



**User Name:** Kerry Jones

**Date and Time:** Wednesday, August 24, 2022 10:13:00 AM EDT

**Job Number:** 177987603

## Document (1)

1. [Cortez v. Lamorak Ins. Co., 2022 U.S. Dist. LEXIS 150788](#)

**Client/Matter:** ACT

## Cortez v. Lamorak Ins. Co.

United States District Court for the Eastern District of Louisiana

August 23, 2022, Decided

CIVIL ACTION NO. 20-2389 SECTION "R" (1)

### Reporter

2022 U.S. Dist. LEXIS 150788 \*

CALLEN J. CORTEZ, ET AL. VERSUS LAMORAK  
INSURANCE COMPANY, ET AL.

**Notice:** Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

### Core Terms

exposure, wallboard, asbestos, employees, asbestos exposure, levels, mesothelioma, contends, galleys, reasons, studies, ships', living quarters, asbestos dust, cross-examination, industrial, microscopy, hygienist, witnesses, products, reliable, cutting, exposed, argues, opined

### Opinion

#### [\*1] ORDER AND REASONS

Hopeman Brothers, Inc. and Liberty Mutual Insurance Co. (together, "Hopeman") move to strike the testimony of Gerald Baril, plaintiff's expert industrial hygienist, under Federal Rule of Evidence ("FRE") 702, 703, and 403, as well as Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).<sup>1</sup> For the reasons that follow, the Court denies the motion.

#### **I. BACKGROUND**

Callen Cortez, now deceased, sued Hopeman, among others, for asbestos exposures causing him to develop mesothelioma.<sup>2</sup> Plaintiffs' industrial hygienist, Gerald Baril, opined that plaintiff suffered paraoccupational, direct, and bystander exposure to asbestos products from Hopeman that significantly contributed to his risk of developing

1

2

R. Doc. 491.

R. Doc. 1-1 at 1-3, 11-13 (Complaint ¶¶ 1-2, 25-29).

mesothelioma.<sup>3</sup> Baril relies on testimony from Cortez's brothers, Daniel and Mitchell Cortez, that they worked around Hopeman's employees while the employees cut asbestos wallboard at Avondale Shipyards, as well as testimony from other Avondale employees that Hopeman's workers installed wallboard in living areas and galleys of ships at Avondale.<sup>4</sup> The testimony was that when Hopeman cut wallboards around the Cortez brothers, Hopeman exposed them to asbestos dust.<sup>5</sup> Baril also relied on Callen Cortez's testimony about [\*2] his work around Hopeman's employees at Avondale, including that he worked next to Hopeman's employees while they cut asbestos wallboard in ships' galleys and living quarters.<sup>6</sup> Baril used six studies to determine the level of asbestos exposure Cortez experienced from Hopeman's cutting of wallboard.<sup>7</sup> The cited exposure levels ranged from 1.84 f/cc up to 112.2 f/cc. Baril then compared Cortez's exposures to current and historical occupational health standards for asbestos and found them to be well in excess of these standards and to present a significant risk of mesothelioma.<sup>8</sup>

3

4

5

6

7

8

See generally R. Doc. 491-7 (Baril Report). *Id.* at 17-44.

*Id.* at 23- 24, 27.*Id.* at 33.

*Id.* at 43.

*Id.* at 44.

2

## II. DISCUSSION

Hopeman seeks to exclude Baril's testimony as unreliable and unhelpful. See [Fed. R. Evid. 702](#) (requiring expert testimony to be reliable and helpful to the factfinder). Hopeman first contends that Baril did not reliably determine **asbestos** exposure levels.<sup>9</sup> This argument is without merit. Baril's methodology consisted of consulting scientific studies and literature that calculated **asbestos** exposure levels from activities like those identified by witnesses and comparing the resulting exposure levels to occupational [\*3] standards establishing permissible exposure limits to **asbestos**. The law does not require plaintiffs to show the precise amount of a toxic substance to which they were exposed. [Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 671 \(5th Cir. 1999\)](#). In [Curtis, supra](#), the Fifth Circuit upheld an expert's opinion that relied, *inter alia*, on testimony about the work practices at the workplace at issue, including testimony that witnesses became soaked in the relevant toxic material when they performed certain tasks. *Id.* This is similar to the evidence Baril relied on here. Hopeman also contends that Baril simply assumes that every exposure above background is harmful. But Baril has not opined that exposures from Hopeman were harmful simply

9 R. Doc. 491-1 at 6.

3

because they were above background. Rather, he concluded that they exceeded applicable safety standards. This argument is likewise without merit.

Hopeman's other argument, that Baril was unfamiliar with its operations or materials, also does not warrant exclusion of Baril's testimony. Baril's report discusses witness testimony that Hopeman's wallboard was made of Micarta and that Hopeman's workers cut the boards with skil saws, creating **asbestos** dust.<sup>10</sup> Baril relies on studies that evaluated **asbestos** fiber [\*4] releases from cutting products with this material. Hopeman's arguments do not support a finding that Baril's opinion lacks a factual basis. Rather, these arguments are the proper subject of cross-examination.

Hopeman also argues that the Court should preclude plaintiffs from using a videotape of the Longo/Hatfield Micarta study at trial. This argument is moot, because plaintiffs stipulate that they will not attempt to use the video at trial.

To the extent that Hopeman attacks the Longo/Hatfield study itself, its arguments lack merit. For example, Hopeman argues that the study simulated workers who stood still during exposures, while Cortez simply walked by Hopeman's workers in passing. But the record reflects that Callen

10 R. Doc. 491-7 at (Baril Report).

4

Cortez also testified that he worked next to Hopeman's employees in ships' living quarters and galleys while they cut the dust-generating wallboards. Hopeman's argument does not warrant exclusion of this study. Hopeman also faults the Longo/Hatfield study because it uses a transmission electron microscopy ("TEM") method of measuring **asbestos** release, which Hopeman contends produces exaggerated results. But the study also uses the phase-contrast [\*5] microscopy ("PCM") method, which Hopeman does not criticize. Baril relies only on the PCM test results in his report. For this reason, the use of the TEM method by Longo/Hatfield is not a basis to exclude Baril's testimony about the study, although this topic may be explored on cross-examination.

## III. CONCLUSION

For the foregoing reasons, the Court DENIES Hopeman and Liberty Mutual's motion to exclude or limit Gerard Baril's testimony.

New Orleans, Louisiana, this 23rd day of August, 2022.

\_\_ \_\_ SARAH S. VANCE

UNITED STATES DISTRICT JUDGE 5

---

End of Document