied where the plaintiff should have known that the third-party was an independent contractor if that disclaimer was presented in a click-wrap style agreement. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007). The court held for Defendant search engine when Plaintiff attorney alleged that an agreement to purchase pay-per-click ads to be displayed on the search engine was unenforceable because the click-wrap agreement was “presented in readable 12-point font[,]. . . was only seven paragraphs long. . . [and] the user had ample time to review the document.” *Id.* at 237.

The court further explained that “absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms.” *Id.* at 236; see *Forrest v. Verizon Communications Inc.*, 805 A.2d 1007, 1010–11 (D.C. Cir. 2002) (enforcing a forum selection clause in a click-wrap agreement because the plaintiff could have read the terms and conditions the clause was located in).

This case is unlike *Gilbert* because Miller should have known that CCS was an independent contractor based on the explicit language “independent contractor physicians or automated software applications developed by another company” and “the physicians and software are not employees or agents of Metropolitan Health System. MHS exercises no operational control over the clinical judgment or diagnostic methods used by the independent contractor physicians or any automated software applications” included in the hyperlinked terms and conditions below the MHS user login. R0005. These terms clearly defined the automated software application of CCS as independent from MHS and further emphasized that MHS exercises no control over the methods used by CCS. *Id.* The record reflects that Miller affirmatively clicked and accessed the hyperlinked terms and conditions in April 2018 when he signed up for an appointment, confirmed by digital audit logs. *Id.* Because MHS clearly stated that CCS was not an agent of MHS and further emphasized that MHS exercises no control over CCS, the case at issue is a stark contrast to *Gilbert*, where the hospital explicitly stated that treatment would be provided by hospital staff.

Instead, this Court should find similarly to *Feldman* because the text used to disclaim the agency relationship was a readable sign-in wrap agreement; it was 34 lines of black text on a contrasting white background. R0004. In *Feldman*, the acceptable text in question was seven paragraphs of text in a twelve-point font size. 513 F. Supp. 2d at 233. Further, Miller was confronted with a second disclaimer before he opened the chat box to receive care from Cyber

MD. R0005. Miller and other patients had to “navigate a pop-up box stating in red, sixteen-point font: ‘Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.’ [and then] users must click ‘Accept’ to proceed.” *Id.* When Miller initiated his virtual intake session with Cyber MD in 2018, and every time after, he was presented with this disclaimer in large, readable sixteen-point font in a red color, and therefore was on notice that the help he was receiving did not come from a licensed healthcare professional, thus alleviating any expectations that the care was administered by MHS. *Id.*

Public policy generally favors holding parties to the agreements they enter. *See Restatement (Second) of Contracts* § 227 cmt. b (Am. L. Inst. 1981) (explaining that where language is clear, “the policy favoring freedom of contract requires that, within broad limits, the agreement of the parties should be honored even though forfeiture results.”) As the courts in *Feldman* and *Forrest* explained, an individual cannot excuse themselves from a contract’s terms simply because they chose not to read them. *Feldman*, 513 F. Supp. 2d at 236; *Forrest*, 805 A.2d at 1010–11. If this Court grants summary judgment in favor of MHS, it will reach a result consistent with those decisions and with public policy favoring the enforcement of valid contracts.

B. MHS has not engaged in acts creating the appearance of authority over Cyber MD.

The second element establishing an apparent agency relationship has to do with acts creating the appearance of authority. Acts creating the appearance of authority include the communication and reasonable notice provided by the principal regarding the third-party relationship. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995). Enforceability of an online agreement which provides reasonable notice is evaluated by fact-intensive inquiry. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). Federal courts consistently hold that online agreements, such as “clickwrap,” “scroll wrap,” or “sign-in wrap” agreements where a user must

click a button or link to accept clear terms, confer legally sufficient notice as a matter of law, leaving no triable issue regarding whether the terms were communicated. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853 (9th Cir. 2022). To be enforceable, the agreements require only “reasonably conspicuous notice of their terms and unambiguous manifestation of assent to those terms by the user.” *Id.* Some state courts have made similar decisions enforcing terms in online agreements. *See also Santana v. SmileDirectClub, LLC*, 475 N.J. Super. 279 (Super. Ct. App. Div. 2023) (upholding a click-wrap agreement and explaining that such agreements typically provide sufficient notice); *Ambrosius v. Chi. Ath. Clubs, LLC*, 203 N.E.3d 239 (Ill. App. Ct. 2021) (asserting “an online prompt to read terms that are available at a hyperlink, and manifest assent thereto by clicking on a box, can be sufficient to form a contract”); *HealthPlanCRM, LLC v. AvMed, Inc.*, 458 F. Supp. 3d 308 (W.D. Pa. 2020) (upholding a browsewrap agreement because it provided sufficient notice and functioned similarly to a clickwrap agreement).

In *Meyer v. Uber Technologies, Inc.*, the court found that an arbitration clause located in a hyperlinked terms and conditions page upon signup for an iPhone app was an enforceable sign-in wrap agreement because Plaintiff had sufficient notice where the terms were highlighted in blue and underlined, and further noted that a plaintiff is on notice even if they make the personal choice not to read the additional terms. 868 F.3d at 79. The court noted that “a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.” *Id.* at 77–78. By clicking “register” on the page with the embedded hyperlink, Plaintiff affirmatively agreed to the terms and conditions within the app's online platform. *Id.* at 80. The principal's terms of service and privacy policy therefore put Plaintiff on sufficient notice of an enforceable arbitration clause within the sign-in wrap agreement. *Id.*

Alternatively, the court in *Berman*, found that consumers had no reasonably conspicuous notice of an arbitration agreement located within a terms and conditions hyperlink because of the “small font size and format [of the arbitration clause] and because the fact that a hyperlink was present [on the webpage containing the agreement] was not readily apparent.” 30 F.4th at 854. Here, the court distinguished that the existence of a hyperlink should be indicated by customary, recognizable design including “the use of a contrasting font color (typically blue) and the use of all capital letters, both of which can alert a user that the particular text differs from other plain text in that it provides a clickable pathway to another webpage.” *Id.* at 857.

Similarly to the hyperlinked terms and conditions in *Meyer*, the hyperlinked terms and conditions in the case at hand provided enforceable notice and communication of a third-party relationship. The hyperlink was located below the user login on MHS’s primary domain, embedded in a statement “By entering the portal, I accept the MHS Terms and Conditions.” R0004. The hyperlink was blue and underlined, in the same sign-in wrap format accepted by the *Meyer* court. *Id.* Miller’s claim that the agency disclaimer clause was “buried deep in the agreement” is not compelling, because he clicked the hyperlink and viewed the disclaimer, and even if he had not, *Meyer* makes clear that a plaintiff is on notice even if they make the personal choice not to read the terms. R0009. Therefore, Miller was on sufficient notice of the statements MHS made regarding the use of independent contractors and disclaiming operational control over software applications, including CCS, every time he logged into the patient portal.

This case is differentiated from *Berman* because the hyperlink in this case was a contrasting blue color and there is no indication in the record that the hyperlink or the statement it was contained in was written in an unreasonably small font size. R0004. Further, the hyperlink was located on the main MHS webpage right below the user login. *Id.* The hyperlink was readily

apparent, which is indicated both by the customary design of the hyperlink, and by the fact that Miller himself clicked the hyperlink and remained on the webpage it opened in 2018. R0005.

Granting summary judgment in favor of MHS would align with the court's assertion in Meyer that a reasonably prudent person is able to identify a hyperlink and cannot avoid responsibility for reading terms and conditions located in a hyperlink by claiming they were unaware there was one. *Meyer*, 868 F.3d at 77–78. Granting summary judgment for MHS would similarly align with public policy which favors holding parties to agreements they enter and enforcing clear contractual terms. *See Restatement (Second) of Contracts* § 227, Cmt. b (Am. L. Inst. 1981). If this Court holds differently, parties could potentially avoid contractual obligations clearly outlined in terms and conditions by claiming they did not know the terms were included in a hyperlink. Such a rule could also expose companies to liability for the conduct of third parties despite clear contractual provisions disclaiming a principal-agent relationship, thereby undermining the certainty businesses rely upon when defining the scope of their contractual obligations.

C. Miller has not acted in reliance upon the conduct of MHS, as there were multiple alternatives available and no indication of oppressive terms.

The third element for determining apparent agency is whether the plaintiff acted in reliance upon the conduct of the principal or its agent. *See Bradford v. Jai Med. Sys. Managed Care Org., Inc.*, 439 Md. 2 (2014); *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208 (1996). Where the plaintiff acts in reliance upon the principal or agent because he lacked alternative options, or where the plaintiff proves individualized circumstances surrounding the contract were so unfair that there was "no voluntary meeting of the minds", then the court may find that the reliance created an unenforceable contract of adhesion by procedural unconscionability. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025). To determine whether a contract is procedurally

unconscionable, the court considers several factors, “including the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice.” *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023); *see Hines*, 140 F.4th at 328.

In *Hines v. National Entertainment Group.*, the court upheld an arbitration agreement where the clause appeared conspicuously in the release waiver, the heading of the clause appeared in all capitalized letters, the text was in the same font as the rest of the document, and the meaning of the arbitration clause was not hidden in confusing legal terms. 140 F.4th at 328–29. The language was clear, readable, and readily understandable by both parties at the time of the agreement. *Id.* The court also noted that a party “feeling rushed” to sign a contract does not rise to the level of unconscionability which would invalidate the contract. *Id.* at 329. Further, the court declared that “[a] person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed.” *Id.* at 330 (quoting *ABM Farms v. Woods*, 81 Ohio St. 3d 498 (1998)). An individual's claim of adhesion is not compelling where the individual could have read the terms before signing them. *Id.*

In *Payne v. Savannah College of Art & Design, Inc.*, the court upheld an arbitration agreement containing small discrepancies and non-mutual provisions because the elements did not rise to the level of unconscionability. 81 F.4th 1187, 1201 (11th Cir. 2023). Instead, the court emphasized the “demanding standard for satisfying procedural unconscionability which requires ‘the complaining party’ to prove ‘that it was essentially defrauded in entering the agreement.’” *Id.* at 1198.

In *VoiceStream Wireless Corp. v. U.S. Communications, Inc.*, the court found no procedural unconscionability where a commercial business entered into a contract with a specialized technology provider, despite the technology provider being the only provider of such specialized technology in the South Florida area. 912 So. 2d 34 (Fla. Dist. Ct. App. 2005). The court reasoned that a lack of convenient alternatives does not equal unconscionability. *Id.* at 40.

The present case is like *Hines* because the language contained in the Terms and Conditions, as well as in the pre-session pop-up box, was clear, readable, and in plain language. There is no indication in the record of a time limitation imposed on Miller's ability to read the terms and conditions, and even if he had felt rushed, that sentiment would not have been a valid reason for finding the contract procedurally unconscionable. R0005. Miller's claims that "the disclaimer was buried deep in the agreement, and that no reasonable person in Miller's position would have understood that he was utilizing an independent third-party software application" lack conviction because Miller could have read the disclaimer located three-quarters down the terms page, where he, and any reasonable person, would have seen the text stating plainly that "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." R0009; R0005. There is no indication of unfair circumstances or unclear language here.

Similarly to *Payne*, the presence of some unsavory elements within the provisions doesn't make the entire contract unconscionable, where here it is true that the text providing the disclaimer in the terms and conditions was single-spaced, typed in a font smaller than the rest of the website, and was not formatted. R0004. The text was written in black text on a contrasting white background and there is no indication in the record that the text was written in a font which was

too small to be readable. R0004. Miller has not been "essentially defrauded". Therefore, even if some of the design elements decreased readability of the disclaimer, those elements are outweighed by the facts in the record which support conscionability, and do not cause the entire agreement to rise to the level of unconscionability.

MHS's online platform was not the only resource available for Miller to receive medical attention, and neither was the flagship location in Goshen. Where the technology provider in *Voicestream* was the only provider in the South Florida area, MHS was the nearest provider of radiology services to Miller, but not the only radiology provider available, and not the only healthcare provider. *VoiceStream*, 912 So. 2d at 40 (Fla. Dist. Ct. App. 2005). Simmons County had three primary care providers in the county at the time that Miller sought medical care, as well as access to mobile radiology services. R0004. Miller utilized the MHS healthcare portal for the first time in 2018, when he experienced shortness of breath. Any of the three primary care providers in Simmons County could have provided care for this symptom. The court in *Voicestream* found that a lack of convenient alternatives due to geographical location did not suffice to show contractual unconscionability, and this Court should similarly find that Miller's distance from MHS does not cloud the services provided by MHS's online platform in an unconscionable contract. *Id.* at 40. Even if Miller could not seek medical care from the multiple providers in Simmons County or other providers outside of Simmons County, the court may still find similarly to the decision in *Voicestream*, holding that geographical inconvenience does not equate to unconscionability.

Further, this Court should grant summary judgment in favor of MHS because doing so would support public policy, which supports upholding valid agreements. To satisfy procedural unconscionability, a party must demonstrate circumstances that undermine the voluntariness of the

agreement, a high standard that *Payne* describes as "essentially [be] defrauded in entering the agreement". *Payne*, 81 F.4th at 1198. The demanding standard is consistent with broader public policy favoring freedom of contract and upholding valid agreements. Because MHS has not defrauded Miller in its representations on the patient portal, this Court should find that granting summary judgment in favor of MHS best supports public policy by upholding a voluntary and valid agreement.

For the foregoing reasons, Miller has failed to meet the three elements recognized by Shawnee as determinative of an apparent principal-agent relationship. Miller has further failed to raise a triable issue of fact showing that Cyber MD provided services in a manner which caused Miller to believe the services were provided by MHS itself. Therefore, this Court should reverse the decision of the Shawnee Court of Appeals and find similarly to the Simmons Circuit Court, upholding a grant of summary judgment in favor of MHS, and in favor of public policy.

D. Miller's claim for procedural unconscionability lacks support.

Procedural unconscionability concerns the circumstances surrounding contract formation and whether the parties' consent was meaningfully voluntary, including circumstances involving fraud, mistake, duress and unfair surprise. Horatio Spector, *A Contractarian Approach to Unconscionability*, 81 Chi.-Kent L. Rev. 95, 96–7 (2006). To determine whether a contract is procedurally unconscionable, courts often consider several factors, “including the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice.” *Payne*, 81 F.4th at 1194; *Hines*, 140 F.4th at 328.

Evaluating these factors, the record lacks sufficient facts to support a finding of procedural unconscionability. First, Miller was sixty-eight years old when he accessed the MHS portal to initiate a virtual intake session in 2018. R0003; R0005. There is no indication in the record that Miller's age impaired his ability to assent to the terms and conditions. Miller had retired only two years earlier, when the steel mill he worked at closed. R0003–4. *See Haydon v. Elegance at Dublin*, 97 Cal. App. 5th 1280 (2023) (finding procedural unconscionability existed where the plaintiff was seventy-four years old and suffered from dementia and financial strain, enticed by a discount offer contingent upon signing a contract quickly). Second, the record does not establish that Miller's education weighs in favor of procedural unconscionability. Although Miller began working at the Shawnee Steel Company's primary steel mill when he was twenty years old, the record does not indicate whether he received a high school or college education before he started work. R0003. Nor does the record indicate that Miller was unable to read or understand the terms presented to him. R0010. Likewise, the record contains no information indicating that Miller lacked the intelligence necessary to understand the terms or information presented to him.

The record also does not establish that Miller's business or bargaining experience was so limited as to render his assent involuntary. Miller spent the majority of his life working in the maintenance department at a steel mill, which suggests that he had less business experience and bargaining power than MHS. R0003. The circuit court noted this lack of business acumen as well. R0010. However, as the lower court also explained, these factors are not determinative where the agreement and notice are not so oppressive as to rise to the level of unconscionability. *Id.*; *see Marquez v. Amazon.com, Inc.*, 69 F.4th 1262, 1272 (11th Cir. 2023) (holding that “the fact that unequal bargaining power exists will not, standing alone, justify a finding of procedural unconscionability.”); *Bigler v. Harker Sch.*, 213 Cal. App. 4th 727, 737 (2013) (upholding an

arbitration clause in an enrollment contract between a school and parents of its students because there was no indication of oppression or surprise). Nor did Miller lack meaningful choice. As *Voicestream* and the circuit court both illustrated, lack of convenient alternatives is not the same as lacking meaningful choice, and Miller could have sought in-person care at Goshen rather than proceeding through MHS's virtual portal. R0010. Miller also could have sought care at any of the three primary care providers in Simmons County when he began experiencing shortness of breath. Thus, the record does not establish that Miller was effectively compelled to accept MHS's terms. *See Dougherty v. Roseville Heritage Partners*, 47 Cal. App. 5th 93 104, 260 (2020) (finding procedural unconscionability where a clause was buried in a seventy-page contract and the plaintiff was an eighty-nine-year-old man with dementia who had been removed from multiple care facilities, but needed to be transported from the hospital to a new care facility that same day).

The terms were also sufficiently conspicuous and comprehensible. Although some of the design elements of the text may have reduced its conspicuousness, that does not render the terms and conditions unreadable or negate other design elements that facilitated Miller's ability to review them. There is no indication in the record that Miller was unable to read the terms and conditions or the disclaimer pop-up. *Id.*; *see Narayan v. Ritz-Carlton Dev. Co.*, 140 Haw. 343, 352 (2017) (holding that ambiguity in contract terms had “the potential to confuse or mislead the non-drafting parties and deprive[d] those parties from a full and adequate understanding of their rights under contract.”)

Finally, the oppressiveness factor weighs against Miller because there is no indication in the record that the terms and conditions were oppressive, and after opening the terms and conditions, Miller continued forward through the portal. R0005; R0010.

Considering the totality of the circumstances, the record does not establish that Miller's assent was anything other than voluntary. Miller has therefore failed to establish procedural unconscionability. Accordingly, this Court should reverse the Court of Appeals decision and reinstate the findings of the Circuit Court at Simmons County, finding that MHS is entitled to summary judgment as a matter of law.

II. The Court of Appeals erred in holding that Miller's claims are not barred by Shawnee's four-year statutes of repose.

Statutes of repose are enacted to give explicit protection to defendants. *Cal. Pub. Empls' Ret. v. ANZ Sec.*, 582 U.S. 497, 505 (2017). The rationale is that defendants should be free from liability after the legislatively determined period of time. *Id.* Tolling of this time period is only permissible when there is a particular indication that the legislature did not intend to give defendants complete repose, but instead the law will extend the statutory period under certain circumstances such as express exceptions under the statute. *Id.*

In this matter, Shawnee County implemented two statutes addressing statutes of repose. § 12-404, addresses limitation of health care malpractice, while § 12-410, addresses product liability. Neither of these statutes give defendants complete repose but instead extend the statutory period under narrow exceptions. Because Miller has failed to demonstrate with clear and convincing evidence that his circumstances meet the limited exceptions of § 12-404 and § 12-410, Miller's claims of healthcare malpractice and product liability are barred by the statutes of repose.

A. Miller's claims are barred by Shawnee's health care malpractice statute of repose because Cyber MD's four annual diagnostic screenings did not constitute a "continuous course of treatment" under § 12-404(b).

Section 12-404(b) bars any health care malpractice action brought more than four years after the act or omission alleged to have caused the injury or death. § 12-404(b); R0014. The repose period does not apply only 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.” § 12-404(b).

The omission alleged here occurred in April 2018, when Cyber MD's baseline algorithm failed to identify a lesion visible on Miller's first scans. R0006. The repose period therefore expired in April 2022. R0011. Respondent filed suit in July 2024. R0007. As a matter of law, the narrow exception does not apply because (1) the case bears no resemblance to the cases that created the continuous course of treatment doctrine, *see infra* Part A.1; (2) the record satisfies none of the exception's four requirements, *see infra* Part A.2; and (3) the Court of Appeals’ reading would nullify the repose period, *see infra* Part A.3.

1. The continuous treatment doctrine was created to protect patients in active, corrective care, not patients who undergo periodic screenings.

The Shawnee legislature adopted a doctrine with a settled meaning: it protects patients who are actively being treated by the provider who injured them, not patients who return for periodic checkups. A legislature that borrows a term of art adopts the meaning attached to it. *Morissette v. United States*, 342 U.S. 246, 263 (1952). The Shawnee legislature used the term “continuous course of treatment” and limited it to treatment “for the same illness, injury, or condition.” § 12-404(b). That is the formulation New York courts used when they created the doctrine, and it carries their limits. Under those limits, the doctrine covers ongoing treatment for the same or related illnesses or injuries, “not mere continuity of a general physician-patient relationship.” *Borgia v. City of New York*, 187 N.E.2d 777, 779 (N.Y. 1962); *see FDIC v. Deloitte & Touche*, 834 F. Supp. 1129, 1148–50 (E.D. Ark. 1992) (applying *Borgia*’s limit to reject the doctrine where an accounting firm audited a bank every year from 1983 to 1986, because annual audits, like annual physical examinations, show only a recurring professional relationship rather than treatment of the

same problem, and reasoning that a doctor who performs yearly checkups and misses the same illness each year until the patient dies has not engaged in continuous treatment).

The founding cases demonstrate what kind of care the doctrine protects. In *Hammer v. Rosen*, a claim against a psychiatrist was timely in part because his beatings of his patient were part of a single course of psychiatric treatment that continued until the year she sued. *Hammer v. Rosen*, 165 N.E.2d 756, 757 (N.Y. 1960). In *Borgia v. City of New York*, a child suffered brain damage from a hospital's negligence on the night of his admission and was neglected three more times during the same stay. 187 N.E.2d at 779. Without the doctrine, the notice period would have expired while he was still hospitalized for those injuries. The court held that a patient should not have to interrupt corrective treatment to sue, but it rejected the idea that claims stay open as long as a patient keeps seeing the same provider. *Id.*

Later courts have applied the doctrine only to active, corrective care. See *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080–81 (2d Cir. 1988) (applying the doctrine to a patient injured in a fall who received less than three months of intensive corrective care in the same hospital, while distinguishing cases of intermittent treatment over three and seven years); *Lane v. Lane*, 752 S.W.2d 25, 27 (Ark. 1988) (applying the doctrine to eighteen years of prescriptions that caused addiction, and explaining that it covers a series of negligent acts, not a single misdiagnosis); *accord Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 475–76 (8th Cir. 2008) (holding that the doctrine could not extend the period past a nursing home resident's last day of care).

Writing the doctrine into a statute does not expand it. Courts treat the doctrine as a choice for the legislature, and legislatures that adopt it keep *Borgia*'s limits. See *Cunningham v. Huffman*, 609 N.E.2d 321, 322–24 (Ill. 1993) (refusing to adopt the doctrine under a repose statute nearly identical to § 12-404(b), even though the patient was treated at the same clinic from 1977 to 1988

while a retained IUD went undiscovered, because only the legislature could add such an exception, as New York and Texas had done). New York, where the doctrine began, codified it with *Borgia*'s limits intact: its statute excludes examinations a patient requests solely to learn the state of his condition. N.Y. C.P.L.R. 214-a (McKinney 2024). By using *Borgia*'s same words, the Shawnee legislature adopted the same limits.

The patients in *Hammer*, *Borgia*, *Ulrich*, and *Lane* were receiving ongoing, affirmative treatment for injuries the defendant caused, and a lawsuit would have disrupted that care. Miller had four remote sessions with software, each a year apart. R0006. Cyber MD never identified or treated his cancer and referred the only therapy it recommended, inhaler management, to a local practitioner. *Id.* There was no corrective care for a lawsuit to interrupt.

This case is also far weaker than *Ulrich*, on which the Court of Appeals relied. R0025. The *Ulrich* patient spent less than three months in intensive hospital care; Miller had one short session a year for four years, the kind of intermittent pattern *Ulrich* distinguished. 853 F.2d at 1081; R0006. And unlike the years of prescriptions in *Lane*, the error here was a missed diagnosis, which *Lane* declined to treat as a continuing wrong. 752 S.W.2d at 27. Nor does codification help Respondent: the legislature adopted *Borgia*'s formulation, and New York's statute excludes exactly the kind of periodic examinations Miller received. N.Y. C.P.L.R. 214-a. The Court of Appeals extended the doctrine to precisely the kind of periodic, general relationship that its creators excluded. That error alone warrants reversal.

2. The record does not satisfy any of the four requirements of the § 12-404(b) exception.

Respondent cannot satisfy any of the exception's four requirements, and she must satisfy all of them. The repose period is lifted only where (1) "the defendant healthcare provider" (2)

engaged in a “continuous course” (3) of “treatment” (4) “for the same illness, injury, or condition that gives rise to the claim.” § 12-404(b). This Court may reverse if anyone is missing.

First, Miller's sessions were not “continuous.” Intermittent care at substantial intervals does not satisfy the doctrine. *Jones*, 720 N.E.2d at 346. The doctrine requires an active relationship and is not triggered by return visits merely to check the patient's condition or by monitoring without additional treatment. *Hoffner v. Johnson*, 660 N.W.2d 909, 32-33 (N.D. 2003). Courts ask (1) whether the physician and patient have a relationship regarding the illness; (2) whether the physician is attending and examining the patient; and (3) whether something more remains to be done. *Wheeler v. Schmid Labs., Inc.*, 451 N.W.2d 133, 138 (N.D. 1990); *accord Cefaratti v. Aranow*, 138 A.3d 837, 846 (Conn. 2016).

Under this rule, gaps of a year or more defeat continuity. *See Kollross v. Goldstein*, 191 N.E.3d 39 (Ill. App. Ct. 2021) (holding the claim barred where defendants misread a patient's MRI in 2013 and saw her once more in 2017, because the gap defeated continuity and the misreading was a discrete act); *Collins v. Sullivan*, 679 N.E.2d 423, 425 (Ill. App. Ct. 1997) (holding that twelve surgeries on the same condition over twenty-four years were not continuous because nine years separated two of them); *Flynn v. Szwed*, 586 N.E.2d 539, 545 (Ill. App. Ct. 1991) (holding that treatment interrupted by fifteen- and twelve-month gaps was intermittent). So do periodic check-ins and isolated later contact. *See Hoffner*, 660 N.W.2d at 918–19 (rejecting the doctrine where a physician misdiagnosed diabetes and then told the patient he was cured and needed no further monitoring); *Wheeler*, 451 N.W.2d at 138 (rejecting the doctrine where a patient kept taking prescribed medication for eight years and had one routine examination at the same clinic); *Froysland v. Altenburg*, 439 N.W.2d 797, 800 (N.D. 1989) (rejecting the doctrine where an allegedly negligent anesthesiologist participated in a second surgery more than two years later);

Deloitte & Touche, 834 F. Supp. at 1150–51 (rejecting the doctrine for annual services, reasoning that otherwise consecutive yearly services would always suspend the statute). Courts find continuity only where the provider is actively and repeatedly treating the patient. *See Follis v. Watkins*, 855 N.E.2d 579, 588 (Ill. App. Ct. 2006) (finding a fact question where a patient visited the same dentist forty-eight times over eight years for ongoing dental work); *Cefaratti*, 138 A.3d at 848–49 (finding a fact question where a patient returned to her surgeon with symptoms caused by a sponge he left in her abdomen, but explaining that routine monitoring would not suffice and that the doctrine does not apply where the provider concludes no further treatment is needed and the patient seeks none).

Miller had four self-contained sessions: April 2018, May 2019, May 2020, and June 2021. R0006. The record reflects no contact between them; in each, Cyber MD read new scans, reported no evidence of disease, and the encounter ended. *Id.* As in *Flynn* and *Kollross*, a year or more separated each encounter, and as in *Kollross*, the alleged error was a misread image. *Id.* The facts also track the *Deloitte & Touche* hypothetical: annual examinations, a clean report each year, the same illness overlooked, and a patient who later died. 834 F. Supp. at 1150; R0006–07. Each *Wheeler* factor points the same way: Cyber MD had no relationship with Miller regarding cancer because it never identified cancer; it did not attend or examine him between sessions; and after each session nothing remained to be done because it had reported no disease. R0006.

By contrast, Miller received four scan readings, not the forty-eight rounds of hands-on care like in *Follis*, and he returned for scheduled screenings, not with symptoms of the provider's error as in *Cefaratti*. 855 N.E.2d at 588; 138 A.3d at 848–49. After each session, Cyber MD concluded that no treatment was needed, the very situation *Cefaratti* excludes. 138 A.3d at 848.

The Court of Appeals reached a contrary result only by calling Cyber MD's imaging protocol “mandatory” and saying it promised to monitor Miller. R0025. The record shows only a recommendation and a promise to review the initial scans, which Cyber MD kept. R0006. Reasonable inferences favor the nonmovant, *Anderson*, 477 U.S. at 248, but they cannot supply new facts. Four self-contained sessions a year apart are therefore not a continuous course.

Second, Cyber MD rendered no “treatment.” Treatment means the application of remedies to cure a condition, and the word limits the doctrine. *Pavlik v. Kornhaber*, 761 N.E.2d 175, 182–83 (Ill. App. Ct. 2001). A plaintiff must show subsequent treatment by the same provider, *Stallings v. Gunter*, 394 S.E.2d 212, 216 (N.C. Ct. App. 1990), and the doctrine does not apply to a “continued course of non-treatment.” *Mathis v. May*, 358 S.E.2d 94, 97 (N.C. Ct. App. 1987). A misdiagnosis is a discrete act, not a continuing one. *Lane*, 752 S.W.2d at 27; *Kollross*, 191 N.E.3d at 34; *Jones*, 720 N.E.2d at 346.

Courts therefore refuse to treat diagnostic and communication failures as treatment. *See Pavlik*, 761 N.E.2d at 182–83 (holding that a therapist’s letters and calls after the final session were not treatment); *Turner v. Nama*, 689 N.E.2d 303, 311–12 (Ill. App. Ct. 1997) (holding that a physician who never told a patient her Pap smear showed cancer did not engage in continuing treatment); *Ferrara v. Wall*, 753 N.E.2d 1179, 1183 (Ill. App. Ct. 2001) (running the repose period from when a physician received abnormal PSA results and failed to share them, not from his disclosure two years later). A negative diagnosis ends the provider’s undertaking. *See Mathis*, 358 S.E.2d at 97 (holding that a physician who told a patient by letter that her breast mass was benign completed his undertaking that day, so any negligence in the diagnosis or in failing to order follow-up occurred then); *Conner v. St. Luke's Hosp., Inc.*, 996 F.2d 651, 654–55 (4th Cir. 1993) (rejecting the doctrine where a hospital failed to tell an asthma patient about abnormal x-rays and released

her to her personal physician after each visit, because a failure to treat is complete when it occurs). And later contact does not convert a missed diagnosis into continuing treatment. *See Forshey v. Jackson*, 671 S.E.2d 748, 758 (W. Va. 2008) (running the repose period from the surgery in which a scalpel blade was allegedly left in the patient's hand, despite later care); *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 85 (Ill. 2003) (explaining that a continuing wrong requires continuing wrongful conduct, not continuing ill effects).

Cyber MD applied no remedy to Miller's cancer; it read scans, reported results, and referred the only therapy it recommended to a local practitioner. R0006. That is *Conner*, where the hospital released the patient to her own physician after each visit. 996 F.2d at 654–55. Like the physician in *Mathis* who told his patient her mass was benign, Cyber MD told Miller each year that there was no evidence of malignancy, and each negative report completed its undertaking. 358 S.E.2d at 97; R0006. As in *Turner*, 689 N.E.2d at 311–12 and *Ferrara*, 753 N.E.2d at 1183 the alleged error was a failure to identify and communicate a dangerous finding, not an act of treatment. The later readings added nothing new: the lesion was visible in 2018 and was missed each year by the same baseline algorithm, the continuing effect of a single omission. R0006; *see Forshey*, 671 S.E.2d at 758; *Feltmeier*, 798 N.E.2d at 85. And as in *Hoffner*, Cyber MD reported no disease each year and then advised that imaging was no longer necessary, which *Hoffner* called the opposite of continuing treatment. 2003 ND 79, 913, 919; R0006. A provider that tells a patient he has no disease is not treating him for it, so this requirement also fails.

Third, Cyber MD never treated the “same illness, injury, or condition that gives rise to the claim.” § 12-404(b). The doctrine applies when the patient's condition imposes on the provider a duty of continuing care for that condition. *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC*, 819 N.W.2d 408, 417 (Iowa 2012). An ongoing relationship is not enough; the

treatment must be directed at the specific condition at issue. *Borgia*, 187 N.E.2d at 779; *Stallings*, 394 S.E.2d at 215.

Courts reject the doctrine where later care was not directed at the condition that caused the injury. *See Miller v. United States*, 932 F.2d 301, 305 (4th Cir. 1991) (rejecting the doctrine where doctors failed to order a mammogram that would have revealed breast cancer, because later care by other doctors was not treatment for the same problem by the same doctor); *Deloitte & Touche*, 834 F. Supp. at 1149 (rejecting the doctrine where annual audits showed an ongoing relationship but not treatment of the same problem); *Cefaratti*, 138 A.3d at 849 (explaining that routine monitoring of the obesity the surgery was meant to treat would not have sufficed; only symptoms from the retained sponge did).

The condition giving rise to Respondent's claim is lung adenocarcinoma. R0002, R0006. Cyber MD never diagnosed, treated, or monitored it; it diagnosed asthma, referred that condition elsewhere, and reported no malignancy every year. R0006. Like the patient in *Miller*, whose doctors never ordered the test that would have revealed her cancer, Miller received no treatment directed at the cancer that caused his death. 932 F.2d at 305. And like the routine monitoring *Cefaratti* said would not count, his annual scans were never directed at the tumor. 138 A.3d at 849. The Court of Appeals avoided this problem by redefining the condition as Miller's "high-risk respiratory status" from asbestos exposure. R0025. But a risk profile does not "give [] rise to the claim"; the undetected tumor did. § 12-404(b). If a risk factor sufficed, any smoker or aging patient would be in a perpetual course of treatment with any provider who screened him, the general relationship *Borgia* excluded. 187 N.E.2d at 779. Because Cyber MD never treated the condition that gives rise to the claim, this requirement fails as well.

Fourth, MHS itself engaged in no course of treatment. The exception requires that "the defendant healthcare provider" engage in the course of treatment. § 12-404(b). The doctrine presupposes a personal, confidential physician-patient relationship, *Johnson v. Core-Vent Corp.*, 636 N.E.2d 726, 729 (Ill. App. Ct. 1993), and protects a patient who trusts the physician treating him. *Ulrich*, 853 F.2d at 1081; *Miller*, 932 F.2d at 304.

Courts decline to apply the doctrine without that relationship. *See Johnson*, 636 N.E.2d at 729 (refusing to let an implant manufacturer invoke the doctrine against a dentist with whom it had no physician-patient relationship); *Hertel v. Sullivan*, 633 N.E.2d 36, 39–40 (Ill. App. Ct. 1994) (refusing to extend the rule to clergy, whom congregants are not forced to rely on). The relevant relationship is with the provider rendering care, not the institution. *See Huang ex rel. Zhuang v. Uribe*, 162 N.E.3d 343, 351 (Ill. App. Ct. 2020) (holding that a child's continued treatment at a clinic did not extend the repose period for physicians whose treatment had ended years earlier); *Hayes v. Wilson*, 670 N.E.2d 867, 869 (Ill. App. Ct. 1996) (running the repose period from the date the clinic's dentists stopped treating the plaintiff).

Nothing in the record shows that any MHS physician examined, diagnosed, or treated Miller before his emergency admission in October 2023. R0006. Every encounter at issue was with a program that warned him before each session that it was not a licensed health care professional. R0005. As in *Hayes* and *Huang*, continued access to an institution's platform does not show that the defendant itself provided continuous treatment. Whatever this Court decides about vicarious liability, § 12-404(b) asks a different question, and MHS provided no treatment.

Because Miller must satisfy all four requirements and cannot satisfy any of them, the exception does not apply, and this Court should reverse the errors of the Court of Appeals.

3. Extending the exception to routine annual screenings would nullify § 12-404(b) and rewrite a legislative judgment.

Even if the record were ambiguous, the Court of Appeals' reading should be rejected because it cannot be reconciled with the nature of a statute of repose.

A statute of repose is an absolute bar on liability that runs from the defendant's last culpable act rather than from accrual of the claim. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). It reflects a legislative judgment that defendants should be free from liability after a fixed period and generally cannot be tolled, even for extraordinary circumstances. *Id.* at 9. The period may be extended only where the legislature has indicated that it did not intend complete repose, and a bar that begins "[i]n no event" admits no unwritten exceptions. *ANZ Sec., Inc.*, 582 U.S. at 505, 507.

In *ANZ*, the Supreme Court refused to apply a judge-made tolling rule to a securities repose period, even for a plaintiff who had been part of a timely class action, because the statute's "in no event" language showed Congress intended complete repose and courts lacked authority to rewrite it. *Id.* at 505–07, 513; *see also United States v. Brockamp*, 519 U.S. 347, 350 (1997) (refusing to read implied exceptions into emphatically worded tax refund deadlines). The Court explained that a shorter discovery-based limitations period and a longer repose period work together: the first protects plaintiffs who have not learned of an injury, and the second protects defendants from indefinite liability. *ANZ*, 582 U.S. at 506. State courts enforce medical malpractice repose statutes like Shawnee's just as strictly. *See Cunningham*, 609 N.E.2d at 325 (explaining that the four-year repose period was enacted to end the prolonged exposure created by the discovery rule, and that even the narrower continuing negligent treatment rule ends once the negligent physician stops treating the patient); *Collins*, 679 N.E.2d at 425 (refusing to let later treatment revive a barred claim); *Marzolf v. Gilgore*, 914 F. Supp. 450, 452–54 (D. Kan. 1996) (barring claims for prescriptions more than four years before suit despite continued treatment, and warning that otherwise liability could last a lifetime). State courts also refuse to extend continuity to other

recurring professional relationships. *See Feltmeier*, 798 N.E.2d at 86 (explaining that *Cunningham* created no general continuing violation rule); *Carlson v. Michael Best & Friedrich LLP*, 186 N.E.3d 478, 489 (Ill. App. Ct. 2021) (attorneys); *Maniscalco v. Porte Brown, LLC*, 127 N.E.3d 786, 791–92 (Ill. App. Ct. 2018) (accountants).

Section 12-404 has the structure *ANZ* described: subsection (a) runs from discovery, and subsection (b) runs from the defendant's act and begins with “[i]n no event.” § 12-404(a)–(b); R0014. Subsection (b)’s exception shows that the legislature did not intend complete repose, but only for the circumstances it described, and courts may not enlarge it. *See ANZ Sec.*, 582 U.S. at 507, 513. The Court of Appeals’ reading does just that. Repose would never begin to run while a patient periodically returned for screening, leaving only the discovery rule of subsection (a) and rendering subsection (b) surplusage. That is the indefinite exposure *Cunningham*, *Collins*, and *Marzolf* rejected. *See also Deloitte & Touche*, 834 F. Supp. at 1149 (warning that if recurring annual services sufficed, no limitations period would ever run against any professional). No health system offering annual mammograms or cancer screenings could obtain the certainty § 12-404(b) promises while its patients kept returning, a burden that would fall hardest on providers serving places like Simmons County. R0003–04. As the trial court recognized, that result would defeat the purpose of repose, R0012, and whether that certainty should yield is a question for the legislature. *See Marzolf*, 914 F. Supp. at 453.

The Court of Appeals’ construction erases the line between limitations and repose, and its ruling should be rejected.

B. Miller’s products liability claim fails as a matter of law because this suit was commenced after the four-year window legislatively prescribed by Shawnee Revised Statute § 12-410.

When it pertains to claims of product liability, defendants enjoy a legal presumption that any harm caused after a certain time of the delivery of a product, signifies that the useful safe life has expired. *Arnold v. Riddel Inc.*, 882 F.Supp. 979, 987 (D. Kan. 1995). The useful safe life of a product usually begins at the time it was delivered to the first purchaser, and its expiration depends on the jurisdiction. K.S.A.1991 Supp. 60–3303(b)(1) (Kansas useful safe life of a product is ten years); I.C. § 6–1403 (Idaho’s useful safe life of a product is ten years); Ill.Rev.Stat.1989, ch. 110, par. 13–213(b) (Illinois useful safe life ranges between ten and twelve years which depends on who is the initial seller). Nevertheless, if a product is recertified and reconditioned to meet the standards of a new product, then the useful safe life will begin at the time the product was reconditioned, rather than delivered. *Arnold*, 882 F.Supp. at 987.

If a plaintiff seeks to rebut the presumption that the useful safe life has not expired, they may do so only with clear and convincing evidence. *Id*; *Baugh v. Eli Lilly and Co.*, 356 F.Supp.2d 1166, 1171 (D. Kan. 2005). Clear and convincing evidence requires a degree of proof greater than a mere preponderance but less than the criminal standard of beyond a reasonable doubt. *Pate v. Columbia Mach, Inc.*, 930 F.Supp. 451, 466 (D. Idaho 1996). This means that the plaintiff must demonstrate that the truth of the factual contentions is highly probable. *Rice Sys., Inc. v. United States*, 62 Fed. Cl. 608, 621 (2004).

Cyber-Care only needs to demonstrate that the harm Cyber MD caused was more than four years after the delivery date, and it will be presumed that the harm occurred after Cyber MD's useful safe life; therefore, Cyber-Care will be immune from liability. § 12-410(a); *Oats v. Nissan Motor Corp.* 879 P.2d 1095, 1098 (Idaho 1994). The burden then shifts to Miller to rebut with clear and convincing evidence the presumption that the product's useful safe life did not expire after the four years, using the exceptions set forth in § 12-410(b)(3). *Oats*, 879 P.2d at 1098. The

exception allows the useful safe life of the product to extend if the injury-causing aspect of the product was not discoverable by an ordinary reasonably prudent person until more than four years after the time of delivery. § 12-410(b)(3).

Miller has failed to rebut with clear and convincing evidence that the product's useful safe life has not expired because the statute is clear in that Miller's claim is barred by § 12-410(a). Furthermore, that Cyber MD was retrained, not reconditioned, and the defect of Cyber MD was so open and obvious that it was discoverable by a reasonable prudent person.

1. CCS delivered Cyber MD to MHS in 2017, and the statute of repose window expired in 2021, barring Miller's product liability claim.

- i. Section 12-410(a) bars Miller's claim because the claim was filed after the repose window.

Under § 12-410(a), a product liability claim must commence within four years from the date of first sale, lease, or delivery of possession to its initial purchaser. § 12-410(a). This means that any product liability claim filed after the four years will be completely barred.

On March 1, 2017, Cyber-care delivered Cyber MD to MHS. R0005. That same year, MHS integrated Cyber MD into its telehealth portal. *Id.* Miller's first use of the product was in April 2018. *Id.* Miller was then misdiagnosed later that year. R0006; R0013. Miller died in 2024. R0007. Miller's product liability claim was filed in July 2024. *Id.*

When a statute is clear and unambiguous, a court must give it effect as it is written. *Garza v. Navistar Int'l Transp. Corp.*, 666 N.E.2d 1198, 1200 (Ill. App. Div. 1996). Because the delivery of Cyber MD to MHS occurred in 2017, and Miller's injury occurred in 2024, the Circuit Court correctly determined that Miller's products liability claim is barred by § 12-410 since the repose window had run in 2021. R0012-13. § 12-402(b) is not an exception to § 12-410(a), but rather a requirement that Miller's death had to occur within the repose period to benefit from an extension.

- ii. Section 12-402(b) is not an exception to § 12-410(a), but rather a requirement that Miller's death had to occur within the repose period to benefit from an extension.

Product liability claims must be brought or maintained within the period provided by the applicable statutes of limitation or statutes of repose. *Thomas v. Unique Food Equip., Inc.*, 537 N.E.2d 1375, 1377 (Ill. App. Div. 1989). When reading the language of a statute, courts must not read exceptions, limitations, or conditions that the legislature did not express. *Garza*, 666 N.E.2d at 1200.

In *Garza*, Garza sued the defendant after he suffered injuries in a construction accident. *Id.* at 1199. The defendant first made the sale of a Dresser Payloader in 1977. *Id.* Garza was injured in 1989 and filed his action eight days after the accident. *Id.* The Supreme Court of Illinois ruled that for Garza to benefit from an extension to the statute of repose, his injuries must have occurred within the repose period, not after. *Id.* at 1200-02. Similarly, in *Taylor v. Raymond*, the plaintiff's injuries occurred after the repose period, and the court also dismissed the plaintiff's claims because the repose period had expired. *Taylor v. Raymond*, 719 F.Supp. 738, 741 (N.D. Ill. 1989), *aff'd*, *Taylor v. Raymond*, 909 F.2d 225 (7th Cir.1990). Also, in *Gardner v. Navistar International Transportation Corp.*, the appellate court of Illinois, affirmed the dismissal of the products' liability claim because the injuries of the plaintiff occurred after the repose period. 571 N.E.2d 1107, 1114 (Ill. App. Div. 1991).

Illinois has a similar statute to § 12-402(b) and § 12-410(a), except that Illinois extends its statute of repose to ten years, rather than four years. Ill.Rev.Stat.1989, ch. 110, par. 13–213(b). Section 12-410(a) states that a product liability action must be filed, not only within the statute of limitations, but also within four years from the date of first sale, lease, or delivery of possession to its initial user. § 12-410(a). The applicable limitation here is wrongful death, which shall be

commenced within two years. § 12-402(b). Miller passed away in July 2024, three years after the repose period expired. R0007; § 12-410(a). Similar to *Garza*, *Taylor*, and *Gardner*, Miller's injuries occurred after the repose period, not during, therefore Miller's claim of product liability is barred under § 12-410(a).

The Court of Appeals is mistaken with its application and interpretation of § 12-402(b) and § 12-410(a). The Court of Appeals states that because Miller passed away in 2024, and filed this suit in July 2024, the claims are fully timely under § 12-402. R0027. However, cases like *Garza*, *Taylor*, and *Gardner*, require us to read that because the death of Miller occurred three years after the repose period, he cannot take advantage of the extensions provided in § 12-402(b).

If this Court does not interpret § 12-410(a) to mean that the wrongful death must occur within the repose period, then the expiration clause of § 12-410(a) would be meaningless. See *Garza*, 172 Ill.2d at 386. Essentially, injured individuals will be permitted to bring claims even after the repose period, which contradict the nature of repose statutes. Time after time, courts have been clear in stating that a court must give statutes its effect as it is written.

In summary, § 12-402 is an extension to the repose period only if the injury occurred within four years from the date of first sale, lease, or delivery. Because the delivery of Cyber MD occurred in 2017, the repose window ran in 2021 for Miller, and Miller died three years after, this court should reverse the appellate court's decision because this suit is time barred.

2. Cyber MD's subsequent retraining in 2023 did not extend its useful safe life because Cyber MD was not recertified.

When a product is reconditioned and recertified to meet the standards of a new product, the useful safe life begins to run at the time of reconditioning, rather than the time of delivery. *Arnold*, 882 F.Supp. at 987. However, when a product has repairs made, the useful safe life does not extend. *Baumann v. Excel Industries, Inc.* 17 Kan.App.2d 807, 817 (App. Div. 1993).

In *Baumann*, the appellate court of Kansas ruled that making repairs to a lawn mower does not reset the clock for the entire product. *Id.* Here, Cyber MD, similar to the lawn mower, was merely repaired to restore high accuracy. R0006. This does not mean that every time repairs are made the useful safe life of a product should extend past the 10 years set in the state in the statute of repose, as that would prolong the total productive life of the product, and completely oppose the statute of repose. *Baumann*, 17 Kan.App.2d at 817.

This matter is distinguishable from *Arnold v. Riddell Inc.*, where the District Court of Kansas held that a helmet's useful safe life had not expired because the defective helmet was reconditioned with new pads and recertified to meet the requirements of a new product. 882 F.Supp. at 987. This is because helmets are designed to be reconditioned periodically, to meet the standards of new athletic equipment. *Id.* The helmet was recertified, and to a certain degree reintegrated, to meet the standards of a new helmet. *Id.* In the present matter, Cyber MD was not recertified nor reintegrated to MHS, rather, there was a proper servicing and repair done which does not reset the clock for the entire useful safe life of the product. R0007; *Baumann*, 17 Kan.App.2d at 817.

Ultimately, because Cyber MD was retrained and not reconditioned to meet the standards of a new product, under § 12-410(a) the useful safe of life of Cyber MD ended in 2021.

3. Miller has failed to demonstrate with clear and convincing evidence that the circumstances of this matter fall under the exceptions of § 12-410(b)(3).

Miller and the Court of Appeals only maintain that the four-year statute of repose does not apply under § 12-410(b)(3) because the injury-causing aspect of Cyber MD was not discoverable by an ordinary reasonably prudent person.

To determine whether a defect of a product was discoverable by a reasonably prudent person, the respondent must demonstrate that, under the circumstances of the case, a careful person, without placing himself or herself in danger, would not have been able to comprehend the danger and determine how to avoid the danger. *Arnold*, 882 F.Supp. at 988; *Oats*, 126 Idaho at 165. In other words, courts must determine whether the danger was hidden in a way that was not discoverable by an ordinary reasonably prudent person. *Id.* at 165. To be discoverable by an ordinary reasonably prudent person, the danger must be open and obvious. *Id.*

In *Baumann*, Baumann attempted to prime the fuel pump of a lawn mower while it was running. 17 Kan.App.2d at 810. Baumann suffered serious injuries and sued the manufacturing company of the lawn mower. *Id.* The Court of Appeals ruled that under the circumstances of the case, the danger of the lawn mower was so open and obvious a reasonable person would have identified it. *Id.* at 819. The court further stated that a reasonable person would have read the manual of a land mower and realized that attempting to use the manual valve when the mower's engine was running could result in injury. *Id.* Also, in *Kerns v. G.A.C., Inc.*, the plaintiff sued the manufacturer of a large-size mesh fence enclosing a swimming pool. 255 Kan. 264, 267 (1994). The plaintiff complained that the fence assisted his child to climb and jump over the fence, and as a result the child suffered serious injuries. *Id.* The Supreme Court of Kansas ruled that the danger and hazard of a large fence was so open and obvious that a reasonable user of the product would have realized the defect at the time it was installed. *Id.* at 273. Furthermore, the District Court of Kansas, similar to § 12-410, clarified in *Noll v. Bridgestone Americas Tire Operation, Inc.*, that the state of Kansas does not impose a duty to warn of obvious and generally known risks connected to the use of the product. No. 09-4092-KGS, 2011 WL 4526775, at *5 (D. Kan. Sept. 28, 2011).

This matter is similar to *Baumann* and *Kerns*. Every time an individual begins a chat session with Cyber MD, they must navigate a pop-up box stating in red, 16-point font that "Cyber MD is not a licensed health care professional. It is an artificial intelligence software program." R0005. Then a user must click "accept" to proceed. *Id.* A careful person would have read the pop-up box and realized that the danger of a misdiagnosis was open and obvious. This is because a reasonable person in Miller's position could've read the pop-up box and realized that Cyber MD is not a healthcare professional, but rather an AI program. Furthermore, Miller had a chance to read the pop-box three times (2019, 2020, and 2021). R0006. Additionally, after Miller uploaded his scan to Cyber MD, Cyber MD referred him to a local practitioner. *Id.* There are three primary care practices¹ in Shawnee County. A reasonably prudent person would've taken the scans to a local practitioner where they could have analyzed the scan and revealed the 6.4 cm malignant mass in Miller's left lung. The defect of Cyber-MD was open and obvious.

The rulings in *Baumann* and *Kerns* demonstrate that plaintiffs have a responsibility to exercise caution and awareness when using certain products. Here, the danger of Cyber MD was so open and obvious that a careful person in Miller's circumstances, without placing himself in danger, would have been able to comprehend the danger of Cyber MD and determine how to avoid the danger by actually reading the pop-up box, and seeking a primary care doctor in Shawnee.

Tolling is of great value to injured individuals who, through no fault of their own, did not discover the injury until the limitations period expired. *ANZ Sec., Inc.*, 582 U.S. at 515. Miller is not that individual. Cyber MD's danger, under the circumstances of the case, was so open and obvious that it was discoverable by an ordinary reasonably prudent person like Miller.

¹ Primary care practices serve as a main point of contact for routine health needs, preventive care, and the management of common or chronic medical conditions. *Primary Care Provider*, Cleveland Clinic (Apr. 24, 2025). <https://my.clevelandclinic.org/health/articles/23467-primary-care-physician>.

CONCLUSION

MHS is entitled to summary judgment as a matter of law because Miller has failed to raise a triable issue of fact regarding the lack of a principal-agent relationship between MHS and Cyber MD. Further, Miller's claim for procedural unconscionability is not supported by the totality of the circumstances. Additionally, Miller's use of Cyber MD did not constitute a continuous course of treatment because four isolated sessions, a year apart, where Cyber MD merely read scans does not constitute a "continuous course of treatment." Finally, § 12-410 is clear and unambiguous; Miller's suit is barred by the statute of repose, and he does not meet the exception set forth in the statute because the defect of Cyber-MD was discoverable by a reasonable prudent person.

In light of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals and affirm the Circuit Court's opinion.