United States District Court,
D. Puerto Rico.

ESSO STANDARD OIL COMPANY, (PUERTO RICO) Plaintiff
v.
Carlos E. RODRÍGUEZ PÉREZ, et al., Defendants

No. Civ.01-2012 SEC JA.

Jan. 20, 2005.

David P. Freedman, Alexandra Rivera-Sáez, San Juan, Puerto Rico, Julio Gómez, Keena Mackay, John McGahren, Alejandro Pérez, Bruce Taterka, Newark, NJ, for Plaintiff or Petitioner.

José A. Hernández-Mayoral, San Juan, PR, Juan H. Saavedra-Castro, San Juan, PR, Orlando Cabrera-Rodríguez, San Juan, PR, Rafael E. García-Rodón, San Juan, PR, for Defendant or Respondent.

José D. Pagán-Pagán, Guaynabo, Puerto Rico, for Third Party Defendant.

Madelaine Riefkohl-Gorbea, San Juan, PR, for Interested Party.

Carlos M. Belgodere-Pamies, Urb. Monte Claro, Bayamón, PR, Party, pro se.

OPINION AND ORDER

ARENAS, Chief Magistrate J.

I. INTRODUCTION

There are several motions pending before the court. On August 2, 2004, plaintiff Esso Standard Oil Company (Puerto Rico) (hereinafter "Esso"), filed a motion to strike defendants' expert. (Docket No. 246.) Said motion stands unopposed as of this date. Also before the court are the motions for reconsideration and to alter or amend judgment filed on October 12, 2004 by co-defendants Carlos E. Rodríguez Pérez (hereinafter "Rodríguez"), his wife Carmen Ortiz López (hereinafter "Ortiz"), and the conjugal partnership formed by both (Docket Nos. 252, 253), requesting that the court reconsiders its opinion and order of October 4, 2004. (Docket No. 250.) [FN1] Esso opposed co-defendants' motions on October 19, and 26 respectively. (Docket Nos. 260, 261.) In addition, co-defendants Rodríguez and Ortiz filed replies to Esso's opposition. (Docket Nos. 264, 266.) However, Esso has moved to strike said submissions on the grounds that they were, among other things, filed in violation of the local rules of this court. (Docket No. 271.) As expected, the co-defendants opposed such motion to strike. (Docket No. 273.)

> FN1. On this same date I issued an order to show cause directed at Esso regarding its claims in light of the United States Supreme Court recent decision in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, --- U.S. ----, 125 S.Ct. 577, --- L.Ed.2d ---- (2004) (holding that a private party who has not been sued under sections 106 or 107 of **CERCLA**, cannot obtain contribution from other liable parties under section 113(f)). I will issue a ruling regarding the effects, if any, of *Aviall Servs.* over the claims asserted in this case once the issue has been briefed. However, I find it unnecessary to defer ruling on the motions for reconsideration that are now before the court since the issues presented are not those covered by the Supreme Court decision. In other words, the co-defendants have not sought reconsideration of my findings regarding the specific question addressed by the Court in *Aviall Servs.*, which I discussed in the previous opinion and order (Docket No. 250), following the case law as it existed at the time. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir.2002).

The court is also considering co-defendant Carlos Belgodere Pamies' (hereinafter "Belgodere") motion similarly requesting the court to reconsider its October 4, 2004 opinion and order. (Docket No. 262, October 26, 2004.) Esso duly opposed Belgodere's motion on November 10, 2004. (Docket No. 269.) Furthermore, co-defendants Rodríguez and Ortiz filed a motion requesting that sanctions be imposed against Esso. (Docket No. 267, November 11, 2004.) Esso's opposition to the motion for sanctions and co-defendants' reply appear in the record at Docket Nos. 272 and 275.

I will consider each motion in the order outlined above, but first some background is in order.

II. PROCEDURAL BACKGROUND

Esso brought the present action against co-defendants Rodríguez, Ortiz and Belgodere under the

Comprehensive Environmental Response Compensation and Liability Act (hereinafter "**CERCLA**"), 42 U.S.C. § 9601 *et seq.* Esso sued the co-defendants, *inter alia,* under section 113(f) of **CERCLA,** 42 U.S.C. § 9613(f), seeking to recover part of the response costs that it has incurred in cleaning up the environmental contamination at a gasoline service station located in the La Vega Ward, Barranquitas, Puerto Rico. In due course, all parties moved for summary judgment on the issue of liability for contribution. (See Docket Nos. 228, 235, 236.) Esso also moved for summary judgment with respect to the claims asserted in the counterclaim filed by co-defendants Rodríguez and Ortiz. (Docket No. 229.)

On October 4, 2004, I issued an opinion and order disposing of the parties' requests for summary judgment. (Docket No. 250.) I granted Esso's motion for partial summary judgment on the issue of liability for contribution under **CERCLA.** Accordingly, I denied co-defendants' motions for summary judgment on the same issue. (*Id* .) I also granted Esso's unopposed motion with respect to co-defendants' counterclaim. (*Id.*)

III. DISCUSSION

A. *Esso's Motion to Strike Co-defendants' Expert*

Esso moves the court to strike the expert report submitted by co-defendants Rodríguez and Ortiz' expert witness, Professor Juan Antonio Dávila García (hereinafter "Dávila"). Esso also requests an order precluding the testimony of said witness at trial. According to Esso, the co-defendants have failed to comply with the requirements of Federal Rule of Civil Procedure 26(a)(2)(B) inasmuch as they have failed to submit, along with Mr. Dávila's report, his qualifications or his curriculum vitae; a list of publications authored by the expert within the preceding 10 years; the compensation to be paid for his study and testimony; and a list of other cases in which the proposed expert has testified either at trial or by deposition within the preceding four years.

In addition, Esso adduces that it attempted to depose co-defendants' expert on June 21, 2004. However, the deposition had to be adjourned because the witness insisted in charging a fee that was more than three times higher than his customary fee. In fact, the witness requested to be paid $1,100 per hour. (Docket No. 246, Ex. 2, at 7-8.) He also demanded that he be paid for three hours in advanced. (*Id.* at 7.) But the record demonstrates that his customary fee is between $200 and $375. (*Id.*) After negotiations and this court's intervention in trying to resolve the issue, the parties were unable to agree on a reasonable fee. Mr. Dávila would not accept less that $850 per hour. (*Id.* at 25.)

Rule 26 of the Federal Rules of Civil Procedure provides in pertinent part that the expert disclosures must include "the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Fed.R.Civ.P. 26(a)(2)(B). The First Circuit has interpreted these directives to be mandatory since the adoption of Federal Rule of Civil Procedure 37(c)(1), which in turn " 'contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule." ' *Poulis-Minott v. Smith,* 388 F.3d 354, 358 (1st Cir.2004) (quoting *Klonoski, M.D. v. Mahlab, M.D.,* 156 F.3d 255, 269 (1st Cir.1998)). In the ordinary case, the mandatory sanction is preclusion of the proffered testimony. *Klonoski, M.D. v. Mahlab, M.D.,* 156 F.3d at 256; *see also* Fed.R.Civ.P. 37(c)(1) (stating that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence ... any witness or information not so disclosed.").

In this case, absent co-defendants' opposition to Esso's motion to strike, the court is presented with only one side of the story. Nevertheless, that is an adverse situation of co-defendants' own making. Given the failure to comply with the requirements of Federal Rules of Civil Procedure 26(a)(2)(B), and because of the witness' attempt to extort from the plaintiff an exorbitant amount in exchange for his testimony at the deposition, Esso's motion to strike Mr. Dávila's expert report is GRANTED. Additionally, the co-defendants are precluded from calling Mr. Dávila to testify as their expert at trial. No costs or attorney's fees are awarded.

B. *Co-defendants' Motions for Reconsideration*

All co-defendants filed motions requesting the court to reconsider the rulings made in the October 4, 2004, opinion and order. Co-defendants Rodríguez and Ortiz move the court to reconsider arguing, *inter alia,* that: (1) the court did not have in front of it sufficient evidence to support the entry of summary judgment in favor of Esso; (2) the opinion and order was

written in part relying on false evidence submitted by Esso; (3) the court erred in determining that the co-defendants had waived the affirmative defense of *res judicata;* and (4) this is a very complicated case where the public interest is involved and should not be resolved at the summary judgment stage.

Belgodere, on the other hand, maintains that the court should reconsider the entry of summary judgment because the evidence in the record demonstrated that he was not an operator of the station as defined by **CERCLA.** It is also Belgodere's position that the court did not take into consideration the opinion of Magistrate Judge Gustavo Gelpí in civil case No. 03-1485 where he held that **CERCLA** did not preempt state law, thus entitling him to statutory immunity under 12 P.R. Laws Ann. § 1291. Finally, Belgodere claims that the court should reconsider its decision because this case is not a **CERCLA** case inasmuch as the petroleum exclusion applies.

Motions for reconsideration are governed by Federal Rule of Civil Procedure 59(e). It has been held that "Rule 59(e) motions are 'aimed at reconsideration, not initial consideration.' " *FDIC v. World Univ., Inc.,* 978 F.2d 10, 16 (1st Cir.1992) (quoting *Harley-Davidson Motor Co., Inc. v. Bank of New England,* 897 F.2d 611, 616 (1st Cir.1990)). The motion under Rule 59(e) must direct the court's attention to a manifest error of law or fact or present newly discovered evidence; it cannot present a new legal theory or evidence which was available but not presented. *See Landrau-Romero v. Banco Popular de Puerto Rico,* 212 F.3d 607, 612 (1st Cir.2000); *see also Aybar v. Crispín-Reyes,* 118 F.3d 10, 16 (1st Cir.1997) ("The rule ... does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."). Simply put, a motion for reconsideration is not an opportunity to present new legal claims or to re-litigate issues already decided at the summary judgment stage.

1. Rodríguez and Ortiz

Most of the arguments presented in co-defendants Rodríguez and Ortiz' motion for reconsideration can be disposed of fairly quickly for their lack of merit. First, co-defendants' contention that the court had insufficient evidence before it to support the entry of summary judgment is incorrect. The court considered all the evidence that appeared in the record and found that as a matter of law, the co-defendants were liable to Esso for contribution under **CERCLA.** Co-defendants Rodríguez and Ortiz presented a motion for summary judgment of their own but submitted no evidence whatsoever in support of the same. Additionally, the co-defendants failed to file an appropriate opposition to Esso's motion for summary judgment in accordance with Federal Rule of Civil Procedure 56 and the local rules of this court. [FN2] In doing so, the co-defendants cannot seriously claim that the court had no sufficient evidence before it to decide the motion for summary judgment when such a circumstance responds to their own failure to submit evidence to controvert Esso's position. The co-defendants did submit a statement of undisputed facts. (Docket No. 233.) But the same made no reference to evidence in the record, nor was it accompanied by any exhibits or documents. Furthermore, the required opposition to Esso's motion for partial summary judgment was never filed by the co-defendants. Consequently, their argument that the court's decision on summary judgment is without evidentiary support fails on the face of their own procedural failures. *Aybar v. Crispín-Reyes,* 118 F.3d at 16 (quoting *Moro v. Shell Oil Co.,* 91 F.3d 872, 876 (7th Cir.1996)) (Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures").

> FN2. Specifically, Local Rule 56(b) requires a motion for summary judgment to be accompanied by a separate, short and concise statement of material facts that supports the moving party's claim that there are no genuine issues of material fact in dispute. These facts are then deemed admitted until the nonmoving party provides a similarly separate, short and concise statement of material fact establishing that there is a genuine issue in dispute. *See* Local Rule 56(e) (2004); *Morales v. A.C. Orssleff's EFTF,* 246 F.3d 32, 33 (1st Cir.2001); *Ruiz Rivera v. Riley,* 209 F.3d 24, 26 (1st Cir.2000); *Domínguez v. Eli Lilly & Co.,* 958 F.Supp. 721, 727 (D.P.R.1997).

The same rationale applies to the claim that the court decided Esso's motion for summary judgment on the counterclaim filed by the co-defendants, misled by Esso's submission of false evidence. The co-defendants argue that the court's conclusion on the issue of statute of limitations was based on the submission by Esso of false evidence inasmuch as Esso never informed the court that the co-defendants had timely asserted their claims when they answered

a complaint that was filed in state court by the Estate of Pagán-Pagán. They further maintain that in the state action, they asserted a third-party complaint against Esso for the controversy arising out of the closing of the station. Assuming for purposes of this discussion that the interposition of the third-party claim against Esso in 1999 interrupted the running of the statute of limitations, there is no explanation in the record or in co-defendants' motions for reconsideration as to why they simply chose not to oppose Esso's motion for summary judgment so as to justify disturbing my original determination. [FN3] Neither do I find merit in co-defendants' allegation that Esso submitted false evidence. Co-defendants' failure to demonstrate the existence of a factual dispute is also precluding them to use Rule 59(e) as a vehicle to bring arguments and evidence that were available and should have been brought at the summary judgment stage.

> FN3. I reviewed the answer to the complaint in the state eviction case and it appears that the third-party complaint against Esso was filed on September 24, 1999, that is more than one year after August 1, 1998, the actual date the station was closed and thus the latest possible time during which co-defendants' loss of income cause of action could have accrued.

The co-defendants also contend that this case should not have been decided at the summary judgment stage because of the complexity of the case and the public interest implicated. While it may be true that the case involves complex issues and that there are public interest implications, that does not mean that the court cannot summarily dispose of the same, specifically where, as here, there were no genuine issues as to any material fact, and judgment was appropriate as a matter of law.

Next, I address co-defendants' contention that the court erred in ruling that they had waived their *res judicata* affirmative defense. First, I need to point out that the co-defendants misunderstood the nature of my ruling. I did not hold that they had waived the defense. The actual language of my order is:

> Specifically, these co-defendants maintain that the present action is barred by: the applicable statute of limitations; *res judicata;* waiver; and the equitable doctrine of laches. Finding that the grounds argued either have no merit, have already been decided or are asserted in a perfunctory manner, I find it unnecessary to address them in a lengthy discussion.

>Docket No. 250, at 30.)

The word waiver appears next to the term *res judicata* but not as an indication that the court considered the issue waived. The court was simply enumerating the additional grounds raised by the co-defendants in support of their motion for summary judgment. The ruling is in the subsequent sentence where I found that said additional grounds either had no merit, had already been decided or were asserted in a perfunctory manner. The affirmative defense of *res judicata* was indeed argued in a perfunctory manner in co-defendants' motion for summary judgment and that is the reason the court did not address said defense in depth.

The co-defendants limited themselves to argue in their motion for summary judgment that Esso *waived* its **CERCLA** contribution claim because it "failed to allege **CERCLA** when it was sued in local court in 1992 or during the administrative procedures [sic]." (Co-defendants' Motion for Summary Judgment, Docket No. 235, at 24.) In addition to the above, and after engaging in a treatise-like discussion of the *res judicata* concept, the co-defendants stated the following:

> The present case is similar to the case in Bayamón; it deals with releases gasoline from underground storage tank of La Vega Service Station. Plaintiff had to bring a counter claim alleging **CERCLA** and did not, waiving all rights to recover any cost.
> Furthermore, the Appellate Court of Puerto Rico made ESSO responsible for the spill at the La Vega Station and ordered the Superior Court to determine the amount lost.
> In the EQB, plaintiff was afforded due process by the agency. Plaintiff ESSO has not alleges [sic] **CERCLA** in the administrative proceedings and has waived any recovery from any other responsible party.

>Docket No. 235, at 28-29.) However, they presented no evidence and no argument whatsoever as to put the court in a position to determine that all the elements of the *res judicata* defense had been met in this case. The co-defendants attempted to argue, tersely, that since Esso did not bring its **CERCLA** contribution claim either at the 1992 lawsuit or at the administrative proceedings at the EQB, that *res judicata* barred the present action. Such an argument cannot be said to be sufficient to establish a movant's burden on summary judgment. It is well-settled that

> issues adverted to in a perfunctory manner, unaccompanied by some effort at developed

argumentation, are deemed waived.... It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.... Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

King v. Town of Hannover, 116 F.3d 965, 970 (1st Cir.1997) (quoting *Willhauk v. Halpin*, 953 F.2d 689, 700 (1st Cir.1991)).

Alternatively, in addition to co-defendants' deficient presentation of their arguments regarding the *res judicata* defense, a review of the evidence and the arguments presented for the first time reveals that it is questionable at best that the defense would preclude Esso's **CERCLA** claim. One of the central requirements of the defense is the existence of a final judgment on the merits. *Breneman v. United States ex rel. FAA*, 381 F.3d 33, 38 (1st Cir.2004) (quoting *Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (1st Cir.1995)) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action."). Here, the co-defendants rely on the "Order to Do and To Show Cause" issued by the Environmental Quality Board against Esso (Docket No. 265, Ex. 1) and the judgment of the Puerto Rico Court of Appeals issued on March 18, 2003. (Docket No. 253, Ex 3.) Their reliance is, however, misplaced. First, the "Order to Do and Show Cause" is merely the document by which the agency initiated the administrative process against Esso. As the court is well aware, said administrative process has not concluded, *see Esso Standard Oil, Co. v. Mujica-Cotto*, 327 F.Supp.2d 110 (D.P.R.2004), *aff'd*, 389 F.3d 212 (1st Cir.2004); hence, the order cannot constitute *res judicata*. Second, a reading of the Puerto Rico Court of Appeals judgment reveals that it is not a final judgment on the merits. The appellate court in that case reversed the lower court's decision to dismiss co-defendant's complaint pursuant to Rule 39(c)(2) of the Puerto Rico Rules of Civil Procedure, 32 P.R. Laws Ann.App. II. (Docket No. 253, Ex. 3, at 26.) The court reversed the judgment of the lower court, declared the nullity of a hold harmless clause at issue in the case, and remanded to the lower court for the continuation of proceedings in accordance with the opinion stated therein. (*Id.*) At this time, the court is not aware of any final and firm judgment entered subsequent to the order of remand from which the co-defendants may assert the defense of *res judicata*. Therefore, in view of the above, co-defendants Rodríguez and Ortiz' motion for reconsideration and to correct or amend judgment is DENIED. [FN4]

FN4. Esso has also moved to strike co-defendants' replies (Docket Nos. 264, 266) on the grounds that said submissions were filed in violation of Local Rule 7(c) and (e). (Motion to Strike, Docket No. 271.) The replies were indeed belatedly filed without first obtaining leave from the court and the reply memorandum at Docket No. 266 is 26-pages long in violation of Local Rule 7(c). As such, Esso's motion to strike (Docket No. 271) is GRANTED. The replies were not considered.

Finally, in their opposition to co-defendants' motion for reconsideration, Esso moves the court to enter partial judgment dismissing co-defendants counterclaim. Having granted Esso's motion for summary judgment regarding the counterclaim filed by the co-defendants, it follows that the counterclaim must be dismissed in its entirety. Consequently, there being no just cause for delay, the court will accordingly enter partial judgment pursuant to Federal Rule of Civil Procedure 54(b).

2. Belgodere

Belgodere's motion for reconsideration must similarly be denied. In it, Belgodere seeks to re-litigate and re-argue arguments already presented to and resolved by the court in the October 4, 2004, opinion and order. The only contention that the court will discuss is Belgodere's claim that there is a triable issue regarding statutory immunity under 12 P.R. Laws Ann. § 1291. Because the issue was raised in Belgodere's opposition to Esso's motion for partial summary judgment and because it was not addressed by me in the October 4, 2004, opinion and order, it is the only issue that qualifies for review on reconsideration as a possible manifest error of law.

This is not the first time that Belgodere has argued that he is immune from **CERCLA** liability by virtue of 12 P.R. Laws Ann. § 1291. In his original motion to dismiss/summary judgment (Docket No. 105), Belgodere asserted that he was entitled to immunity under Law 94 of November 29. He provided neither a citation for the statute nor the year in which the law was passed. Based on such failure, I denied Belgodere's motion for summary judgment on that issue. (Docket No. 170 at 15.)

Subsequently, in a related action, Civil No. 03-1485, Carmen Marrero-Hernández brought suit against Esso pursuant to section 505 of the Clean Water Act, as amended, 33 U.S.C. § 1365, and section 7002 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6972, arising out of the same occurrence at issue here. Esso filed a third-party complaint against herein co-defendants Rodríguez and Belgodere under article 1802 of the Puerto Rico Civil Code seeking contribution and indemnification against them in the event that Esso is found liable in the principal action. In due course, Belgodere moved for dismissal/summary judgment claiming statutory immunity under 12 P.R. Laws. Ann. § 1291. In an opinion and order issued on June 17, 2004, Magistrate Judge Gelpí denied Belgodere's motion for summary judgment. *Marrero-Hernández v. Esso Standard Oil Co.*, 321 F.Supp.2d 301, 308 (D.P.R.2004). Magistrate Judge Gelpí found that Belgodere could invoke the Puerto Rico immunity statute because the same was not preempted by **CERCLA.** *Id.* at 304-05. However, summary judgment was denied because there was a genuine issue of material fact as to whether Belgodere qualified for immunity under the statute. *Id.* at 308. Belgodere relies on Magistrate Judge Gelpí's opinion and order to claim statutory immunity under 12 P.R. Laws Ann. § 1291.

Esso has argued that the limited immunity provision found in section 1291 is inapplicable to this action inasmuch as state-law cannot provide the rule for determining liability under **CERCLA.** (Docket No. 244.) In other words, it is Esso's position that by enacting **CERCLA,** Congress provided a federal rule of decision in questions of liability that cannot be altered by application of a state statute or standard. Additionally, Esso contends that since section 119 of **CERCLA** includes a provision by which a response action contractor may obtain immunity, any Puerto Rico statute purporting to confer immunity on similar terms is preempted by **CERCLA.**

Section 1291 of Title 12, Puerto Rico Laws Annotated, provides:

> (a) The provisions of any other law notwithstanding, no person or intervening party shall be liable for the cleaning, removal or disposal expenses or for the damages caused by actions or omissions while remedying or trying to remedy or eliminate an oil or hazardous substances spill or while providing or rendering attention, help, assistance, or counsel following the National Contingency Plan or answering to the instructions and orders of the Federal On-Scene Coordinator or the designated Commonwealth official.
> (b) The aforementioned immunity shall not apply to:
> (1) the parties liable for the spill as defined in § 1290(h) of this title;
> (2) incidents causing personal damages or death;
> (3) incidents where negligence or actions contrary to law are shown.
> (c) The liable party shall answer for the cleaning, removal or disposal expenses as well as for the damages caused by any other person relieved from responsibility under this section.
> (d) This chapter does not exempt from the liability any responsible party may have for any kind of oil or hazardous substances spill.
> 12 P.R. Laws Ann. § 1291.

Without extensive discussion, Magistrate Judge Gelpí concluded that Belgodere could rely on this statute because **CERCLA** itself explicitly states (42 U.S.C. § 9652(d)) [FN5] that it does not preempt state-law as to issues of liability. *Marrero-Hernández v. Esso Standard Oil Co.*, 321 F.Supp.2d at 304-05. Specifically, the magistrate judge held that 12 P.R. Laws Ann. § 1291 applied and that the court will not look to 42 U.S.C. § 9607 for questions concerning liability. *Id.*

> FN5. Section 9652 of **CERCLA** provides in relevant part that
> (d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.
> 42 U.S.C. § 9652(d).

It is not at all clear why Magistrate Judge Gelpí concluded under **CERCLA** that the court would only look to state law concerning issues of liability. First, the action under the court's consideration was brought pursuant to the Clean Water Act and the Waste Disposal Act, not **CERCLA.** Therefore, the determination is dictum and is not binding on this court. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir.1992) (holding that although relevant, observations not essential to the determination of the legal questions before the court are dicta). Second, if pursuant to 42 U.S.C. § 9652(d), courts could only look at state law for questions concerning liability, **CERCLA's** purpose would be frustrated, rendering useless the

liability standard of 42 U.S.C. § 9607. In any event, the issue before the court is whether the state immunity statute can be invoked to preclude as a matter of law the imposition of **CERCLA** contribution liability. I find that it cannot.

CERCLA does not completely preempt the field of compensation and recovery for injuries caused by the release and disposal of hazardous substances. In addition to section 9652 discussed above, **CERCLA** also provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). In *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir.1993), for instance, the court stated that "Congress clearly expressed its intent that **CERCLA** should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." Clearly, Congress did not intend to preempt the field of hazardous waste cleanup with the enactment of **CERCLA.** *New Mexico v. Gen. Elec. Co.*, 335 F.Supp.2d 1185, 1224 (D.N.M.2004). However, a state statute or regulation conflicting with the purpose or enforcement of any **CERCLA** provision might find itself preempted. *See United States v. City & County of Denver*, 100 F.3d 1509, 1512-13 (10th Cir.1996); *see also Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F.Supp.2d 203, 208 (D.Conn.2001).

Conflict preemption exists when " 'compliance with both federal and state regulations is a physical impossibility' [or when] the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) (citations and internal quotations omitted). As an example, at least two circuits have held that state, common law contribution, restitution and indemnification claims are preempted by section 113(f) of **CERCLA**. *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir.1998); *In re Matter of Reading Co.*, 115 F.3d 1111, 1117 (3d Cir.1997); *cf. MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490-91 (5th Cir.2002). Similarly, a savings clause such as the one found in **CERCLA** cannot be said to allow state law to nullify the specific provisions of a federal Act. *PMC, Inc. v. Sherwin-Williams, Co.*, 151 F.3d 610, 618 (7th Cir.1998).

Such a conclusion does not resolve the present controversy. The court must determine if the statutory limited immunity set forth in 12 P.R. Laws Ann. § 1291 is in actual conflict with any **CERCLA** provision so as to be preempted. As stated above, section 1291 provides limited immunity to a person under the particular circumstances described therein, i.e. "while remedying or trying to remedy or eliminate an oil or hazardous substances spill or while providing or rendering attention, help, assistance, or counsel following the National Contingency Plan or answering to the instructions and orders of the Federal On-Scene Coordinator or the designated Commonwealth official." 12 P.R. Laws Ann. § 1291(a). In addition, the statute provides the factors under which such a person would not qualify for the immunity despite falling within the above-definition. But **CERCLA** itself has an immunity provision for response action contractors allowing the contractor to escape liability if the circumstances defined in the statute are met. 42 U.S.C. § 9619. Section 9619, however, provides a standard that is different and that varies from the standard set forth in the local immunity statute. The standard for immunity under state law appears more lenient than the standard under **CERCLA,** thus creating a conflict. But the most significant conflict between the local statute and **CERCLA** is that concerning the imposition of liability and the exceptions to immunity in section 1291.

I assume for purposes of this discussion that section 1291 indeed applies to the present action, and as Magistrate Judge Gelpí observed in his opinion and order. To qualify for immunity under said section, Belgodere would have to meet at least one of the criteria of section 1291(a) and not fall within any of the exceptions to immunity set forth in section 1291(b). Once again, assuming that Belgodere fits the mold of one of the section 1291(a) criteria, he still cannot fall within one of the exceptions of section 1291(b). Section 1291(b) denies liability to an otherwise qualified person if (1) the person qualifies as a party liable for the spill as defined in section 1290(h) of this title; (2) the incident at issue caused personal damages or death; or (3) the incident is one where negligence or actions contrary to law are shown. 12 P.R. Laws Ann. § 1291(b). Magistrate Judge Gelpí found that there was a genuine issue of material fact precluding summary judgment on exceptions (2) and (3). *Marrero-Hernández v. Esso Standard Oil Co.*, 321 F.Supp.2d at 307-08. As to exception (1), however, the magistrate judge found that Belgodere was not as a matter of law precluded

from immunity. *Id.* at 307. In other words, he found that Belgodere is not a party liable for the spill as defined by 12 P.R. Laws Ann. § 1290(h). The reason is that section 1290(h) defines responsible party as one who "owns *and* operates a facility." 12 P.R. Laws Ann. § 1290(h)(2) (emphasis added). Magistrate Judge Gelpí concluded that even if Belgodere meets the definition of an operator, he is not an owner of the station and therefore, not a responsible party. *Id.* The problem with the statute lies in such a construction.

Liability under sections 107 or 113(f) of **CERCLA** can be imposed on either a current or past owner *or* operator of a facility. 42 U.S.C. § 9607(a) (emphasis added); *see also Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150-51 (1st Cir.1989). Unlike section 1290(h)(2), there is no requirement that the person be both an owner and an operator. In my opinion and order, I found that Belgodere qualified as an operator of the station under the United States Supreme Court definition, *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998); therefore, he was a person liable or potentially liable for the release of hazardous substances, from which Esso could seek contribution. *See* 42 U.S.C. § 9613(f)(1). Based on such finding, Belgodere would also fall within exception (1) of section 1291(b) but for the requirement in section 1290(h)(2) that he be both an owner and an operator. Such conflict between **CERCLA** and the state immunity statute cannot be reconciled in light of **CERCLA's** purpose and spirit. Consequently, the state law immunity set forth in section 1291 stands as an obstacle to the full accomplishment of the purposes and objectives of **CERCLA** and is, therefore, preempted.

In view of the above, the denial of Belgodere's motion for summary judgment on the issue of **CERCLA** liability and the granting of Esso's motion for partial summary judgment was not a manifest error of law mandating that my October 4, 2004 opinion and order be disturbed. Belgodere's motion for reconsideration is DENIED.

C. *Rodriguez and Ortiz' Motion for Sanctions*

Co-defendants Rodríguez and Ortiz filed a motion on November 11, 2004, requesting that sanctions be imposed on Esso pursuant to Rule 11 of the Federal Rules of Civil Procedure. (Docket No. 267.) Co-defendants' specific allegation is that Esso included misleading statements in its opposition to co-defendants' motion for reconsideration with the sole purpose of inducing this court to error and in clear violation of Rule 11. On November 22, 2004, Esso submitted its opposition to co-defendants' motion for sanctions. (Docket No. 272.) In it, Esso argues that co-defendants' motion under Rule 11 should be denied as a threshold matter for their failure to comply with a number of procedural requirements. Esso maintains, *inter alia,* that the motion for sanctions was not served previously as mandated by Rule 11; that the co-defendants did not seek leave from the court to submit a motion that exceeds the page limit set forth in Rule 7 of the local rules of this court; and that the request for sanctions should be stricken from the record pursuant to Federal Rule of Civil Procedure 12(f). In reply, the co-defendants defend against Esso's contention claiming that Esso is using "legal technicalities" to divert the court's attention from the real issue, the Rule 11 violation. (Docket No. 275.)

Rule 11 provides in relevant part that a party or attorney may be sanctioned by the court on its own initiative or by motion of a party if the claims or arguments presented are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" or if there is no evidentiary support for the facts alleged or denied. Fed.R.Civ.P. 11(b)-(c); *Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P.*, 171 F.3d 52, 56 n. 2 (1st Cir.1999). Rule 11 has a "safe harbor" provision requiring a movant to serve the motion on the opposing counsel or party and then wait 21 days after service before filing the motion for sanctions with the court. Fed.R.Civ.P. 11(c)(1)(A). The purpose of this provision is to allow an attorney to correct his or her error before the opposing party or counsel initiates Rule 11 proceedings. *Nyer v. Winterthur Int'l*, 290 F.3d 456, 460 (1st Cir.2002).

Evidently, the co-defendants failed to comply with the safe harbor provision of Rule 11. They admit as much when they characterize the requirement of Federal Rule of Civil Procedure 11(c)(1)(A) as a "legal technicality" that does not require denial of the motion for sanctions. Throughout this litigation, the co-defendants have exhibited a complete disregard for procedural rules and the local rules of this court. Procedural rules are not, as the co-defendants would have the court hold, mere technicalities. They exist for a reason and are not to be followed only at the option, convenience or whimsy of litigants. Co-defendants' failure to comply with the safe harbor

provision alone justifies denial of the motion for sanctions. *See* Waters v. Walt Disney World Co., 237 F.Supp.2d 162, 167-68 (D.R.I.2002); *Martins v. Charles Goodwin Inn. Sch.*, 178 F.R.D. 4, 7 (D.Mass.1997).

In addition, co-defendants' motion for sanctions does not comply with the requirements of Rule 7 of the Local Rules of this district which requires that a non-dispositive motion not exceed 15 pages in length unless otherwise authorized by the court. *See* Local Rule 7.1(e). Co-defendants' motion for sanctions is 29-pages long and no leave from the court was obtained for such filing in excess of the total pages allowed. This is yet another example of co-defendants disregard for procedural rules. Therefore, co-defendants' motion for sanctions is DENIED.

IV. CONCLUSION

In view of the above, Esso's motion to strike co-defendants Rodríguez and Ortiz' proposed expert is GRANTED. The motions for reconsideration of my October 4, 2004 opinion and order are all DENIED. Co-defendants' motion for sanctions is also DENIED.