LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Mar. 5, 2018 Case No. 16CV190343

EDWARD SHAFFER, ET AL. — Plaintiff
J. Grunda, C. Stern, G. Henderson — Plaintiff's Attorney

VS

A. W. CHESTERTON CO., ET AL. — Defendant
M. Mendoza, B. Rimmel - FOR USSC — Defendant's Attorney

This matter is before the Court on separate Defendant, United States Steel Corporation's, Motion For Summary Judgment on Plaintiffs' Federal Claims, filed October 16, 2017; Plaintiffs' Response, filed November 6, 2017; and, Defendant, United States Steel Corporation's Reply Brief, filed December 1, 2017.

THE COURT RULES THAT: Separate Defendant, United States Steel Corporation's Motion For Summary Judgment on Plaintiffs' Federal Claims, is well-taken and hereby GRANTED.

See Judgment Entry. No Record.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: All Counsel of Record

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Plaintiff

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INTRODUCTION

This matter is before the Court on separate Defendant, United States Steel Corporation's, Motion For Summary Judgment on Plaintiffs' Federal Claims, filed October 16, 2017; Plaintiffs' Response, filed November 6, 2017; and, Defendant, United States Steel Corporation's Reply Brief, filed December 1, 2017.

Oral argument had January 22, 2018.

STATEMENT OF PERTINENT FACTS

Plaintiff, Edward Shaffer ("Shaffer"), contracted mesothelioma from exposure to various asbestos-containing products he encountered during his lifetime. These exposures allegedly occurred during his numerous employment endeavors as an auto mechanic, carpenter, drywall installer, welder, auto worker, and significantly for this decision, a merchant mariner for the Pittsburg Steamship Division of separate Defendant, United States Steel Corporation, ("USSC") during the years 1960-1961.

It is generally uncontested that Shaffer sailed on four ships owned by USSC between April, 1960 and October, 1961, for a total of approximately 194 days.[1] In addition, Shaffer worked on the vessels during the winter months when the ships were in port. This amounted to about 25 days of work.[2]

[1] At oral argument, there was some dispute as to the exact number of days Shaffer sailed with the figure of 191 days being the correct number. Regardless, the discrepancy is not germane for resolution of the issue.
[2] Similarly, there may be some additional days in this regard, but the record is unclear.

Shaffer's duties on the ships included working in the engine and boiler rooms, cleaning boilers and filters and cleaning the flues in the stacks. He also worked on and around pipe insulation material and in a "very dusty" environment and cleaned-up insulation that fell to the deck. He often replaced insulation throughout the ship and was required to mix the insulation products with water to spread over the areas that required repair or replacement of insulation.

Shaffer also worked on steam wenches that were "packed" with an insulation-like material and valves with packing material and gaskets. And, Shaffer was on occasion near the turbines when they were torn-down, though he did not perform the tear-down himself.

While Shaffer was unable to testify affirmatively about direct exposure to asbestos or asbestos-containing products on USSC's ships, his Industrial Hygienist (Jerome Spear) provided an expert opinion that Shaffer "was likely exposed to asbestos during his employment with [USSC] at levels which exceeded historical and current occupational exposure limits on a routine basis."

And, Capt. William Lowell, a long-time member of the Merchant Marines who spent decades on Great Lakes ships[3] and is familiar with Shaffer's work for USSC opines that ". . . sailors were in position while onboard ships to be in the immediate vicinity of work that would necessarily disturb asbestos-containing gaskets, packing, and insulation."

In addition, Shaffer's medical expert (Dr. John Maddox) posited an expert report that states that Shaffer was exposed "occupationally" to asbestos at "virtually every job he ever held." Applying the "cumulative exposure theory," Dr. Maddox concluded that "based on the exposure history and pleural plagues, [Plaintiff's] cumulative asbestos exposure caused this lethal malignant pleural mesothelioma."

SUMMARY JUDGMENT STANDARD OF REVIEW

The Ninth District Court of Appeals has recently stated the standard of review for summary judgment. "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come

[3] But did not visit any of the ships Shaffer worked on.

to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977)." *Petroskey v. Martin,* 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15. "The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E). *Petroskey* at ¶ 16.

And, "Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to 'set forth specific facts showing that there is a genuine issue for trial.' * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C)." *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. See *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996). *Messer v. Summa Health System,* 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

ANALYSIS

Shaffer alleges two federal claims against USSC, to wit: violation of the Jones Act and Unseaworthiness under General Maritime Law.

As a matter of law, both claims must fail.

THE JONES ACT

The Jones Act, 46 U.S.C. § 688 *et seq.*, is, basically, a federal negligence claim available to seamen against their employers for injuries occurring during the course of their employment. It provides additional protections to seamen above and beyond general maritime claims.

In order to prevail on a Jones Act claim, a plaintiff must demonstrate 1) an unsafe condition on the vessel while the plaintiff was aboard as an employee of defendant; 2) the unsafe condition was a cause, however slight, of injury to him; 3) the employer had actual or constructive knowledge of that unsafe condition; and 4) the harm from the

unsafe condition was foreseeable at the time. *Gallick v. Baltimore & Ohio R. Co.* 372 U.S. 108, 117 (1963).

The gravamen of USSC's argument relative to the Jones Act is that Shaffer did not believe or have knowledge of actually being exposed to asbestos while a mariner; that if Shaffer was in fact exposed to asbestos on the ships it was because USSC was required by law to use asbestos-containing materials by government mandate; that any exposure was within acceptable limits per OSHA regulations; none of Plaintiffs' experts opine that USSC was negligent; and, that even if Shaffer was exposed to dangerous asbestos-containing products, USSC was unaware of the danger and, thus, had no duty to protect Shaffer from an unforeseeable risk.

Shaffer responds that he can demonstrate exposure to asbestos through circumstantial evidence and USSC admits the presence of asbestos in its "government mandate" argument; that there is no evidence posited by USSC to support its "government mandate" defense; that USSC failed to use ordinary care to protect Shaffer and his experts do opine that USSC was negligent; and, that USSC knew about the dangers of asbestos for years before Shaffer was employed.

For the reasons that follow *infra,* the Court need not address the propriety of each of these arguments.

UNSEAWORTHINESS UNDER GENERAL MARITIME LAW

A claim of unseaworthiness is, essentially, a breach of warranty claim made by a seaman against a shipowner based upon the shipowner's alleged breach of the duty to provide to his seamen a ". . . vessel and appurtenances reasonably fit for their intended purpose." *Cook v. American Steamship Co.* 53 F.3d 733, 741 (1995 6th Cir.) (quoting *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 550 (1960)). The claim is brought under Admiralty Law.

To prevail on a claim of unseaworthiness, an injured seaman must show that an unseaworthy condition was the proximate cause of his injury. *Mitchell Miller v. Am. President Lines, Ltd.,* 989 F. 2d 1450, 1463-64 (6th Cir. 1993).

According to USSC, there is no evidence in this case that an unseaworthy condition existed on any of the USSC ships Shaffer sailed or worked on. As for the presence of asbestos, USSC again argues that if there was asbestos present on any of the ships, its presence was mandated by the government; that Shaffer did not believe he was ever exposed to asbestos on the ships; and, that his experts fail to opine that any of the ships were unseaworthy.

Finally, and significantly, USSC urges that there is no evidence that exposure to asbestos on the ships was a substantial factor in causing Shaffer's injuries.

Shaffer responds by reiterating that there is no evidence of USSC's "government mandate" defense; that Shaffer testified that he was not trained or instructed on how to handle asbestos; that there was evidence posited by Shaffer about the shabby condition of the ships and the presence of asbestos; and, that Dr. Maddox's opinion that Shaffer's exposure was not trivial or *de minimis* but "repetitive, clearly above normal background levels, and with a latency period longer than 10 years . . ." and that **the cumulative exposure** to asbestos caused Shaffer's injuries. (Emphasis added.)

Again, because of the reasons explained *infra,* it is unnecessary for the Court to analyze each of these arguments.

DOES SUBSTANTIVE OHIO LAW APPLY

In a very recent landmark decision, the Ohio Supreme Court abrogated the "cumulative exposure" causation theory in asbestos cases. See: *Schwartz, Exr. v. Honeywell Int., Inc.* 2018-Ohio-474. Essentially, the Supreme Court determined that the cumulative exposure theory, without more, is insufficient to demonstrate that a particular defendant's product was a "substantial factor" in causing a plaintiff's injury.

The question becomes then, does this substantive Ohio law apply to the two federal claims herein or is state law preempted by federal law?

"The Supremacy Clause of the United States Constitution provides that "the Laws of the United States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Clause 2, Article VI, United States Constitution. The clause grants Congress the power to preempt state laws. See *Jenkins v. James B. Day & Co.* (1994), 69 Ohio St.3d 541, 544, citing *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259." See: *Norfolk S. Ry. Co. v. Bogle,* 115 Ohio St.3d 255, 2007-Ohio-5248, at ¶ 6.

"The United States Supreme Court has identified three methods by which Congress may preempt state legislation. First, it may expressly state that an enactment preempts applicable state law. *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95–98. Second, Congress may preempt an entire field of activity, without expressly stating its intention to do so, if an intent to preempt can be inferred "from a 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (Ellipsis and brackets *sic.*) *English v.*

Gen. Elec. Co. (1990), 496 U.S. 72, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230. Finally, Congress preempts state law when a state law actually conflicts with a federal law, i.e., 'where it is impossible for a private party to comply with both state and federal requirements.'" *English* (citations omitted.)" *Id.* at ¶ 7.

In the case at bar, the Court finds that Ohio substantive law does apply and that *Schwartz* is controlling. First, there are no express mandates in either the Jones Act or General Maritime Law that expressly preempts state law. Second, Congress certainly did not intend to preempt the entire field of negligence law, which both federal claims really sound in. And finally, there is no *relevant* conflict between the federal negligence standard and Ohio's negligence standard.

IS THERE A CONFLICT BETWEEN RC 2307.96 AND *SCHWARTZ* AND THE SECOND PRONG OF THE JONES ACT

Recall that the second element of the Jones Act requires a plaintiff to demonstrate "the unsafe condition was a cause, *however slight,* of injury to him." Conversely, RC 2307.96 requires that in order to maintain a cause of action in tort against a defendant resulting from exposure to asbestos, the plaintiff must prove ". . . that the conduct of that particular defendant was a substantial factor in causing the injury or loss . . ." *Id.* (Emphasis added.)

The Ohio Supreme Court in *Schwartz* reaffirmed this standard and abrogated the "cumulative exposure" theory to demonstrate causation.

The two statutes then, at least at first blush, appear to be in conflict. The Jones Act, a statute that creates a substantive federal claim in negligence for seafarers requires only that the plaintiff demonstrate that even the "slightest" unsafe condition caused his injury. Conversely, RC 2307.96, Ohio's statute that identifies the standard of review for multi-defendant asbestos litigation requires a plaintiff to demonstrate that a particular defendant's conduct was a "substantial factor" in causing his injury.

How can these two opposite standards be read *in pari materia* and if they cannot, which one applies?

The answer, of course, is two-fold: First, if in fact the two standards, one for federal claims and one for state claims cannot be harmonized, it is of no accord for resolution of this case; and, Two, the precedent enunciated by the United State Court of Appeals for the Sixth Circuit in *Lindstrom v. A-C Product Liability Trust,* 424 F.3d 488 (2005) and by the United States Court of Appeals for the Seventh Circuit in *Krik v. Exxon Mobile Corp.,* No. 15-3112, Northern Dist. Illinois, Eastern Div., 8/31/2017 are dispositive.

In *Lindstrom,* the plaintiff was a merchant seaman who filed suit against multiple defendants seeking compensation for his mesothelioma. Like Shaffer herein, Lindstrom brought claims under the Jones Act and Unseaworthiness under Maritime Law.

The Sixth Circuit held, "Under either theory, a plaintiff must establish causation. *Stark v. Armstrong World Indus., Inc.,* 21 Fed.Appx. 371, 375 (6th Cir.2001). We have required that a plaintiff show, for each defendant, that (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered. *Id.* * * * 'Minimal exposure' to a defendant's product is insufficient. *Id.*" *Lindstrom* at pg. 492.

The court continued, "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient. *Id.* Rather, where a plaintiff relies on proof of exposure to establish that a product was a substantial factor in causing injury, the plaintiff must show 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural' * * * In other words, proof of substantial exposure is required for a finding that a product was a substantial factor in causing injury." *Id.*

Lindstrom's causation expert, a Dr. Corson, advanced the "every exposure"[4] theory to demonstrate causation. This theory, like the "cumulative exposure" theory in *Schwartz,* was rejected by the Sixth Circuit.

The *Lindstrom* court noted, "The affidavit does not reference any specific defendant or product, but rather states in a conclusory fashion that every exposure to asbestos was a substantial factor in Lindstrom's illness. The requirement, however, is that the plaintiff make a showing with respect to *each* defendant that the defendant's product was a substantial factor in plaintiff's injury, *see Stark* at 375 ('Commonly, [the substantial factor] standard is separately applied to each of the defendants.'). As a matter of law, Corson's affidavit does not provide a basis for a causation finding as to any particular defendant. A holding to the contrary would permit imposition of liability on the manufacturer of any product with which a worker had the briefest of encounters on a single occasion."[5]

Thereafter, in a much more recent case, the Seventh Circuit in *Krik* went even further. In similar fashion, the court held, "The law of causation, however, required the plaintiff to prove that the defendants' acts or products were a 'substantial contributing factor' to Krik's illness. De minimis exposure is not sufficient." *Krik*, 76 F. Supp. 2d at 753 (Lee)

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[4] The "every exposure" theory is an analog to the "cumulative exposure" theory – that is, they are the same theory identified by two different names.

[5] Dr. Carson in *Lindstrom* submitted an Affidavit as his report.

(citing maritime and Illinois law). And substantial exposure that cannot be attributed to a particular defendant is likewise insufficient." *Id.* at pg. 8.

In rejecting the cumulative exposure theory, the court stated, "In other words, causation requires that an expert connect the nature of the asbestos exposure and pair it with a Daubert-approved methodology that can be used to determine whether such an exposure was a substantial cause of the defendant's injury." *Id.* at pg. 10. "[The cumulative exposure theory] is not an acceptable approach for a causation expert to take." *Id.* at pg. 13.

Finally, the *Krik* court noted, "To summarize, the principle behind the 'each and every exposure' theory and the cumulative exposure theory is the same—that it is impossible to determine which particular exposure to carcinogens, if any, caused an illness. In other words, just like 'each and every exposure,' the cumulative exposure theory does not rely upon any particular dose or exposure to asbestos, but rather all exposures contribute to a cumulative dose. **The ultimate burden of proof on the element of causation, however, remains with the plaintiff.** *Shelton v. Old Ben Coal Co.*" *Id.* at pg. 13-14. (Citations omitted, emphasis added.)

For the foregoing reasons, and based upon the compelling precedent noted above, this Court rejects the "however slight" standard contained in the Jones Act and instead, applies the "substantial factor" test required by RC 2307.96, *Lindstrom, Krik,* and *Schwartz* and finds that, under both Ohio law and maritime law, a plaintiff must demonstrate that asbestos was a "substantial contributing factor" to his injury.

AS SHAFFER RELIES UPON THE "CUMULATIVE EXPOSURE" THEORY OF CAUSATION AS THE SUBSTANTIAL FACTOR IN CAUSING HIS MESOTHELIOMA, THE APPLICATION OF *SCHWARTZ* MANDATES DISMISSAL OF HIS FEDERAL CLAIMS AGAINST USSC

In *Schwartz,* the Ohio Supreme Court flatly rejected the cumulative exposure theory finding it, for multiple reasons, ". . . incompatible with the plain language of RC 2307.96."[6], *Id.* at ¶18. The court reasoned, "The statute requires an individualized determination for each defendant: there must be a finding that the conduct of a 'particular defendant was a substantial factor' in causing the plaintiff's disease. R.C. 2307.96(A). But the cumulative-exposure theory examines defendants in the aggregate: it says that because the cumulative dose was responsible, any defendant

[6] RC 2307.96, "Asbestos claim – multiple defendants – substantial factor test," is Ohio's multi-defendant asbestos statute that establishes the threshold standard prerequisite to maintaining a cause of action against any named defendant based on injury or loss from exposure to asbestos.

that contributed to that cumulative dose was a substantial factor. It is impossible to reconcile a statutory scheme that requires an individualized finding of substantial causation for each defendant with a theory that says every defendant that contributed to the overall exposure is a substantial cause." *Id.*

As noted *supra,* like the plaintiffs in *Schwartz, Krik*, and *Lindstrom*, Shaffer relies upon this discredited theory to link his injury to USSC. His expert, Dr. Maddox, opines "It is my opinion that the risk of developing mesothelioma is a dose-response process, and that the mesothelioma is the **cumulative result of the exposure to asbestos that a person receives** . . ." (Dr. Maddox Expert Report, pg.4 of 20, emphasis added.)

The Ohio Supreme Court has clarified the intent of the General Assembly that the conduct of each defendant in an asbestos action must form a "substantial factor" in the plaintiff's injury before liability can attach. The court held, "Thus, in R.C. 2307.96 the legislature made clear that in asbestos cases, there must be a determination whether the conduct of each 'particular defendant' was a substantial factor in causing the plaintiff's injury and that this determination must be based on specific evidence of the manner, proximity, frequency, and length of exposure." *Id.* at ¶ 14.

EXPOSURE TO ASBESTOS FROM USSC SHIPS WAS NOT A SUBSTANTIAL FACTOR IN CAUSING SHAFFER'S MESOTHELIOMA

In considering whether Shaffer presented sufficient evidence that his exposure to asbestos on the ships was a substantial factor in his contracting mesothelioma, the Court must focus on the manner, proximity, frequency, and length factors attendant to his employment with USSC.

In his expert report, Shaffer's causation expert (Dr. Maddox) does not opine that Shaffer's exposure to asbestos on USSC's ships was a substantial factor in causing his disease, and the cumulative-exposure theory that he did rely on is an insufficient basis on which to find substantial causation. *Schwartz, supra.* The other evidence offered about Shaffer's exposure to USSC's ships and their appurtenances is likewise insufficient to establish causation under RC 2307.96.

In consideration of the manner in which Shaffer was allegedly exposed to asbestos, he arguably came in contact with asbestos on the ships when removing insulation, mixing insulation, working on steam wenches and valves, and while working on the boilers and turbines in the winter months.[7] But exposure to asbestos, if at all, in what amount or concentration, is in question. Shaffer could not testify for sure that he *was ever* exposed to asbestos. Capt. Lowell opined that Shaffer was exposed to asbestos, but

[7] The Court is cognizant that USSC does not concede that Shaffer was exposed to *any* asbestos on the ships.

was never on any of the ships that Shaffer sailed on and sheds very little light on the actual manner of exposure.[8]

As for proximity, this element of the RC 2307.96 test is met as the Court reaches a favorable inference[9] as to the reports of Capt. Lowell and Mr. Spear.

Frequency and length of exposure, however, are not demonstrated. There is testimony in the record that Shaffer worked "four hours then received eight hours off." But, how much of his four hour shifts were spent exposed to asbestos is a mystery. How long he was in contact with asbestos-containing products is equally unclear. And, at most, Shaffer spent 191 days (or so) working on USSC's ships. This is a bit more than six-months, or one-half of a year. There is absolutely no evidence in the record that this length of exposure was a "substantial factor" that caused Shaffer's mesothelioma.

This Court must also consider Shaffer's exposure to asbestos from USSC's ships in the context of his exposure while employed in other endeavors. Dr. Maddox's report concludes that Shaffer was exposed to asbestos in numerous other professions and by multiple employers including the Lorain Ford Plant (1966-2004); Automotive Garage (1959-1960); personal automobile work (1957-2001); his time in the Merchant Marine (1961-1964)[10]; as a welder with American Ship Building Co. (1964-1966); and, various "crafts" as a carpenter, plumber, and roofer (1960-1963).

This time-span covers roughly 1959-2004, a period of 45 years, only six-months of which was spent on USSC's ships.

As such, when the Court considers the manner, proximity, frequency, and duration of Shaffer's exposure to asbestos from USSC's ships in relation to these "other factors which contribute in producing the harm," 2 Restatement of the Law 2d, Torts, Section 433, at 432, this Court cannot say that Shaffer established that his exposure to asbestos from USSC's ships was a substantial factor in causing his mestothelioma.

Like the causation expert in *Krik,* Dr. Maddox's report herein does not "tie" a specific quantum of exposure attributable to USSC but instead opined that "every exposure" was a substantial contributing factor to the cumulative exposure that causes cancer. Accordingly, the failure of Shaffer's causation expert (Dr. Maddox) to testify that Shaffer's exposure to asbestos while on USSC's ships was a substantial contributing factor to his mesothelioma is fatal to his federal claims.

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[8] The testimony of Shaffer's Industrial Hygienist, Jerome Spear, is similarly unconvincing.
[9] See Civ. R 56(C).
[10] Of which only 1960-1961 was with USSC.

CONCLUSION

After review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, perusal of Civ. R 56(C) as well as the relevant, and recent, case law supplied by the parties and Court and the oral arguments of counsel, the Court finds the following:

There are no genuine issues of material fact in dispute. As such, separate Defendant, United States Steel Corporation's, Motion For Summary Judgment is well-taken and hereby GRANTED. United States Steel Corporation is dismissed as a party defendant.

IT IS SO ORDERED.

JUDGE D. Chris Cook