UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2299

September Term, 2015

MURRAY A. KIVITZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF SEYMOUR BADEN

v.

ERIE INSURANCE EXCHANGE

Eyler, Deborah S.,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: April 29, 2016

A motorist was involved in an accident that resulted in the death of his passenger, a resident of his household. The motorist's insurance policy contained a household exclusion, which excluded coverage for the passenger's own injury and death.

The decedent's children brought wrongful death claims, seeking to recover for their own mental anguish and for their loss of the decedent's services. The motorist's insurer declined coverage, asserting that the children's claims were "derivative" of the decedent's claims and thus were barred by the household exclusion. In the motorist's declaratory judgment action against the insurer, the Circuit Court for Montgomery County entered summary judgment against the motorist, reasoning that the insurer's interpretation was "more reasonable."

Construing the specific language of the particular policy at issue in this case, we shall hold that the relevant provisions are, at the very least, ambiguous. Although the insurer undoubtedly could have drafted a policy that unambiguously excluded coverage for the types of claims asserted by the decedent's children, the policy in this case does not achieve that end. Because an ambiguous insurance policy must be construed against the insurer, we shall, therefore, reverse with directions to enter summary judgment against the insurer.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Automobile Accident and Insurance Coverage for that Occurrence

On September 23, 2012, Elizabeth Colton was a passenger in a car that was being driven by Seymour Baden. Baden's car collided with a vehicle driven by another motorist, Rachel Weintraub.

Colton suffered fatal injuries as a result of the collision. She was survived by her two adult sons, David Colton and Joshua Colton.

Baden himself died six months later, from causes unrelated to the automobile accident.[1]

At the time of the accident, Baden and Colton lived at the same residence, but were not married. Baden and Colton jointly owned an automobile liability policy issued by Erie Insurance Exchange ("Erie"). They also owned an umbrella policy[2] issued by Erie (the "Policy"). The Policy insured both Baden and Colton for the period from January 2012 to January 2013.

An eight-page agreement, drafted by Erie, set forth the Policy's terms. The document included a set of definitions for terms with "special meaning" in the Policy. The document defined "'bodily injury'" to "mean[] physical harm, sickness or disease including mental anguish, care, loss of services, or resulting death." The document, in turn, defined "personal injury" to include "bodily injury."

Both the insuring agreement and the exclusions used the defined term "personal injury." The insuring agreement stated that Erie promised to pay the insured's legal obligations to pay damages "because of personal injury" resulting from a covered

[1] Murray Kivitz is the personal representative of Baden's estate and the named appellant in this case. Because Kivitz is a party to this appeal only in his representative capacity, we refer to the appellant as "Baden's estate" or "the Baden estate" throughout this opinion.

[2] In broad, general terms, an umbrella policy is an insurance policy that provides insurance coverage above the limits of the insurer's liability in another policy, such as the automobile liability policy in this case.

occurrence. On the other hand, the Policy contained two household exclusions that provided that Erie did not cover "personal injury" to the policyholders themselves or to adults who resided in the same household as a policyholder.

B. Wrongful Death and Survival Action Brought by the Colton Sons

On May 29, 2013, Colton's sons, David Colton and Joshua Colton, commenced a wrongful death and survival action in the Circuit Court for Montgomery County. The complaint named both Baden's estate and Weintraub, the driver of the other car, as defendants. The Colton sons alleged that the negligence of Baden and Weintraub caused Colton's death.

In their wrongful death counts, the Colton sons asserted claims for "significant mental anguish, emotional pain and suffering, loss of society, companionship, comfort, and attention" resulting from their mother's death. They also asserted claims for, among other things, "the pecuniary value of services expected to be performed by" Colton, and "any and all damages recoverable under the Maryland Wrongful Death Statute."[3]

In the survival counts, David Colton, as personal representative of his mother's estate, sought to recover damages for the cost of medical care that Colton incurred and the pain and suffering that she experienced from the time of the accident to the time of her death.

[3] Md. Code (1974, 2013 Repl. Vol.), § 3-904(e) of the Courts and Judicial Proceedings Article provides that wrongful death damages for the death of a parent of an adult child "may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, attention, advice, counsel, training, education, or guidance where applicable."

C. Declaratory Judgment Action Against Erie Insurance

Seeking to determine the extent of Erie's insurance coverage for the claims asserted by the Colton sons, the Baden estate commenced a declaratory judgment action in the Circuit Court for Montgomery County on December 20, 2013. The estate asked the court to declare that the Policy obligated Erie to indemnify it for any damages assessed in the wrongful death and survival actions in excess of the basic coverage from the underlying automobile policy.

The complaint alleged that Erie had disclaimed any obligation under the Policy to cover Baden's potential liability for the wrongful death and survival claims. Erie's letter allegedly cited the Policy's household exclusions. The complaint asserted that those exclusions did not apply to the Colton sons, who had not been residents of the same household as their mother or Baden.

The complaint also named "Erie Insurance Company" as a co-defendant, alleging that the Policy listed "both Erie Insurance Company and Erie Insurance Exchange as insurers." The complaint asserted identical claims against those two named entities.

The Baden estate's complaint named three more defendants as necessary parties: David Colton, both in his individual capacity and his capacity as representative of his mother's estate; Joshua Colton, individually; and Weintraub, the co-defendant from the wrongful death and survival action.

In its answer to the declaratory judgment complaint, Erie asserted that the Policy excluded coverage for any damages resulting from Colton's injuries or death. Erie contended that the sons' wrongful death claims were "derivative" of the claims for bodily

injury to Colton and hence were excluded under the provisions that would exclude coverage for bodily injury to Colton herself. Erie asked the court to declare that the Policy did not provide liability coverage to Baden for the wrongful death and survival claims.

The answer also asserted that claims against "Erie Insurance Company" should be dismissed on the ground that no entity by that name was a party to the insurance policy.

D. Cross-Motions for Summary Judgment

On April 9, 2014, the Baden estate moved for summary judgment in the declaratory judgment action. The motion asserted that, under Maryland law, the wrongful death claims asserted by Colton's sons were "independent" of her own personal injury claims.[4] The estate concluded that the household exclusion excluded coverage only for Colton's injuries and not for the injuries to her sons.

Erie opposed the motion and made a cross-motion for summary judgment on its own behalf. Erie contended that it had no obligation to indemnify Baden for the survival claims because the Policy excluded coverage for Colton's injuries. Erie also contended that, for the purposes of Maryland insurance law, "wrongful death claims are considered to be 'derivative' of the decedent's claim[.]" According to Erie, the exclusion that

[4] The argument in support of the motion relied primarily upon *Mummert v. Alizadeh*, 435 Md. 207 (2013), which held that "a wrongful death claimant's right to sue is not contingent on the decedent's ability to file a timely negligence claim prior to her death[,]" (*id.* at 228), because Maryland's wrongful death statute created "a new and independent cause of action[.]" *Id.* at 222.

pertained to Colton's own injuries also excluded coverage for any "derivative" wrongful death claims that resulted from her death.

Erie based its argument primarily on this Court's opinion in *Costello v. Nationwide Mutual Ins. Co.*, 143 Md. App. 403 (2002), and other comparable cases. In *Costello*, 143 Md. App. at 406-07, this Court construed an automobile policy and umbrella policy owned by a policyholder who died in a car accident. Based on the terms of those policies, which included a narrow definition of "'bodily injury'" and a broad limitation on liability "'for all legal damages, including all *derivative* claims . . . arising out of . . . bodily injury'" (*id.* at 409) (emphasis added), we concluded that the insurer's obligation to cover wrongful death claims was limited to the amount that the decedent herself would have been able to recover under the policy. *Id.* at 414. Although Erie relied on *Costello*, it admitted that its own policy did not assert a similar limitation for "derivative" claims.[5]

The Colton sons filed briefs in support of the Baden estate's motion and in opposition to Erie's cross-motion. The sons argued that, under the express language of the Policy, Erie covered Baden's liability for their wrongful death claims and that none of the exclusions negated that coverage. The Coltons emphasized that the Erie policy, both in its broad definition of "bodily injury" and its narrow exclusions, was quite unlike the policies at issue in *Costello* and in the other cases cited by Erie.

[5] Nor does the Erie policy define "bodily injury" as narrowly as the policy at issue in *Costello*. *See infra* pp. 16-17.

E. Judgment of the Circuit Court in Favor of Erie

After holding a hearing, the circuit court issued a written order on August 26, 2014, granting summary judgment in favor of Erie. The court declared that the Policy "does not provide insurance coverage for Seymour Baden or his Estate for wrongful death and survival claims asserted by David Colton and Joshua Colton[.]"

In an opinion accompanying the order, the circuit court stated that, because the survival action was "based solely on any claim Colton could have made for her own personal injuries had she survived the collision," it followed that the household exclusion for Colton's injuries excluded coverage for those survival claims.[6]

In concluding that the Policy also excluded coverage for the sons' wrongful death claims, the court stated:

> While the immediate issue does not appear yet to have been addressed by Maryland appellate law, case law cited by Erie is analogous and reflects that the "derivative" nature of a wrongful death claim usually drives the outcome of similar issues such as application of insurance policy limits or statutory coverage limitations. Considering the definitions and language in the Policy, the Court finds that the defendant sons' wrongful death claim is not separate and distinct from the bodily injury of Colton – that is, it is "derivative" – for purposes of insurance coverage. Since her bodily injury claims are excluded from coverage under the Policy, so are the sons' claims derived therefrom. The Court believes *this is a more reasonable interpretation of the language of the Policy* and more consistent with the intent and expectations of the parties to the contract.

(Emphasis added.)

[6] This ruling regarding the extent of Erie's coverage for survival claims has not been challenged.

Although the court granted summary judgment as to Erie Insurance Exchange, the court's orders did not address the pending claims that the estate had asserted against "Erie Insurance Company."

The Baden estate filed a notice of appeal after the entry of the summary judgment order. On its own motion, this Court dismissed that appeal as premature, because the failure to resolve the claims against "Erie Insurance Company" meant that the court had not yet entered a final judgment disposing of all claims against all parties. *Murray A. Kivitz, Personal Representative of the Estate of Seymour Baden v. Erie Insurance Company, et al.*, No. 1581, Sept. Term 2014 (filed Sept. 4, 2015).

In response, the parties filed a joint stipulation of dismissal, and the court entered an order dismissing with prejudice all claims against Erie Insurance Company. Within 30 days after the entry of that order, the Baden estate noted this appeal.

QUESTION PRESENTED

The Baden estate contends that the circuit court incorrectly granted summary judgment in favor of Erie. The appellant's brief framed the issue in these terms: "Under Maryland law, does a liability insurance policy provision that excludes from coverage a mother's bodily injury claims against a tortfeasor act automatically to exclude the corresponding wrongful death claims of her adult children on the basis that they are 'derivative'?" As discussed below, we conclude that the court erred in construing crucial terms of the Policy.

Based on the specific definition of "bodily injury" in the Erie Policy ("physical harm, sickness or disease including mental anguish, care, loss of services, or resulting

death"), a reasonably prudent layperson could conclude that the Policy specially defined both "mental anguish" and "loss of services" as types of "bodily injury." Under this reading of the Policy, the Colton sons have sustained bodily injuries that are distinct from their mother's injuries. Erie promised to cover Baden's legal obligations to pay for injuries that resulted from the accident, which arguably include the mental anguish and loss of services that the Colton sons claim to have suffered. Although the Policy excludes coverage for the injuries to Colton herself, the household exclusions do not exclude "derivative" claims or claims "arising from" or "resulting from" her injuries, such as wrongful death claims for loss of services or for the mental anguish suffered by a survivor. Nor do the sons' claims involve allegations of "bodily injury" to a member of Colton's household.

Erie could have drafted a policy that unambiguously expressed an intent either not to cover the types of injuries claimed by the Colton sons or to exclude those types of injuries from coverage, but this Policy unambiguously expressed neither intent. The circuit court should have granted judgment in favor of the Baden estate.

DISCUSSION

A. Standards for Reviewing Court's Grant of Summary Judgment

In general, summary judgment is appropriate where "there is no genuine dispute as to any material fact" and where "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "Although summary judgment in a declaratory judgment action is 'the exception rather than the rule,' summary judgment may be warranted where there is no dispute as to the terms of an insurance contract but

only as to their meaning." *Nationwide Mut. Ins. Co. v. Scherr*, 101 Md. App. 690, 695 (1994) (quoting *Loewenthal v. Sec. Ins. Co.*, 50 Md. App. 112, 117 (1981)), *cert. denied*, 337 Md. 214 (1995). Both in the circuit court and in this appeal, the parties have agreed that the proper interpretation of this insurance contract is a question of law for the court. Because the summary judgment decision turns on a question of law, we conduct an independent review of the legal correctness of the decision without giving any special deference to the circuit court's legal conclusions. *Payne v. Erie Ins. Exch.*, 442 Md. 384, 391 (2015) (citing *Mathews v. Cassidy Turley Maryland, Inc.,* 435 Md. 584, 598 (2013)).

In determining the rights of the insured and the obligations of the insurer under an insurance contract, we apply the following well-established principles:

> We construe an insurance policy according to contract principles. Maryland follows the objective law of contract interpretation. Thus, the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract. When the clear language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used. Unless there is an indication that the parties intended to use words in the policy in a technical sense, they must be accorded their customary, ordinary, and accepted meaning. Although Maryland does not follow the rule that insurance contracts should be construed against the insurer as a matter of course, any ambiguity will be construed liberally in favor of the insured and against the insurer as drafter of the instrument.

Maryland Cas. Co. v. Blackstone Int'l Ltd., 442 Md. 685, 694-95 (2015) (internal citations and quotation marks omitted); *see also Connors v. Gov't Emps. Ins. Co.*, 442 Md. 466, 482-83 (2015) (explaining that, although a court may resort to extrinsic evidence of parties' intent to resolve ambiguity in insurance contracts, the court will

construe an ambiguous provision against the drafter as a matter of law if no such extrinsic evidence is offered).

The test to determine whether an insurance contract is ambiguous "is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood them to mean." *Consumers Life Ins. Co. v. Smith*, 86 Md. App. 570, 575 (1991) (citation and quotation marks omitted). A term in an insurance policy is considered ambiguous if, when read by a reasonably prudent layperson, the language is susceptible of more than one meaning. *See, e.g.*, *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 80-81 (2006) (holding that reasonable person could understand that an occurrence continuing across four policy periods implicated the coverage limits of four successive insurance policies where the limit-of-liability provisions did not expressly state that the limit applied regardless of the number of policies); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 510-11 (1995) (construing "pollution" exclusion in homeowners' insurance policy against drafter so as not to exclude coverage for injuries from lead paint exposure).

"Drafters of insurance policies have it within their power to draft policies . . . so that exclusions and coverage options are not open to more than one inference or interpretation." *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 189 (1997). Because the policy language drafted by an insurer is construed against an insurer where that language is open to more than one interpretation, "the insurer must use clear and unambiguous language to distinctly communicate the nature of any limitation of coverage

to the insured." *Megonnell v. United Servs. Auto. Ass'n*, 368 Md. 633, 656 (2002) (citation and quotation marks omitted).[7]

B. Special Meanings of Policy Terms

The Policy, drafted by Erie, begins with a recitation that "[i]t is written in plain, simple terms so that it can be easily understood." The Policy then includes a comprehensive set of definitions for words and phrases that "have a special meaning in [the Policy] when they appear in bold type." Many of these definitions are of particular importance here.

The Policy uses first-person plural pronouns ("we," "us," and "our") to refer to the insurer that issued the policy: Erie Insurance Exchange. Second-person pronouns ("you" and "your") refer to the named policyholders: Baden and Colton.

The special term "anyone we protect" includes the named insured, as well as relatives of the named insured who are residents of the same household as the named insured. It is undisputed here that the Policy's phrase "anyone we protect" does not include Colton's adult sons, who were not residents of their mother's household.

[7] Although the parties offered the circuit court competing interpretations of the policy language here, the court's opinion did not explicitly analyze whether the pertinent contractual provisions were ambiguous. The court stated only that it believed that Erie's proposed reading was "a *more reasonable interpretation* of the language of the Policy[.]" (Emphasis added.) The court's statement could be read to imply that Erie's adversaries had advanced a "reasonable interpretation," but that Erie's was "more reasonable." If the court believed that Erie's adversaries had advanced a "reasonable interpretation," it should have found the Policy to be ambiguous and interpreted it against Erie, the drafter.

The Policy defines "'bodily injury'" to "mean[] physical harm, sickness or disease including mental anguish, care, loss of services, or resulting death." The Policy, in turn, defines the term "personal injury" to include any "bodily injury."

The word "occurrence" means "an accident . . . which results in personal injury or property damage which is neither expected nor intended." Finally, the term "ultimate net loss" means "the sum actually paid or payable in cash in the settlement or satisfaction of losses for which anyone we protect is liable, either by judgment or settlement with our consent[.]"

The Policy's insuring agreement uses many of those specially-defined terms:

> OUR PROMISE
>
> We pay the ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage resulting from an occurrence during this policy period. We will pay for only personal injury or property damage covered by this policy.

The Baden estate contends that, under the specific terms of this contract, Erie promised to indemnify Baden for damages that he may be obligated to pay because of "mental anguish" and "loss of services" sustained by the Colton sons as a result of the September 2012 occurrence. This interpretation is, at the very least, a reasonable one.

C. Liability Coverage for "Bodily Injury" Under the Policy

The most crucial provision here is the Policy's definition of "bodily injury." In drafting its Policy, Erie did not employ the ordinary meaning of that term, but instead used the term in a special sense. The definition lists different types of injury separated by commas: "'bodily injury' means physical harm, sickness or disease including mental

anguish, care, loss of services, or resulting death." Under a literal reading of the definition, Colton herself unquestionably suffered "bodily injury" because she suffered the "physical harm" and "resulting death" in the collision. In addition, under a literal reading of the definition, the Colton sons may also have suffered their own separate "bodily injury" because they claim to have suffered "mental anguish" and to have incurred a "loss of services."

Even though loss of services to a person is not typically regarded as a type of bodily injury, the Court of Appeals has held that, when an insurance policy specifically defines "bodily injury" to include "loss of services," the insurer is bound by that definition. *See Valliere v. Allstate Ins. Co.*, 324 Md. 139, 143 (1991). Because Erie's Policy indicated that the term "bodily injury" had special meaning within the Policy, Erie's own definition controls the extent of the coverage.

In *Valliere*, 324 Md. at 140, Mrs. Valliere brought a wrongful death and survival action against an Allstate insured, alleging that her husband's death had resulted from an accident caused by the insured's negligence. *Id.* at 140. As personal representative of her husband's estate, Mrs. Valliere sought to recover for her husband's conscious pain and suffering; in her own capacity and on behalf of her minor child, she sought to recover for the loss of her husband's services. *Id.* at 140-41.

In its contract with its insured, Allstate had promised to: "'pay for all damages an insured person is legally obligated to pay because of bodily injury . . . meaning: [] bodily injury, sickness, disease or death to any person, including loss of services[.]'" *Id.* at 141. The policy included a $50,000 coverage limit for bodily injury to each person, as well as

an aggregate limit of $100,000 for all bodily injury from a single occurrence. *Id.* The central question was whether more than one person had suffered "bodily injury" within the meaning of the policy and, hence, whether the $50,000 limit was inapplicable.

Allstate contended that the lower, per-person limit applied, because, it said, the policy included "loss of services" within the definition of the "bodily injury" that the decedent had suffered. Mrs. Valliere, on the other hand, contended that the policy expressly defined "bodily injury" to include the "loss of services" and thus that she and her child, as well as the decedent, had all suffered "bodily injury" within the meaning of the policy. Because more than one person had suffered "bodily injury" under her interpretation, Mrs. Valliere contended that that the higher, per-occurrence limit should apply.

While the tort case was pending, Mrs. Valliere instituted a declaratory judgment action against Allstate, "seeking a determination that Allstate's policy defined 'loss of services' as a type of 'bodily injury.'" *Id.* at 141. The circuit court granted summary judgment in Allstate's favor, declaring that only the decedent, Mr. Valliere, had suffered bodily injury from the accident and thus that the Allstate policy limited liability coverage to the $50,000 limit for a single injured person rather than the $100,000 limit for a single occurrence. *Id.* at 142.

The Court of Appeals reversed. The Court explained the settled proposition that the policy definition will control the meaning of words within an insurance contract if there is evidence that the parties intended to employ the language in a special sense. *Id.* at 142. Because the Allstate policy specifically defined the term "'bodily injury'" to

mean "'bodily injury, sickness, disease, or death to any person, including loss of services[,]'" the Court concluded that the policy "unambiguously define[d] 'loss of services' as a type of 'bodily injury[.]'" *Id.* at 146. The Court rejected Allstate's argument that the policy language "evidence[d] an intent to provide coverage for consequential damages under the [lower] 'per person' limit when those damages arise from a single bodily injury." *Id.* at 145.

The Court reasoned, moreover, that even if the policy were susceptible of an alternative interpretation offered by Allstate, "the ambiguity would be resolved against the insurance company [that] prepared the policy and in favor of the insured." *Id.* at 146. For instance, it might have been reasonable to infer that Allstate meant to "include" the consequential damages for loss of services experienced by Mrs. Valliere and her child as part of the injury that her husband experienced in the accident. But by failing to clarify that intent, Allstate left open the more literal reading that "loss of services" to a person is one type of "bodily injury" to that person. The reasoning of *Valliere* controls our interpretation of the Erie Policy, because the "bodily injury" definition in this case also included "loss of services," without additional qualifications on that term.[8]

[8] In some respects, the Erie Policy defines "loss of services" as a type of "bodily injury" even more plainly than the Allstate policy did in *Valliere*. In that case, Allstate had argued that the phrase "including loss of services" did not illustrate a type of *injury*, but instead qualified the "damages" that Allstate had promised to pay because of "bodily injury." (Allstate had promised to "'pay for all *damages* an insured person is legally obligated to pay because of bodily injury . . . meaning: [] bodily injury, sickness, disease or death to any person, *including loss of services*[.]'" *Id.* at 141 (emphasis added.) Erie cannot avail itself of a comparable argument, because the language of its policy ("bodily injury" means "physical harm, sickness or disease including mental anguish, care, loss of services, or resulting death") relates solely to the definition of (continued…)

It is true that "bodily injury does not usually encompass loss of services in insurance contracts," *Scherr*, 101 Md. App. at 696 (citing *Daley v. United Servs. Auto. Ass'n*, 312 Md. 550, 553-54 (1988)), but the question ultimately turns on the specific language of the policy at issue. *Scherr* involved largely the same legal issue considered in *Valliere* – whether a per-person limit applicable to a decedent also limited liability coverage for related wrongful death claims. In *Scherr*, however, the policy contained very different contractual terms from those in *Valliere*. The policy in *Scherr* did not include "loss of services" within its definition of "bodily injury." Instead, the policy narrowly defined "bodily injury" simply as "'bodily injury, sickness, disease, or death of any person.'" *Scherr*, 101 Md. App. at 693, 698. In addition, a broadly-drafted provision set the lower, per-person limit "'for all legal damages, *including* care or *loss of services*, claimed by anyone for bodily injury to one person as a result of one occurrence.'" *Id.* at 694 (emphasis added).

Interpreting those contractual terms, we held that the insurer's obligation for loss of services claims against the insured tortfeasor was limited to the policy's per-person limit, not the higher per-occurrence limit. We acknowledged that the wrongful death claimants, the surviving spouse and children of a decedent, "each ha[d] valid claims for the loss of [the decedent's] services." *Id.* at 698. Citing *Valliere*, we also acknowledged that the insurance policy could have "cover[ed] loss of services as distinct from the claims of the person physically injured" if the insurer had "included loss of services in

"bodily injury," and not to some other term.

the definition of bodily injury." *Id.* Nevertheless, the policy at issue was "unlike the policy in *Valliere*, which specifically included loss of services within the definition of bodily injury." *Id.* As a result, only the decedent had sustained bodily injury as defined in that insurance policy. *Id.*; *see also Daley*, 312 Md. at 551-53 (holding that parent's damages for mental anguish and pain and suffering in wrongful death action were not considered "bodily injury" damages under automobile insurance policy that defined "bodily injury" as "'[b]odily [i]njury, sickness or disease, including death resulting therefrom'").

At the very least, Erie's definition ("'bodily injury' means physical harm, sickness or disease including mental anguish, care, loss of services, or resulting death") is reasonably susceptible of the same construction used by the Court of Appeals in *Valliere*. Under this reading, the Policy "specifically included loss of services within the definition of bodily injury." *Scherr*, 101 Md. App. at 698. As in *Valliere*, the definition of "bodily injury" includes the lost services that a decedent's child claims to have suffered in a wrongful death action. Even assuming that the language might be susceptible of a different interpretation, the ambiguity is resolved against Erie as the drafter of the instrument. *See Valliere*, 324 Md. at 146.

Erie's brief largely ignores whether the Policy defines "mental anguish" and "loss of services" as types of "bodily injury." Instead, Erie unpersuasively proposes a few alternative readings of the Policy, suggesting that Erie desired other narrow coverage limitations that were not stated in the contractual language.

Erie first submits that, "[c]learly," in its view, "that 'resulting death' is included in this definition demonstrates that, in cases of wrongful death, the other items listed therein," including mental anguish and loss of services, "must occur *before* the death 'results.'" Turning to the insuring agreement, Erie further argues that, "[c]learly," once again, any injury experienced by either of the Colton sons was not "the result of the 'occurrence,'" but "[r]ather, their 'personal injury' was the result of the death of their mother."[9] Erie offers no linguistic or legal justification for these strained interpretations of the Policy. Although an insurance policy could have imposed the types of restrictions suggested in Erie's brief, this particular policy did not objectively express those intentions at all, let alone "clearly" or unambiguously do so. *See Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 780-82 (1993) (rejecting insurer's argument to import narrow meaning of "damages" into coverage provision, absent express language in the contract, because a "reasonably prudent layperson [would] not cut [the] nice distinctions" suggested by insurer).

In sum, a reasonably prudent layperson could conclude that the Erie Policy defines both "mental anguish" and "loss of services" as different types of "bodily injury." In accordance with this interpretation, at least three persons – Colton and her two sons – sustained a bodily injury as a result of the automobile accident. *See Valliere*, 324 Md. at 147. Stated differently, a reasonably prudent layperson could read the Policy as

[9] In making both of these arguments, Erie appears to concede that the "bodily injury" definition is a list of different types of injuries and that Colton sons have indeed sustained a bodily injury within the language of the Policy.

recognizing that the injuries for "mental anguish" and "loss of services" are personal to the Colton sons and separate from the injuries suffered by their mother. Incorporating that definition into the coverage provision, it follows that Erie has arguably promised to cover Baden's legal obligations to pay damages because of those injuries.

D. Effect of the Household Exclusion Provision

Having determined that injuries claimed by the Colton sons arguably fall within the initial scope of liability coverage, we now examine whether the Policy nonetheless excludes coverage for those injuries. In analyzing this question, we keep in mind that an exclusion from insurance coverage "must be conspicuously, plainly[,] and clearly set forth in the policy" and that "[a]n exclusion by implication is legally insufficient." *Megonnell*, 368 Md. at 656 (citation and quotation marks omitted) (holding that, in the absence of clear, conspicuous, and express clause, court could not infer that household exclusion from primary automobile insurance policy also applied to excess coverage in umbrella policy).

The exclusions in the Policy again use the term "personal injury," which incorporates the defined term "bodily injury." Consequently, the scope of the exclusions depends upon the meaning of "bodily injury" within the Policy. Erie purports to rely on the Policy's household exclusion provisions, which provide:

> WHAT WE DO NOT COVER – EXCLUSIONS
>
> We do not cover:
>
> ***

> 13. personal injury to you and if residents of your household, your relatives, and persons under the age of 21 in your care or in the care of your resident relatives.
>
> 14. personal injury to anyone we protect or other person(s) who resides on the residence premises, except a residence employee.

The parties agree that, under these exclusions, Erie excluded liability coverage for the physical harm to Colton and thus excluded coverage for her "resulting death." For this reason, the circuit court correctly concluded that Erie had no obligation to indemnify Baden for the survival claims brought on behalf of Colton's estate, which sought to recover for Colton's injuries. On the other hand, there is no dispute that Colton's adult sons, who did not share a residence with their mother or Baden, do not fall within any of the categories of persons excluded by the household exclusions.

Erie contends, however, that the Policy excludes coverage for the specific claims raised by the Colton sons in their wrongful death action. Erie argues that the mere exclusion of coverage for personal injury to Colton also "by its own terms, precludes coverage for claims *arising from* the death of Colton." (Emphasis added.)

The Baden estate responds that the exclusions use no such language to exclude coverage for claims "arising from" Colton's injuries. Based on a "plain reading" of the definitions and exclusions, the estate asserts that exclusions 13 and 14 should be read by substituting the definitions for the specially-defined terms as follows: "We [Erie] do not cover [physical harm, sickness or disease including mental anguish, care, loss of services, or resulting death] to [Colton]." The Baden estate goes on to assert that, even if these

terms are susceptible to a different interpretation, the exclusions cannot be read to unambiguously exclude coverage for the injuries to the Colton sons.

Once again, the interpretation proposed by the Baden estate is at least a reasonable one. As the drafter of the Policy, Erie could have unambiguously limited the scope of coverage for damages "arising from," "derived from," or "resulting from" personal injury to the excluded household members. *E.g. Daley*, 312 Md. at 552 (policy expressly limited "'all damages, including damages for care or loss of services, arising out of bodily injury sustained by one person'"); *see also Scherr*, 101 Md. App. at 694 (policy stated that per-person bodily injury limits were "'for all legal damages, including care or loss of services, claimed by anyone for bodily injury to one person'"). Yet the Policy uses no such language. As the Policy is written, a reasonable layperson would not be required to infer that the exclusion applied to the claims of others merely because those injuries would not have occurred but for the injuries to excluded persons. *See Valliere*, 324 Md. at 145 n.3 (reasoning that, if insurer intends to limit recovery of "consequential damages arising out of a 'bodily injury[,]'" then insurer must provide "a clear and unambiguous articulation of this intent").

Erie nevertheless argues that, even without words expressly to that effect, the exclusion for Colton's death necessarily bars liability coverage for the Coltons' wrongful death claims. Erie contends that "for purposes of liability insurance coverage, wrongful death claims are considered 'derivative' of the decedent's claim, and are therefore not entitled to be treated as separate losses of the decedent's surviving next of kin." In support of its argument, Erie relies primarily upon *Costello v. Nationwide Mut. Auto. Ins.*

Co., 143 Md. App. 403 (2002), a case in which this Court construed a contract with language substantially different from the language in Erie's Policy.

In *Costello*, 143 Md. App. at 405-06, adult children asserted wrongful death claims against their father for causing the death of their mother through his negligent driving. At the time of the accident, the parents held two insurance policies issued by Nationwide: an underlying automobile insurance policy and an umbrella policy that provided coverage for the father above the limits of the automobile policy. *Id.* at 406. Both policies contained a household exclusion that precluded coverage for bodily injury to the mother and thus limited recovery for the mother's injuries to the statutorily-mandated minimum coverage of $20,000. *Id.* at 409, 418. After the adult children sought a declaration regarding Nationwide's coverage for the wrongful death claims regarding their mother's death, the circuit court determined that the insurance policies limited Nationwide's entire liability for the wrongful death of the mother to the statutory minimum. *Id.* at 406. This Court affirmed for the same reason. *Id.* at 407.

In determining the scope of those policies, this Court focused on a few important provisions. The Nationwide automobile policy provided liability coverage for damages resulting from automobile use that caused bodily injury. The policy defined "bodily injury" as "'bodily injury[,] . . . sickness[,] . . . disease[,] . . . or . . . death . . . of any person'" and did not include "loss of services." *Id.* at 409. The umbrella policy similarly defined "bodily injury" as "'bodily harm, including resulting sickness, disease, or death.'" *Id*. at 418. Next, the Nationwide automobile policy provided that its bodily injury coverage limits were applicable "'for *all legal damages, including all derivative*

claims, claimed by anyone arising out of and due to the bodily injury to one person as a result of one occurrence.'" *Id.* at 409 (emphasis added by *Costello*). The limitation provision also provided: "'*No separate limits are available to anyone for derivative claims, statutory claims, or any other claims made by anyone arising out of bodily injury, including death, to one person* as a result of one occurrence.'" *Id.* (emphasis added by *Costello*). Finally, the policy's household exclusion provision excluded coverage for bodily injury to members of the insured's household, "'to the extent that the limits of liability for this coverage exceed the limits of liability required by Maryland law.'" *Id.*

Interpreting those provisions, we concluded that the only person who suffered "bodily injury," as defined by the Nationwide policy, was the decedent mother, and not her adult children. *Id.* at 411. Although the children had sustained emotional injuries as a result of their mother's death, the policy provided "no independent coverage for emotional injury." *Id.* at 414; *see id.* at 415-16 (stating that the policy did not "provide for coverage for emotional injuries that are not a consequence of some bodily injury"). Because the Nationwide policy provided that its coverage limits included damages for "'all derivative claims, claimed by anyone arising out of and due to bodily injury to one person[,]'" it followed that the wrongful death damages of the adult children were "included within their mother's 'bodily injury' and [were] thus limited by the household exclusion in the policy." *Id.* at 417.

If the Erie Policy were the same as, or substantially identical to, the Nationwide policy that this Court considered in *Costello*, Erie would have been entitled to summary

judgment. The contract that Erie actually drafted, however, lacks the two features that were central to this Court's reasoning in that case.

First, as discussed earlier, the Erie Policy includes both "mental anguish" and "loss of services" within its definition of "bodily injury." Thus, it cannot be said here that Colton is the only person who suffered "bodily injury" as defined by the Erie policy. Rather, at least "three persons sustained 'bodily injury' according to the definition" in the Erie Policy. *See Valliere*, 324 Md. at 147; *cf. Costello*, 143 Md. App. at 411. The Colton sons have asserted claims for their own "bodily injur[ies]" under the Policy, not for the injuries to their mother.

Second, the Erie Policy does not place any limitation or exclusion on damages for "derivative claims" or on damages "arising out of" another person's injuries. The policy in *Costello* unambiguously stated that its coverage limits applied to claims by one person that arose from or were derivative of bodily injury to another person. By contrast, the Erie Policy lacks any language to comparable effect. If Erie had intended to exclude coverage for claims that derive from or arise out of the claims of an injured person, it needed to express that intention in the terms of its contract. *See Valliere*, 324 Md. at 145 n.3; *see also Employers' Liab. Assurance Corp. v. Reed's Refrigeration Serv., Inc.*, 222 Md. 49, 51-52 (1960) (rejecting insurer's argument that coverage provision for losses sustained through dishonest act of any employee limited coverage to acts of employees within scope of employment, because the insurer's preferred construction would read additional language into the provision, and "[t]he fatal difficulty with that construction is that it is not what the policy says").

In effect, Erie now desires to re-write the language of the contract it drafted. Erie has defined "bodily injury" as "physical harm, sickness or disease including mental anguish, care, loss of services, or *resulting* death." (Emphasis added.) But as the Baden estate correctly points out, Erie placed the word "'resulting' where it modifies only the word 'death,'" which immediately follows it. By structuring the clause so that "resulting" modifies "death" and nothing else, Erie "preclude[d]" the application of "resulting" "to any of the prior terms in the series."

If Erie had put the word "resulting" at a place where it modified "mental anguish" and "loss of services," the meaning of the provision would change significantly. In that event, the "resulting mental anguish" and "resulting loss of services" could be regarded as part of Colton's bodily injury. As the policy is actually written, however, the terms "mental anguish" and "loss of services" are listed in the series, without that qualification.

Erie attempts to avoid the implications of the language it drafted by drawing an analogy to other insurance policies in which an insurer defined the loss of services "resulting" from a person's bodily injury as part of the injury to that person. Erie's brief extensively discusses cases from outside of Maryland that have applied exclusions to bar coverage for wrongful death claims resulting from those injuries. According to Erie, these courts all "considered policy language that defined 'bodily injury' similar [sic] to the definition provided in the Erie policy at issue[.]"

Contrary to Erie's argument, these cases illustrate a difference rather than a similarity. In each of those instances, the "bodily injury" definition mentioned "loss of services" with the important qualification that the loss of services "result" from the

injury. These cases demonstrate different ways in which Erie could have characterized the loss of services "resulting" from Colton's injuries as part of her injuries.

In one recent case cited by Erie, the policy defined "'bodily injury' as 'bodily harm, sickness or disease. It includes resulting loss of services, required care and death.'" *Barrows v. Am. Family Ins. Co.*, 842 N.W.2d 508, 510 (Ct. App. Wis. 2013). The Wisconsin court held that an exclusion for bodily injury to the insured precluded coverage for claims for wrongful death of the insured. In reaching its decision, the court reasoned that, "[u]nder [the policy's] definition, 'bodily injury' plainly includes any loss of services *resulting from* bodily harm to the injured person." *Id.* at 514 (emphasis added).

In *Wintlend v. Baertschi*, 963 S.W.2d 387 (Mo. Ct. App. 1998), a Missouri appellate court interpreted a homeowner's insurance policy in which "[t]he term 'bodily injury' was defined as 'bodily harm, sickness or disease, *including* required care, loss of services and death *that results*.'" *Id.* at 390 (emphasis in *Wintlend*). The court reasoned that the proper interpretation of the policy must "give effect to the language 'that results' at the end of the sentence defining 'bodily injury.'" *Id*. Consequently, the court reasoned that a household exclusion that precluded coverage to injured decedents also precluded coverage to wrongful death claimants for the loss of services *that resulted* from the deaths of those decedents. *Id.* In subsequent cases construing household exclusions in policies with identical definitions of "bodily injury," other courts applying Missouri law followed the analysis of *Wintlend* to reach the equivalent conclusion. *See St. Paul Fire &*

Marine Ins. Co. v. Warren, 87 F. Supp. 2d 904, 907-11 (E.D. Mo. 1999); *American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876, 877-79 (Mo. Ct. App. 1998).

In *Cincinnati Indemnity Co. v. Martin*, 710 N.E.2d 677 (Ohio 1999), a homeowner's insurance policy provided: "'[B]odily injury' means bodily harm, sickness or disease. Your coverage includes required care, loss of services and death resulting from your bodily injury." *Id.* at 678. Because the policy's household exclusion excluded coverage for bodily injury to the insured decedent, the Ohio court reasoned that the language of the policy also excluded coverage for wrongful death claims "resulting from" the decedent's injuries. *Id.* at 680. Under the language of that policy, a wrongful death claimant "ha[d] not suffered his own bodily injury." *Id.* at 670.[10]

Ultimately, we are unpersuaded that the Erie Policy unambiguously regards Colton's bodily injury as including the "resulting loss of services" (*Barrows*, 842 N.W.2d at 510), or "loss of services . . . that results" (*Warren*, 87 F. Supp. 2d at 907; *Moore*, 970 S.W.2d at 877; *Wintlend*, 963 S.W.2d at 390), or "loss of services . . . resulting from

[10] A New York trial court followed the reasoning of the Ohio court where the relevant policy language was "[n]early identical" to the policy definitions from *Martin*. *See Courtney v. Dryden Mut. Ins. Co.*, 41 Misc. 3d 721, 723 (Sup. Ct. N.Y. 2013) (definition of bodily injury included "'bodily harm, sickness or disease to a person including required care, loss of services and death *resulting therefrom*'") (emphasis added). Erie also cites a handful of cases in which the relevant insurance policy defined bodily injury coverage narrowly and provided no coverage for loss of services at all. *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1240-42 (4th Cir. 1996); *Farmers Ins. Exch. v. Stratton*, 145 Cal. App. 3d 612, 615 (Ct. App. 1983); *Nationwide Mut. Fire Ins. Co. v. Mazzarino*, 766 So.2d 446, 448 (Dist. Ct. App. Fla. 2000); *State Farm Fire & Cas. Co. v. McPhee*, 336 N.W.2d 258, 260-61 (Sup. Ct. Minn. 1983). The latter cases have no bearing on a case, like this, where the definition of "bodily injury" could reasonably be construed to include "loss of services."

bodily injury." *Martin*, 710 N.E.2d at 678. Nor are we persuaded that Erie's household exclusion broadly applies to "derivative claims . . . made by anyone arising out of and due to bodily injury" (*Costello*, 143 Md. App. at 409), or "all legal damages, including . . . loss of services, claimed by anyone for bodily injury" (*Scherr*, 101 Md. App. at 694), or "damages for . . . loss of services, arising out of bodily injury." *Daley*, 312 Md. at 552.

These analogies to cases construing "similar" policies do not control the result here because the Erie Policy lacks the crucial language that dictated the outcomes of those cases. *See Riley*, 393 Md. at 81-82 (rejecting insurer's analogies to "similar" provisions where the different policies contained "one important difference" in that policies did not include provision clearly indicating intent to limit liability under the specific circumstances); *Consumers Life Ins. Co. v. Smith*, 86 Md. App. 570, 578-79 (1991) (holding that policy covering "accidental" injury would not be construed in same way as another policy covering injury by "accidental means," because policy language did not specifically state that requirement); *see also Sullins*, 340 Md. at 518 n.3 (observing that policy could have excluded coverage for particular type of claim if insurer had included provision from policies examined in other cases that expressly excluded that type of claim).

We can construe only the language of this Policy, not the language of some hypothetical policy that Erie could or should have written. As a result of the special definition used by Erie, the Policy can be reasonably read to include the Colton sons' "loss of services" as a type of "bodily injury" for which the Policy provides liability

coverage. *See Valliere*, 324 Md. at 142. To the extent that Erie subjectively intended to cover injury more narrowly, or to apply more sweeping exclusions from coverage, Erie needed to express that intent in the instrument that it drafted. *See Megonnell*, 368 Md. at 657.

CONCLUSION

In this case, the circuit court correctly observed that courts "usually" interpret other insurance contracts to accomplish the result that Erie would prefer here. The court erred, however, in concluding that, "[c]onsidering the definitions and language in the Policy," the Coltons' wrongful death claims were "not separate and distinct from the bodily injury of Ms. Colton."

On remand, the Baden estate is entitled to a declaratory judgment in its favor. Construing the ambiguity against the drafter, as we must, we conclude that David Colton and Joshua Colton each sustained "bodily injury" according to the Policy. Erie is contractually obligated to pay the ultimate net loss, if any, that Seymour Baden becomes legally obligated to pay as damages because of those injuries, which resulted from a covered occurrence. Subject to the limits of liability in the Policy, Erie must indemnify Baden to the extent that Baden is legally obligated to pay, in the wrongful death action, for the "mental anguish" and "loss of services" sustained by the Colton sons.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.