Circuit Court for Baltimore City
Case No. 24-C-14-005676

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1888

September Term, 2016

DAQUANTAY ROBINSON, ET AL.

v.

CX REINSURANCE COMPANY LIMITED, ET AL.

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*Woodward,
Kehoe,
Nazarian,

JJ.

Opinion by Woodward, J.

Filed: October 15, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

In the Circuit Court for Baltimore City, after Daquantay Robinson, appellant, prevailed in a lead paint action against his former landlords ("the Underlying Action"), he filed this declaratory judgment action against his former landlords' liability insurers, Pennsylvania National Mutual Casualty Insurance Company ("Penn National") and CX Reinsurance Company Limited ("CX Re") (collectively "the Insurers"), appellees. Robinson asked the court to declare that Penn National and CX Re were jointly and severally liable for the entire judgment obtained against their insureds. The Insurers moved for summary judgment arguing that Robinson's injury did not fall within their respective coverage periods and, therefore, their obligation to indemnify their insureds had not been triggered. After a hearing, the circuit court granted, in part, and denied, in part, Penn National and CX Re's motions for summary judgment. The circuit court subsequently entered a final declaratory judgment allocating liability between the Insurers based upon the pro rata time-on-the-risk approach adopted by this Court in *Mayor & City Council of Baltimore v. Utica Mutual Insurance Co.*, 145 Md. App. 256 (2002). The circuit court declared that Penn National was liable for 12.04% of Robinson's judgment and that CX Re was liable for 25.7% of Robinson's judgment. Robinson appealed and the Insurers cross-appealed.

The parties present the following questions for our review, which we have rephrased as follows:[1]

[1] As posed by the parties, the questions are:

Robinson:

1. Should this Court's decision in *Mayor & City Council of Baltimore v. Utica Mutual Ins. Co.*, 145 Md. App. 256, 802 A.2d 1070 (2002) be overruled with respect to pro rata allocation, and replaced with an all sums rule, such that insurers who issue standard CGL policies are required to pay all sums that the insured becomes legally obligated to pay as damages?

2. Did the Circuit Court err when it granted declaratory judgment to both CX Re and Penn National, and instead of requiring both insurers to pay all sums that Dackman was legally obligated to pay Robinson, ordered each insurer to pay its relative time on the risk, specifically, 12.04% of the underlying judgment to be paid by Penn National and 25.7% of the underlying judgment to be paid by CX Re?

Penn National:

1. Did the Circuit Court err when it failed to grant Penn National's motion for summary judgment on all issues, holding in part that Robinson could rely on post-trial evidence procured solely to raise a genuine issue of material fact as to whether Robinson sustained injury from lead paint exposure during Penn National's policy period?

2. Assuming, *arguendo*, Robinson proved injury due to lead exposure during Penn National's policy period, did the Circuit Court correctly apply Maryland law, as stated in *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 802 A.2d 1070 (Md. Ct. Spec. App. 2002), and followed in *Pa. Nat.'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106 (4th Cir. 2012), in holding that Penn National is responsible for 171/1,420 (12.04%) of the judgment in the Underlying Action?

CX Re:

1. Did the circuit court err by applying this Court's precedents on pro rata allocation, rather than applying an outside line of authority this Court has rejected?

2. Does Robinson's procedural objection fail for lack of a cognizable claim of prejudice?

3. Did the circuit court err in allocating liability to CX Re's third policy period because, under its clear terms, this policy did not cover Robinson's claim against the Dackmans?

Robinson's Appeal

I. Did the circuit court err by granting summary judgment in favor of the Insurers on the issue of the application of the pro rata time-on-the-risk allocation of liability?

Penn National's Cross-Appeal

II. Did the circuit court err by denying Penn National's motion for summary judgment on the issue of coverage and declaring that Robinson's injuries fell within its policy period?

CX Re's Cross-Appeal

III. Did the circuit court err by allocating liability to CX Re under its third policy period?

For the following reasons, we hold that the trial court did not err by declaring that liability for the judgment would be allocated on the pro rata time-on-the-risk basis, and we decline to overturn *Utica Mutual* and adopt the alternative "all sums" approach. We further hold that the trial court did not err by declaring that Robinson's injuries fell within Penn National's policy period, but did err by declaring that his injuries were covered under CX Re's third policy. Accordingly, we affirm, in part, and reverse, in part, the judgment of the circuit court, and remand the case for entry of an amended declaratory judgment consistent with this opinion.

BACKGROUND

A. The Underlying Action

In January 1997, Tiesha Robinson ("Tiesha") moved into a row house at 1642 E. 25th Street in Baltimore City (the "Property"), which was leased by her mother, Sandra Moses. Tiesha was eight months pregnant with Robinson, who was born on February 11, 1997. Robinson lived at the Property until the end of 2000. The Property was owned by the Dackman Company and managed by Jacob Dackman & Sons, LLC ("the Dackmans"). On December 3, 1997, when Robinson was nearly ten months old, his blood was tested for lead. The results indicated that Robinson had an elevated blood lead level of twelve micrograms of lead per deciliter of blood (µg/dL). Over the next three years, while Robinson lived at the Property, he continued to have elevated blood lead levels:

Date Taken	Blood Lead Level
December 3, 1997	12 µg/dL
May 13, 1998	13 µg/dL
November 11, 1998	12 µg/dL
June 11, 1999	14 µg/dL
February 18, 2000	9 µg/dL
August 30, 2000	9 µg/dL

On November 28, 2012, Robinson, by and through his mother,[2] sued the Dackmans in the Circuit Court for Baltimore City, alleging that he suffered injuries caused by exposure to lead-based paint while residing at the Property. At trial, Tiesha testified that during the first eighteen months of Robinson's life, he was not in daycare and spent most of his time at the Property in various rooms, including the basement, where Robinson's

[2] When the lawsuit was filed, Robinson was fifteen years old. He is now over twenty-two and a half years old.

grandfather lived, and Tiesha's bedroom, where Robinson also slept. Tiesha and Moses both testified that there was chipping, peeling, and flaking paint on the interior and exterior of the house when they first moved in and throughout their tenancy. Robinson also admitted into evidence an ARC Environmental report from an inspection of the Property conducted on June 10, 2013. The ARC report identified lead-based paint above the Maryland standard (> .7 mg/cm^2) on the front porch post, the porch ceiling, the basement door, the basement jam, and other areas in the basement. Jaclyn Blackwell-White, M.D., a pediatrician, was Robinson's medical expert in the Underlying Action. She explained how lead poisoning occurs, how it may be detected in children, and the harm it can cause. Upon being asked when Robinson was first exposed to lead, Dr. Blackwell-White responded that "I can only say some time around or before nine months of age."

On September 19, 2014, after a five-day trial, the jury returned a verdict in Robinson's favor, awarding $1,270,000 in economic damages and $818,330 in non-economic damages. The Dackmans moved for remittitur, for judgment notwithstanding the verdict, and/or for a new trial. The motions for judgment notwithstanding the verdict and/or for a new a trial were denied. The court granted the motion for remittitur, in part, reducing the economic damages award to $1,000,000 and the non-economic damages award to $530,000. The reduced judgment was entered on November 3, 2014 ("the Underlying Judgment").

The Underlying Judgment was affirmed by this Court in an unreported opinion. *See Dackman v. Robinson*, No. 2035, Sept. Term 2014 (filed Aug. 31, 2018). The Court of

Appeals granted the Dackmans's petition for *writ of certiorari* and affirmed. *Dackman v. Robinson*, 464 Md. 189 (2019).

B. The Insurance Policies

Penn National and CX Re undertook the Dackmans's defense in the Underlying Action, subject to a reservation of rights. Penn National issued the Dackmans a Commercial General Liability policy ("CGL") for an initial term from June 1, 1996 to June 1, 1997, which was extended to August 1, 1997, and an umbrella policy for the same period ("the Penn Policies"). CX Re issued the Dackmans three consecutive one-year CGL policies, which ran from August 1, 1997 to August 1, 1998 ("CX Policy 1"), August 1, 1998 to August 1, 1999 ("CX Policy 2"), and August 1, 1999 to August 1, 2000 ("CX Policy 3"), respectively.

The standard form CGL policies all covered the Property. Coverage A of each policy provides, in pertinent part:

> 1. Insuring Agreement
>
> a. *We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury"* or "property damage" *to which this insurance applies.* We will have the right and duty to defend any "suit" seeking those damages. . . . But:
>
> (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); . . .
>
> ***
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and

> (2) *The "bodily injury" or "property damage" occurs during the policy period.*

(Emphasis added). The "coverage territory" is anywhere within the United States and an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

As we shall discuss in detail, *infra*, the three CX Policies also include a specific endorsement narrowing coverage arising from lead contamination, as well as an exception to that exclusion.

C. The Declaratory Judgment Action

On October 2, 2014, after the jury verdict but before the post-trial motions were ruled upon, Robinson filed this declaratory action against the Dackmans, Penn National, and CX Re. Robinson asked the court to declare that Penn National and CX Re are jointly and severally liable and obligated under their insurance contracts to pay all sums that the Dackmans are legally obligated to pay Robinson.

Penn National and CX Re moved for summary judgment, arguing that Robinson's injuries did not trigger coverage under their respective policies. In its motion, Penn National argued that Robinson's injury occurred on or around December 3, 1997, which was after the Penn Policies' period ended (August 1, 1997), and therefore coverage was not triggered. Penn National relied upon Dr. Blackwell-White's testimony at the trial of the Underlying Action and the date of Robinson's first elevated blood lead level. According to Penn National, because the "occurrence," *i.e.*, Robinson's continuous exposure to lead paint, was outside the policy period, it had no obligation to indemnify the

Dackmans. Alternatively, Penn National argued that, if the court found that Robinson's injury occurred within the policy period, Penn National was at most liable for 12.04% of the entire judgment based on its pro rata time-on-the-risk allocation from February 11, 1997 until August 1, 1997, or 171 out of 1,420 days[3] of total lead exposure.

Robinson opposed Penn National's motion, attaching two affidavits from Dr. Blackwell-White in which she averred that it was her opinion that Robinson "was exposed to lead-based paint hazards at [the Property] from his birth until [the day] they moved out[.]" Further, Robinson asserted that Penn National should be held jointly and severally liable for the entire amount of the Underlying Judgment, not its pro rata allocation.

In its motion, CX Re argued that the limitation of liability under CX Policies 1 and 2 had been exhausted by payment of other claims, and therefore only CX Policy 3 could potentially be used to satisfy the Underlying Judgment. CX Re maintained, however, that the lead contamination endorsement, which we will discuss, *infra*, excluded coverage for Robinson's injuries, and, accordingly, CX Re had no liability for the Underlying Judgment.

Robinson opposed CX Re's motion and filed a cross-motion for summary judgment, arguing that coverage under CX Policy 3 was triggered as a matter of law based upon the plain and unambiguous language of the endorsement. In the alternative, Robinson argued that, if the court agreed with CX Re's construction of CX Policy 3, he should be permitted to conduct limited discovery to determine whether CX Policies 1 and 2 had been exhausted.

[3] The 1,420 days was calculated from Robinson's birth date (February 11, 1997) to the date he moved out of the Property (December 31, 2000).

On June 27, 2016, the circuit court held a hearing and ruled from the bench, granting, in part, and denying, in part, the motions for summary judgment. It entered an order to that effect on July 1, 2016. Ultimately, by consent of all parties, on October 12, 2016, the court entered a declaratory judgment,[4] providing in pertinent part:

- That the claims against the Dackmans were dismissed as "nominal defendants";
- That Penn National was "liable for payment of 12.04% of [the Underlying Judgment] based upon its 'time on risk' *pro rata* allocation (171 days out of 1,420 days) in accordance with [*Utica Mutual*]";
- That CX Re was not "liable for any damages due to injuries during the periods covered by [CX Policy 1] (August 1, 1997 to August 1, 1998) and [CX Policy 2] (August 1, 1998 to August 1, 1999), because those policies were exhausted by payment of prior claims";
- That CX Re was "liable under [CX Policy 3] for 25.7% of the [Underlying Judgment] calculated based on CX Re's 'time on risk' *pro rata* allocation (365 days out of 1,420 days) in accordance with [*Utica Mutual*]";
- "[T]hat by consenting and agreeing to the form of this Declaratory Judgment, the parties do not waive their respective rights to appeal this judgment, which makes final the rulings stated in the Order of July 1, 2016"; and
- "[T]hat final judgment is hereby entered in this case in satisfaction of the requirements of Maryland Rule 2-601(a)."

Robinson noted this timely appeal, and the Insurers timely cross-appealed.

[4] As we shall discuss in more detail, *infra*, the circuit court initially entered an order that did not finally determine the amount of the Insurers' liability or resolve a nominal claim against the Dackmans. After the parties filed a consent motion for the entry of a declaratory judgment, the court entered an order resolving the rights and liabilities of all parties.

STANDARD OF REVIEW

"Trial courts may resolve matters of law by summary judgment in declaratory judgment actions." *Emerald Hills Homeowners' Ass'n, Inc. v. Peters*, 446 Md. 155, 161 (2016) (citation omitted). We review a declaratory judgment entered on summary judgment "to determine whether it was correct as a matter of law[,] . . . accord[ing] no deference to the trial court's legal conclusions." *Id.* The issues presented in this case all are questions of law that we review *de novo*.

DISCUSSION

I.

Robinson's Appeal

Robinson mounts a broad-based attack on this Court's decision in *Utica Mutual*, 145 Md. App. 256, and its progeny, which holds that in allocating indemnity liability under "occurrence" policies for damages sustained as a result of continuous exposure to harmful conditions, such as lead-based paint, an insurer is only liable "'for that period of time it was on the risk compared to the *entire* period during which damages occurred.'" *Id*. at 313 (emphasis in original) (quoting *Domtar, Inc. v. Niagara Fire Ins. Co*., 563 N.W.2d 724, 732-33 (Minn. 1997)). He asks us to overrule *Utica Mutual* and instead adopt the "all sums" rule, which holds each insurer jointly and severally liable for "'all sums,' resulting from an occurrence." *Id.* at 310. For the reasons explained below, we decline Robinson's invitation.

Utica Mutual arose from a coverage dispute involving property damage caused by asbestos. After Baltimore City settled a lawsuit against Croker, Inc., a subcontractor who had installed "asbestos-containing building materials (ACBMs)" in City school buildings, Baltimore City sought writs of garnishment to collect on that judgment against Croker's insurers. *Id*. at 266-69. The policies at issue all contained identical boilerplate language stating that each insurer agreed to pay "on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence[.]" *Id*. at 284 (emphasis added). After the writs issued, the insurers moved for summary judgment, which the circuit court granted on a variety of bases. On appeal, this Court reversed, in part, and affirmed, in part, the grant of summary judgment. [5]

We determined that the circuit court erred by ruling that coverage under the policies was triggered by the "manifestation of injury," *i.e.*, the date when the City knew or should have known that ACBMs had been installed and, thus that coverage was not triggered under the policies that issued after that date. *Id.* at 297. We reasoned that "[t]he continued presence of ACBMs in the buildings may cause continuous property damage during the coverage periods of policies that take effect subsequent to the moment that the City initially discovered the harmful effects of the asbestos." *Id*. at 302. Consequently, we held that "in a claim that results from the presence of asbestos-containing materials in a building,

[5] The City petitioned for a *writ of certiorari*, which was granted by the Court of Appeals. *Baltimore v. Utica Mutual*, 371 Md. 613 (2002). The City dismissed its petition before oral argument. *Baltimore v. Utica Mutual*, 374 Md. 81 (2003).

continuous or progressive damage will constitute an 'occurrence' within the policy period that the asbestos remains[.]" *Id*. at 306.

Significant to the issue in this appeal, this Court further held that in "continuous trigger" cases – when property damage is progressive or continuous over many years and triggers coverage under successive policies – "the obligation to indemnify the insured . . . is to be prorated among all carriers based on their time on the risk." *Id.* at 309. We explained that the pro rata method is most appropriate because it "conforms with the realities of long term property damage resulting from asbestos in buildings, and the application of the injury in fact/continuous trigger of coverage." *Id.*

In so holding, this Court rejected the construction of the "all sums" policy language embraced in *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981). In that case, which also involved asbestos, the United States Court of Appeals for the D.C. Circuit concluded that "[t]he only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury." *Id*. at 1050.

In rejecting that approach, we reasoned that the "all sums" indemnification language "must be read in concert with other language that limits a policy's liability for damage or loss that occurs during the policy period[.]" *Utica Mutual*, 145 Md. App. at 310-11. Although "'not explicitly mandated by the policies,'" we concluded that pro rata allocation "'is consistent with the language of the policies'" because they provide "'indemnification

for liability incurred as a result of an accident or occurrence *during the policy period*, not outside that period.'" *Id.* at 312-13 (emphasis added) (quoting *Consol. Edison Co. v. Allstate Ins. Co.*, 744 N.E.2d 687, 695 (N.Y. 2002)). We emphasized that "[t]his method of allocation apportions the indemnity risk in a manner that is consistent with the manner in which the coverage is triggered." *Id*. at 313. It followed that losses to the insured during periods when there was no insurance coverage, "unless a gap in coverage [was] due to the insured's inability to obtain insurance," would be apportioned to the insured. *Id*. (footnote omitted).

This Court has twice followed the reasoning of *Utica Mutual* in cases involving bodily injuries caused by exposure to lead paint over many years (and multiple policy periods). First, in *Riley v. United Services Automobile Association*, 161 Md. App. 573 (2005), *aff'd*, 393 Md. 55 (2006), this Court vacated the circuit court's grant of partial summary judgment in favor of the insurer, which had issued four consecutive policies to the insured, concluding, for reasons not pertinent to the issues in this appeal, that there existed a genuine dispute of material fact as to whether the children in the underlying lead paint lawsuit had suffered bodily injury during the first two policy periods. We went on to reason, in *dicta*, that, assuming that the insured landlord could prove bodily injury during each policy period, the policy limits of liability for the four consecutive insurance policies could be "stacked" because "Maryland law dictates that [a] judgment be allocated pro rata among the policies based on their time on the risk" in continuous injury cases, where

"parties cannot establish based on the evidence how to attribute the damages among each of the insurance periods[.]"[6] *Id*. at 592.

A year later, in *Maryland Casualty Co. v. Hanson*, 169 Md. App. 484 (2006), this Court reaffirmed that

> the law in Maryland is that . . . in cases . . . of repeated exposure to lead, which, in turn, results in lead-based poisoning injuries that continue for several years with continuous exposure, the continuous injury or injury-in-fact trigger is applicable and thus triggers insurance coverage during all applicable policy periods.

Id. at 515. We further held that the policy limits could be stacked, emphasizing that because Maryland Casualty was the only insurer for the entire period when bodily injury occurred, it was "on the risk here 100 percent of the time." *Id*. at 519.

The Fourth Circuit Court of Appeals, applying Maryland law in a diversity action, reached the same result in *Pennsylvania National Mutual Casualty Insurance Co. v. Roberts*, 668 F.3d 106, 112 (4th Cir. 2012), a case with significant parallels to the case at bar. In the underlying case in *Roberts*, a Baltimore City jury found two property owners jointly and severally liable for $850,000 in damages arising from injuries to a child (Roberts) caused by exposure to lead-based paint over a period of fifty-five months. *Id.* at 110-12. The exposure occurred at the same house, which changed ownership while Roberts lived there. *Id.* at 110. The first owner (Attsgood) was uninsured for the first year that Roberts lived in the house and was insured by Penn National for the following two

[6] In affirming our reasoning that "stacking" of the policy limits was permitted, the Court of Appeals relied upon the plain language of the policies and did not explicitly mention or adopt the pro rata time-on-the-risk allocation of liability. *See United Servs. Auto. Ass'n v. Riley,* 393 Md. 55, 79-82 (2006).

years under a CGL policy identical to the one in the case at bar. *Id.* The second owner did not appear and was found in default in the underlying action. *Id.* Thus, there was no evidence presented as to whether the second owner purchased liability insurance for the period in which he owned the property. *Id.*

After the judgment issued, Penn National, which had defended Attsgood in the underlying action, filed a declaratory judgment action against Attsgood and Roberts in the United States District Court for the District of Maryland to determine the extent of its obligation to indemnify Attsgood. *Id.* Applying the pro rata approach, the district court found that Penn National was on the risk for 24 out of 55 months, or 43.6% of the judgment. *Id.* at 111. Roberts appealed, arguing that pro rata allocation did not apply when multiple tortfeasors were involved. *Id.* at 113. The Fourth Circuit disagreed and affirmed that aspect of the district court's judgment.[7] Interpreting the same policy language involved in this case, the court determined that Penn National "did not contract to pay those sums that [Attsgood] becomes legally obligated to pay as damages because of bodily injury without qualification[,]" but rather contracted to "pay those sums" that arose from an occurrence during the policy periods. *Id.* at 112 (alteration in *Roberts*) (quotation marks omitted). The court further held that Roberts's argument was inconsistent with established Maryland law, which required a pro rata allocation and "prohibit[ed] [the court] from holding Penn National liable for periods during which it did not provide coverage to Attsgood." *Id.*

[7] The Fourth Circuit held, however, that Penn National was "on the risk" for 22 months, not 24 months, reducing its indemnification obligation to 40% of the judgment, or $340,000. *Penn. Nat'l Mutual Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 118 (4th Cir. 2012).

Returning to the case at bar, when we consider the well-established Maryland precedent requiring a pro rata time-on-the-risk allocation of liability in continuous trigger cases, the same policy language, and the prudential principle of *stare decisis*, we are not persuaded by Robinson's arguments in favor of overruling *Utica Mutual* and its progeny. *See Livesay v. Baltimore Cnty.*, 384 Md. 1, 14 (2004) ("*Stare decisis*, which means 'to stand by the thing decided,' is 'the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). As a result, the three reported decisions of this Court are "binding precedent," and the circuit court did not err in applying that law to allocate liability here. *See Archer's Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 325 (2007), *aff'd*, 405 Md. 43 (2008); *see also State v. Johnson*, 228 Md. App. 489, 519 (2016) (Friedman, J. dissenting) (emphasizing that this Court, like federal intermediate appellate courts, follow "a more strict version of *stare decisis"* based upon prudential *and* institutional concerns), *aff'd*, 452 Md. 702 (2017).[8]

[8] We note that many jurisdictions contemplating the question before us have, like Maryland, adopted pro rata allocation. *See* 15 *Couch on Insurance* § 220:30 (3d ed.) (noting that "[m]any courts reject joint and several allocation and, instead, allocate costs on a pro rata basis"); *see also, e.g.*, *Pub. Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 943 (Colo. 1999) (en banc) (adopting pro rata time-on-the-risk allocation in cases of "long-term environmental pollution spanning many years and many successive insurance policies"); *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp*., 1 F.3d 365, 372 (5th Cir. 1993) (allocating defense costs among insurers based upon their time on risk and allocating to policyholder its share a period of time it lacked coverage) (applying Texas law); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp*., 685 F.Supp. 621, 626 (E.D. Mich. 1987) (allocating defense costs to insurer on a pro rata basis and allocating costs to policyholder for uninsured periods); *N. States Power Co. v. Fid. and Cas. Co. of*

II.

Penn National's Cross-Appeal

A. Record on Summary Judgment

Before turning to the specific contentions of error, we set forth the pertinent facts as developed on summary judgment in the instant case. As discussed, Robinson was born at the Property on February 11, 1997, and lived there until the end of 2000. The Penn Policies were effective from June 1, 1996 until August 1, 1997, when Robinson was five and a half months old. Robinson first was tested for the presence of lead on December 3, 1997, when he was between nine and ten months of age. His blood lead level was found to be elevated (12 µg/dL).

In its motion for summary judgment, Penn National argued that the evidence adduced by Robinson in the Underlying Action conclusively established that Robinson was not exposed to lead until at or around his first elevated blood lead level, well after the Penn Policies ended. Penn National emphasized that Robinson's only medical expert in the Underlying Action, Dr. Blackwell-White, was asked to opine "within a reasonable degree of medical probability, . . . when . . . Robinson was first exposed to and ingest[ed] lead

New York, 523 N.W.2d 657, 662 (Minn. 1994) (allocating damages to insurers based upon time on risk); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994) (adopting a hybrid "method of allocation . . . related to both the time on the risk and the degree of risk assumed"); *Crossman Cmtys. of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 594 (S.C. 2011) (adopting "'time on risk' framework" for progressive injuries).

while residing at [the Property]." She replied: "I can only say some time *around or before nine months of age*." (Emphasis added).

In opposing the motion for summary judgment, Robinson supplied two affidavits of Dr. Blackwell-White. The first affidavit was made on August 21, 2014, and was attached to Robinson's motion for summary judgment in the Underlying Action ("First Affidavit"). The second affidavit was made on May 27, 2016, during the instant declaratory judgment action ("Second Affidavit"). In the First Affidavit, Dr. Blackwell-White opined "to a reasonable degree of medical probability . . . that . . . Robinson was exposed to lead-based paint hazards at [the Property] from his birth until [his family] moved out of the [P]roperty[.]" In the Second Affidavit, Dr. Blackwell-White offered the same opinion. She further clarified her trial testimony in the Underlying Action as follows:

> 8. I testified at the trial of [the Underlying Action] on September 17, 2014. During my testimony, I discussed at length the manner in which young children and infants ingest lead. As I stated, when an old house contains copious amounts of deteriorated lead-based paint, like [the Property] did during the entire time period when Daquantay Robinson lived there, children can ingest lead dust even before they are old enough to crawl. The dust can fall into cribs and playpens. Children can also be placed on floors or other surfaces that contain lead dust from deteriorated paint. The lead dust then gets on their hands, which they then put into their mouths.
>
> 9. The testimony of Tiesha Robinson and Sandra Moses indicated that Daquantay was brought home from the hospital after his birth to [the Property] and that he continued to live there throughout the period of his elevated blood lead levels. During that entire time frame, that house contained deteriorated lead-based paint, which would create lead dust, throughout the interior and on the front porch. Those areas included [Robinson's] bedroom and his grandfather's room in the basement, both areas where Daquantay spent much of his time.

> 10. Based on all of the evidence I have reviewed in this matter the testimony, the childhood lead poisoning literature and my education, training and experience**,** it is my opinion, to a reasonable degree of medical probability, that Daquantay Robinson was exposed to lead dust from deteriorated lead-based paint from the day he was brought home to [the Property] until the day he moved out.
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> ***
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> 12. At the trial, I was asked when Daquantay Robinson's lead exposure began, and I stated that it began "around or before" his first elevated blood lead level at age 9 months. In my mind, I was looking at when we were certain that Mr. Robinson's exposure to lead had begun. We can only be certain of lead exposure by testing the blood of the patient.
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> 13. In this case, Mr. Robinson's blood was not tested for lead until he was 9 months old. However, I do believe that, more likely than not, he was exposed to and ingesting lead during the entire time he was residing at [the Property]. If I had been asked at trial whether I believed, to a reasonable degree of medical probability, that Daquantay Robinson had been exposed to lead during the entire time he lived at [the Property], my answer would have been yes.
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> 14. I do not believe that Daquantay Robinson's initial elevated blood lead level of 12 mg/dl on December 3, 1997 was indicative of an acute ingestion of a single chip of leaded paint. His blood lead levels rose over the next 2 years and remained elevated during his entire tenancy at [the Property]. This is indicative of chronic, ongoing lead exposure rather than an instance of an acute, one time ingestion. Further, given the fact that Daquantay Robinson's mother resided in [the Property] during her pregnancy with him, it is likely that he was exposed to lead in utero.

B. The Declaratory Judgment

As a threshold matter, we address the posture of this appeal. Penn National moved for summary judgment on two alternative bases. First, as set out above, Penn National asked the court to rule that coverage was not triggered under the Penn Policies because there was no occurrence during the policy period ("the coverage issue"). Second, alternatively, Penn National argued that it was "at most, liable . . . for a six (6)-month

period representing its time on the risk, from February 11, 1997 (when the newborn [Robinson] moved into the insured premises) through August 1, 1997, the end of the term of the [Penn Policies]" ("the pro-rata issue").

After hearing argument, reviewing Dr. Blackwell-White's trial testimony, and considering the First and Second Affidavits, the circuit court granted, in part, and denied, in part, Penn National's motion for summary judgment. On the coverage issue, the court ruled that Robinson had adduced evidence "sufficient to present at least a question of material fact that [Robinson] sustained injury during the policy period." The court noted that in that regard, it agreed with Robinson that he was not "preclude[d] [from] introduc[ing] . . . further affidavits . . . [in this] contractual dispute." On the pro rata issue, the court held that *Utica Mutual* controlled and thus "Penn National is liable for no more than its time on [the] risk, which appears to be 12.04 percent of the damages sustained by [Robinson]."

On July 1, 2016, the circuit court entered an order consistent with the above ruling. Pertinent to the instant cross-appeal, the court ordered that Penn National's "liability for *any* damages in this case shall be *no more than* its 'time on risk' allocation pursuant to [*Utica Mutual*], or 171 days out of 1420 days[.]" (Emphasis added). Thus the July 1, 2016 order did not finally resolve Penn National's liability for the Underlying Judgment but left the coverage issue to be litigated.[9]

[9] The case was set in for a pre-trial conference on October 13, 2016, and for trial on November 15, 2016.

Recognizing that the July 1, 2016 order (1) was not a final appealable judgment, both because it left open the claim against the nominal defendants, the Dackmans, and also did not "terminate[ ] the case in the trial court" as to Penn National, *Taha v. S. Mgmt. Co*., 367 Md. 564, 567 (2002), and (2) did not fall within that subset of interlocutory orders that are immediately appealable, *see* Md. Code (2006, 2013 Repl. Vol.), §12-303 of the Courts & Judicial Proceedings Article, Penn National moved to alter or amend. Penn National asked the court to amend the July 1, 2016 order to dismiss the Dackmans, as nominal defendants, and to amend the language of the order that created an "ambiguity as to the Court's ruling on the amount of Penn National's and CX Re's 'time on risk' allocation . . . due to the inclusion of the words 'no more than' which precede the Court's calculation of Penn National's and CX Re's respective time on risk allocations."

Robinson responded to Penn National's motion to amend, stating that "all parties hereto desire finality in this case, for appeal purposes, although there may not be agreement among all parties as to how to achieve that goal." Robinson asserted that he disagreed with the circuit court's ruling to the extent that it denied him further discovery on the exhaustion of CX Policies 1 and 2, and determined that pro rata allocation applied, but that he "desire[d] to finalize the ruling so that the appropriate appeals can follow." In a footnote, Robinson emphasized that, because the July 1, 2016 order denied Penn National's motion for summary judgment on the coverage issue, "there is currently no final judgment to be appealed unless the order is modified."

Thereafter, on October 3, 2016, Robinson, Penn National, and CX Re jointly filed a "Consent Motion for Entry of Order of Declaratory Judgment." Without waiving any "post-judgment rights," they consented to the entry of a declaratory judgment, which they attached to the motion. As set out above, the declaratory judgment, which was entered by the court on October 12, 2016, ordered that Penn National was liable for payment of 12.04% of the Underlying Judgment, which reflected its time on the risk beginning on Robinson's birth date and concluding on the date that the Penn Policies ended.

In sum, the circuit court's July 1, 2016 order granting, in part, and denying, in part, Penn National's motion for summary judgment left the coverage issue, *i.e.*, whether Penn National was liable for 12.04% or none of the Underlying Judgment, to be decided at trial, depending upon the factual determination of when Robinson was first exposed to lead-based paint; the declaratory judgment, however, determined as a matter of law that Robinson's exposure to lead paint began when he was born. Thus any genuine dispute of material fact on this issue was extinguished by the entry of the declaratory judgment determining the amount of Penn National's liability and, by consenting to the entry of that final declaratory judgment, Penn National gave up its right to further litigate *in the trial court* the factual issue of the triggering date for coverage under the Penn Policies. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462, *as supplemented on denial of reconsideration*, 433 Md. 493 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right."). Were this not so, then the declaratory judgment would be interlocutory, and this appeal would

not properly be before us. *See, e.g., Huber v. Nationwide Mut. Ins. Co.*, 347 Md. 415, 422-23 (1997) ("an order that resolves liability issues but does not determine the amount of damages cannot be made final and appealable under Md. Rule 2-602(b)" because to allow an immediate appeal from such an order would offend the "well-established policy against piecemeal appeals"). Accordingly, Penn National's express reservation of its "post-judgment rights" is limited to challenging the trial court's determination of liability as an issue of law, not fact.

C. Dr. Blackwell-White's Affidavits

Penn National contends that Dr. Blackwell-White's testimony at the trial in the Underlying Action conclusively established that the date of Robinson's exposure to lead post-dated the end of the Penn Policies. Penn National asserts, in reliance upon the Fourth Circuit's decision in *Roberts*, *supra*, that Robinson was bound by that evidence and, under the principles of judicial estoppel, should not have been permitted to introduce the First and Second Affidavits in support of an earlier triggering date. Accordingly, Penn National asks this Court to reverse the ruling that Penn National is liable and remand for entry of an amended judgment declaring that it has no liability to indemnify the Dackmans for the Underlying Judgment.

Robinson responds that the circuit court "correctly found coverage under the Penn National policy" based upon the testimony and evidence in the Underlying Action and the First and Second Affidavits. He maintains that the precise date of his exposure to lead-based paint was not at issue in the Underlying Action, beyond the fact that he was exposed

while he lived at the Property from 1997 to 2000. For that reason, he asserts that the decision in *Roberts* in inapposite and judicial estoppel is not implicated.

"Judicial estoppel is defined as 'a principle that precludes a party from taking a position in a subsequent action inconsistent with a position taken by him or her in a previous action.'" *Dashiell v. Meeks*, 396 Md. 149, 170 (2006) (quoting *Underwood-Gary v. Mathews*, 366 Md. 660, 667 n.6 (2001)). Judicial estoppel only applies if three criteria are satisfied:

> (1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent position must have intentionally misled the court in order to gain an unfair advantage.

Id. at 171. "Thus, judicial estoppel applies when it becomes necessary to protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system." *Id.*

In *Roberts*, 668 F.3d at 109-10, the owner of the premises where Roberts was exposed to lead paint was uninsured from Roberts's birth until her first birthday. Thereafter, Penn National insured the owner of the premises for twenty-four months, until the premises were sold to a new owner. *Id.* at 110. The district court calculated that Roberts was exposed to lead paint at the premises over a period of fifty-five months, beginning from her birth. *Id.* at 111. Thus, Penn National's time on risk allocation of liability was 43.6% (24/55 months). *Id*. at 111. On appeal from that judgment, Roberts argued that the district court should have found that her lead exposure began on the date of

her first elevated blood-lead level at age twenty months, not her date of birth. *Id.* at 116. By using that later date, the period of Roberts's total lead exposure would be reduced from fifty-five months to thirty-five months, thereby reducing the denominator in the allocation fraction and increasing Penn National's share of the judgment. *Id.*

The Fourth Circuit rejected that argument. It emphasized that Roberts took the position in her complaint and at the trial in the underlying action that "she had been exposed to lead . . . since her infancy." *Id.* In her complaint, Roberts alleged that she was exposed to lead paint in 1990 before she was born. *Id.* Roberts's medical expert in the underlying trial was also Dr. Blackwell-White. Dr. Blackwell-White testified at trial that "[Roberts's] lead levels themselves indicate that she was exposed, conservatively, . . . to lead from the age of 20 months on through to four years," but also opined extensively about the effects of lead on the brains of infants and toddlers. *Id.* Roberts's mother testified to the presence of flaking and chipping lead paint at the premises from before Roberts was born and throughout her infancy, during which time Roberts sucked her thumb. *Id.* at 117. In sum, the Fourth Circuit concluded that Roberts's position at trial was that she had been exposed to lead from "at least her infancy" and that such position had contributed to her obtaining an $850,000 jury verdict. *Id.* at 117.

The court then turned to judicial estoppel, explaining that

> [i]f a litigant "assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Id. (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted)). The Fourth Circuit declined to decide if judicial estoppel applied to bar Roberts from taking a contrary position to the one she took at the underlying trial because "at the very least, [her] previous position undermine[d] the credibility of her current argument" and supported the district court's determination that, in calculating Penn National's pro rata allocation, the appropriate starting point was the date Roberts was born. *Id*.

We return to the case at bar. We conclude that Robinson was not judicially estopped from presenting the First and Second Affidavits on the issue of Penn National's time on the risk, and that the circuit court did not err by declaring that the Penn Policies were triggered as of February 11, 1997, Robinson's birth date. We explain.

Unlike in *Roberts*, Robinson does not take a position on the coverage issue inconsistent with a position that he took in the Underlying Action. Throughout the litigation of the Underlying Action, Robinson maintained that his lead exposure started when he was born. In his complaint, Robinson alleged that "[o]n or about birth to approximately 2000, while living at [the Property], the minor, Daquantay Robinson, was exposed to flaking, chipping, and peeling lead paint and lead paint dust[.]" In opposition to the Dackmans's motion for summary judgment in that action, Robinson submitted the First Affidavit, which as discussed, included Dr. Blackwell-White's opinion that Robinson "was exposed to lead-based paint hazards at [the Property] from his birth until [his family] moved out[.]"

At trial, Dr. Blackwell-White was called as an expert witness on the subject of pediatrics and childhood lead poisoning. She was asked how "children get the paint from the deteriorated condition into their bodies?" She replied:

> The way it works is that there's peeling, chipping paint, dust, what have you. Children, first off, I guess, *even from before they crawl*, if their house is in enough disrepair, *lead dust can even fall into the cribs and the playpens and so forth, and they will get it on their sticky fingers.*

(Emphasis added). She further opined that exposure to lead paint "can occur prenatally."

Tiesha testified that she moved into the Property when she was eight months pregnant with Robinson, in January 1997. Both Tiesha and Moses testified that there was chipping, peeling, and flaking paint throughout the house from the time that they moved in. Consistent with this testimony, in his closing argument, Robinson's counsel argued that the case began "in January of 1997 when . . . Moses and Tiesha . . . who at the time was eight-months pregnant moved into [the Property]."

Based on a very similar record in *Roberts*, the Fourth Circuit ruled that Roberts had taken the position at the trial that her exposure began at birth, even though Dr. Blackwell-White had opined in that case, based upon the first elevated blood lead level, that she had been exposed from "the age of 20 months on through to four years." 668 F.3d at 116. Here, Dr. Blackwell-White's exposure opinion was less definitive. Dr. Blackwell-White's opinion, offered in the First and Second Affidavits, that Robinson was exposed to lead from the day he was born is consistent with her trial testimony that Robinson was exposed to lead "*around* or *before* nine months of age[.]" These two opinions can coexist simultaneously. As Dr. Blackwell-White explained both at trial and in the Second

Affidavit, the only certain way to determine if a child has an elevated blood lead level is to test the child's blood. A blood lead test is evidence of a prior exposure to lead, but the timing and location of that exposure must be proved by other evidence. Here, there was ample evidence of lead hazards at the Property before Robinson was born and continuing until his first blood lead level test.

There also is no evidence in the record that the court ever accepted the position that Robinson's lead exposure began at nine months of age or that Robinson "intentionally misled the court in order to gain an unfair advantage." *Dashiell*, 396 Md. at 171. The precise date of Robinson's exposure to lead was not an issue in the trial of the Underlying Action because he had lived at the Property from his birth until he was almost four years old. This is not a case, like *Roberts*, where Roberts took a position in the underlying trial that was advantageous to her and to her chances of a larger recovery and then "changed her tune" when it "came time to divvy up [the] judgment" in a coverage dispute. 668 F.3d at 117. The circuit court did not err by ruling on this record that the Penn Policies were triggered as of Robinson's date of birth and that Penn National was liable for its time on risk.

III.

CX Re's Cross-Appeal

In its cross-appeal, CX Re contends that the circuit court erred by declaring that CX Policy 3 provided coverage for Robinson's claim. Robinson responds that the circuit court correctly construed CX Policy 3 to provide coverage and, to the extent that we may

disagree, that the court erred by denying Robinson additional discovery relative to the claimed exhaustion of CX Policies 1 and 2.

A. Exhaustion of CX Policies 1 and 2

As discussed, CX Re insured the Dackmans pursuant to three consecutive CGL policies covering the Property. All of the CX Policies include identical language explaining that payment of indemnity claims erodes or impairs, and can eventually exhaust, CX Re's limits of insurance under each policy. CX Re's "limits of insurance" for lead exposure claims are $1,000,000 per "occurrence" and $1,000,000 "in all" during a policy period.

On summary judgment, CX Re presented evidence, in the form of an affidavit from its claims processing administrator, that CX Policies 1 and 2, which ran from August 1, 1997 to August 1, 1998, and from August 1, 1998 to August 1, 1999, respectively, were fully exhausted by payments made prior to the Underlying Judgment. CX Policy 3, which ran from August 1, 1999 to August 1, 2000, was partially impaired to the extent of $162,299, leaving $837,701 available.

In opposing CX Re's motion, Robinson did not contradict the claims administrator's affidavit, but argued that it was entitled to additional discovery "as to how CX Re has Applied its Exhaustion Calculations."

In its ruling on summary judgment, the circuit court held that it was "clear and cannot be disputed that the 1997 and 1998 policies have been exhausted. And under the provisions of the unambiguous contract, CX is not required to indemnify or pay further

coverage under those policies." As we shall discuss, however, the circuit court determined that coverage under CX Policy 3 was triggered and, thus, that CX Re was liable for its pro rata share of the underlying judgment, which was calculated to be 365 days out of 1,420 days (25.7%).

In his opening brief in this Court, Robinson did not challenge the circuit court's ruling on exhaustion of CX Policies 1 and 2, arguing only that the circuit court erred by allocating CX Re's liability under CX Policy 3 on a pro rata basis. CX Re contends that Robinson waived this issue for appellate review by not presenting argument on it in his opening brief. We agree.

Rule 8-504(a)(6) requires that an appellant's brief include "[a]rgument in support of the party's position on each issue." This Court has stated that failure to raise an argument in an initial brief will deem the argument waived on appeal. *See Bryan v. State Road Comm'n of State Highway Admin.*, 115 Md. App. 707, 715 n. 6 (1997), *aff'd*, 356 Md. 4 (1999).

Robinson maintains that he was not aggrieved by the circuit court's ruling that CX Policies 1 and 2 were exhausted because the circuit court determined that CX Policy 3 *was* triggered. In his view, if, and only if, this Court were to reverse that ruling would Robinson be aggrieved. Thus he asserts that he properly raised this issue in his response to CX Re's cross-appeal challenging the court's ruling on CX Policy 3.

The flaw in Robinson's reasoning is that the circuit court ruled against Robinson on separate and independent grounds that the Insurers were entitled to pro rata allocation and

that CX Policies 1 and 2 had been exhausted, and in favor of Robinson that CX Policy 3 provided coverage. CX Re fully prevailed with respect to its exhausted policies and its cross-appeal sought no relief relative to those policies. Robinson, as the only party aggrieved by the exhaustion ruling, was required to raise that issue in his initial brief. Having failed to do so, Robinson has waived this issue on appeal.

B. Coverage under CX Policy 3

CX Policy 3 (and the other CX Policies) include an endorsement entitled "COVERAGE LIMITATION – LEAD CONTAMINATION." As pertinent, at Section I, it provides: "This insurance does not apply to: . . . (3) '[b]odily injury' . . . arising out of the ingestion, inhalation, absorption of, or exposure to, lead, lead-paint or other lead-based products of any kind, form or nature whatsoever" (the "Exclusion"). Section II creates an exception to the Exclusion:

> Section II – COVERAGE LIMITATION
>
> (a.) Exclusion (3) above does not apply to and we will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" arising out of the Ingestion, Inhalation, absorption of, or exposure to lead, lead-paint or other lead-based products of any kind, form or nature whatsoever to which the insurance provided by this endorsement applies. We will have the right and duty to defend any "suit" seeking those damages.

Section II**,** subsection (b.) explains when coverage is available under this exception:

> (b.) This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; **and**

> (2) The "occurrence" is not before the beginning of the Policy Period shown in the Declarations of this policy; **and**
>
> (3) The "property damage" first occurs during this policy period; **or**
>
> (4) For "bodily injury" a lead level in blood, bone or body tissue in excess of the "safe level" is first diagnosed by a State licensed physician or other State licensed health care provider during this policy period[.]

(Emphasis added). The term "safe level" is elsewhere defined in the endorsement to mean "10 [µg/dL] as prescribed by the Centers for Disease Control."

In its motion for summary judgment, CX Re maintained that to trigger coverage for a lead-related bodily injury under Section II(b.), subsections (1), (2), *and* (4) must be satisfied. There is no dispute that Robinson satisfied subsections (1) and (2). CX Re maintained, however, that Robinson failed to satisfy subsection (4) because he was "first diagnosed" with an elevated blood lead level "in excess of the 'safe level'" on December 3, 1997, which was before CX Policy 3 began on August 1, 1999.[10] Consequently, CX Re asserts that the circuit court erred by ruling that it was liable to indemnify the Dackmans for the Underlying Judgment under CX Policy 3.

Robinson, on the other hand, maintained that coverage was triggered under Section II(b.) for a bodily injury if subsections (1) and (2) were satisfied *or* if subsection (4) was satisfied. Thus, in his view, because he sustained bodily injury caused by an occurrence between August 1, 1999 and August 1, 2000 in the United States, satisfying subsections (b.)(1) and (2), he was not obligated to satisfy subsection (b.)(4).

[10] This was the first day of the CX Policy 1 policy period, which, as mentioned, was exhausted.

The circuit court agreed with Robinson's construction, ruling:

> Regarding the 1999 through 2000 policy period, the provisions of the endorsement at Exhibit G of Defendant CX's motion for summary judgment is controlling. The Plaintiff here is seeking coverage for bodily injury due to lead-based paint, which all parties agree is under the purview of this endorsement. The provisions requisite for bodily injury coverage have been satisfied under the unambiguous contract provisions. The contract requires that for bodily injury coverage, the bodily injury is caused by an occurrence during the policy period and the occurrence is not before the beginning of the policy period.

Maryland law is well settled that "the interpretation of an insurance policy is governed by the same principles generally applicable to the construction of other contracts[.]" *Mitchell v. AARP Life Ins. Program*, 140 Md. App. 102, 116 (2001). Accordingly, "'ordinary principles of contract interpretation apply.'" *Megonnell v. United Servs. Auto. Ass'n*, 368 Md. 633, 655 (2002) (citation omitted); *accord Dutta v. State Farm Ins. Co.*, 363 Md. 540, 556 (2001). In "'deciding the issue of coverage under an insurance policy, the primary principle of construction is to apply the terms of the insurance contract itself.'" *Universal Underwriters Ins. Co. v. Lowe*, 135 Md. App. 122, 137 (2000) (quoting *Bausch & Lomb, Inc. v. Utica Mutual Ins. Co.*, 330 Md. 758, 779 (1993)).

The Court of Appeals has explained that interpretation of insurance contracts, like any other contract, "begins with the language employed by the parties." *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 279 (2003). Generally, Maryland courts "analyze the plain language of [an insurance] contract according words and phrases their ordinary and accepted meanings as defined by what a reasonably prudent lay person would understand them to mean." *Kendall v. Nationwide Ins. Co.*, 348 Md. 157, 166 (1997). If

the policy's language is unambiguous, then the Court gives effect to "its plain, ordinary, and usual meaning, taking into account the context in which [the language] is used." *John L. Mattingly Constr. Co. Inc. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, (2010) (citation omitted). When a contract is unambiguous, "there is no room for construction." *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985). Moreover, the insurance policy, including endorsements, "must be construed as a whole and 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution' must be examined." *Riley*, 393 Md. at 79 (quoting *Chantel Assocs. v. Mt. Vernon Fire Ins. Co.*, 338 Md. 131, 142 (1995)).

With these principles in mind, we turn to the policy language. The Exclusion generally precludes coverage for "bodily injuries" and "property damage" resulting from lead. Section II excepts from the Exclusion "bodily injuries" and "property damage" arising under certain limited parameters. Under a plain reading of Section II (b.), coverage is triggered for property damage if subsections (1), (2), *and* (3) are met, while coverage is triggered for bodily injury if subsections (1), (2), *and* (4) are met. Robinson's construction of Section II (b.) would create two avenues to trigger coverage: i) satisfaction of subsections (1)-(3), *or* ii) satisfaction of just subsection (4). However, subsections (1) and (2) apply to *both* bodily injury *and* property damage, whereas subsection (3) applies *only* to property damage and subsection (4) *only* to bodily injury. As a result, it would be illogical to group subsections (1)-(3) together and treat subsection (4) as an independent basis for coverage under the circumstances of the instant case.

The above construction is consistent with the reasoning of the United States District Court for the District of Maryland in *CX Reinsurance Co. Ltd. v. Levitas*, 207 F. Supp. 3d 566, 574 (D. Md. 2016), *aff'd*, 691 Fed. Appx. 130 (4th Cir. 2017),[11] interpreting the identical contract language. In that case, CX Re's insured, Stewart Levitas, had been sued individually by a former tenant, Loyal, who alleged that she had been injured by exposure to lead-based paint at the leased premises. *Id.* at 570. CX Re filed a declaratory judgment action against Levitas and Loyal to determine the parties' rights and obligations under two CGL policies issued by CX Re to Levitas that were identical to CX Policy 3. *Id.* at 569. CX Re moved for summary judgment, arguing that the "COVERAGE LIMITATION – LEAD CONTAMINATION" endorsement excluded coverage for Loyal's injuries. *Id.*

As in the case at bar, Loyal argued that Section II(b.) of the endorsement provided "two alternatives for liability coverage: either 'the bodily injury is caused by an occurrence that takes place in the policy's coverage territory and the occurrence does not take place before the beginning of the policy period,' or a lead level in excess of the 'safe level' was first diagnosed during the policy period." *Id.* at 575. Loyal claimed that she could "establish coverage under the first of these proposed disjunctive interpretations." *Id.* The district court rejected such construction, explaining that it was "strained and violate[d] the settled principle of giving effect to the contract's plain and ordinary meaning." *Id.* The

[11] Robinson asserts that *CX Re Insurance Co. Ltd. v. Levitas*, 207 F. Supp. 3d 566, 574 (D. Md. 2016), *aff'd*, 691 Fed. Appx. 130 (4th Cir. 2017), "has no precedential value" because it was affirmed by the Fourth Circuit in a *per curiam* opinion. A reported decision of a federal district court, though not binding on this Court, nonetheless may be considered as persuasive authority. *See French v. Hines*, 182 Md. App. 201, 262 n.21 (2008).

court explained that "if one reads subsections 1 and 2 in isolation" then Section II(b.) did not require "an occurrence of bodily injury during the policy period[.]" *Id.* Instead, the court held that "under the established canons of contract interpretation, all of Section II must be read together. By doing so, one finds the limitations of subsections 1, 2, and 4 applicable to bodily injury and the limitations of subsections 1, 2, and 3 applicable to property damage." *Id.*

Returning to the case at bar, we are likewise persuaded that the plain and ordinary meaning of Section II(b.) of the endorsement required Robinson to satisfy subsections (1), (2), and (4). Robinson concedes that he was not "first diagnosed" with a blood lead level in excess of 10 µg/dL during the term of CX Policy 3. It follows, based upon the plain language of the lead contamination endorsement, that the exception to the Exclusion was not satisfied and that coverage was excluded for Robinson's bodily injury. For that reason, we hold that the circuit court erred by determining that coverage was triggered under CX Policy 3. Considering our conclusion, we need not reach Robinson's contention that the circuit court erred by allocating liability under CX Policy 3 on a pro rata basis even though CX Re did not request "pro rata relief" in its motion for summary judgment.

CONCLUSION

For the reasons stated herein, we affirm the declaratory judgment, in part, holding that Penn National is liable for 12.04% of the Underlying Judgment and that CX Policies 1 and 2 are exhausted. We reverse the declaratory judgment, in part, holding that CX Re

is not liable for 25.7% of the Underlying Judgment under CX Policy 3. On remand, the circuit court shall enter an amended declaratory judgment consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ENTRY OF AN AMENDED DECLARATORY JUDGMENT CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EVENLY BETWEEN ROBINSON AND PENN NATIONAL.