VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of February, 2018.

Dominion Nuclear Connecticut, Inc., Appellant,

against Record No. 170130
Circuit Court No. CL16-570

Securitas Security Services USA, Incorporated, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County.

Resolving a contract dispute between Dominion Nuclear Connecticut, Inc. ("Dominion") and Securitas Security Services USA, Incorporated ("Securitas"), the circuit court held that a contractual indemnity provision did not require Securitas to defend and indemnify Dominion in a personal injury suit filed against Dominion by a Securitas employee. Dominion appeals, arguing that the circuit court misread the disputed indemnity provision and that, properly read, this provision requires Securitas to defend and perhaps ultimately indemnify Dominion depending on the resolution of the personal injury suit. We agree and reverse.

I.

Jennifer Brandenburg, a Securitas employee, allegedly slipped and fell at Dominion's power plant in Waterford, Connecticut. Brandenburg was performing security services at the plant pursuant to a service contract between Dominion and Securitas. In a Connecticut court, she filed a personal injury suit against Dominion alleging negligence. Dominion responded to the complaint by denying its negligence and asserting that Brandenburg was "comparatively responsible and/or at fault for the accident." J.A. at 95. Dominion also sent a letter to Securitas demanding that Securitas defend and indemnify Dominion against any liability that Dominion may have to Brandenburg.[1]

[1] Securitas initially "agreed to defend and indemnify Dominion" by email correspondence dated August 15, 2014, but later withdrew that agreement. J.A. at 6-7; *see id.* at 18-26. Count II of Dominion's complaint thus alleged a breach of contract because "Securitas

When Securitas refused the demand, Dominion filed suit against Securitas in Virginia pursuant to the forum-selection clause of the service contract, *see id.* at 83, alleging a breach of the indemnity provision of the service contract, which states:

> To the extent arising from the negligence, gross negligence, or willful misconduct of [Securitas] . . . or [employees of Securitas], [Securitas] agrees to indemnify, defend, and hold harmless [Dominion], [Dominion's] Affiliates (defined below), and each of their respective directors, officers, employees, contractors, and agents (each an "Indemnitee") from and against any and all claims, demands, lawsuits, or other proceedings brought or threatened by any party, including but not limited to an Indemnitee, [Securitas], . . . and [employees of Securitas] (each, a "Claim"), and to pay all of each Indemnitee's costs in connection with any Claim, including but not limited to, any judgment, amounts paid in settlement, fines, penalties, forfeitures, and expenses (including reasonable attorneys' fees through final appeal), whether at law, in equity, or administrative in nature, in any manner arising out of or in connection with: (a) this Agreement; (b) [Securitas's] breach of this Agreement; (c) personal injury or death; (d) property damage; or (e) violation of law. [Securitas] will not be liable under this Indemnity Article for any injuries, deaths, or damage to the extent that they are caused by an Indemnitee's gross negligence or willful misconduct.

Id. at 124. Dominion filed a motion for partial summary judgment arguing that the plain meaning of the indemnity provision required Securitas to defend Dominion and, depending on the outcome, to indemnify Dominion for any ultimate liability. Securitas filed a cross-motion for summary judgment contending that the provision could not apply to the Brandenburg complaint because it did not allege that Dominion was liable to any extent for the negligence of Securitas or its employees. The circuit court agreed with Securitas and dismissed Dominion's suit.

II.

On appeal, Dominion argues that the circuit court failed to enforce the broad language of the indemnity provision, which applies to "any and all claims, demands, lawsuits, or other

---

wrongfully withdrew its agreement to defend and indemnify Dominion." *Id.* at 6. The circuit court declined to rely on Securitas's initial agreement as evidence of the proper interpretation of the indemnity provision, *see id.* at 205, and Dominion does not appeal on this ground. We thus express no opinion on Securitas's initial agreement either.

proceedings brought or threatened by any party, including but not limited to an Indemnitee, [Securitas], . . . and [employees of Securitas] . . . in any manner arising out of or in connection with . . . personal injury or death." *Id.* For this broad provision to apply, Dominion contends, there is only one textual requirement: The duty to defend and indemnify applies only "[t]o the extent" that a claim "aris[es] from the negligence, gross negligence, or willful misconduct of" Securitas or its employees. *Id.* Thus, Securitas's duties exist whether Dominion was negligent or not, so long as the claim arises in part or to any extent from the negligence, gross negligence, or willful misconduct of Securitas or its employees.[2] This conclusion is bolstered by the second sentence of the indemnity provision, which provides the only other limiting principle: "[Securitas] will not be liable under this Indemnity Article for any injuries, deaths, or damage to the extent that they are caused by an Indemnitee's gross negligence or willful misconduct." *Id.* The presence of this second sentence, according to Dominion, "proves that Claims arising out of Dominion's conduct are within the risks covered by the first sentence" and "that Claims arising out of Dominion's ordinary negligence remain within the scope of covered risks." Appellant's Br. at 15-16. Otherwise, this exclusion for Dominion's gross negligence or willful misconduct would be unnecessary. *See id.* at 15.

We agree with Dominion's interpretation of the indemnity provision and find that the Brandenburg complaint falls within its scope. Brandenburg's personal injury allegations against Dominion constitute a claim within the scope of the first sentence of the provision and do not implicate the "gross negligence or willful misconduct" exclusion, J.A. at 124, set forth in the second sentence. The complaint satisfies the "[t]o the extent" qualification of the first sentence, *id.*, because Dominion responded to the complaint with the assertion that Brandenburg was comparatively at fault for the accident. Connecticut is a modified-comparative-fault jurisdiction,[3] meaning that Brandenburg cannot recover if her alleged negligence exceeds that of

---

[2] *See generally Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 365-67, 641 S.E.2d 476, 479-80 (2007) (holding that parties to a contract can agree to an indemnity provision requiring the indemnitor to indemnify the indemnitee for the indemnitee's own negligence).

[3] Connecticut follows the "51% rule," which bars a plaintiff from recovering only when her negligence exceeds that of the defendant. Otherwise, her recovery is reduced by her percentage of negligence. *See* Conn. Gen. Stat. § 52-572h; *see also Ruiz v. Victory Props., LLC*,

Dominion, and, if it does not, she can only recover for Dominion's percentage of fault. In both of these scenarios, however, Brandenburg's personal injury suit implicates her negligence as a Securitas employee and thus triggers Securitas's duty to defend and, depending on the outcome of the suit, to indemnify Dominion.

We do not rule on Securitas's ultimate duty to indemnify because, as Dominion's opening brief on appeal states, "Dominion did not (and does not) seek summary judgment establishing that Securitas must, in fact, indemnify Dominion. The duty to indemnify depends, in part, on Dominion's payment of a judgment, which will not occur until the Connecticut case is resolved." Appellant's Br. at 6 n.1; *see also* J.A. at 48 n.2, 139. Dominion also conceded in the circuit court that the potential duty to indemnify exists "because there are scenarios under which Securitas would be liable for a judgment based on the facts alleged in the Brandenburg Complaint; namely, a verdict where Brandenburg shares liability." J.A. at 44; *see also id.* at 53, 55, 150-51, 181. Dominion maintains this position on appeal. *See* Appellant's Br. at 1; Reply Br. at 9-10.

That said, we disagree with Securitas that the phrase "[t]o the extent," J.A. at 124, functions as a proportional limitation on its duty to defend or indemnify Dominion inasmuch as any duty of Securitas to indemnify Dominion will be for the entire amount of the judgment entered against Dominion. As Dominion is the only defendant in the Connecticut litigation, the only judgment award entered in that case will be against Dominion, and the entire amount awarded will represent Dominion's negligence. *See supra* note 3 (describing Connecticut's modified-comparative-fault rule in which the court merely subtracts that percentage of the award reflecting the plaintiff's negligence from the judgment against the defendant). Therefore, the

---

107 A.3d 381, 398 n.12 (Conn. 2015) (noting that this statute "supplanted the rule of joint and several liability with a system of apportioned liability in which each defendant is liable for only his proportionate share of damages according to his percentage of negligence that proximately caused the plaintiff's injury" (alteration and citation omitted)); *Giles v. City of New Haven*, 636 A.2d 1335, 1341 (Conn. 1994) ("The purpose of the comparative negligence statute was to replace the former rule, under which contributory negligence acted as a complete defense, with a rule under which contributory negligence would [o]perate merely to diminish recovery of damages based upon the degree of the plaintiff's own negligence."). *See generally* William L. Prosser & W. Page Keeton, Prosser and Keeton on the Law of Torts § 67, at 473-74 (Dan B. Dobbs et al. eds., 5th ed. 1984) (describing the modified-comparative-negligence rule).

circuit court also erred in not concluding that "Securitas's indemnity obligation, should it be established, must be for the entire amount of Dominion's liability." J.A. at 139.

For these reasons, we reverse the circuit court's entry of summary judgment in favor of Securitas and remand the case for further proceedings.

This order shall be certified to the Circuit Court of Chesterfield County.

JUSTICE KELSEY, with whom CHIEF JUSTICE LEMONS and JUSTICE GOODWYN join, dissenting.

The first three words of the indemnity provision are "To the extent." J.A. at 124. This case turns on the answer to a single question. To what extent? Dominion has a ready answer: *to the extent* that it can prove that *Brandenburg was in any way at fault*. Under this reading, if Dominion can prove that Brandenburg was at least 1% at fault, then Dominion gets 100% indemnity from Securitas — even though each percentage of fault attributed to Brandenburg proportionately *reduces* Dominion's liability to her. *See ante* at 3 n.3.[4] Under this view, Securitas must also reimburse Dominion for every litigation dollar that it spends trying to get to that conclusion, regardless of whether the litigation is successful or not.

I read the indemnity provision quite differently. Boiled down to its essential terms, the provision states: "To the extent *arising from* the negligence" of Securitas or its employees (such as Brandenburg), Securitas "agrees to indemnity, defend, and hold harmless" Dominion "from and against any and all *claims*." J.A. at 124 (emphases added). Though awkwardly worded, the phrase "[t]o the extent" measures something — specifically a claim — "arising from the negligence" of Securitas or its employees. *Id.*

Despite its poor craftsmanship, the provision says exactly what one would think an indemnity provision would say: Securitas will defend and indemnify Dominion *to the extent* a *claim* against Dominion *arises out of* the negligence of Securitas or its employees. The claim in this case is stated in Brandenburg's complaint. Not a word of that complaint alleges that either

---

[4] While I disagree with the majority's interpretation of the phrase "[t]o the extent," J.A. at 124, I do agree with the majority's conclusion that (assuming its interpretation were correct) any duty to indemnify would be for the entire amount of any judgment against Dominion if the verdict form indicates that Brandenburg was negligent to any degree. *See ante* at 4-5.

Securitas or Brandenburg was negligent. The Brandenburg complaint alleges that Dominion was 100% negligent. *See id.* at 13 ("At all times mentioned herein, [Brandenburg] was in the exercise of due care. . . . The injuries and damages to [Brandenburg] were caused by the negligence and carelessness of [Dominion] . . . ."). Nothing in this *claim* can be said to *arise out of* anything other than *Dominion's* negligence.

In a creative interpretation, Dominion defines the relevant claim under the indemnity provision not as Brandenburg's complaint, which is predicated solely on Dominion's negligence, but rather as Dominion's answer, which includes a comparative-fault defense predicated solely on Brandenburg's negligence. I am content to dismiss this argument with the observation that the claim referred to in the indemnity provision means a *claim* — not an *affirmative defense* to a claim. Dominion sees no difference between the two because it substitutes the word "accident" for the word "claim" in the indemnity provision. Dominion's briefs on appeal lay bare this substitution with the repetitive, but erroneous, assertion that the indemnity provision applies if Dominion shows that the "*accident* was caused, at least in part, by [Brandenburg's] own comparative negligence" and that, as a result, "the *accident* could have arisen from Securitas's negligence." Reply Br. at 9-10 (emphases added); *see* Appellant's Br. at 34-35 ("[B]ecause Brandenburg is a Securitas employee, the Indemnity Article applies equally where the *accident* arises out of her own negligence. . . . Dominion has presented clear, uncontested evidence that the *accident* arose, at least to some extent, from the negligence of a Securitas employee." (emphases added)).[5] "That possibility triggers the Indemnity Article," Dominion concludes. Reply Br. at 10. But that is not what the indemnity provision states. It says that Brandenburg's *claim* — not her *accident* — must have arisen from the negligence of Securitas or its employees.

---

[5] *See also* Appellant's Br. at 28 ("Dominion not only alleged that Ms. Brandenburg's conduct contributed to the *accident*, but it also presented specific and concrete evidence supporting that position. . . . A jury could certainly find that the Brandenburg case is a lawsuit brought by a Securitas[] employee against Dominion and arising out of the negligence of Securitas's employee." (emphasis added)); Reply Br. at 4-5 ("There could be no clearer allegation that the underlying lawsuit arose 'out of or in connection with' the Contract" than the allegation "that Ms. Brandenburg's *accident* . . . occurred as she performed the security services for Securitas." (emphasis added) (quoting J.A. at 124)); *id.* at 5-6 ("Dominion has argued throughout the litigation that the Brandenburg case falls within the risk covered, because a jury could find that her *injuries* arose from her own comparative negligence." (emphasis added)).

See J.A. at 124. Her claim, of course, does nothing of the sort. It arises solely from her allegations of Dominion's negligence.

Read correctly, the indemnity provision has no application to Brandenburg's claim against Dominion. But any number of other hypothetical claims, such as those alleging the concurrent negligence of Securitas and Dominion employees, would easily implicate the indemnity provision. Such a claim, if proven, would render Dominion jointly and severally liable to the tort victim and enable Dominion to seek contribution from Securitas for any judgment that Dominion paid.[6] Under contribution principles, Dominion would only be entitled to 50% of the judgment as contribution from Securitas and 0% reimbursement for its attorney fees.[7] In contrast, under the indemnity provision of the service contract, Dominion would receive 100% of the judgment as indemnity from Securitas as well as 100% of its attorney fees[8] — except, as the second sentence of the provision states, to the extent that the accident was "caused by" Dominion's "gross negligence or willful misconduct." *Id.*[9] Understood this way,

---

[6] *See generally* Code § 8.01-34 ("Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude."); Kent Sinclair, Sinclair on Virginia Remedies § 1-7, at 1-38 (5th ed. 2016) ("Contribution, or payment by each joint tortfeasor of his share of the liability, is expressly authorized in Virginia practice where mere negligence is involved and where no moral turpitude exists. The right of contribution is said to arise when one tortfeasor has paid a claim (by judgment or settlement) for which the other wrongdoer is also liable. The burden is on the party seeking contribution to establish the concurring negligence of both parties." (footnote omitted)).

[7] Contribution distributes liability pro rata among joint tortfeasors but does not allocate among them any attorney fees, which would not be part of an ordinary tort judgment. *See Sullivan v. Robertson Drug Co.*, 273 Va. 84, 92, 639 S.E.2d 250, 255 (2007) ("Accordingly, each such wrongdoer is responsible for an *equal share of the amount paid in damages* for a single injury." (emphasis added)); Sinclair, *supra* note 6, § 11-3[C], at 11-6 to -7 ("Where there is only one 'single, indivisible injury' caused by the concurring negligence of multiple persons, all or none are liable for pro rata shares *of the damages*." (emphasis added)); *see also* Restatement (Second) of the Law of Torts § 914(1) (1979) ("The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.").

[8] Securitas conceded this point during oral argument on appeal. *See* Oral Argument Audio at 16:03 to 16:37, 21:33 to 22:39. It also conceded this point in oral argument before the circuit court. *See* J.A. at 235-36.

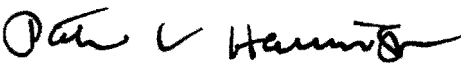
[9] Unlike the first sentence of the indemnity provision, the second sentence defines the scope of its application as "any injuries, deaths, or damage to the extent that they are caused by

both sentences of the indemnity provision have a common-sense application and neither provision is rendered meaningless.

In short, the indemnity provision applies to claims against (not defenses asserted by) Dominion arising out of the negligence of Securitas or its employees. Win or lose, Dominion will not pay a dollar of legal fees defending itself against a claim of Securitas's negligence. Any verdict against Dominion will be based solely on its own negligence, not the negligence of Securitas or its employees. For these reasons, I would hold that Securitas has neither a duty to indemnify nor a duty to defend Dominion in the Brandenburg litigation.[10]

A Copy,

Teste:



Clerk

---

an Indemnitee's gross negligence or willful misconduct." *Id.* at 124. The predicate for the indemnity of the first sentence is that the *claim* must *arise out of* the negligence of Securitas or its employees, while the predicate for the exception of the second sentence is that the *injury itself* was *caused by* Dominion's gross negligence or willful misconduct. *See id.*; *cf. Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 287-90, 619 S.E.2d 76, 78-80 (2005) (upholding and enforcing an indemnity provision which stated that DPI agreed to indemnify Safeway for any claims "for the recovery of damages . . . caused or alleged to have been caused by the handling, shipment, delivery, consumption or use of any Article shipped or delivered by DPI" without any predicate requirement of negligence on the part of DPI (alteration omitted)).

[10] Absent contractual language suggesting otherwise, a duty to defend does not apply if no conceivable duty to indemnify exists. *See, e.g.*, *AES Corp. v. Steadfast Ins.*, 283 Va. 609, 617, 725 S.E.2d 532, 535-36 (2012) ("[I]f it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend."); *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978) (same).