
No. 26-338

In The
Shawnee Supreme Court
November Term, 2026

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

Petitioners

v.

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

Respondent

On Petition for Leave to Appeal from the
Shawnee Court of Appeals
for the Second District

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

- 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.
- 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 Shawnee Revised Statute § 12-404; or
 - (b) The latent, un-discoverable nature of the algorithmic flaw and subsequent retraining under the exceptions in Shawnee Revised Statute § 12-410.

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OPINIONS BELOW

The Circuit Court of Simmons County opinion and order GRANTING Defendants' motion for summary judgment is contained in the Record at pages 1–12. The Shawnee Court of Appeals for the Second District's opinion reversing and remanding the lower court is contained in the Record at pages 14–26.

STATUTORY PROVISIONS

The following statutory provisions are relevant to this case: Shawnee Rev. Stat. §§ 12-402(a)–(c), 12-404(a)–(b), 12-410(a)–(b). These provisions are reproduced in Appendix A.

STATEMENT OF THE CASE

Factual Background

Mr. Miller's home. Cartersville is located in Simmons County, a rural county with approximately 7,500 residents. (R. at 4). The county has no remaining local hospitals, urgent care facilities, or permanent diagnostic imaging centers, and only three primary care practices. *Id.* After severe population decline and economic contractions spanning decades, both of the county's hospitals closed in 2015 following bankruptcy. *Id.*

Healthcare shortages in rural America. Across the United States, rural hospitals are closing faster than they are opening. Eden Volkov, Kaushik Ghosh, Steven Sheingold, and Ge Bai, *Determinants of Rural Hospital Closures or Conversions in the United States*, Assistant Secretary for Planning and Evaluation, HHS (June 15, 2026), <https://aspe.hhs.gov/reports/rural-hospitals-report>. 8% of rural hospitals have either closed or reduced their services since 2010, affecting care for millions of Americans. *Id.* Over the past twenty years, Simmons County has lost over 75% of its healthcare professionals. (R. at 4). State and federal authorities have designated Simmons County as a Health Professional Shortage Area and a Medically Underserved Area. *See What is a shortage Designation?*, HEALTH RESOURCES & SERVICE ADMINISTRATION, <https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation#hpsas> (last visited Sep. 1, 2026); (<https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation#mups>).

CyberMD. In 2012, Metropolitan Health System, Inc. ("MHS") contracted with a digital health infrastructure provider, Cyber-Care Solutions, LLC ("CCS"), to

design and host a proprietary remote telehealth platform. (R. at 4). In 2017, MHS integrated into that platform an artificial intelligence (“AI”) diagnostic tool developed by CCS called “Cyber MD.” (R. at 5). The platform’s patient-facing interface was controlled by MHS, while CCS designed and hosted the platform. (R. at 4). Through Cyber MD, patients could input symptoms, answer follow-up questions, and compile clinical history; Cyber MD then generated differential diagnoses and ordered and interpreted diagnostic tests. (R. at 5).

In 2017, CCS received FDA clearance for Cyber MD. (R. at 5). That same year, MHS integrated the new AI software tool into its telehealth portal, allowing patients who faced physical barriers to access medical care. *Id.* When Cyber MD debuted, it achieved a 97% overall accuracy rate in classifying lung lesions, having trained on a dataset of forty thousand images from three hospital systems. *Id.*

The online agreement. To access the platform, patients log in through MHS’s website. (R. At 4). The login page states: “By entering the portal, I accept the MHS Terms and Conditions.” *Id.* The “Terms and Conditions” are hyperlinked in blue, underlined typeface. *Id.*

Clicking the hyperlink opens a standalone webpage displaying 34 lines of contractual language in a single-spaced, unformatted, standard font. *Id.* Approximately three-quarters down the page reads the following provision:

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

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

Id. at 5. According to digital audit logs, Mr. Miller accessed this webpage before using CyberMD for the first time. *Id.* He remained on the page for four seconds before exiting and continuing through to the MHS portal. He never accessed the hyperlink again during later sessions. *Id.*

Mr. Miller's treatment history. A year after Cyber MD received FDA clearance, in April 2018, Mr. Miller, experiencing shortness of breath, initiated a virtual intake session directly with the AI platform. (R. at 5–6). Mr. Miller detailed his 35-year occupational history with asbestos, Cyber MD ordered a chest X-ray and CT scan through a mobile radiology service visiting Cartersville. *Id.* Two weeks later, Cyber MD reviewed Mr. Miller's scans and diagnosed him with adult-onset asthma. *Id.* The AI reported "zero evidence" of malignancy, referred him to a local practitioner for inhaler management, and recommended annual follow-up imaging. *Id.* Mr. Miller conducted annual virtual follow-up evaluations with Cyber MD in 2019, 2020, and 2021 with no concerning diagnoses. *Id.* After his last report in 2021, Cyber MD advised him that annual imaging was no longer necessary. *Id.*

Mr. Miller's medical emergency. In October 2023, Mr. Miller suffered a spontaneous pneumothorax, a sudden lung collapse without outside injury or trauma. (R. at 6). He was airlifted to MHS's flagship hospital in Goshen, a 190-mile, 3.5-hour drive from Cartersville. (R. at 4, 6). A 6.4 centimeter mass was discovered on his left lung; retrospective expert review determined that it was first visible in 2018 as a

seven-millimeter lesion when Mr. Miller first used Cyber MD. R. at 5. He died on April 14, 2024. (R. at 6).

CyberMD’s update. In 2022, CCS discovered that Cyber MD’s diagnostic accuracy dropped to 85% when evaluating images of patients with prior occupational asbestos exposure. (R. at 5). This was due to pleural shadowing—a mark or cloudy area on a chest scan that can mask underlying tumors. (R. at 5). After discovering the error, CCS promptly began retraining Cyber MD using 10,000 asbestos-exposed image sets, restoring the accuracy rate, and releasing the update in 2023, two years after Mr. Miller last utilized the AI platform. *Id.*

Procedural History

The Simmons County Circuit Court granted MHS and CCS summary judgment pursuant to Rule 56 of the Shawnee Rules of Civil Procedure. (R. at 1–12). The Shawnee Court of Appeals for the Second District reversed, holding that there were genuine issues of material fact for resolution by a jury. (R. at 13–25). This Court granted Petitioners’ petition for leave to appeal under Shawnee Supreme Court Rule 315, limited to the two questions presented. (R. at 26).

SUMMARY OF THE ARGUMENT

Mr. Miller constructively knew that no agency relationship existed between CyberMD and Metropolitan Health Center, and therefore MHS is not vicariously liable under the doctrine of apparent agency. Every time Mr. Miller utilized CyberMD for an online consult, he was presented with hyperlinked “Terms and Conditions” that clarified CyberMD was not an agent of MHS. Every time he accessed CyberMD, he entered the MHS portal, manifesting assent to those terms.

When considering whether online agreements are enforceable, federal courts look to whether reasonably prudent users are under reasonable notice of the terms and conditions they assent to in online agreements. When terms and conditions are hyperlinked, the hyperlinked text must be distinguishable from the rest of the website's interface so a reasonable person could review binding contractual language before agreeing to the online proposal.

In this case, MHS presented several disclaimers clarifying that CyberMD was not an agent, that MHS exercised no control over CyberMD, and that CyberMD was an independent contractor. These provisions were included in a hyperlinked "Terms and Conditions" section of the MHS online portal login page. The hyperlinked text stood out from the rest of the page such that a reasonable person would understand the legal significance of the weblink and follow it to review potentially binding language. Accordingly, MHS provided reasonably conspicuous notice that CyberMD was not an agent of MHS in an online agreement that is enforceable.

Furthermore, this online agreement is not procedurally unconscionable. Procedural unconscionability occurs during the contract formation process where one party has such significant bargaining power that the other lacks a meaningful choice to enter into the contract. When reviewing whether a contract is procedurally unconscionable, federal courts consider several factors of the weaker party under a totality of the circumstances approach, examining age, education, intelligence, business acumen, experience, and more. However, unconscionability is a high bar,

and the party alleging unfairness has the burden to establish that the compulsion to enter into the contract is akin to coercion or fraud.

In this case, there is no evidence to suggest that Mr. Miller was in such a weaker bargaining position when compared with MHS that the online agreement was procedurally unconscionable. The appellate court highlighted his age and remote living circumstances, failing to take a comprehensive approach when reviewing his capacity to assent. But Mr. Miller was neither mentally nor physically infirm when utilizing CyberMD. Age, without more, does not render a contract unenforceable under procedural unconscionability.

The statute of repose bars the Respondent's claims, and to hold otherwise would extinguish the legislatively enacted policy and judicially hijack statutory control. First, the legislature made a deliberate policy choice that an action against a healthcare provider arising out of patient care may “in no event” be brought more than four years after the act or omission alleged to have caused the injury. A statute of repose reflects the legislature’s judgement that, after a fixed period of time, defendants should no longer face liability. Therefore, this Court should not extend liability beyond the exception drafted by the legislature. Section 12-404(b) contains one narrow exception for “continuous treatment of the patient for the same illness, injury, or condition.” The only question is the scope of that exception as it applies in this case, and the text’s plain language answers it.

Section 12-404(b)’s language closely tracks New York’s malpractice statute, and New York’s high court has long held that routine examinations and failed

diagnoses are not continuous treatment. Reading “treatment” to include annual screenings would empty the meaning of the “in no event” provision and expose healthcare providers to liability that the legislature purposefully limited.

Second, the hidden defect exception set forth in § 12-410(b)(3) does not apply, because Cyber MD properly warned Mr. Miller of its defect through its disclaimer. Through an objective lens, a reasonably prudent person in Mr. Miller’s shoes would have acknowledged the disclaimer that Cyber MD is merely artificial intelligence and not a licensed healthcare professional. Even if this Court found the hidden defect exception to apply, and the defect was not immediately discoverable the Respondent cannot maintain an independent action under the statute of limitations. Mr. Miller did not exercise the reasonable diligence required by law in investigating his ongoing symptoms while relying on Cyber MD’s prognosis. Thus, this Court should hold that the statute of repose bars Respondents’ claims. To hold otherwise would expand legislative intent and create a hazard of holding AI to the same standard as a licensed physician.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, applying the same standard as the courts below. (R. at 18). Summary judgment is appropriate only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Sn. R. Civ. P. 56; *Vance v. Oakridge Health Sys., Inc.*, 142 Sn.2d 88, 94 (2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

ARGUMENT

I. MHS is not vicariously liable when Mr. Miller was constructively notified that CyberMD operated without actual authority.

Under the doctrine of apparent authority, a principal can be vicariously liable for the tortious conduct of its agents. Restatement (Third) Of Agency, § 7.08 (A.L.I. 2006). Apparent authority is established when a third party reasonably believes the agent acts on the principal's behalf due to the principal's manifestations. *Id.* However, if the third party knows or should know that the tortfeasor agent lacks authority, then there is no apparent authority and no vicarious liability. *Id.*

Generally, a hospital can only be held liable under apparent authority if, among other things, the party committing the tort is perceived as an employee or agent of the hospital. *Gilbert v. Sycamore Mun. Hosp.*, 156 2s. 511, 525 (1993) (citing *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188 (1988)). The Simmons County Circuit Court and Shawnee Second District Court of Appeals narrowed their scope of analysis to this requirement, commonly called the “holding out” element, though other components must ordinarily be proven to establish apparent authority. A liable hospital “holds itself out” as a provider of care if, under the totality of the circumstances, it fails to adequately inform the patient that the care is provided by independent parties. *Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019). Courts consider the provider's actions or inactions and the patient's knowledge of the provider's arrangements. (*Webster v. CDI Ind., LLC*, 917 F.3d 574, 575 (7th Cir. 2019)).

In this case, the Plaintiff, Evelyn Miller, on behalf of herself and the estate of Elias Miller, seeks to hold MHS liable for the diagnostic errors of Cyber MD, a product of CCS. (R. at 6). But Mr. Miller was notified with clear, conspicuous, and fair terms that Cyber MD operated as an independent entity with no actual authority from MHS – numerous times. (R. at 5). Under the totality of the circumstances, Mr. Miller was constructively aware that Cyber MD was not an agent of MHS, and the hospital is not vicariously liable CyberMD’s conduct.

A. The holding out element fails as a matter of law when Mr. Miller assented to a contract waiving MHS of liability and classifying CyberMD as an independent entity.

When determining whether online agreements are enforceable, federal courts routinely apply elemental principles of contract formation. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853 (9th Cir. 2022). “[A] transaction, in order to be a contract, requires a manifestation of agreement between the parties.” *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 28 (2nd. Cir. 2002) (citing *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987 (Cal. Ct. App. 1972)). But a party is not bound by unknown and inconspicuous provisions contained in documents that are not reasonably identified as contractual terms. *Windsor Mills*, 25 Cal. App. 3d at 993. Therefore, enforceable online agreements must (1) provide reasonably conspicuous notice of binding terms and conditions, and (2) users must manifest assent. *Compare Berman*, 30 F.4th at 856 (requiring courts to find that the user unambiguously manifests assent), *with Kauders v. Uber Technologies, Inc.*, 159 N.E.3d 1033, 1049 (Mass. 2021) (requiring only a reasonable manifestation of assent).

“Clickwrap agreements” are the strongest applications of conspicuous notice and mutual assent, requiring users to affirmatively click some variation of an “I agree” checkbox that acknowledges specific terms presented on the website. *Berman*, 30 F.4th at 856; (R. at 22). These are routinely enforced by courts. *Berman*, 30 F.4th at 856. At the other end of the spectrum are “browsewrap agreements,” where terms and conditions are typically hyperlinked at the bottom of a webpage, and users impliedly assent by simply continuing use of the site. *Id.*; *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178 (9th Cir. 2014); (R. at 23). Courts are generally reluctant to enforce such agreements. *Oberstein v. Live Nation Entm’t, Inc.*, 60 F.4th 505, 513 (9th Cir. 2023). When an online agreement falls between these two extremes, “courts analyze mutual assent under an objective-reasonableness standard.” *Id.* (citing *Berman*, 30 F.4th at 856–58). Only a “fact-intensive inquiry” can determine whether “a non-clickwrap agreement [meets] an objective standard of mutual assent,” creating an enforceable contract. *Id.*

The Shawnee Court of Appeals for the Second District concluded that MHS’s interface was a “sign-in wrap agreement” – a middle category between clickwrap and browsewrap agreements. (R. at 13); *See Oberstein*, 60 F.4th at 513. The Court relied on *Cullinane v. Uber Techs., Inc.* and *Berman v. Freedom Fin. Network, LLC*, holding that the reasonably conspicuous notice of MHS’s contract terms presented a triable question of fact. 893 F.3d 53 (1st Cir. 2018); 30 F.4th 849 (9th Cir. 2022); (R. at 23). In both *Cullinae* and *Berman*, the courts applied objective standards when determining whether sign-in wrap agreements provided sufficient notice of binding

terms and conditions. *See generally* 893 F.3d 53; *see generally* 30 F.4th 849. In *Cullinae*, the First Circuit Court of Appeals observed that “clarity and conspicuousness [of contract terms] are a function of design and content of the relevant interface.” 893 F.3d at 62. There, the Court refused to enforce the defendant’s sign-in wrap agreement because the hyperlink containing the terms and conditions was not noticeable by a reasonable person. *Id.* Hyperlinks are “commonly blue and underlined,” as opposed to the defendant’s hyperlink which matched the font, color scheme, and size of the surrounding text. *Id.* at 62-63. As a result of the uniform interface, the “hyperlink’s capability to grab the user’s attention” was diminished, undermining the conspicuousness of binding contractual language. *Id.* at 64.

Other jurisdictions apply similar methods of review. In *Berman*, the Ninth Circuit concluded that reasonably conspicuous “notice must be displayed in a font size and format such that... a reasonably prudent internet user would have seen it.” 30 F.4th at 856. There, the defendant displayed hyperlinked terms and conditions in a similar color--yet considerably smaller font size--compared to the surrounding text. *Id.* at 854. In holding that the hyperlinked terms and conditions were not noticeably displayed, the Court reasoned that web designers must ensure that hyperlinked text is “sufficiently ‘set apart’ from the surrounding text.” *Id.* at 857 (citing *Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1, 29 (Cal. Ct. App. 2021)). Furthermore, the interface must explicitly notify a user of what legally significant action she “must take to enter into a contractual agreement.” *Id.* Because the defendant buried the

terms and conditions hyperlink in a uniform interface and failed to clarify what action users should take to assent, the sign-in wrap agreement was unenforceable. *Id.*

In this case, Mr. Miller was presented with a sign-in wrap agreement before entering the CyberMD platform. (R. at 4). The agreement disclaimed that users accept the terms and conditions “by entering the portal...” (R. At 4). “Terms and Conditions” was hyperlinked in blue, underlined text, distinct from the rest of the sign-in wrap agreement. *See* (R. at 4). Under *Cullinane*, the hyperlinked terms and conditions were presented in a “customary manner” that a reasonable user would have interpreted as leading to binding language. 893 F.3d at 63. Moreover, the agreement included specific, noticeable, legally significant terms instructing users on how to manifest assent. *Berman*, 30 F.4th at 858. According to digital audit logs, Mr. Miller clicked on this hyperlink the first time he utilized CyberMD, accessing the terms and conditions before continuing on to use the MHS portal. (R. at 4).

The Shawnee Court of Appeals scrutinized this interface, questioning the validity of an online agreement that “coupled [Mr. Miller’s] access to essential healthcare with passive assent to a separate legal document.” (R. at 23). The Court proceeded to review the text of the terms and conditions, observing the “single-spaced, unformatted black text in a font size noticeably smaller than the rest of the website.” *Id.* However, the Court of Appeals overbroadly applied *Cullinane* and *Berman*. By focusing on the contractual text of the terms and conditions and whether “an elderly user” understood it, the Court improperly minimized the significance of the hyperlink’s conspicuousness in the notice inquiry analysis used by the First and

Ninth Circuit Courts. *Id.* Furthermore, by examining the type of agreement MHS provided rather than the notice it provided, the Court of Appeals failed to appropriately consider components that are “essential if electronic bargaining is to have integrity and credibility.” *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 35 (2nd. Cir. 2002).

Conversely, the Shawnee Circuit Court focused on the numerous disclamers Mr. Miller encountered when navigating MHS’s online portal, confirming that CyberMD was functionally an independent contractor developed by another company. (R. at 9). Unlike the Court of Appeals, the trial court simply considered whether the online agreement presented by MHS conferred “legally sufficient notice as a matter of law,” focusing on the conspicuousness of the hyperlinked terms and conditions as well as the separate, 16-point font disclaimer in red stating that CyberMD was not a licensed health care professional. *Id.* The trial court’s approach is the better approach to obtain integrity and credibility in online bargaining, and the Court of Appeals should be reversed.

B. The agreement was not procedurally unconscionable.

Procedural unconscionability scrutinizes defects in the bargaining and contract formation process. (Restatement of contract law, Consumer Contracts, Section 6, comment 6(a)). The doctrine applies when one party has such superior bargaining power that the other lacks an effective, “meaningful choice” to enter into the contract. *Hines v. Nat’l Ent. Grp.*, LLC, 140 F.4th 322, 328 (6th. Cir. 2025) (citing *Thomas v. Hyundai*, 154 N.E.3d 701, 709 (Ohio Ct. App. 2020)). Courts consider “age, education, intelligence, business acumen, and experience in similar transactions” of

the weaker party, as well as whether the contract terms were conspicuous and comprehensible when reviewing a contract for fairness. *Id.*; *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th. Cir. 2023) (citing *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996)). If, under the totality of the circumstances, there were no gross disparities in the bargaining process, then the contract is likely not procedurally unconscionable. See *Payne*, 81 F.4th at 1194; (R. At 23).

Unconscionability is “hard to satisfy . . .” *Payne*, 81 F.4th at 1194. In cases where courts are asked to review the enforceability of arbitration provisions, unconscionability requires the moving party “to prove ‘that it was essentially defrauded in entering the agreement.’” *Id.* at 1198 (citing *Innovative Images, LLC v. Summerville*, 309 Ga. 675, 684 (Ga. 2020)) (emphasis added). In *Hines v. Nat’l Ent. Grp., LLC*, the Sixth Circuit Court of Appeals considered whether an arbitration provision was unconscionable when the plaintiff lacked sufficient business experience to meaningfully review the contract. 140 F.4th 322, 328 (2025). In approving the provision, the Court noted that procedural unconscionability arguments are commonly rejected from signees who consent to contracts without reading them. *Id.* Moreover, inequality of bargaining power is insufficient; the party alleging procedural unconscionability must show that the contract agreement was effectively coerced due to a severe imbalance in bargaining power. *Id.* at 330 (citing *Vanyo v. Clear Channel Worldwide*, 808 N.E.2d 482, 487 (Ohio Ct. App. 2004) (emphasis added)). The Eleventh Circuit Court of Appeals similarly upheld an arbitration provision in *Payne*, holding that “[t]he law does not favor destruction of contracts on

grounds of uncertainty,” especially when the parties can cure confusion by asking questions and seeking help from third parties. 81 F.4th at 1198 (citing *Kitchen v. Insuramerica Corp.*, 675 S.E.2d 598, 601 (Ga. Ct. App. 2009)).

The record does not establish that Mr. Miller was effectively coerced or defrauded into accepting MHS’s agreement. The hyperlinked terms and conditions stated that “physicians and software are not employees or agents of Metropolitan Health System,” after roughly 25 lines of text on a distinct webpage. (R. at 5). The terms stipulated that automated software applications are performed by independent parties, and MHS does not control the judgement or methods used by those applications in plain language. (R. at 5). MHS did not hide the meaning of this provision with “abstruse legal terms” that would diminish Mr. Miller’s understanding. *Hines*, 140 F.4th at 329. Crucially, Mr. Miller never made any attempts to contact MHS and ask for clarification regarding these terms or seek assistance from a third party. See (R. at 4-5). Under *Hines*, if he inquired with MHS about the contract terms but was denied assistance, his bargaining power may be so weakened that the agreement becomes procedurally unconscionable. See 140 F.4th at 329. But Mr. Miller spent only four seconds on the terms and conditions webpage in this case. (R. at 5). He likely did not read the provisions clarifying MHS’s relationship with CyberMD. Failure to read a contract’s terms does not make them unenforceable. *Hines*, F.4th at 330. Under the totality of the circumstances, considering his age, intelligence, business acumen, and experience, Mr. Miller’s assent was not marred by

gross disparities in the bargaining process. Under *Hines* and *Payne*, his agreement with MHS was not procedural unconscionability.

The Shawnee Court of Appeals relied on *Hines* and *Payne* when reviewing whether the pre-session notices were enforceable, ultimately concluding that Mr. Miller's age and living circumstances raised significant unconscionability questions. (R. at 24). Courts commonly find procedural unconscionability when the weaker contracting party is an elderly individual who lacks the requisite mental capacity to enter into a contract. See *Martin v. Manorcare Health Servs., LLC*, 246 N.E.3d 598 (Ohio Ct. App. 2024); *Wascovich v. Personacare of Ohio, Inc.*, 943 N.E.2d 1030 (Ohio Ct. App. 2010). However, "age, in and of itself, is not a sufficient basis for finding the agreement procedurally unreasonable." *Hayes v. Oakridge Home*, 908 N.E.2d 408, 413 (Ohio 2009). More importantly, "this case does not involve an individual who lacked the [mental] capacity to contract..." *Hines*, 140 F.4th at 331.

The Court of Appeals failed to consider Mr. Miller's education, intelligence, and experience when determining whether he could reasonably protect his interests. See *Oakridge Home*, 908 N.E.2d at 413 (reversing the lower court for basing its decision on facts *not* in the record). The Court concluded that Mr. Miller faced "severe structural barriers to care" when reaching its decision, but it provided minimal discussion of the oppressiveness of the terms, the contract language, and whether he made a meaningful choice considering his age, or other relevant factors. *Payne*, 81 F.4th at 1194; *Hines*, 140 F.4th at 328. In its misapplication of *Payne* and *Hines*, the

Court improperly placed dispositive weight on one factor above all others rather than evaluating the totality of the circumstances. (R. at 24).

Conversely, the trial court reached its decision after a thorough review of Mr. Miller's circumstances. The Simmons County Circuit court acknowledged the "grim realities of rural healthcare access," as well as Mr. Miller's bargaining power and business acumen. (R. at 10). Furthermore, the trial court scrutinized whether the agreement and pre-session notices were oppressive and one-sided, ultimately concluding that there was no evidence showing a lack of understanding or coercion. The trial court applied the more faithful interpretation of *Payne* and *Hines*, granting MHS's motion for summary judgement after finding no issues of material fact under the guidelines established by those cases. Accordingly, the Shawnee Court of Appeals should be reversed.

II. The Respondent's claims are barred by Shawnee's statutes of repose because the legislature drafted the statutes to bar claims after a period of time and only to be allowed when they conform to explicit statutory exceptions.

Statutes of repose, like statutes of limitations, afford balance to parties in litigation. Both are mechanisms that "limit the temporal extent or duration of liability [of a defendant] for tortious acts." *CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014). A statute of limitations' clock begins to run as soon as the injury that is the basis for the lawsuit has occurred or been discovered. *Id.* at 8 (citing Black's Law Dictionary 1546 (9th ed. 2009)). On the other hand, a statute of repose's clock begins to run on the "date of the last culpable act or omission of the defendant." *Id.* Statutes of repose do not require that an injury occurs or that a plaintiff discovers it. *Gidor v.*

Mangus, 345 A.3d 629, 640 (Pa. 2025). Both statutes serve the justice system by encouraging plaintiffs to bring causes of action diligently, but statutes of repose impose a cutoff, protecting the defendant. *Waldburger*, 573 U.S. at 8–9.

Statutes of limitations can be tolled, affording protection to plaintiffs who cannot bring a timely lawsuit due to extraordinary circumstances. *Waldburger*, 523 U.S. at 10. Statutes of repose, however, generally cannot be tolled. This is because statutes of repose are a policy selected by a legislature to shorten the length of time a defendant could be held liable. *Id.* at 9. Nevertheless, a state legislature can create statutory exceptions that demonstrate an intent for limitations on complete repose. *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017).

Here, Shawnee’s legislature expressly created exceptions to its repose statutes. *See* Sn. Rev. Stat. § 12-404(b); § 12-410(b)(3). For medical malpractice actions, the four-year repose clock will not bar an action if the 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. § 12-404(b). For product liability actions, the four-year product liability repose bar does not apply if the injury-causing aspect of the product existing at the time of delivery was not discoverable by an ordinary, reasonably prudent person until more than four years after delivery, or if harm was caused by prolonged exposure. Sn. Rev. Stat. § 12-410(b)(3).

A. Canons of statutory construction prohibit the judicial expansion of express exceptions to statutes of repose.

Since the legislature included exceptions within the statutes of repose, the question before this Court is the scope of the exceptions. This Court must begin its

analysis with the plain text of the statutes. Because statutes of repose are strict legislative limits on liability, exceptions to a statutory repose bar must be applied strictly according to their explicit textual terms. *See Waldburger*, 573 U.S. at 9 (statutes of repose “effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time’”); *ANZ Sec., Inc.*, 582 U.S. at 507–08. When a statutory framework sets forth a general rule of repose alongside enumerated exceptions, court-created or expanded exceptions to the repose bar are only permissible if the claim fits within the narrow terms of the express statutory exception. *See Comm’r v. Clark*, 489 U.S. 726, 739 (1989) (when “a general statement of policy is qualified by an exception [courts] usually read the exception narrowly in order to preserve the primary operation of the provision”).

Crucially, courts cannot rely on broad, unwritten “remedial purpose” canons to judicially expand statutory exceptions beyond their plain language. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (courts “must presume that a legislature says in a statute what it means and means in a statute what it says there”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102–103 (1897); *Oneale v. Thornton*, 10 U.S. 53, 68 (1810). As the Supreme Court emphasized in *Waldburger*, treating abstract remedial intent as a substitute for statutory text is an error, because “no legislation pursues its purposes at all costs.” 573 U.S. at 12 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–526 (1987) (per curiam)).

For example, in *Koch v. Shell Oil Co.*, the Tenth Circuit specifically rejected the argument that statutory exceptions to repose should be broadly construed under a generalized remedial intent, holding that courts have no authority to rewrite clear statutory definitions or create exceptions where the legislature declined to do so. 52 F.3d 878, 882 (10th Cir. 1995).

Furthermore, under the canon of express mention (*expressio unius*), where the legislature explicitly enacts specific exceptions while omitting others, courts must presume the omission was intentional and refrain from reading expanded categories into the statute. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980))). In *TRW*, the Court applied the rule to a time bar that, like §§ 12-404(b) and 12-410(b)(3), contained an express discovery-based exception, and it refused to read a broader discovery rule into the statute. *Id.* at 28–29.

The text of § 12-404 confirms that its exception is limited. The statute governs “claims arising out of patient care,” but its exception reaches only a “continuous course of treatment.” Sn. Rev. Stat. § 12-404(b). When a legislature uses different words, courts presume the difference is intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983). By choosing “treatment” rather than “care,” the legislature confined the exception to the ongoing management of a condition, not the diagnostic

screening of a patient. *See Treatment, Black's Law Dictionary (11th ed. 2019); Care, Black's Law Dictionary (11th ed. 2019).*

Shawnee's exceptions are also borrowed language, and they carry their settled meaning with them. When a legislature adopts statutory language that has already received judicial construction, it is presumed to have adopted that construction. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). Section 12-404(b)'s "continuous treatment...for the same illness, injury, or condition" tracks New York's malpractice statute. *See* N.Y. C.P.L.R. 214A ("continuous treatment for the same illness, injury or condition"). And § 12-410(b)(3) reproduces, nearly word for word Kansas's statute. *See* K.S.A § 60-3303(b)(2)(D) ("shall not apply . . . if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery . . ."). Because these are questions of first impression in this state, New York's and Kansas's decisions construing these provisions therefore supply the meaning of Shawnee's exceptions. (*See* R. at 7 n.1).

Finally, a statute "should be construed so that the effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001). Reading "treatment" to reach periodic screening would drain § 12-404(b)'s "in no event" clause of meaning for every patient who returns for periodic checkups, the very patients for whom repose matters most. *Id.*

1. Expanding statutory exceptions to encompass discrete annual checkups or override extinguished claims violates statutory structure and policy.

Applying these governing canons to §§ 12-404(b) and 12-410 requires a strict, text-bound interpretation of their respective exceptions. Section 12-404(b) provides a narrow exception to the medical malpractice repose bar only where a provider engages in a “continuous course of treatment...for the same illness, injury, or condition.” Under established medical malpractice precedent, the continuous treatment exception requires an active, ongoing course of corrective therapy for a specific, diagnosed condition—not discrete, routine annual checkups for general health monitoring where no disease was ever diagnosed or treated. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648 (4th Cir. 2004). Similarly, a provider’s failure to diagnose a condition cannot itself constitute a continuous course of treatment. *Schwehnus v. Urological Assocs. of L.I., P.C.*, 943 N.Y.S.2d 141, 143 (2d Dep’t 2012).

Likewise, Respondent cannot avoid § 12-404(b)’s repose bar by recasting an injury arising out of patient care as a product liability claim. Respondent’s claim remains subject to the medical repose statute however it is pleaded. Because a statute of repose defines the substantive existence of a cause of action, allowing a product exception to revive a claim the legislature has already extinguished would create an irreconcilable statutory conflict and nullify the absolute four-year cap imposed by § 12-404(b). *See Waldburger*, 573 U.S. at 9. When two statutes are capable of co-existing, the courts must interpret each as effect and not interpret one to nullify the other. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)

(quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Reading § 12-410(b)(3) to reach injuries arising out of patient care would leave § 12-404(b)'s cap without effect.

B. Respondent's claims are not extended because Cyber MD's annual diagnostic evaluations of Mr. Miller did not amount to a "continuous course of treatment."

State law requires healthcare malpractice claims to be brought within two years of their discovery. In no event, however, may such a claim be brought more than four years after the act, omission, or occurrence alleged to have caused the injury or death. Sn. Rev. Stat. § 12-404(b). However, the Shawnee legislature created an exception where the action will not be barred 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. *Id.* To invoke this exception, the law requires an active, continuous, and substantially uninterrupted course of examination and treatment for a specific, known ailment. *Castillo*, 372 F.3d at 648.

1. Cyber MD's programming does not transform annual screenings into a continuous course of treatment, even if there was a failed diagnosis.

Subsequent visits do not qualify as continuous treatment when the visits amount to mere routine annual checkups for general health monitoring rather than an ongoing effort to address a *specific* condition. *Gordon v. Magun*, 83 N.Y.2d 881, 883 (1994). This holds true even where the condition was never actually diagnosed. *Id.* Similarly, the continuous treatment doctrine does not extend to situations involving ongoing diagnostic efforts, or a failure to diagnose, that prevented

treatment from ever occurring. *Schwelnus v. Urological Assoc. of L.I., P.C.*, 943 N.Y.S.2d 141, 143 (App. Div. 2nd Dept.); *see also Wright v. Southampton Hosp.*, 131 N.Y.S.3d 216 (App. Div. 2nd Dept.).

The doctrine will not apply if the later consultations were not part of a continuous effort directed at treating that specific condition. *Gordon*, 83 N.Y.2d at 883. This holds true even where the condition missed at the outset is the same condition underlying the eventual malpractice claim. *Id.*

Mr. Miller's annual interactions with Cyber MD fail to satisfy this standard under established legal precedent. Cyber MD's programming does not transform annual screenings into a continuous course of treatment and the continuous treatment must amount to more than annual checkups.

In *Nykorchuck v. Henriques*, the New York Court of Appeals considered whether a suit was barred by the two-and-a-half-year statute of limitations for medical malpractice that commenced more than eight years after the lump was first brought to defendant's attention and more than four years after plaintiff's last appointment with defendant in connection with another medical condition. 78 N.Y.2d 255, 258 (1991). The court held that isolated examinations of a breast condition did not constitute continuous treatment where the examinations were "discrete and complete" and separated by substantial periods of time. *Id.* at 259. The court emphasized that neither a continuing physician-patient relationship nor the continuing nature of a diagnosis was sufficient to satisfy the requirements of continuous treatment. *Id.* The plaintiff was required to show that the physician had

established a course of treatment for a particular condition giving rise to the malpractice claim. *Id.*

Similarly, in *Gordon v. Magun*, the New York Court of Appeals again rejected the application of the doctrine. 83 N.Y.2d at 883). There, although the defendant physician conducted consultations that ultimately involved the same condition alleged in the malpractice claim, the doctrine did not apply because the consultations were not part of “continuing efforts by a doctor to treat a particular condition.” *Id.* (quoting *Massie v. Crawford*, 78 N.Y.2d 516, 519 (1991)). The court held that the fact that the condition overlooked during an earlier consultation was the same condition later diagnosed did not transform the intervening diagnostic contacts into continuous treatment. *Id.*

In *Schwelnus*, the court similarly held that continuing efforts to reach a diagnosis, coupled with the physician’s failure to diagnose the condition and resulting failure to provide treatment, did not constitute a continuous course of treatment. 94 A.D.3d 971, 973 (2d Dep’t 2012). Thus, the relevant inquiry is not whether a patient periodically encountered the same healthcare provider or whether later examinations concerned the condition ultimately underlying the malpractice claim. Rather, the inquiry is whether the provider undertook an actual, affirmative, and continuous course of treatment directed toward that condition. *See Nykorchuck*, 78 N.Y.2d at 259; *Schwelnus*, 943 N.Y.S.2d at 143.

Here, Cyber MD’s virtual encounters with Mr. Miller in 2019, 2020, and 2021 were approximately twelve months apart and consisted of separate diagnostic

screenings rather than ongoing treatment, therapy, medication management, or other affirmative efforts to address a known condition. That distinction is dispositive. Unlike a patient who returns repeatedly because a physician is actively treating an identified condition, Mr. Miller received periodic evaluations that were complete when performed and were not part of an uninterrupted treatment plan.

The result is no different merely because Cyber MD allegedly failed to diagnose the condition during those evaluations. Indeed, *Nykorchuck* specifically rejected treating examinations separated by substantial intervals as continuous treatment, while *Schwelnus* recognized that diagnostic efforts that never mature into treatment cannot themselves constitute the required course of treatment. 78 N.Y.2d at 259; 943 N.Y.S.2d at 143. As *Gordon* makes clear, a later diagnosis of the condition allegedly overlooked earlier does not retroactively convert prior diagnostic consultations into continuous treatment. 83 N.Y.2d at 883. Nor does the fact that Cyber MD's programming contemplated periodic annual screenings alter the analysis. The continuous-treatment doctrine requires continuity of treatment for the particular condition, not merely continuity of scheduled contact between a patient and provider.

Here, Mr. Miller's virtual encounters in 2019, 2020, and 2021 were separate, independent diagnostic checkups spaced roughly twelve months apart rather than an active, continuous course of care. (R. at 5, 10). Isolated encounters or intermittent medical contacts separated by lengthy intervals do not establish the ongoing physician-patient relationship required to toll statutory repose periods. *Castillo*, 372 F.3d 643 at 650; *Nykorchuck*, 678 N.Y.2d at 259. In this case, Mr. Miller had a

checkup about once every year. However, these annual checkups are a far cry from a systematic treatment of a specific underlying illness.

2. Mr. Miller and Cyber MD did not have a mutual anticipation of treatment that would occur in the near future for corrective efforts of a specific condition.

Under established medical malpractice jurisprudence, a course of treatment does not extend beyond a visit unless further care or monitoring for a specific condition is explicitly anticipated by *both* physician and patient, as manifested by a regularly scheduled appointment in the near future for ongoing corrective efforts. *Cohen v. Gold*, 165 A.D.3d 879; *Petito v. Roberts*, 113 A.D.3d 743; *Gordon*, 83 N.Y.2d at 883. To satisfy the continuous treatment exception, the provider must be engaged in active, ongoing corrective efforts for the specific ailment that forms the basis of the lawsuit *Massie*, 78 N.Y.2d at 519; *Nykorchuck*, 78 N.Y.2d at 259. Annual diagnostic checkups spaced twelve months apart for general monitoring do not constitute an ongoing plan of corrective care. *Gordon*, 83 N.Y.2d at 883; *Massie*, 78 N.Y.2d at 519.

In April 2018, Cyber MD diagnosed Mr. Miller with adult-onset asthma, referred him to a local practitioner for inhaler management, and reported “zero evidence” of malignancy. (R. at 20). Because Cyber MD concluded no tumor existed, it never undertook or planned any corrective therapy for lung cancer. *Id.* Under *Nykorchuck*, a provider’s failure to diagnose a condition—and the resulting failure to prescribe corrective treatment—cannot itself constitute a continuous course of treatment. 78 N.Y.2d at 259–60. During Mr. Miller's yearly checkups in 2019, 2020, and 2021, Cyber MD merely conducted routine annual screenings and repeatedly assured him that there was “zero evidence” of disease. (R. at 20). Crucially, after his

2021 checkup, Cyber MD expressly advised Mr. Miller that annual imaging was no longer necessary, terminating even the expectation of routine future contact. *Id.*

C. The algorithmic flaw in Cyber MD’s software and CCS’ subsequent retraining will not toll the repose period because it does not constitute a “hidden defect.”

Under Shawnee’s Statutes of Repose, plaintiffs must commence product liability actions within the applicable limitations period, which would be within two years of the cause of action accruing. *See* Sn. Rev. Stat. § 12-402(a), 12-410(a). The statute of repose creates a temporal bar, as a plaintiff must commence an action within four years from “the date of the first sale, lease, or delivery of possession to its initial user or customer.” *See id.* at § 12-410(a).

1. A reasonably prudent person could ascertain the algorithmic flaw in Cyber MD’s software based on its disclaimer of its limitations.

The Respondent asserted claims against CCS for product liability on two theories: design defect and failure to warn. (R. at 1). The Respondent claimed at the trial court that both were “inherent in the Cyber MD software algorithm.” *Id.* The Respondent asserts that the facts of this case fall within the second statutory exception, which reads as follows: “if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than four (4) years after the time of delivery[.]” Sn. Rev. Stat. § 12-410(b)(3).

This statutory exception denotes that the Shawnee legislation did not intend for its repose statute to be absolute. *See ANZ Sec., Inc.*, 582 U.S. at 507. This repose exception mirrors what courts call a “hidden defect limitation.” *See Pate v. Columbia*

Mach., 930 F. Supp. 451, 465 (D. Idaho 1996) (quoting I.C. § 6-1403(2)(b)(4)); *see also Koch v. Shell Oil Co.*, 52 F.3d 878, 884 (10th Cir. 1995) (quoting Kan. Stat. Ann § 60-3303(b)(2)(D)). Statutes with a hidden defect exception or limitation typically include similar language to the Shawnee statute. *See Pate*, 930 F. Supp at 465. State legislatures add the hidden defect exception for product defects that a reasonably prudent user could not discover until after the repose period has expired. *See Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 643 (Colo. 1988) (citing to commentary to the Model Uniform Products Liability Act).

Courts use an objective test when analyzing a hidden defect exception to statutes of repose. *See id.* (“The test . . . for purposes of [Colorado’s hidden defect to its repose statute] is whether the defect was not readily apparent or discoverable by a reasonably prudent user.”); *see also Eaton v. Jarvis Products Corp.*, 965 F.2d 922, 928–29 (10th Cir. 1992) (confirming the objective test set forth in *Anderson*). Moreover, a plaintiff’s subjective knowledge or awareness of the existence of the later-alleged defect has no effect on a court’s analysis. *See id.* Courts define “hidden defect[s]” as something beyond a mechanical or functional issue, but rather something that would make the product unreasonably dangerous. *Id.* (quoting *Wayda v. Comet Int’l Corp.*, 738 P.2d 391, 393 (Colo. Ct. App. 1987) (quotations omitted)).

a. Cyber MD’s disclaimer put a reasonably prudent user on notice that artificial intelligence is not a licensed medical physician.

In *Baumann v. Excel Indus.*, the Kansas Court of Appeals determined whether the injury-causing aspect of the lawnmower was not easily discoverable by an ordinarily prudent person at the time of delivery. 17 Kan. App. 2d 807, 818 (1993).

There, the plaintiff sued the manufacturer of a lawn mower after sustaining injuries when using the mower. *Id.* at 808. The court affirmed the lower court's finding that the defect was not hidden, and instead that it was easily discoverable. *Id.* at 819.

In support of its holding, the court referenced definitions of “discoverable,” “reasonable,” and “prudent.” *Id.* at 819. Courts define “discoverable” as “means by which the user can without danger to himself reasonably detect the hidden danger and guard against it.” *Id.* 818 (citing to *Gisriel v. Uniroyal, Inc.*, 517 F.2d 699, 704 (8th Cir. 1975)). “Reasonable” is what is “suitable under the circumstances.” *Id.* (citing to Black's Law Dictionary 1265 (6th ed. 1990)). “Prudent” is interchangeable with “careful” or “sensible.” *Id.* at 819 (citing to Black's Law Dictionary 1226 (6th ed. 1990)). The court reasoned that a careful person would have comprehended the danger of the lawnmower, such that it *could* cause an injury. *Id.* The court noted that an ordinary person would avoid danger, such as by reading the manual. *Id.*

Other jurisdictions interpret “hidden defects” similar to Kansas courts. For example, in *Anderson*, the Colorado Supreme Court considered “whether failure to place guards to protect a user from the dangerous areas of a machine may constitute a ‘hidden defect’ within the meaning of the exception to the statute of repose.” 766 P.2d at 644. There, the plaintiff sued the manufacturer of a conveyor after sustaining injuries from use of it at work. *Id.* at 639. The plaintiff claimed that the manufacturer failing to place a guard on the conveyor constituted a hidden defect, thus exempting his claim from the repose bar. *Id.* The Colorado Supreme Court held that the statute of repose barred the plaintiff's claim because the conveyor's danger was open and

obvious. *Id.* The court reasoned its holding by stating: “Although failure to guard may constitute a defect, failure to guard an *open* and *obvious* danger does not constitute a *hidden* defect within the meaning of [the repose] statute.” *Id.*

Here, the discovery of the algorithmic defect in Cyber MD’s software after the repose window closed will not toll the statute. The court of appeals in this case characterized the defect as “foundational . . . embedded in Cyber MD’s 2017 baseline algorithm[.]” (R. at 23). In other words, the defect was, according to the appellate court, inherent in Cyber MD’s software upon delivery to MHS in 2017. *See id.*; *see also* (R. at 1). Yet, this software had a 97% accuracy rate in classification of lung lesions. R. at 0016. The software developers trained Cyber MD on 40,000 lung scans from three different hospitals and achieved a nearly perfect accuracy rate. (R. at 4). Additionally, the FDA cleared Cyber MD before its release to MHS.¹ At the time of delivery, Cyber MD was not defective in nature.² Although CCS discovered a drop in accuracy in 2022, it quickly retrained Cyber MD to restore its high accuracy rates. (R. at 4–5).

Nevertheless, the danger, like *Anderson*, was open and obvious here. 766 P.2d at 644. A patient’s consistent use of a telehealth platform that explicitly disclaimed

¹ The FDA likely classified Cyber MD as Software as a Medical Device (SaMD), with approval under a 501(k) plan. *See Understanding FDA regulations for AI in SaMD*, ICON, (Jun. 24, 2025) <https://www.iconplc.com/insights/blog/2025/06/24/fda-regulations-ai-medical-devices>. The FDA likely cleared Cyber MD by evaluating its risk and acknowledging its similarity to another FDA-approved software. *See id.*

² Other jurisdictions, such as South Dakota, determine whether a product is compliant with industry standards at the time of the first sale or delivery. *See* S.D. Codified Laws § 20-9-10.1. California requires health care uses of AI to include a disclaimer indicating to the patient that communications were AI generated. *See* Cal. Health & Saf. Code § 1339.75(a)(1). Cyber MD providing a disclaimer conforms with other jurisdictional and industry requirements for AI in health care. *See id.*

that it is simply artificial intelligence, *not* a licensed physician, creates potential for dangerous outcomes. Even if an ordinary person, in the shoes of Mr. Miller or his treating providers, could not discover the flaw with “ordinary prudence[.]” Cyber MD took an extra step in warning or “guarding” against any dangers associated with consultation of AI in lieu of a doctor. *See* (R. at 4, 23–24). Additionally, a reasonably prudent person would acknowledge this disclaimer, as Mr. Miller did before every Cyber MD session. *See Baumann*, 17 Kan. App. 2d at 819; *see also Meyer*, 868 F.3d at 66 (demonstrating how courts enforce clickwrap disclaimers when users click “I agree”). The court in *Anderson* found an obvious danger *without* a guard or safety mechanism to not constitute a hidden defect. 766 P.2d at 644. Here, this Court should find the same—that the obvious danger of Cyber MD *with* a disclaimer that the program is unable to replace a licensed medical professional, is not a hidden defect. *Id.*; *see also* (R. at 4).

b. Respondent’s claim for failure to warn would improperly extend legislative intent and therefore is barred by the repose statute.

In *Anderson*, the plaintiff sued the conveyor manufacturer for strict products liability, claiming that the manufacturer was liable for failure to warn. 766 P.2d at 643. The Colorado statute of repose contains a hidden defect exception, which the plaintiff believed to include failure to warn claims. *Id.* The Colorado Supreme Court held that the legislature did not intend for the hidden defect exception to also encompass failure to warn claims. *Id.* at 643–44. The Colorado legislature feared adding that exception would “encourage excessive litigation and frustrate the purpose of the statute.” *Id.* at 644. The court ultimately held that the statute of repose barred

the plaintiff's failure to warn claim because he brought it after the expiration of the repose period. *Id.*

Here, the appellate court ruled that the Respondent's claims generally fell within the hidden defect exception. *See* (R. at 23–24). This Court should not read Respondent's claim of CCS' failure to warn, or the subsequent retraining into the repose exception.³ Like the Colorado Supreme Court reasoned in *Anderson*, this Court should also consider the legislative intent behind Shawnee's statutes of repose. 766 P.2d at 644. If this Court were to construe additional claims to fall into the scope of the hidden defect exception, this would lead to an overbroad reading of Shawnee's legislation. *See id.*; *see also Koch*, 52 F.3d at 881 (rejecting broad reading of repose exception). Likewise, statutory canons of construction prohibit this Court from expanding this exception to encompass more than what the plain text says is within its scope. *See Germain*, 503 U.S. 249 at 253–54; *see also Waldburger*, 573 U.S. at 12 (rejecting a court's use of a “remedial purpose” canon to broadly construe statutory exceptions).

³ Based on the record, the Respondent likely supported its “failure to warn” claim with the fact that CCS did not publish its verification data to the public. *See* R. at R. at 0003–4. After the FDA cleared Cyber MD, it likely published a 501(k) summary of the product. The FDA publishes these summaries in a database, where clinical test conclusions may be published, but confidential information is excluded. *See* 21 CFR §§ 807.92(b), 807.93(c) (demonstrating burden is on FDA, depending on approval path for SaMD products). The raw verification data and its results is likely confidential under 21 CFR § 20.61(c), which is not available for public disclosure. Additionally, courts have found that warnings affixed to the product amount to an adequate disclaimer. *See Pate*, 930 F. Supp at 461.

c. This Court cannot hold an AI software program to the same standard as a medical physician.

MHS implemented Cyber MD to aid a medically underserved county by providing access to healthcare, not to fully replace doctors. *See* (R. at 4–5). Cyber MD served as an easily accessible healthcare platform, which was crucial for a community that lost majority of its hospitals and medical professionals. *See id.* Patients nevertheless had access to the MHS hospital in Goshen, Shawnee, a 3.5-hour drive from Cartersville. (R. at 3).

Cyber MD explicitly disclaimed that it was simply artificial intelligence and *not* a doctor. *See* (R. at 4–5). Nevertheless, the Respondent wants to hold its developer, CCS, to the same standard as a licensed healthcare professional. (R. at 1). Although Cyber MD could make differential diagnoses, its eventual misdiagnosis of Mr. Miller’s condition should not constitute strict liability. *See Henriques*, 678 N.Y. 2d at 259. Courts have found that licensed healthcare professionals misdiagnosing patients does not toll a statute of repose for medical malpractice. *See id.* Mr. Miller did not seek out a second opinion from a licensed doctor, and instead solely relied on AI for his worsening condition. (R. at 5). This Court should not hold an AI program that explicitly warns patients of its limitations to the same standard as a doctor with a board-certified medical license. If courts are willing to give leeway to physicians, then this Court should do the same for an AI program.⁴

⁴ Sources suggest that the liability still falls on the physician’s shoulders, not an AI program. *See* Sermo Team, *Who is responsible when AI makes a medical mistake?* SERMO (Aug. 6, 2026), <https://www.sermo.com/resources/who-is-responsible-when-ai-makes-a-medical-mistake/>. (“Physicians have an independent, non-delegable duty to the patient.”)

Thus, this Court should hold that the Respondent's claims for products liability are well outside the repose window, because the clock began to run on the delivery of Cyber MD to MHS in 2017.

2. Respondent cannot maintain an independent action for an underlying claim via Shawnee's statute of limitations.

Courts interpreting the interplay of statutes of limitation and repose have demonstrated that state legislatures cannot revive claims, nor can courts create such a remedy to circumvent legislative intent. *See Doe v. Popravak*, 55 Kan. App. 2d 1, 12, 20 (2017) ("Once the statute of repose . . . barred [Plaintiff's] claims, nothing in [the statute of limitations] could bring those claims back to life.").

Because the statute of repose extinguishes the Respondent's causes of action for both medical malpractice and products liability, the Respondent cannot revive her claims. Conversely, the repose exceptions did not apply—Mr. Miller's treatment with Cyber MD did not amount to a continuous course of treatment, nor did the algorithmic flaw constitute a hidden defect. Therefore, the exception set forth in § 12-410(b)(3) does not apply, and the statute of repose bars Respondents' claims.

a. Even if an ordinary, reasonably prudent person could not discover the algorithmic flaw, the discovery rule exception does not apply.

Even if this Court finds that the injury for the basis of the Respondent's causes of action was not immediately discoverable, such that the hidden defect exception *did* apply, then the discovery rule exception does not apply. (R. at 12). Under Shawnee's statute of limitations, the legislature created a discovery rule exception, which tolls

the statute of limitations until the claimant know or should reasonably know of the tortfeasor's identity and the injury. Sn. Rev. Stat. § 12-402(c).

The discovery rule exception applies in cases where the plaintiff does not discover an injury or its cause because it is not reasonably knowable. *Saksek v. Janssen Pharms., Inc.*, 656 Pa. 649, 661. Courts look to whether the plaintiff should have known about both their injury and its cause by exercising diligence as required by the law. *Saksek v. Janssen Pharms., Inc.*, 656 Pa. 649, 661 (Pa. 2019) (quoting *Gleason v. Borough of Moosic*, 609 Pa. 353 (Pa. 2011)). A plaintiff does not need to know the full extent of the injury or the cause. *Id.* If a party fails to make inquiry into information available to them, then they fail to exercise reasonable diligence as a matter of law. *Kennedy v. Rigotti*, 51 Pa. D. & C. 4th 225, 229 (2001).

In *Rigotti*, the court determined whether the plaintiff exercised reasonable diligence under the discovery rule when his symptoms persisted for years, resulting in a later diagnosis of dementia. *Id.* at 229–30. The court found the discovery rule did not apply because he failed to exercise reasonable diligence when he relied on the doctor's prognosis despite his persistent symptoms and the doctor's prognosis. *Id.* at 232. Thus, his claims were barred by the statute of limitations. *Id.* The court reasoned that awareness of the exact diagnosis is not necessary to begin the statute of limitations clock. *Id.* at 230. Although the doctor correctly diagnosed the plaintiff five years later, the court attributed the delay to the plaintiff's lack of diligence in not investigating his injury further. *Id.* at 229–30.

Under the discovery rule, this Court should find that Mr. Miller did not exercise the requisite diligence required by law. Here, Mr. Miller was aware of his ongoing, persistent symptoms over the course of five years. (R. at 5). Like *Rigotti*, Cyber MD gave Mr. Miller a misdiagnosis of adult asthma, which Mr. Miller relied on throughout his sessions with the platform. *See* 51 Pa. D. & C. 4th at 232; *see also* (R. at 5). Nevertheless, this misdiagnosis is not dispositive. *See Rigotti*, 51 Pa. D. & C. 4th at 230. Mr. Miller was not only on notice that Cyber MD was not a licensed physician, but knew his symptoms were persistent despite his yearly online visits. (R. at 5). Given these circumstances, this Court should find that Mr. Miller did not diligently investigate his injury, such as by getting a second opinion from a licensed medical professional. *See Rigotti*, 51 Pa. D. & C. 4th at 230. Thus, this Court should hold that the discovery rule does not apply, and the Respondent's claims fall outside the limitations and repose windows.

CONCLUSION

Under apparent agency, a principal can be liable for the tortious actions of its agent if a third party perceives the agent to have actual authority as a result of the principal's manifestations. But if the third party is notified that no agency relationship exists between the perceived principal and agent, then there is no apparent agency, and the principal is not vicariously liable for the conduct of the perceived agent.

In this case, MHS took extensive steps to inform users that CyberMD was neither an agent nor an employee. Before users enter the MHS online portal, they are presented with a sign-in wrap agreement containing "Terms and Conditions,"

conspicuously hyperlinked and reasonably distinguishable from the rest of the website's interface. These terms specify that CyberMD is an independent contractor, and MHS has no control over its diagnostic methods or functions. The agreement expressly instructs users how to assent: by entering the portal. Numerous times over several years, Mr. Miller was presented with these same terms and continuously entered the portal. The hyperlinked contractual language was reasonably conspicuous on MHS's website interface, and Mr. Miller's online agreement is enforceable.

Additionally, the online agreement is not procedurally unconscionable. Procedural unconscionability occurs when the contract bargaining process is egregiously unfair. When reviewing whether a contract is procedurally unconscionable, federal courts consider several factors of the weaker party under a totality of the circumstances approach, examining age, education, intelligence, business acumen, experience, and more. However, unconscionability is a high bar, and the party alleging unfairness has the burden to establish that gross disparities existed between the contracting parties that removed meaningful choice.

In this case, there is no evidence to suggest that Mr. Miller's bargaining position was grossly disparate when compared to MHS. The appellate court highlighted his age and remote living circumstances, failing to take a comprehensive approach when reviewing his capacity to assent. But Mr. Miller was neither mentally nor physically infirm when utilizing CyberMD. Without more, the online agreement is not procedurally unconscionable, and the contract is enforceable. Pursuant to

the contract terms, Mr. Miller had constructive notice that no agency relationship existed between MHS and CyberMD. Accordingly, MHS is not vicariously liable for CyberMD's negligence.

Section 12-404(b)'s language is clear. The legislature set an absolute four-year limit on claims arising out of patient care and made one narrow exception for when there is continuous treatment for the same condition. Cyber MD's annual screenings were neither continuous nor treatment. The screenings were separate diagnostic encounters that never identified, managed, or planned care for the condition on which Respondent sues. Stretching § 12-404(b)'s singular, narrow exception to cover Mr. Miller's death would judicially rewrite the statute and undermine the specific policy choice chosen by the legislature. This Court should hold that Respondent's malpractice claim falls outside of the scope of the continuous treatment exception and are thus barred by § 12-404(b). Additionally, the hidden defect exception will not toll the statute of repose under § 12-404(b)(3). A reasonably prudent person would have acknowledged Cyber MD's disclaimer of its limitations as artificial intelligence and understood the risk of relying on its opinions. Even if this Court found the exception to apply, then the statute of limitations' discovery rule exception does not. Mr. Miller did not exercise reasonable diligence as required by law for his persistent symptoms. Therefore, this Court should hold that the statute of repose bars Respondent's products liability claims, or conversely, the Respondent filed the claims outside the repose and limitations windows.

We hereby ask this court to reverse the Shawnee Court of Appeals for the Second District in favor of the Circuit Court of Simmons County on the first and second issue.

Respectfully submitted,
/s/ _____ Tolling for Thee
Attorneys for Petitioners

CERTIFICATE OF SERVICE

We certify that a copy of Petitioners' brief was served upon Respondent, Evelyn Miller, through the counsel of record by certified U.S. mail return receipt requested, on this, the 2nd day of October, 2026.

/s/ _____ Tolling for Thee

Attorneys for Petitioners

APPENDIX A: STATUTORY PROVISION

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

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

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

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

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

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

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

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

(a) *Repose Period*. No product liability action based on strict liability in tort shall be commenced except within the applicable limitations period in Section 12-402, and in any event, within four (4) years from

the date of first sale, lease, or delivery of possession to its initial user or consumer.

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

1. The product seller expressly warrants that its product can be utilized safely for a period longer than four (4) years;

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