NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0891

JOSEPH R. LEJEUNE, JR., RUSSELL L. LEJEUNE, CHARLES M. LEJEUNE, CINDY L. JOHNSON, BILLIE S. LEJEUNE, MEREL L. SMITH, AND ESTATE OF JOSEPH R. LEJEUNE, SR.

VERSUS

REED RUBINSTEIN, A. RACHEL ROTHMAN, PEPE & HAZARD, LLP, KOCH AND ROUSE, LLC, RON RIGGLE, AND GARY J. ROUSE

Judgment Rendered: MAY 10 2013

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Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Suit Number 36,534

Honorable Alvin Batiste, Jr., Presiding

* * * * * *

Victor L. Marcello
Donald T. Carmouche
John H. Carmouche
William R. Coenen, III
John S. Dupont, III
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Reed Rubenstein and Pepe & Hazard, LLP

BEFORE: CARTER, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

In this legal malpractice action, defendants, Reed Rubinstein and Pepe & Hazard, LLP, appeal from the trial court's judgment in favor of plaintiffs, Joseph R. LeJeune, Jr., Russell B. LeJeune, Charles M. LeJeune, Cindy L. Johnson, Billie S. LeJeune, Merle L. Smith, and the Estate of Joseph R. LeJeune, Sr., awarding them $447,000.00 in damages for defendants' failure to timely file suit on their state law cause of action. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 23, 1999, Joseph R. LeJeune, Sr., died of multiple myeloma. After his death, plaintiffs became concerned that he may have been exposed to hazardous substances contained in barrels given to him by Nan Ya Plastics Corporation (Nan Ya), a local manufacturer of PVC film, in February of 1993. After having the barrels tested by an environmental engineer, the plaintiffs contacted Reed Rubinstein, an environmental lawyer then practicing in Connecticut, to represent them in their claims for personal injury and property damage against Nan Ya. The plaintiffs and Rubinstein entered into a contingency fee contract on November 15, 1999.

Thereafter, on August 30, 2001, more than two years following the death of Joseph R. LeJeune, Sr., Rubinstein, through local counsel, filed a complaint in United States District Court for the Middle District of Louisiana against Nan Ya, asserting claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA); the Resource Conservation and Recovery Act of 1976 (RCRA); and state law claims for personal injury, property damage, survival damages, wrongful death damages, and punitive damages. Nan Ya answered the complaint, raising as one of its defenses the prescription of plaintiffs' claims.

On June 19, 2002, the plaintiffs filed a petition for damages in Louisiana state court, asserting that Rubinstein failed to timely file an action on their state law claims within the one year prescriptive period, and should the federal district court find that plaintiffs' state law claims are prescribed, Rubinstein and Pepe & Hazard, LLP, the law firm employing Rubinstein, are liable for legal malpractice. Thereafter, the federal district court dismissed plaintiffs' state law claims as prescribed pursuant to a motion for partial summary judgment filed by Nan Ya.

In response to the state court legal malpractice action, Rubinstein and Pepe & Hazard ("defendants") filed a motion for partial summary judgment on the alleged malpractice claims concerning their state law medical damages claims, asserting that plaintiffs cannot establish a causal link between their injuries and any alleged exposure to any materials brought to the plaintiffs' property from Nan Ya. Following a hearing on the motion, the trial court signed a judgment granting summary judgment in favor of defendants and dismissing plaintiffs' wrongful death and personal injury claims against defendants.

The remainder of plaintiffs' claims asserted in the malpractice action proceeded to a bench trial on October 18-20, 2010, after which the trial court signed a judgment in favor of the plaintiffs and against the defendants in the amount of $447,000.00, together with legal interest from the date of judicial demand and all costs of the proceedings. The trial court also ordered that plaintiffs' claims arising from allegations that defendants were negligent in the handling of their personal injury and wrongful death claims be dismissed with prejudice. Defendants filed a motion for new trial, which was denied, and they now appeal from the trial court's judgment.

DISCUSSION

To establish a prima facie case for legal malpractice, a plaintiff must prove there was an attorney-client relationship, the attorney was guilty of negligence in

his handling of the client's case, and the attorney's misconduct caused the client some loss or damage. Costello v. Hardy, 03-1146, p. 9 (La. 1/21/04), 864 So. 2d 129, 138. Causation, of course, is an essential element of any tort claim. However, once the client has proved that his former attorney accepted employment and failed to assert the claim timely, then the client has established a prima facie case that the negligence caused him some loss, since it is unlikely the attorney would have agreed to handle a claim completely devoid of merit. Jenkins v. St. Paul Fire & Marine Insurance Co., 422 So. 2d 1109, 1110 (La. 1982).

Once a prima facie case of malpractice has been made by the plaintiff, the burden of proof shifts to the defendant, and the defendant attorney bears the burden of proving that the client could not have succeeded on the original claim. Prestage v. Clark, 97-0524, p. 9 (La. App. 1st Cir. 12/28/98), 723 So. 2d 1086, 1091 n.9, writ denied, 99-0234 (La. 3/26/99), 739 So. 2d 800; see also Jenkins, 422 So. 2d at 1110. Accordingly, when the plaintiff proves that negligence on the part of his former attorney has caused the loss of the opportunity to assert a claim and thus establishes the inference of causation of damages resulting from the lost opportunity for recovery, an appellate court (viewing the evidence on the merits of the original claim in the light most favorable to the prevailing party in the trial court) must determine whether the negligent attorney met his burden of producing sufficient proof to overcome plaintiff's prima facie case. Jenkins, 422 So. 2d at 1110.

In the instant case, the parties do not dispute that an attorney-client relationship existed between them. The record demonstrates that the plaintiffs and Rubinstein entered into a contingency fee agreement on November 15, 1999, whereby Rubinstein agreed to represent the plaintiffs in the pursuit of their personal injury and property damage claims against Nan Ya. Therefore, the

plaintiffs have established that an attorney-client relationship existed between them and the defendants.

After agreeing to represent the plaintiffs, Rubinstein filed suit on their behalf in federal district court on August 30, 2001, asserting federal claims under CERCLA and RCRA, as well as state law claims for personal injury,[1] wrongful death damages, survival damages, property damage, and punitive damages. However, according to La. C.C. arts. 2315.1 and 2315.2, a beneficiary has one year from the death of the deceased to bring a survival and wrongful death action. See also Jones v. Fontenot, 12-0441, p. 6 (La. App. 1st Cir. 12/28/12), ___ So. 3d ___. Further, prescription commences to run on delictual actions asserting claims for damages to immovable property on the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. La. C.C. arts. 3492, 3493; see also Naquin v. Bollinger Shipyards, Inc., 11-1217, pp. 4-5 (La. App. 1st Cir. 9/7/12), 102 So. 3d 875, 879, writs denied, 12-2676, 12-2754 (La. 2/8/13), 108 So. 3d. 87, 108 So. 3d 93.

According to the record, LeJeune died on June 23, 1999. Therefore, any wrongful death and survival claims prescribed one year following his death, or June 23, 2000. Additionally, Mary Field, an environmental consultant, testified that she conducted testing of plaintiffs' property and found evidence of contamination in September of 1999. Thereafter, she compiled a report detailing her findings of contamination, which she delivered to Rubinstein in April of 2000. Accordingly, at the latest, the plaintiffs acquired or should have acquired knowledge of damage to the LeJeune property by April of 2000, and therefore, any property damage claims prescribed one year later, in April of 2001. Therefore, it is

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[1] Plaintiffs also asserted claims for their own personal injuries sustained as a result of the alleged contamination of their property, such as headaches, nausea, emotional distress, mental anguish, loss of consortium, skin sores, lesions, and increased risk of cancer and/or other disease. However, these claims were not discussed in the trial court, having been dismissed by way of a previous motion for partial summary judgment, and are not at issue in the instant appeal.

clear that Rubinstein, who did not file the lawsuit until August 30, 2001, failed to file suit on the plaintiffs' survival and wrongful death claims within one year of LeJeune's death, and also failed to file suit on plaintiffs' property damage claims within one year of knowledge of the contamination.

As such, plaintiffs have established a prima facie case that Rubinstein's negligence in failing to timely file their wrongful death, survival, and property damage claims caused them some loss, and the burden shifted to defendants to produce evidence to overcome plaintiffs' prima facie case by proving that the plaintiffs could not have succeeded on the original claim. See Jenkins, 422 So. 2d at 1110.[2]

At trial, defendants asserted that plaintiffs suffered no loss as a result of Rubinstein's failure to timely file suit on their survival and wrongful death actions, because the trial court had previously determined, by way of a partial motion for summary judgment, that plaintiffs could not establish that any alleged contamination of the LeJeune property caused injury to LeJeune or caused his

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[2] The defendants assert that the trial court misapplied the burden of proof, arguing that Jenkins does not relieve a plaintiff from proving damages but only shifts the burden to the attorney to rebut the inference of causation. However, this interpretation is in direct contravention of the language of Jenkins, which states that "a rule which requires the client to prove *the amount of damages* by trying the 'case within a case' simply imposes too great a standard of certainty of proof ... [and] the more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim, and the causation and damages questions are then up to the jury to decide." Jenkins, 422 So. 2d at 1110. (Emphasis added.)

Further, we find the defendants' reliance on Rawboe Properties, LLC v. Dorsey, 06-0070, p. 10 (La. App. 4th Cir. 3/21/07), 955 So. 2d 177, 183, writ denied, 07-0763 (La. 6/1/07), 957 So. 2d 178, to be misplaced. In Rawboe, the issue of malpractice was determined by way of a motion for summary judgment and the only issue at trial was whether the plaintiffs were owed damages as a result of the malpractice. The plaintiffs argued on appeal that the trial court incorrectly placed the burden of proving damages on them, requiring them to try a "case within a case." 06-0070 at pp. 4, 9-10, 955 So. 2d at 180, 182-183. However, the Fourth Circuit specifically noted, in upholding the trial court's determination on damages, that the defendants "presented evidence at trial sufficient to overcome Appellant's allegations of damages that were incurred as a result of [the attorney's] malpractice" and that this "does not indicate that the trial court required Appellants to try a 'case within a case.'" Rawboe, 06-0070 at p. 10, 955 So. 2d at 183. Accordingly, the court in Rawboe did not distinguish Jenkins, but rather followed Jenkins by finding that the defendants had met their burden in overcoming plaintiff's prima facie showing of damages and, absent any other showing of damages by the plaintiffs, were entitled to judgment in their favor. Rawboe, 06-0070 at p. 10, 955 So. 2d at 183. Therefore, we find defendant's argument that the trial court misapplied the burden of proof without merit.

death. Though it is unclear whether these claims were even before the court at the trial of this matter, having been previously dismissed,[3] we find that the previous dismissal of these claims due to lack of evidence of medical causation proves that the plaintiffs could not establish that they suffered a loss as a result of Rubinstein's failure to timely file their survival and wrongful death claims. As such, we find no error in the trial court's inclusion in the final judgment of an order formally dismissing plaintiffs' claims arising from allegations that the defendants were negligent in the handling of plaintiffs' personal injury and wrongful death claims.[4]

Defendants also assert that they carried their burden of showing that plaintiffs have not suffered any damages as a result of Rubinstein's failure to timely file their property damage claim, because the evidence presented at trial established that the plaintiffs' property was not damaged by contamination from material in Nan Ya's barrels.

It is undisputed that LeJeune approached Nan Ya about acquiring some fifty-five gallon barrels of waste oil that he noticed on Nan Ya's property when he went to pick up mahogany crate wood. Thereafter, LeJeune used a trailer to pick up approximately sixty-seven barrels, which he stored on his property. A picture of these barrels on the trailer depicts red and orange barrels, as well as some blue barrels.

According to the testimony of James Cline, the safety and environmental coordinator at Nan Ya from 1991-1995, raw materials, including oil, plasticizers and stabilizers, were brought to Nan Ya in fifty-five gallon barrels. Cline stated

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[3] Though the defendants made their assertions regarding the survival and wrongful death claims in their post trial brief submitted to the trial court, there was no evidence presented at the trial of this matter regarding these claims, nor did the plaintiffs attempt to re-urge these claims as a basis for their malpractice action.

[4] On appeal, the defendants assert that the trial court erred in finding that they failed to carry their burden of proving that their negligence did not cause a loss with regard to plaintiffs' wrongful death and survival claims. However, the trial court specifically noted in its reasons for judgment that it had previously granted summary judgment in favor of defendants on these claims, and the final judgment, as detailed above, dismisses these claims against the defendants. Accordingly, we find this assignment of error to be without merit.

that lubricating oil and gear oil were in reddish/orange barrels and plasticizers and stabilizers were in black or blue barrels. Cline stated that the barrels at Nan Ya had residual from the raw materials because they couldn't always get everything out of the barrel. Cline stated that some of these barrels contained stabilizers, some contained oil, and some contained a mixture of different chemicals. Cline acknowledged that some of these drums could have been given to LeJeune. He also stated that used oil from the process of making PVC, which is a mixture of various waste streams and contains stabilizer, was potentially given to LeJeune.

Following LeJeune's death, and after receiving a letter from the Louisiana Department of Health and Hospitals, LeJeune's family contacted Mary Fields, a civil environmental engineer, to come and examine the barrels and give them advice. According to Ms. Fields' testimony, she visited the plaintiffs' property and conducted sampling in September of 1999 and February of 2000. In September of 1999, she sampled a barrel, an underground storage tank, and material she found oozing from a corroded barrel. After having the samples tested, she discovered that all three samples tested positive for phenol, a listed U-188 hazardous waste. According to Ms. Fields, she was surprised to find phenols of this level in used oil. In February of 2000, Ms. Fields sampled three different drums and sent the samples to two different labs. The lab results showed different types of benzenes, acetone, and butanone; however, they did not include an analysis for phenol.

Greg Miller, an environmental consultant qualified as an expert in geology, hydrogeology, site assessment, remediation, and implementation of RECAP,[5] also testified at trial. Mr. Miller stated that he reviewed Ms. Fields' report and did preliminary research on what potential constituents might have been used at Nan Ya. Mr. Miller stated that he visited the plaintiffs' property, inventoried the

[5] RECAP (Risk Evaluation and Corrective Action Program) is a Department of Environmental Quality risk assessment program.

barrels, and performed sampling of an overpacked barrel and the underground storage tank. The results of the sampling showed over eleven percent phenol in the overpack barrel, which according to Mr. Miller is a lot. Phenol was also found in the underground storage tank. Mr. Miller agreed with Ms. Fields that phenol is not normally a component seen in used oil. According to Mr. Miller, the likely source for the phenol is a Baerostab 361 stabilizer, a barium/cadmium/zinc stabilizer, used by Nan Ya in the production of PVC film. In arriving at this conclusion, Mr. Miller relied on the deposition testimony of Mr. Cline, who stated that it was possible that some of the drums given to LeJeune could have contained Baerostab stabilizer. Mr. Miller also reviewed material safety data sheets (MSDS) generated by Nan Ya for Baerostab, which state under the heading "hazardous decomposition" that soluted phenol can occur in the case of hydrolysis with water. Mr. Miller acknowledged that he could not say exactly how that reaction occurs, but he stated that it is the only evidence in the case to explain the finding of eleven percent phenol in the overpack barrel and phenol in the underground storage tank, where LeJeune poured contents of the Nan Ya barrels.

Mr. Miller further stated that though the finding of phenol is a marker for Baerostab, the real "bad actor" with that material is the cadmium, which makes the material hazardous. The hazardous character of the Baerostab is evidenced by an April 1993 notice of hazardous waste activity sent by Nan Ya to the Louisiana Department of Environmental Quality (DEQ) showing cadmium as a D-listed hazardous waste generated by Nan Ya. Mr. Miller stated that though he did not test for cadmium, because he did not receive information about Nan Ya's characterization of waste until after his assessment, he thinks, more probable than not, that he will find cadmium if the source of the phenol is Baerostab. Mr. Miller reiterated that in his opinion, the only plausible source of the phenol in this case is the Baerostab stabilizer.

Further, Miller testified that though he did not find phenol in the soil surrounding the underground storage tank, he did find a hydrocarbon mixture, diesel fuel, and oil. Mr. Miller stated that these waste oil signatures, given Charles LeJeune's testimony that the tank was always used for fuel up until the time that his father, LeJeune, received the waste oil barrels from Nan Ya, at which point LeJeune put the waste oil in the tank, relates the contamination of the soil to Nan Ya. Miller stated that there was also an isolated pocket of soil contamination adjacent to a barrel, which showed chemicals consistent with products used by Nan Ya as solvent cleaner.

At trial, defendants presented the testimony of Dr. Raymond Harbison, an expert qualified in pharmacology, toxicology, and site assessment for risks for human health. Dr. Harbison stated that he visited the plaintiffs' property twice, taking pictures and investigating inside the repair shop. In his opinion, none of the materials or chemicals identified at the property can be specifically connected to Nan Ya. Rather, in his opinion, these materials are associated with the operation of a repair facility. Further, Dr. Harbison stated that he did not know of a mechanism under conditions either at Nan Ya or at the plaintiffs' property, by which the Baerostab could be converted to phenol. Dr. Harbison, who is not a chemist but did state that he uses chemistry in the practice of toxicology, acknowledges that the MSDS says soluted phenol occurs in case of hydrolysis with water, but he states that is a reaction that is not likely to occur without significant energy to break the covalent bonds to release the phenol in the molecule. However, Dr. Harbison noted that hydrolysis could occur with an oxidizer, such as peroxide or nitric acid.

The defendants assert on appeal that the trial court erred in admitting Mr. Miller's testimony that phenol indicated the presence of cadmium, asserting that Mr. Miller's opinion was unsubstantiated speculation. The factual basis for an expert opinion determines the credibility of the testimony. An unsupported

opinion can offer no assistance to the fact finder and should not be admitted as expert testimony. Miramon v. Bradley, 96-1872, p. 6 (La. App. 1st Cir. 9/23/97), 701 So. 2d 475, 478. The abuse of discretion standard applies to the trial court's ultimate conclusion as to whether to exclude expert witness testimony and to the trial court's decisions as to how to determine reliability. Ashy v. Trotter, 04-612, pp. 18-19 (La. App. 3rd Cir. 11/10/04), 888 So. 2d 344, 356, writs denied, 05-0180, 05-0347 (La. 3/24/05), 896 So. 2d 1045, 1047. To ensure reliability, an expert's opinions may not be based on subjective belief or unsupported speculation. Goza v. Parish of West Baton Rouge, 08-0086, p. 1 (La. App. 1st Cir. 5/5/09) (on rehearing), 21 So. 3d 320, 340, writ denied, 09-2146 (La. 12/11/09), 23 So. 3d 919, cert denied, 130 S. Ct. 3277, 176 L. Ed. 2d 1184 (2010).

In arriving at his opinion, Mr. Miller relied on the information supplied by Nan Ya on the MSDS as to the hazardous decomposition of Baerostab. These sheets describe Baerostab as being made up of barium/cadmium/zinc. These sheets also specifically note that soluted phenol occurs in the case of hydrolysis with water. Therefore, Mr. Miller's opinion that it is more probable than not that cadmium is present, given his finding that Baerostab is the only plausible source in this case to explain the presence of phenol, is not purely speculative, but is supported by documentary evidence in the record. Further, Dr. Harbison acknowledged that cadmium is a part of the Baerostab stabilizer, and that soluted phenol could occur in the case of hydrolysis with water and an oxidizer. Accordingly, we find no abuse of the trial court's discretion in admitting Mr. Miller's testimony that the finding of phenol indicated the presence

cadmium.[6]

The defendants also assert that the only evidence in the record as to contamination was purely speculative. After reviewing the record, we find that the evidence presented at trial, considered as a whole, amounts to more than mere speculation, and rather, is circumstantial proof that the barrels provided by Nan Ya to LeJeune contained hazardous waste. It is well established that proof in a case may be by direct or circumstantial evidence. See Benjamin ex rel. Benjamin v. Housing Authority of New Orleans, 04-1058, p. 5 (La. 12/1/04), 893 So. 2d 1, 4. And, the use of circumstantial evidence and the deductions and inferences arising therefrom is a common process for establishing liability. Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 665 (La. 1989).

Further, viewing the evidence in the record in the light most favorable to the plaintiffs, we find no error in the trial court's determination that the defendants failed to prove, more probable than not, that the plaintiffs would not have been successful in their state law claim for property damage against Nan Ya. See Jenkins, 422 So. 2d at 1110.

Defendants assert that the testimony of Chad Serio, the manager of maintenance at Nan Ya at the time of trial, that he did not put anything into fifty-five gallon barrels except waste oil from the machines after they arrived from the manufacturer in Taiwan, supports their assertion that the barrels provided to LeJeune did not contain hazardous waste. However, Mr. Serio also stated that he did not know anything about plasticizers and stabilizers and did not know how they

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[6] The defendants also assert, in one sentence in their brief, that "Dr. Harbison's testimony was more than sufficient to dispel the notion that is was possible that phenol was a maker for cadmium contamination in this case." However, it is well settled that where the testimony of expert witnesses differs, the trier of fact has great, even vast discretion in determining the credibility of the evidence, and a finding in this regard will not be overturned unless it is clearly wrong. Cotton v. Sate Farm Mutual Automobile Insurance Company, 10-1609, pp. 7-8 (La. App. 1st Cir. 6/5/11), 65 So. 3d 213, 220, writ denied, 11-1084 (La. 9/2/11), 68 So. 3d 522. After reviewing the record, we cannot say that the trial court was clearly wrong in choosing to credit the testimony of Mr. Miller over that of Dr. Harbison.

arrived at Nan Ya, because he only worked on the machine lines and plasticizers and stabilizers were handled by a different department. Further, upon looking at various pictures of barrels on the plaintiffs' property, Serio admitted that he could only identify barrels that came from his department, and other barrels on LeJeune's trailer could have come from some other department at Nan Ya.

Additionally, the defendants rely on a DEQ report from February 17, 1993. This report, prepared following a RCRA compliance evaluation inspection of Nan Ya, states that there are no apparent violations of the Louisiana Hazardous Waste Regulations. However, the information in the report was provided by individuals at Nan Ya who stated that they did not generate hazardous waste, that the only anticipated hazardous waste was a D001 parts wash solvent, that as of that time no used oil had been shipped off site but was being stored in fifty-five gallon barrels on the property, and that Nan Ya planned on having the oil picked up by a handler registered with the DEQ. However, the evidence at trial unequivocally establishes that Nan Ya gave LeJeune barrels of used oil sometime in February of 1993, and Nan Ya reported shortly thereafter that they were generating D006 hazardous waste containing cadmium, which information clearly conflicts with that provided in the report. Further, the lab results attached to the report, showing concentrations of chemicals below regulatory limits, reflect testing of samples from a cooling tower, and there is no evidence in the record that the cooling tower is related to any material in Nan Ya's barrels, or that it is the source of the used oil waste stream.

Finally, the defendants assert that the testimony of Dr. Harbison supports their assertion that the soil and groundwater on the plaintiffs' property was not contaminated by anything from Nan Ya's barrels. At trial, Dr. Harbison stated that any contamination of the soil or groundwater on the plaintiffs' property was the result of operations of LeJeune's repair shop and not substances in the Nan Ya barrels. However, as detailed above, Mr. Miller specifically related the

contamination of the plaintiffs' property to the barrels received from Nan Ya. The defendants acknowledge in their brief that these opinions represent "equal probabilities." Accordingly, because the burden was on the defendant to come forward with evidence to overcome the plaintiffs' prima facie case, and viewing the evidence in the light most favorable to the plaintiffs, we find no error in the trial court's determination that the defendants failed to meet their burden.

In addition to arguing the merits of the plaintiffs' underlying state law property damage claim, the defendants also assert that the plaintiffs have not suffered a loss as a result of the defendants' failure to timely file that claim, because any damages that may have been awarded by the trial court are recoverable as "response costs" in the timely-filed federal CERCLA and RCRA actions.

CERCLA provides a remedy to a claimant seeking to recover response costs for removal and remediation of hazardous substances released into the environment. 42 U.S.C. §§9601-9675. To establish a prima facie case of liability under CERCLA, a plaintiff must prove: (1) that the site in question is a "facility" as defined in §9601(9); (2) that the defendant is a responsible person under §9607(a); (3) that a release or threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs. Amoco Oil Co. v. Borden, Inc., 889 F. 2d 664, 668 (5th Cir. 1989). However, a plaintiff may only recover those response costs that are necessary and consistent with the National Contingency Plan. 42 U.S.C. §9607(a)(4)(B).

Unlike CERCLA, however, RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254, 516 U.S. 479, 483, 134 L. Ed. 2d 121 (1996). RCRA's primary

purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste, which is nonetheless generated, so as to minimize the present and future threat of human health and the environment. Meghrig, 116 S. Ct. at 1254, 516 U. S. at 483. A plaintiff suing to enforce the provisions of RCRA under 42 U.S.C. §6972(a)(1)(B) may obtain a mandatory injunction ordering a responsible party to take action by attending to the cleanup and proper disposal of toxic waste or a prohibitory injunction restraining a responsible party from further violating RCRA if he establishes: (1) that the defendant is a person, including but not limited to, one who was or is a generator of solid hazardous waste, or one who was or is an owner or operator of a solid or hazardous waste treatment, storage or disposal facility; (2) that the defendant has contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to human health or the environment. 42 U.S.C. §6972(a)(1)(B); see also Meghrig, 116 S. Ct. at 484, 516 U.S. at 1254.

The defendants have not produced any evidence that the plaintiffs would be able to recover under these federal causes of action, which require a more onerous standard of proof than a state law negligence action for damage to property. First, with regard to the CERCLA action, there is no evidence that the plaintiffs incurred any response costs, which, as set forth above, is a necessary precondition to recovery under CERCLA. See Trimble v. ASARCO Inc., 83 F. Supp. 2d 1034, 1038-1040 (D. Neb. 1999), aff'd, 232 F. 3d 946 (8th Cir. 2000). The only action taken thus far with regard to the property is the testing conducted by Ms. Field, which both Charles LeJeune and Ms. Field testified was uncompensated. Therefore, assuming that such costs are considered "response costs" consistent

with a CERCLA action, such costs were not incurred, because the plaintiffs did not pay Ms. Field for her services.

Second, with regard to the RCRA action, there was no evidence that the alleged hazardous waste at the plaintiffs' property presents an imminent and substantial endangerment to human health or the environment. In fact, the defendants' own expert, Dr. Harbsion, specifically stated that it is *not* an imminent and substantial endangerment to health or the environment.

Accordingly, because the burden was on the defendants to prove that the plaintifffs did not suffer a loss as a result of the defendants' failure to timely file their state law property damage claims, and the evidence of record establishes that the state law property damage claim is the only viable claim upon which they can recover damages for contamination of their property, we find no error in the trial court's determination that the defendants failed to overcome the plaintiffs' prima facie case of legal malpractice against the defendants.

Finally, the defendants assert that the trial court erred in awarding the plaintiffs damages in the amount of $447,000.00. The defendants assert that the damage award should be reduced to $20,000.00, representing the cost for removing the remaining barrels and the underground storage tank. In support of their assertion, defendants rely on the testimony of Keith Hayes, an estimator and project manager for Clean Harbors. Mr. Hayes stated that he did a site examination and determined that the estimated cost to clean up the property, including vacuuming out and washing the barrels and vacuuming out, removing, and crushing the underground storage tank, is between $18,000.00 and $20,000.00. Mr. Hayes stated that this estimate also includes the cost to remove soil if leakage occurred and was based on the waste oil being classified as non-hazardous waste. The estimate does not, however, include the cost for testing the contents of the barrels.

Mr. Miller, however, stated that he estimated the clean-up costs to be $447,000.00. This estimate included barrel disposal, assuming each barrel would have to undergo characterization or sampling to determine how to manage it, closure and removal of the underground storage tank, the contents of which are assumed to be hazardous, groundwater remediation and monitoring, and soil excavation and disposal. Mr. Miller stated that the estimate is based on the hazardous classification of all of the barrels containing substances and the non-hazardous classification of the soil and groundwater to the extent that he knows what is contaminated at this time. Mr. Miller also opined that this estimate could increase if cadmium is detected in the soil.

Given the evidence in the record, we find no error in the trial court's decision to accept the estimate offered by Mr. Miller rather than that offered by Mr. Hayes. Mr. Miller was the only expert qualified at trial to offer testimony on remediation, and unlike Mr. Hayes, Mr. Miller's estimate takes into account the likely presence of hazardous waste on the property and includes costs for testing to ensure proper disposal. Accordingly, we find no error in the trial court's award of $447,000.00 in damages.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court, awarding the LeJeunes $447,000.00, together with legal interest from the date of judicial demand. All costs of this appeal are assessed to defendants, Reed Rubinstein and Pepe & Hazard, LLP.

AFFIRMED.