

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

SHERIANA ESTHER DE LA CRUZ )  
MONEGRO AND ELVI AQUILE )  
HIDALGO CALCANO, Each Individually, )  
and as Parents and Natural Guardians of )  
EZEQUIEL HIDALGO DE LA CRUZ; )  
ESPERANZA JONES METIVIER, )  
Individually, and as Personal Representative )  
of the Estate of “BABY METIVIER;” )  
YORDELI SALOME SUAREZ, )  
Individually, and as Mother and Natural )  
Guardian of “JOANDRY CALCANO )  
SALOME;” SANTA FERMIN DE LENON, )  
Individually, and as Personal Representative )  
of the Estate of “BABY DE LEON;” and )  
LIDIA CAROLINA ESPINO DE LA )  
CRUZ, Individually, and as Personal )  
Representative of the Estate of “BABY DE )  
LA CRUZ,” )

C.A. No. N10C-04-054 JRJ

Plaintiffs, )

v. )

THE AES CORPORATION, AES )  
ATLANTIS, INC., AES PUERTO RICO, )  
LP, AES PUERTO RICO, INC., and AES )  
PUERTO RICO SERVICES, INC., )

Defendants. )

Date Submitted: February 14, 2012  
Date Decided: May 17, 2013

**OPINION**

*Upon Defendants’ Partial Motion to Dismiss Plaintiffs’ Second Amended  
Complaint: **DENIED in part, GRANTED in part.***

Ian Connor Bifferato, Esq., David W. deBruin, Esq., and J. Zachary Haupt, Esq., Bifferato LLC, 800 N. King Street, Plaza Level, Wilmington, DE 19801, Diane Paolicelli, Esq. (argued), *pro hac vice*, and Philip Monier III, Esq., *pro hac vice*, Levy Phillips & Konigsberg, LLP, 800 Third Avenue, 11<sup>th</sup> Floor, New York, New York, 10022, Attorneys for the Plaintiffs.

Timothy J. Houseal, Esq. and William E. Gamgort, Esq., Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Wilmington, DE 19801, Christopher R. Hart, Esq., *pro hac vice*, R. Hackney Wiegmann, Esq., *pro hac vice*, John M. McNichols, Esq. (argued), *pro hac vice*, and Dane H. Butswinkas, Esq., *pro hac vice*, Williams and Connolly LLP, 725 Twelfth Street, N.W., Washington, D.C. 20005, Attorneys for the Defendants.

**JURDEN, J.**

## **I. INTRODUCTION**

The background of this case is set forth in the Court's July 15, 2011 35-page opinion, *Pallano v. AES Corp.*,<sup>1</sup> ("*Pallano I*") granting in part and denying in part Defendants' Motion to Dismiss Plaintiffs' Complaints for Failure to State a Claim Upon Which Relief Can Be Granted. In *Pallano I* the Court held, *inter alia*, that Dominican law applies to Plaintiffs' claims and Plaintiffs sufficiently pled allegations to support four causes of action under Dominican law.<sup>2</sup> Specifically, the Court found that Plaintiffs' allegations in *Pallano I* are sufficient to state cognizable claims under Articles 1382, 1383, and 1384 of the Dominican Civil Code, and Dominican General Law 64-00 ("Law 64-00").<sup>3</sup> Following that ruling, the Plaintiffs, as instructed, amended their complaint to specifically plead those four causes of action.<sup>4</sup>

In the case *sub judice*, Defendants move<sup>5</sup> to dismiss: certain Plaintiffs' claims on statute of limitations grounds; Plaintiffs' Law 64-00 claims; and Plaintiffs' claims for damages based on medical monitoring expenses. For the reasons set forth below and those stated in the Court's

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<sup>1</sup> 2011 WL 2803365 (Del. Super. July 15, 2011) ("*Pallano I*").

<sup>2</sup> Before rendering that decision, the Court hired its own Dominican law expert pursuant to D.R.E. 706. That Court-appointed expert, Professor Keith Rosenn, issued a report dated April 15, 2011, upon which the Court relied in deciding the Motion to Dismiss. The Court felt it necessary to appoint its own Dominican Law expert when it became apparent that the plaintiffs' and defendants' experts disagreed on the proper interpretation of Dominican Law. *See id.* at \*3; *see also* Order Appointing Dominican Law Expert (Trans. ID. No. 35525065); *Pallano v. AES Corp.*, 2011 WL 291097 (Del. Super.) (ORDER) (appointing Professor Rosenn as an independent expert, pursuant to Delaware Rule of Evidence 706, to assist the Court on issues of Dominican law).

<sup>3</sup> *Pallano I*, 2011 WL 2803365, at \*10.

<sup>4</sup> Defendants did not file a Motion for Reargument of the Court's July 15, 2011 Opinion. The parties subsequently deposed Professor Rosenn in September 2011.

<sup>5</sup> Defendants filed a Partial Motion to Dismiss the Second Amended Complaint in both this case (*Monegro v. AES Corp.*) and in *Pallano v. AES Corp.* The Court held a single hearing on the motions and following oral argument, the *Monegro* action was stayed at the request of the parties. A decision was issued on the *Pallano* Motion on May 11, 2012. (*Pallano v. AES Corp.*, 2012 WL 1664228 (Del. Super. May 11, 2012) ("*Pallano II*").) Over Plaintiffs' objections, Defendants requested a ruling on the instant motion because it was submitted and argued prior to the imposition of the stay.

opinions in *Pallano I* and *Pallano II*,<sup>6</sup> the Motion to Dismiss is **DENIED in part and GRANTED in part**.

## **II. DISCUSSION**

### ***A. Dismissal of Certain Plaintiffs' Claims on Statute of Limitations Grounds***

Defendants contend that all claims asserted by Baby de la Cruz and her mother, Lidia Carolina Espino, all claims brought by Plaintiffs Baby de Leon and his father, Santa Fermin de Leon, and Counts II, III, and IV brought by Plaintiffs Ezequiel Hidalgo de la Cruz, his mother, Sheriana Esther de la Cruz Monegro, and his father, Elvi Aquile Hidalgo Calcano, are time-barred.<sup>7</sup>

In *Pallano I*, the Court held that “all of Plaintiffs’ claims based upon Article 1383, negligent or imprudent conduct, are subject to a limitations period of six months, and those claims based upon Article 1382, intentional wrongdoing, are subject to a limitations period of one year.”<sup>8</sup> Because of this brief statute of limitations, the Court recognized that Articles 2271 and 2272 of the Dominican Civil Code allow for the limitations period to be tolled under circumstances that create legal or judicial impossibility to timely filing.<sup>9</sup> Relying on Professor Rosenn’s expert opinion, the Court found that the tolling provisions of the Dominican Civil Code would apply “if the vital facts supporting a claim were reasonably undiscoverable . . . and [thus] the limitations period begins to run ‘from the date on which the holder of a right knew or should have known of the facts to enable him to exercise it.’”<sup>10</sup> After *Pallano I*, the parties deposed Professor Rosenn. During his deposition, Professor Rosenn reaffirmed the opinions set forth in

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<sup>6</sup> *Pallano I*, 2011 WL 2803365; *Pallano 2*, 2012 WL 1664228.

<sup>7</sup> Defs.’ Op. Br. 6.

<sup>8</sup> *Pallano I*, 2011 WL 2803365, at \*5.

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Id.* at \*6 (quoting Rosenn Report at 34).

his expert report.<sup>11</sup> In *Pallano I*, the Court denied Defendants’ Motion to Dismiss on Statute of Limitations Grounds because the Court found that Plaintiffs’ “factual assertions are sufficient to conclude that Plaintiffs’ claims might not be barred by the statute of limitations due to the tolling provisions contained in the Dominican Civil Code. Plaintiffs have pled facts that suggest they did not know, nor should they have known, about the connection between Coal Ash Waste and their injuries until approximately six months before their respective actions were filed.”<sup>12</sup> The tolling standard articulated by the Court in *Pallano I* remains the same, and Plaintiffs’ factual allegations have not changed since *Pallano I* was decided. Defendants’ Motion to Dismiss on statute of limitations grounds is therefore **DENIED**.

***B. Defendants’ Arguments in Support of Dismissal of Claim Under Law 64-00.***

For the reasons set forth in *Pallano II*,<sup>13</sup> Defendants’ Motion to Dismiss Plaintiffs’ Law 64-00 claims is also **DENIED**.

***C. Plaintiffs’ Medical Monitoring Claims***

For the reasons set forth in *Pallano II*,<sup>14</sup> Defendants’ Motion to Dismiss Plaintiffs’ claims for medical monitoring expenses is **GRANTED**.

**III. CONCLUSION**

For the reasons set forth above, Defendants’ Motion to Dismiss Certain Plaintiffs’ Claims on statute of limitations grounds is **DENIED**, their Motion to Dismiss Plaintiffs’ Law 64-00

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<sup>11</sup> Rosenn Dep. at 107:21-108:4:

Q. First of all, has anything that transpired this morning changed in any way the opinions that you’ve rendered in your report which you provided to Judge Jurden?

A. No.

Q. So you continue to hold the views expressed in that report?

A. That’s correct.

<sup>12</sup> *Pallano I*, 2011 WL 2803365 at \*7.

<sup>13</sup> *Pallano II*, 2012 WL 1664228.

<sup>14</sup> *Id.*

claims is **DENIED**, and their Motion to Dismiss Plaintiffs' medical monitoring claims is **GRANTED**.

**IT IS SO ORDERED.**

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**Jan R. Jurden, Judge**

cc: Prothonotary - Original