Filed 11/26/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID TAYLOR et al., Plaintiffs and Appellants, v. JOHN CRANE INC., Defendant and Appellant.	A098044, A098587 (San Francisco County Super. Ct. No. 320278)

Defendant John Crane Inc., appeals a jury verdict in favor of plaintiffs David Taylor (Taylor) and his wife Susan Taylor, based on Taylor's exposure to asbestos-containing products manufactured by defendant. Plaintiffs cross-appeal, contending the jury should not have allocated fault to the United States Navy in calculating defendant's proportionate share of fault. Finding no error, we affirm the judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Taylor served in the Navy as a machinist mate from 1962 to 1971 and again from 1973 to 1976. He worked for the Union Pacific Railroad for approximately six months in the period between his Navy enlistments. He was in the naval reserve from 1976 through 1986. He stopped working in February 2001 because of ill health. He was diagnosed with mesothelioma and the same month was told his life expectancy was a matter of weeks or months.

A. Taylor's Work in the Navy

Taylor testified at trial that, among his other duties as a machinist mate on Navy submarines and surface ships, he performed maintenance on valves (which regulate the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A.-II.D.

flow of steam and fluids through pipes) and flanges (the joints between pipe sections). His work on valves included removing and installing the asbestos-containing packing that was used as a sealant to prevent steam from leaking out of the valve. In doing this work, at times he had to brush debris from the packing gland and blow into the valve to remove the debris; some of the dust that was generated would blow back into his face. His work on flanges included installing and removing the spiral-wound and sheet gaskets that seal the pipe joints. During the course of this work, he had to remove debris from the flange, sometimes with a wire brush. Some of the valves and flanges were above his head as he worked, and debris fell on him. He cleaned up the debris by sweeping it up with a broom and dustpan. He did not wear protective gear during this work.

B. Defendant's Products

Defendant manufactures sealing devices, including valve packing. Some of its packing products contain asbestos. During the period 1963 to 1984, defendant sold both asbestos-containing and nonasbestos-containing packing to the Navy. During the same time period, defendant also sold asbestos-containing gasket material, which had been manufactured elsewhere but contained defendant's logo.

During Taylor's time in the Navy, he worked with defendant's products. The evidence at trial indicated that Taylor also worked with parts made by other manufacturers.

C. The Present Action

Taylor and his wife brought this action in San Francisco County Superior Court on April 5, 2001, naming John Crane Inc. (defendant), and multiple other defendants. Trial proceeded against defendant, and on December 14, 2001, the jury returned a special verdict in favor of plaintiffs. The jury found Taylor's economic damages to be $1,010,849, his noneconomic damages to be $1,790,000, and Susan Taylor's noneconomic damages to be $229,000. Defendant was found to be 31 percent responsible for plaintiffs' injuries; the Navy, which was not a party to the action, was found to be 16 percent responsible. The remainder of the responsibility was allocated to other entities that also were not parties to the trial.

Judgment was entered on December 20, 2001, and amended on December 24, 2001. Defendant moved for a new trial. The motion was denied on March 1, 2002. On March 4, 2002, defendant appealed the December 20, 2001, judgment and the December 24, 2001, amended judgment (appeal No. A098044). On March 26, plaintiffs cross-appealed to the extent the judgments reduced their damages by the fault allocated to the United States Navy. A second amended judgment on the special verdict was filed on April 11, 2002. Defendant appealed from the order denying a new trial and from the second amended judgment on April 17, 2002 (appeal No. A098587). The appeals were consolidated on July 3, 2002.

II. DISCUSSION

A. Consumer Expectations Test

Defendant contends the trial court erred in allowing the case to be tried on the theory that the products violated Taylor's reasonable expectations as a consumer, and that instead the jury should have been instructed on either a risk-benefit or failure to warn theory. Before trial, defendant moved to preclude plaintiffs from relying on the consumer expectations theory of liability; the trial court denied the motion.

Our Supreme Court has stated: "[A] court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 426-27.)

The Supreme Court has also concluded that where the plaintiff's "theory of design defect" is one of "technical and mechanical detail," the consumer expectations test is not proper. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570 (*Soule*).) In *Soule*, the plaintiff was injured in an automobile accident, and asserted that defects in her automobile allowed its left front wheel to break free, collapse rearward, and smash the floorboard into her feet. The defendant contended the injuries were not caused by any

defect in the automobile, but by the force of the collision itself. (*Id.* at p. 556.) The court concluded that in those circumstances, the consumer expectations test was inappropriate; the ordinary consumer of automobiles does not expect that a car will remain intact in any and all accidents, and the consumer's ordinary experience and understanding would not extend to how safely an automobile's design would perform under the "esoteric circumstances of the collision at issue here." (*Id.* at p. 570.) Indeed, the court continued, "both parties assumed that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters. Therefore, injection of ordinary consumer expectations into the design defect equation was improper." (*Ibid.*)

On the other hand, the mere existence of a complex product or technical questions of causation does not automatically render the consumer expectations test improper. "The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Soule*, *supra*, 8 Cal.4th at pp. 568-569.) The court went on to state, "Contrary to GM's suggestion, ordinary consumer expectations are not irrelevant simply because expert testimony is required to prove *that the product failed as marketed*, or that a condition of the product as marketed was a 'substantial,' and therefore 'legal,' cause of injury. We simply hold that the consumer expectations test is appropriate only when the jury, fully apprised of the circumstances of the accident or injury, may conclude that the product's design failed to perform as safely as the product's ordinary consumers would expect." (*Id.* at p. 569, fn. 6.)

Three cases from the First Appellate District have applied the consumer expectations test to injury caused by asbestos products. In *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 466 (*Sparks*), the plaintiff had been exposed to asbestos while working with asbestos-containing insulation on machinery during his service in the Navy. He worked with insulation in both pipe-covering and block forms. (*Id.* at pp. 465-467.) A jury found there was a design defect under the consumer expectations test, and the Court of Appeal affirmed, concluding the test was proper. (*Id.* at p. 476.) Unlike the

case in *Soule*, the products at issue in *Sparks* did not involve " 'complicated design considerations,' " " 'obscure components,' " or " 'esoteric circumstances' " surrounding the incident. (*Id.* at p. 474.) Instead, the insulation was "a simple, stationary product in its ordinary uses." (*Ibid*.) The court stated: "The design failure was in [the insulation's] emission of highly toxic, respirable fibers in the normal course of its intended use and maintenance as a high-temperature thermal insulation. It is a reasonable inference from the evidence that this emission of respirable fibers, which were capable of causing a fatal lung disease after a long latency period, was a product failure beyond the 'legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.' " (*Id*. at p. 475, quoting *Soule*, *supra*, 8 Cal.4th at p. 569.) The evidence showed that insulators used asbestos-containing insulation without taking any special precautions, all the while assuming that it was innocuous; from this, the jury could infer that ordinary users of the insulation—insulators and others who worked with the product—did not expect to develop a fatal disease from breathing dust from the insulation, and thus the product's performance did not meet consumers' minimum safety assumptions. (*Sparks*, *supra*, 32 Cal.App.4th at pp. 475-476.)

Twice since then, the First Appellate District has approved the use of the consumer expectations test for injuries caused by asbestos products. In *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1533-1536 (*Morton*), the court followed *Sparks* in finding the consumer expectations test applicable where the plaintiff had worked with asbestos-containing insulation products aboard a ship and several witnesses testified they did not expect the insulation to make them ill. More recently, in *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1181, the court concluded that the consumer expectations test could be applied to a claim against a supplier of raw asbestos.

Defendant contends these authorities do not apply to this case, because here expert testimony was required to explain the design of the products defendant manufactured and the capacity of those products to release hazardous levels of asbestos fibers. In particular, defendant points out that its valve packing "combines numerous components in an

intricate product design in which asbestos fibers are embedded in other materials," and contends that the safety of this design is not within the ordinary consumer's experience. Defendant also points to expert testimony explaining how to calculate the amount of asbestos released by working with defendant's products. However, as our Supreme Court stated in *Soule*, "ordinary consumer expectations are not irrelevant simply because expert testimony is required to prove *that the product failed as marketed*, or that a condition of the product as marketed was a 'substantial,' and therefore 'legal,' cause of injury." (*Soule*, *supra*, 8 Cal.4th at p. 569, fn. 6.) Rather, the question is "whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Id.* at pp. 568-569.) Here, there is evidence that not only Taylor, but others as well, routinely worked with defendant's products without any special protections and did not expect the packing or gasket debris to cause any harm. Thus, it can be reasonably inferred that ordinary users of defendant's products did not expect their use to lead to a fatal disease.[1] (See *Sparks*, *supra*, 32 Cal.App.4th at p. 476; *Morton*, *supra*, 33 Cal.App.4th at pp. 1535-1536.)

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[1] Citing *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126-127, defendant suggests the consumer expectations test should be used only if the product is within the common experiences of the community at large. However, *Sparks* makes clear that we should consider the expectations of asbestos products' ordinary users. (*Sparks*, *supra*, 32 Cal.App.4th at pp. 475-476.) This conclusion is supported by Supreme Court precedent. In *Soule*, the court stated: "[A]ppropriate use of the consumer expectations test is not necessarily foreclosed simply because the product at issue is only in specialized use, so that the general public may not be familiar with its safety characteristics. If the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who *do* use it, perhaps the injured consumer should not be forced to rely solely on a technical comparison of risks and benefits. By the same token, if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers *do expect* may be proper." (*Soule*, *supra*, 8 Cal.4th at pp. 567-568, fn. 4.) Here there is evidence from Taylor and other former machinist mates that the ordinary users of defendant's asbestos-containing products did not expect their use to lead to serious disease.

This case is not like *Soule*, in which an understanding of the *defect* involved technical detail regarding the precise behavior of obscure components under the complex circumstances of the particular case. (*Soule, supra*, 8 Cal.4th at p. 570.) Here, rather, there is evidence that ordinary users did not expect that breathing while working in a normal manner with defendants' products would lead to serious illness. The fact that expert testimony was needed to explain the ways in which asbestos fibers were released from defendant's products and the amount of asbestos that was released does not change that conclusion. (See *id.* at p. 569, fn. 6; see also *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 866-867 [consumer expectations test appropriate to claim that toxic shock syndrome was caused by use of o.b. tampons where users of tampons could reasonably expect that use of product would not lead to serious illness, and experts testified that tampon was defective in design and use was substantial factor in causing illness].)

Defendant also draws our attention to cases that considered the consumer expectations test in different factual settings. (See *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, 791-795 (*Morson*) [consumer expectations test not applicable to claim of allergic reactions to latex gloves]; *Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1482-1485 (*Pruitt*) [consumer expectations test not applicable to claim that the plaintiff had been injured when an air bag deployed in a low-speed collision].) In reaching its conclusion, *Morson* noted that *Sparks* had applied the consumer expectations test in the asbestos context, and stated: "We find such authorities to be of limited value here due to the problem of comparing apples and oranges in such fact-specific circumstances." (*Morson, supra*, 90 Cal.App.4th at p. 786.) The conclusion in *Morson* was based on the court's determination that the plaintiffs' theory of design defect was a complex one, relying on a variety of factors, including the fact that latex gloves are themselves intended to protect individuals from infection and foreign substances and that the processes by which latex gloves are manufactured can create many degrees of allergic reactions in their users, which can only be understood by referring to the science of manufacturing and preparing them and to the medical aspects of individuals' allergic

reactions. (*Id.* at p. 793.) The court in *Pruitt* concluded the deployment of an air bag is "not part of the 'everyday experience' of the consuming public," and that jurors needed expert testimony to evaluate the risks and benefits of the challenged design. (*Pruitt, supra*, 72 Cal.App.4th at p. 1483.) Here, on the other hand, there is evidence that an ordinary user of asbestos products would not expect that breathing the air while working with those products in a normal manner would cause a deadly disease. This is not a complex theory of design defect or one that requires the fact finder to evaluate the product's risks and benefits. The fact that expert testimony was required to prove that defendant's products released inhalable asbestos fibers, and that those fibers caused Taylor's illness, does not change that conclusion. (See *Soule*, *supra*, 8 Cal.4th at p. 569, fn. 6.)

In this case, "the jury, fully apprised of the circumstances of the accident or injury, [could] conclude that the product's design failed to perform as safely as the product's ordinary consumers would expect." (*Soule*, *supra*, 8 Cal.4th at p. 569, fn. 6.) The consumer expectations test was appropriate.

B. Inconsistent Rulings

Defendant claims the trial court erred in making various evidentiary rulings. We review rulings on the admissibility of evidence for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201 (*Alvarez*); *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431 (*Tudor Ranches*).) We may reverse a judgment based on erroneous admission or exclusion of evidence only if we are of the opinion there has been a miscarriage of justice. (Evid. Code, §§ 353, 354; see also *Tudor Ranches*, *supra*, 65 Cal.App.4th at pp. 1431-1432.)

Over defendant's objection, the trial court allowed William Ewing, an industrial hygienist, to testify about current asbestos safety practices. Plaintiffs' counsel asked Ewing to devise a hypothetical control program for Taylor, given the work practices that had been described. Defendant objected on grounds of relevance. Plaintiffs' counsel responded, "Your Honor, this goes to whether or not Mr. Taylor was exposed and, if so, to what extent." The trial court asked whether the testimony would bear on whether

anyone had been negligent. Plaintiffs' counsel responded: "No, it doesn't, Your Honor. It goes solely to the issue of whether or not the product failed to perform as safely as an ordinary consumer would expect. Mr. Taylor did not expect he would have to wear these suits or use these vacuums. . . ." The trial court overruled the objection, stating in the jury's presence, "The issue is, is the product defective? I'm only going to permit it on the issue of defective. Not into all these safety issues." Ewing testified that the first step in developing appropriate controls for working with packing and gaskets would be to determine whether it was possible to substitute nonasbestos products, and then to use a vacuum or to enclose the flange to separate the worker from the asbestos, to provide a downdraft or back draft, to train the worker in safer techniques, and to provide a respirator and protective clothing.

Later, in cross-examining defendant's industrial hygienist, Frederick Toca, plaintiffs' counsel asked about precautions Toca had taken during his tests with asbestos packing. Defendant objected, and the trial court overruled the objection, noting Toca had testified on direct examination that he had sanitized the room, or wetted it down, after one test in preparation for the next test; he ruled plaintiffs would be allowed to cross-examine Toca about that process. Toca then testified about currently recommended precautions.

Defendant contends these rulings unfairly blamed it for failing to use precautionary practices that were not in use at the time Taylor was exposed to asbestos. According to defendant, since plaintiffs chose to proceed on the single theory of consumer expectations, they should have been barred from introducing any evidence about defendant's fault or conduct.

Bearing in mind the applicable standard of review, we conclude the trial court did not abuse its discretion. Evidence of what precautions are now taken—in light of the currently known risks of asbestos—arguably has relevance to whether defendant's product was defective and whether Taylor expected, when he worked without such precautions, that defendant's products would not expose him to a deadly disease. Additionally, counsel's statements and the court's ruling, both made in the presence of

the jury, made it clear that Ewing's testimony was not being offered to show anyone's negligence, but only to show Taylor's expectations of safety at the time of his exposure. (See *Magnante v. Pettibone-Wood Manufacturing Co.* (1986) 183 Cal.App.3d 764, 767 [allowing evidence of postaccident modification made by another party where evidence was introduced to show product was defective, not to show defendant's negligence]; see also *Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485, 495-496 ["appellants are free to present evidence in the form of expert opinions on the reasonable expectations of consumers of the product involved here, which is outside the experience of ordinary consumers"].) While this evidence was cumulative of other evidence showing Taylor did not expect his exposure to defendant's products to make him ill, the trial court was within its discretion to admit it.[2]

Defendant contends expert witnesses may not opine about what an ordinary consumer would expect when handling a product. The Supreme Court in *Soule* stated that "where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." (*Soule*, *supra*, 8 Cal.4th at p. 567.) However, the court went on to state in a footnote: "[I]f the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers *do expect* may be proper." (*Id.* at pp. 567-568, fn. 4; see also *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120, fn. 3.) Under the circumstances, we conclude the trial court did not abuse its discretion in admitting the challenged testimony.[3]

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[2] To the extent the jury might have considered this evidence as bearing on a negligence theory, rather than a consumer expectations theory, it would logically be more probative of defendant's theory that the *Navy* was negligent in failing to provide a safe working environment.

[3] Defendant also complains that plaintiffs questioned defendant's industrial hygienist, Dr. Toca, about current asbestos standards. Defendant did not object to this line of questioning. In any case, we conclude the evidence was relevant to Taylor's expectations, and there was no miscarriage of justice. (Evid. Code, § 353.) We also note that Toca's testimony regarding the clean-up procedures he used was elicited on cross-

Defendant contends, additionally, that the trial court acted inconsistently in admitting plaintiffs' evidence of precautions that are currently taken without also allowing defendant to present what it characterizes as "state of the art" evidence, in particular current OSHA standards and evidence that the EPA exempted packing and gasket manufacturers from its ban on the manufacture and sale of asbestos-containing products.[4] As stated by *Morton*, "evidence as to what the scientific community knew about the dangers of asbestos and when they knew it is not relevant to show what the ordinary consumer of [defendant's] product reasonably expected in terms of safety at the time of [plaintiff's] exposure." (*Morton, supra,* 33 Cal.App.4th at p. 1536.) The trial here court could reasonably conclude that the scientific conclusions of government agencies were not relevant to Taylor's expectations of safety. On this record we cannot say the court abused its discretion in excluding the proffered evidence.

C. Impeachment with Complaint

In the unverified complaint, plaintiffs alleged that, while working for the Union Pacific Railroad, Taylor removed and replaced asbestos insulation from locomotives and took the removed insulation to a machine that ground them up, then gathered the asbestos and reused it to insulate boilers. However, Taylor testified at trial that his work for Union

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examination, after he had mentioned the clean-up procedures he used on direct examination.

[4] The portion of the reporter's transcript that defendant refers us to appears to contain only the ruling excluding evidence of historical OSHA standards for purposes of the consumer expectations test and of current OSHA standards, apparently for all purposes. The record contains defendant's opposition to plaintiffs' motion to exclude evidence of the EPA's exemption of packing and gaskets from its 1989 ban and labeling requirements for asbestos-containing products. Defendant does not direct us to the portion of the record at which this motion was granted. Even assuming it was granted, our conclusions remain the same.

Pacific did not involve ripping out insulation from locomotive boilers and that he did not recall others doing so.[5]

Defendant contends the trial court erred by refusing to allow it to impeach Taylor with the allegations of the complaint. We reject this contention. The complaint was unverified and "thus contained not [plaintiffs'] allegations, but only those of [their] attorney." (*Ballou v. Master Properties No. 6* (1987) 189 Cal.App.3d 65, 75.) There was no abuse of discretion.

D. Limitation on Testimony

During trial, plaintiffs moved to exclude the testimony of James Delaney, contending he was an undisclosed expert witness. (Code Civ. Proc., § 2034, subd. (j).) During argument on the motion, defendant denied that Delaney was an expert witness, and made the following offer of proof: Delaney served in the Navy, training and working as a machinist mate from 1964 until 1979. He served on a number of nuclear surface ships, as well as a period of time on a nuclear submarine. In 1979, Delaney received a commission as ensign, and he served as an assistant to Admiral Rickover from 1979 through 1991. During that time, Delaney audited, inspected, and reported on the maintenance and repair performance of machinist mates on nuclear surface craft and nuclear submarines. In 1991, he became an inspector at Pearl Harbor, focusing on nuclear ships, and especially nuclear submarines. In 1996, he was assigned to head a nuclear program for the Navy, and retired in 1997 with the rank of Commander. He was prepared to testify, among other things, as to the substantial similarity of the maintenance and repair techniques that he had learned and practiced to those he observed on nuclear submarines; to the similarity of the nuclear propulsion systems that he had experience with on nuclear surface craft and nuclear submarines; the range of duties he practiced himself as a machinist mate and those he observed throughout his career; and a variety of subjects regarding the valve packing techniques that he practiced and that he observed as

[5] Plaintiffs' counsel indicated to the trial court that his office had made a factual mistake in drafting the complaint, and that at the time he signed the complaint, he had never met or spoken with Taylor.

an auditor. He was expected to testify that machinists removed valve packing less frequently than plaintiffs' witnesses had testified.

The trial court allowed Delaney to testify, but limited his testimony to what he saw and did during his time as a machinist mate, which period roughly coincided with Taylor's tours of duty. Delaney was not allowed to testify to his observations during his time as an auditor and inspector of submarines after 1979. Defendant contends this ruling was error, claiming that if Delaney had been allowed to testify about his observations during his time as an auditor and inspector, he would have testified that the number of valves machinist mates repacked in the 1980's was very small. This testimony, according to defendant, would have undermined Taylor's credibility on the issue of the nature and extent of his exposure to asbestos from packing manufactured by defendant. As noted above, we review rulings on the admissibility of evidence for abuse of discretion, and will reverse only if there has been a miscarriage of justice. (*Alvarez*, *supra*, 14 Cal.4th at p. 201; *Tudor Ranches*, *supra*, 65 Cal.App.4th at pp. 1431-1432.)

Using this standard, we conclude the trial court did not abuse its discretion in limiting Delaney's testimony to his own experience as a machinist mate up to 1979. Delaney's post-1979 experience auditing and inspecting submarines, rather than carrying out the operations at issue in the case, was of limited relevance, particularly since Taylor's work as a machinist mate in the Navy essentially ended in 1976.

Defendant contends, however, that Delaney should have been allowed to testify as to his post-1979 observations because one of plaintiffs' witnesses, John Fening, had testified about his work with valves and gaskets from 1972 through 1994. Specifically, defendant relies on Fening's testimony that machinist mates did more valve work in the 1980's than in the 1970's when most of the overhaul work was done in the shipyards. But the relevance of this testimony was significantly attenuated by Fening's additional explanation that during the early 1970's the ships' machinist mates worked side by side with those shipyard workers, including on valves and flanges. Additionally, Fening was designated, without objection, as an expert in the layout, operation, repair, and maintenance of nuclear submarines, including the flanges, pumps, valves, gaskets, and

packing and pipe systems. Defendants did not designate Delaney as an expert witness. (Code Civ. Proc., § 2034.) In the circumstances, we conclude the trial court did not abuse its discretion.

E. Cross-appeal

Plaintiffs argue on cross-appeal that the trial court erred in allowing the jury to allocate fault to the Navy. The verdict form asked, "Assuming the combined negligence and fault of the defendant and of all other persons, companies and entities whose negligence and fault contributed to the plaintiff's injury to be 100%, what percentage of such combined negligence and fault is attributable to the defendant and to such other persons, companies or entities whose negligence and fault was a cause of the plaintiff's injury." One of the lines on the form allowed the jury to attribute fault to the Navy. The jury allocated 31 percent fault to defendant, 16 percent to the Navy, and the remaining amount to other entities.[6] Based on this allocation, the second amended judgment awarded plaintiffs 31 percent of their total noneconomic damages.

Plaintiffs contend the Navy was immune from liability and, as a result, it was error to allocate fault to the Navy for purposes of calculating defendant's proportionate share of their noneconomic damages. They ask us to modify the judgment to eliminate the fault or negligence allocated to the Navy and to increase that allocated to defendant.

1. Immunity of Navy

Plaintiffs rely on two theories of immunity. First, plaintiffs cite the discretionary function immunity, an exception to the Federal Tort Claims Act, that bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. § 2680(a).) This exception has been held to bar actions based on the Veteran's Administration's negligent failure to inspect a house for asbestos before sale (*Kane v. U.S.* (8th Cir. 1994) 15 F.3d 87, 88-89); the government's negligence in failing to warn of the risk of asbestos on ships (*Sea-Land Service, Inc. v. U.S.A.* (3d Cir. 1990) 919 F.2d 888, 892-893); the

[6] The Navy was not a defendant in this action.

government's alleged negligence in constructing, operating, and maintaining asbestos-containing ships (*Gordon v. Lykes Bros. S.S. Co., Inc.* (5th Cir. 1988) 835 F.2d 96, 99-100 (*Gordon*)); and the government's lack of due care in promulgating a policy for asbestos safety in shipyards or in having no policy or program at all on the issue (*Shuman v. United States* (1st Cir. 1985) 765 F.2d 283, 290).

Plaintiffs also contend the doctrine announced in *Feres v. United States* (1950) 340 U.S. 135 (*Feres*) and *Stencel Aero Engineering Corp. v. U. S.* (1977) 431 U.S. 666 (*Stencel*) confers immunity on the Navy. In *Feres, supra*, 340 U.S. at page 146, the United States Supreme Court declared: "[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Supreme Court extended the reach of the *Feres* doctrine in *Stencel* to conclude that a third party indemnity cross-claim against the government for injuries the plaintiff had suffered during military service was barred. (*Stencel*, *supra,* 431 U.S. at pp. 667, 673.) In doing so, the court explained the factors that underlie the *Feres* doctrine: the need for a uniform system of compensation for members of the armed services; the fact that the Veterans' Benefit Act establishes, "as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government"; and the disciplinary problems that would result if soldiers could sue their superiors for negligent orders or negligent acts committed in the course of military duty. (*Stencel*, at pp. 671-672, citing *Feres, supra*, 340 U.S. at p. 143 and *United States v. Brown* (1954) 348 U.S. 110, 112.)[7]

Defendants dispute plaintiffs' claim that the Navy was immune under either the discretionary immunity exception or the *Feres*/*Stencel* rule. We do not decide the issue because we conclude that, even assuming the Navy was immune, the trial court properly allowed the fault of the Navy to be taken into account in allocating responsibility for plaintiffs' injuries.

[7] The parties have not directed our attention to anything in the record indicating whether Taylor received any compensation from the Navy for his illness.

2. Allocation of Fault Under Proposition 51

Several cases have considered the allocation of responsibility for noneconomic damages to an absent party in light of Proposition 51 (Civ. Code,[8] § 1431.2 and amended § 1431). Section 1431.2, subdivision (a) provides that, in actions for wrongful death, personal injury, or property damage based on comparative fault, "the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." (See *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 (*DaFonte*).) Our Supreme Court has explained the purpose of this rule: " '[T]he measure quite clearly is simply intended to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault.' " (*Id.* at p. 603, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1204.)

The plaintiff in *DaFonte* was injured by equipment while on the job; he successfully sought damages from the manufacturer of the equipment. In the trial court, the award of noneconomic damages against the manufacturer was reduced by 45 percent, the amount attributable to the fault of the employer, which was immune from liability for work-related injuries under California's workers' compensation law. (*DaFonte, supra*, 2 Cal.4th at pp. 596-598.) The Supreme Court agreed this procedure was proper, concluding that Proposition 51 "eliminates a third party defendant's joint and several liability to an injured employee for unpaid noneconomic damages attributable to the fault of the employer, who is statutorily immune from suit." (*DaFonte*, at p. 596.) There was no exception for damages "*attributable to the fault of persons who are immune from liability* and have no mutual joint obligation to pay missing shares. [Italics added.] On the contrary, section 1431.2 expressly affords relief to every tortfeasor who *is* a liable 'defendant,' and who formerly *would* have had full joint liability." (*Id.* at p. 601.) Therefore, the court rejected the plaintiff's contention that Proposition 51 did not permit

[8] All subsequent statutory references are to the Civil Code.

apportionment of fault to absent or immune tortfeasors, concluding instead that "the only reasonable construction of section 1431.2 is that a 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendant[s]' present in the lawsuit." (*DaFonte*, at p. 603.)

Plaintiffs contend, however, that it is not *DaFonte* but *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 (*Richards*) that controls here. In *Richards*, the Supreme Court had occasion to consider the interplay between Proposition 51 and a different "immunity" statute, section 1714.45. (*Richards*, at p. 989.) That statute provided that "a manufacturer or seller 'shall not be liable' in a 'product liability action' for harm caused by the ingestion of a 'common consumer product intended for personal consumption, such as . . . tobacco' which is 'inherently unsafe' and consumed with 'ordinary [community] knowledge' of its danger." (*Id.* at p. 988.)[9]

Richards, a smoker, sued Owens-Illinois for asbestos-related injuries. (*Richards, supra*, 14 Cal.4th at pp. 989-990.) Relying on *DaFonte,* Owens-Illinois argued "even if the tobacco companies are themselves immune from liability for their products' contribution to plaintiff's lung disease, these companies' proportionate responsibility for the injury—i.e., their comparative 'fault'—necessarily reduces Owen-Illinois's own degree of 'fault' for the same injury." (*Richards*, at p. 997, italics omitted.) Therefore, the defendant argued, the comparative fault of the tobacco companies should diminish the defendant's proportionate share of liability for noneconomic damages under Proposition 51. (*Ibid.*)

The court in *Richards* began its analysis by scrutinizing the immunity statute. It concluded that section 1714.45 did not merely confer immunity from *liability* for tortious conduct, but constituted a determination by the Legislature that a company supplying tobacco does not engage in tortious conduct because it *breaches no duty* to consumers.

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[9] In 1997, the Legislature amended section 1714.45, subdivision (a) to eliminate the reference to tobacco. (Stats. 1997, ch. 570, § 1, No. 9 West's Cal. Legis. Service, pp. 2838-2839.)

(*Richards, supra*, 14 Cal.4th at p. 1000.) "In other words, under the conditions described by section 1714.45, a tobacco supplier simply commits no tort against knowing and voluntary smokers by making cigarettes available for their use." (*Ibid.*; see also *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 837.)

Having ascertained the meaning of section 1714.45, the court distinguished *DaFonte*, reasoning as follows: Under Proposition 51 the defendant's fault must be compared to all other fault. Because an employer's tort immunity under the workers' compensation scheme "does not imply any absence of legal 'fault' or tortious responsibility in an employer whose act or omission contributed to the harm," the immune employer's share of responsibility for a plaintiff's injury is included in ascertaining comparative *fault*. (*Richards, supra*, 14 Cal.4th at p. 998.) In contrast, the tobacco companies' immunity "arises from a premise which is . . . inconsistent with the allocation of legal 'fault' to such entities under Proposition 51, as contemplated in *DaFonte*." (*Ibid.*) Consequently, no " 'fault' " can be assigned to any acts of the tobacco companies that contributed to plaintiff's harm. (*Id.* at p. 1003.)

Plaintiffs do not address the *Richards* rationale. They assert only that the result in *Richards* applies here and the result in *DaFonte* does not. Plaintiffs contend that *DaFonte* is "unique" in that it "rested on prior Supreme Court decisions holding 'in essence, that an employee's damage judgment against third parties must be reduced by an amount attributable to the employer's proportionate share of fault, up to the amount of workers' compensation benefits paid. . . . [T]hird party defendants remained jointly and severally liable to the injured employee for all damages attributable to the employer's fault which were not covered by workers' compensation benefits.' *DaFonte,* 2 Cal.4th at 599 . . . ." Therefore, plaintiffs argue, the Navy cannot be assigned a portion of the fault in this case because defendant has failed to show that "under *Feres/Stencel* a third party defendant [may] reduce its liability by the federal government's share of fault, up to the amount of veteran's benefits paid to the plaintiff."

Plaintiffs' reading of *DaFonte* is simply wrong. The quoted passage does not constitute the underpinning for the court's holding. It is, rather, part of a recital of the

history of contributory and comparative fault, commencing with *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, and continuing to the passage of Proposition 51 in 1986. (*DaFonte, supra*, 2 Cal.4th at pp. 597-600.) The next paragraph in *DaFonte* makes this crystal clear: "In sum, by 1986 the courts had eliminated certain inequities of the former tort recovery system, but so-called 'deep pocket' defendants whose fault was slight could still be saddled with large damage awards mainly attributable to the greater fault of others who were able to escape their full proportionate contribution. [Citation.] *Proposition 51 sought to modify this system of recovery*." (*Id.* at p. 599, italics added.) The court went on to conclude that under Proposition 51 "the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*DaFonte*, at p. 600.)

Akin to plaintiffs' argument here, the plaintiff in *DaFonte* contended that, absent an exception to Proposition 51 for third party suits by injured workers, "the 'delicate' preexisting balance among the rights of employee, employer, and third party tortfeasor" will be destroyed. (*DaFonte, supra*, 2 Cal.4th at p. 603.) But as the court decisively noted, "[this] principal effect is *precisely that intended by the initiative*: defendants no longer have to pay an injured employee's noneconomic damages caused by the fault of another, and the employee, like any other tort victim, bears the resulting risk of loss. No substantial reason is asserted, let alone a 'compelling' one, why Proposition 51's manifest policy should not apply in this particular situation." (*Id.* at pp. 603-604, italics added, fn omitted.)

Richards and *DaFonte* establish that under Proposition 51, fault will be allocated to an entity that is immune from *paying for* its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious. We are aware of no declaration stating the government breaches no duty to military personnel when it exercises its discretion or when a serviceman is injured in the course of military service. Indeed, the cases make clear the government is immune from claims based on such conduct *even if it has been negligent*. (See, e.g., *Stencel*, *supra*, 431 U.S. at pp. 668-672; *Gordon*, *supra*, 835 F.2d at p. 100.) Accordingly, whatever the

merits of plaintiffs' position that the Navy was immune under either the discretionary immunity exception or the *Feres/Stencel* doctrine, we conclude the trial court did not err in allowing the jury to allocate fault to the Navy for purposes of determining defendant's proportionate share of responsibility.[10]

III. DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

[10] In light of this conclusion, we do not reach defendant's claim that plaintiffs waived their right to challenge the jury's apportionment of fault to the Navy.

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RIVERA, J.

We concur:

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KAY, P.J.

_____
REARDON, J.

Trial Court:	Superior Court of San Francisco County
Trial Judge:	Honorable Douglas C. Munson

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