ADM Quarterly Update

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Phil McManus is Honored by the New York City Trial Lawyer's Alliance, *By: Patrick J. Cooney, Partner, Albertson Office*

At the Eightieth Annual Banquet of the New York Trial Lawyers Alliance, the Hon. George J. Silver, JSC received the Alliance's Harlan Fiske Stone Memorial Reward while Phil McManus was honored with a Lifetime Achievement Award. Phil was humbled to receive such a distinction as it is bestowed by friends, peers and adversaries representing both the plaintiffs and defendants bars.

Coming to the realization that he was old enough to receive a "Lifetime Achievement Award", Phil reflected upon where he started and what the law has provided him; "… law has been more than a profession to me, more than a way to make a living; it appealed to my sense of justice and provided an avenue to debate and argue… I love being right".

During a reflective moment and with a great sense of humility, Phil acknowledged that the law profession is built upon the "character and talents" of attorneys; such attorneys that mentored Phil as a young lawyer and taught him that humility, preparedness, humor and the ability to laugh at yourself are attributes of a great trial attorney.

"The law is challenging, requires a lot of time and hard work but it also requires creativity and a sense of humor. Integrity is basic to everything we do. Trial law places us in adversarial roles but we treat each other with respect and develop life time friendships."

Phil considers himself someone with "modest talents" who was "blessed with having the right people at his side." Those of us, who know Phil, work or have worked with him, would respectfully disagree; Phil is an attorney with immense talents, integrity, humility and a generous heart.

Congratulations on your award; it is well deserved.

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Lourdes Ventura Blazes a New Way for the Queens Bar, *By: Patrick Cooney, Partner, Albertson Office*

For the first time in its 84 year history, the Queens County Women's Bar Association will have a woman of Latina heritage lead its venerable organization.

On June 23, Lourdes, an attorney at ADM, was installed as the 61st President of the QCWBA by the Honorable Jenny Rivera, Associate Justice of the New York State Court of Appeals.

Addressing distinguished guests and members of the QCWBA, an organization dedicated to the promotion of women in the development of their legal careers and expression of their professional skills, Lourdes beamed "I am honored and deeply humbled to serve as President… as a person of Dominican heritage raised in Corona, Queens, I am very proud of this honor and excited to work with my colleagues to increase the ranks and advancement opportunities for woman in the law."

"When you are the first [Latina], you have to create a pipeline for there to be more diversity."

Lourdes was a former Queens County D.A. and an attorney in the Civil Rights Bureau of the New York Attorney General's office. As an attorney at ADM, Lourdes handles complex, high exposure matters.

Firm Results – Recent Trial Verdicts and Summary Judgment Wins Obtained By ADM Attorneys

Williams v. Dee: **Vincent Ambrosino** tried liability and damages before Judge Toussaint in Kings County Supreme Court. The plaintiff alleged that our client was negligent when, while changing lanes on 7th Avenue, he struck the plaintiff's vehicle.

Plaintiff claimed a multitude of injuries including an ACL tear of the left knee; complex, right shoulder labrum tear with arthroscopic repair; and multilevel cervical herniations which required a multilevel anterior discectomy and fusion with implementation. The surgery was performed by Dr. Andrew Merola.

Plaintiff was involved in three prior MVA's between 2000 and 2002. He claimed he only hurt his neck and back. Prior MRI's were positive for herniations and bulges. During the damages trial, plaintiff denied he hurt his left knee and right shoulder in the prior accidents even when impeached by Vinny with prior medical records.

Plaintiff made a policy demand of $500,000.00 before trial and alleged the carrier's offer of $100,000.00 was made in bad faith.

Following the liability trial, the jury returned to 60/40 verdict in favor of the plaintiff. Before the damages trial ensued, and in order to preserve the client's assets, the parties agree to a hi-lo (450k-100k) with appointment still in place.

During the damages trial, plaintiff argued the knee and shoulder injuries were caused by the accident and that his cervical injuries had been aggravated. Dr. Merola and Dr. Howard Baum testified regarding the cervical and shoulder surgeries, and the need for a future medical plan including revision surgeries and knee replacement. Plaintiff's economist, Andrew Weintraub, black boarded $600,000 in past lost earnings, $1,100,000.00 in future earnings, and $590,000.00 in future medical expenses.

Vinny argued causation. He called Drs'. Kulak and Litchenberg to establish the lack of causation and introduced photographs of the damage to the passenger side door of plaintiff's car which demonstrated scrapes and scratches.

Plaintiff's counsel asked the jury for 4.8 Million in damages. The jury returned a verdict finding no causation between the alleged injuries and the accident, dismissing the case.

Firm Results – Continued

Wolf v. East Meadow UFSD and Chiapetta v. Bethpage UFSD: **Maureen Casey** recently obtained defense verdicts in two school district cases.

In *Wolf v. East Meadow*, the infant plaintiff claimed she was continuously bullied by other 7th grade students. Plaintiff established incidents of name calling during class, being pushed while on ice outside the school and the taking of his football by other students during recess. The student denied reporting the incidents but his mother claimed to have reported them to the Guidance Counselor and Dean. The lawsuit arose from altercation where the plaintiff was punched in the nose when he was at his locker.

In directing a verdict in favor of the School District, the Court concurred that when an incident occurs in so short a span of time, that no level of supervision could have prevented it; any lack of supervision could not be a proximate cause. Evidence established that the incident occurred in a two-minute span. The Court also found that there is no expectation that the teachers should be in the hall since their primary responsibility was to remain in the classroom until all students had left.

In *Chiapetta v. Bethpage UFSD*, the plaintiff twisted her ankle and fractured her 5th metatarsal when she stepped in a depression between the football field and concrete pad during gym class. Plaintiff alleged negligent supervision and failure to maintain the field. Successful motions in-limine precluded plaintiff's "supervision" and engineering experts. Plaintiff introduced photographs which allegedly depicted a dangerous condition. Testimony by plaintiff's father, who took the photographs, was inconsistent with his deposition testimony. A report prepared by the school nurse indicated the accident occurred in the rear of the school building, not on the field. The jury had issues with the father's credibility and returned a verdict in favor of the School District.

Philipou v. Baldwin School District and Lawrence School District: Here, in a case tried by **Tom Montiglio**, the plaintiff, an 8th grader on the Lawrence Junior High School wrestling team, traveled to the Baldwin Middle School for an away meet.

The plaintiff alleged that the mat on which he was wrestling was old and therefore, would not lay flat on the gym floor causing the edges to curl up. The plaintiff further alleges that the mat had to be held down by volleyball polls. Last, the plaintiff alleged that due to the age and condition of the mat, the three separate sections could not be taped together properly.

During his match, the plaintiff was taken down by his opponent and sections of the mat allegedly separated causing his arm to come into contact with the gym floor. The plaintiff's mother, who was a spectator, testified at her deposition that her son's arm could not come into contact with the gym floor but at trial, changed her testimony claiming "she could not remember" whether her son's arm struck the gym floor.

The coaches from both teams, the referee, and the plaintiff's opponent, all testified. Each person testified that the mats never separated during the match, the plaintiff was injured from the way he fell on the mat.

As a result of the fall, the plaintiff sustained a fractured elbow with surgical intervention, as well as a fractured humerus. Neither the Lawrence School District nor the Baldwin School District made any offers.

A Nassau County jury returned a defense verdict finding plaintiff assumed the risk of injury by participating in the sport of wrestling and that neither the Baldwin School District nor the Lawrence School District unreasonably increased the inherent risk in the sporting activity.

Perotta v. Bethpage UFSD: Ms. Perotta sued the Bethpage UFSD because she slipped and fell on ice in the parking lot of the high school. The plaintiff was at the school attending her daughter's swim meet and fell when she left at 5:00 p.m.

It snowed two inches the night before the meet. The School District salted and sanded the lot the next morning starting at 6:45 a.m. At 9:00 a.m., the maintenance supervisor inspected and observed that the parking lot was sanded and salted. He did not observe any ice.

Plaintiff testified that when she arrived at 3:00 p.m., she did not see any ice in the parking lot even though she testified to the contrary at her EBT.

At the close of the evidence, **Tom Montiglio** successfully moved for a directed verdict. The Court agreed with Tom that plaintiff failed to establish the School District was on notice of an icy condition.

Oldakowski v. Homestead Farm Estate, LLC, et al.: **Patrick J. Cooney** of the firm's Albertson office, obtained summary judgment in a case involving the death of a guest at a rustic upstate resort.

The decedent and his wife went for a walk on a path owned, but not maintained by the resort. The path featured natural terrain that ran along side a creek. As the decedent walked with his wife, they stopped at a particular point and the decedent's wife claimed that as he stood along the extreme edge of the path, the ground beneath him suddenly gave way, causing the decedent to fall down to the creek (approximately 10 feet). Plaintiff presumably hit his head while falling, causing a serious brain injury and ultimately his death.

We successfully argued that as a recreational hiker, plaintiff, under the doctrine of primary assumption of the risk, assumed the risks associated with hiking; which included slippery or unstable terrain, rocks and most significantly, that the trail would naturally have an edge from which one might fall if standing too close. In addition, we argued that the resort had no duty to warn against naturally occurring features on an unimproved trail where the condition (the edge) was both open and obvious. In opposition, plaintiff offered an expert affidavit opining that the condition (soil breaking free as plaintiff stood at the edge of this trail) should have been discovered and remedied by the resort. The Court granted summary judgment and dismissed all claims against the resort.

William Muha v. Fast Signs, et al.: **Michael C. Salvo** of our New Jersey office, with the assistance of **Sean R. Hutchinson** of the Albertson office, successfully moved for summary judgment dismissing the plaintiff's case and all cross claims in this multi-million dollar personal injury matter.

The case involved a work site accident wherein the plaintiff fell approximately 25 feet from a ladder while installing graphic lettering on the building face of the STEM Building at Kean University. As a result of the accident, the plaintiff was rendered a paraplegic and was seeking $10 Million in damages. Plaintiff alleged that Fast Signs, as general contractor, failed to ensure that the work was done safely and with the appropriate safety equipment. The co-defendant property owner, Kean University, asserted cross claims for contractual indemnification against Fast Signs.

Upon motion, we argued that the plaintiff was an independent contractor and that Fast Signs had no control over the worksite nor the means and methods for the performance of the plaintiff's work. We also argued that there was no basis upon which Fast Signs was obligated to contractually indemnify Kean. The Honorable Mark P. Ciarrocca, J.S.C., granted our motion in its entirety.

Tran v. Pool World, Inc., et al.: **Michael C. Salvo** and **Danielle M. DeMarzo** of our New Jersey office successfully moved for summary judgment on behalf of Pool World, Inc. ("Pool World").

This case involved a multi-million dollar claim resulting from a diving accident wherein the plaintiff dove into the shallow end of a residential swimming pool fracturing his neck and becoming a quadriplegic. The plaintiff alleged that Pool World, a replacement pool liner installer, was liable for the plaintiff's injuries based on a Products Liability theory due to its failure to install adequate warnings against diving into shallow water. We initially successfully moved to bar the plaintiff's expert's reports and testimony as admissible net opinions.

Thereafter, we moved for summary judgment to dismiss all of the plaintiff's claims. Plaintiff argued that despite the order barring his expert, there were questions of fact and that expert testimony was not necessary to move forward with the claims. We argued that Pool World owed no duty to the plaintiff since there were no industry standards that required the installation of warnings signs around a residential in-ground pool. We also argued that plaintiff could not establish any cause of action against Pool World without expert testimony. The Court granted our motion and dismissed the Complaint and all cross claims.

Firm Results – Continued

Cassidy v. Riverhead Central School District, et al.: The firm was successful in obtaining a reversal of an Order of the Supreme Court that denied our client's motion to dismiss and granted plaintiff's motion for leave to serve a late Notice of Claim.

On September 20, 2012, plaintiff alleged to have been injured in a three-car collision, which involved a school bus. Plaintiff failed to serve a Notice of Claim until February 4, 2013, after the expiration of the 90-day period as set forth in General Municipal Law 50-e. On March 18, 2014, after the close of discovery, plaintiff moved for summary judgment and the defendants cross-moved. In response, on August 15, 2014, plaintiffs made an additional cross-motion seeking leave to serve a late Notice of Claim. No motion has been made by plaintiff to serve a late Notice of claim within one year and 90 days of the accrual of the cause of action.

Under these facts, the Appellate Division agreed with our arguments that the Notice of Claim served February 4, 2013, was a nullity. As plaintiff failed to timely seek leave to serve a late Notice of Claim or to deem the February 2013 Notice of Claim timely served nunc pro tunc, the Supreme Court lacked authority to grant plaintiff's motion. The Order was reversed and the Complaint was dismissed. **Maureen Casey** and **Michele Rach** worked on the underling motion. **Nicholas M. Cardascia** and **Glenn A. Kaminska** handled the appeal.

Barros v. Bette & Cring, LLC: In a Labor Law action to recover for bodily injuries where the injured plaintiff fell on an elevated surface from which he was removing snow, the firm was successful in obtaining an affirmance of the Supreme Court order that granted our clients' motions for summary judgment.

In so ruling, the Third Department found that the plaintiff's claims under Labor Law Section 200 and under the common law were properly dismissed as the defendants did not have any supervisory control over the plaintiff's work. Moreover, the risk was readily observable and an inherent hazard in the work being performed, i.e. snow removal. The record reflected that plaintiff was directed to perform the snow removal by his supervisor and that snow removal was a regular function of the employer, as evidenced by the shovels maintained and the fact that snow removal was addressed at the employer's safety meetings. The Third Department also found that dismissal of plaintiff's claims under Law Section 241(6) was appropriate, as there can be no liability where the injury is caused by an integral part of the work being performed. Liability does not attach where the injury is caused by the very condition the plaintiff was charged with removing. **Nicholas M. Cardascia** and **Glenn A. Kaminska** handled the appeal.

Cardascia's Corner

Barretto v. Metro Transit Auth., N.E.3d---N.Y. Slip Op. 03875 (2015) decided by the Court of Appeals in May, highlights the difficulty of assessing whether the facts of a particular case will support a claim predicated upon a violation of LL240(1). Barretto concerned a fall from height of approximately 10 feet.

The decision highlights the difficulty in assessing liability under the statute, as both the decision at the Appellate Division, First Department and the Court of Appeals were divided. In fact, two separate dissenting opinions were issued at the Court of Appeals: one urging to reverse in part on separate grounds, finding a question of fact precluded summary judgment altogether and the other dissent voting to affirm the First Department. Essentially, nine appellate justices issued three completely different decisions when presented with the same set of facts.

The plaintiff was employed as an asbestos abatement contractor tasked with removing subterranean asbestos situated underneath wiring at a site owned by the City (and leased to NYCTA and MTA). The job required removing a manhole, creating a containment area above ground (directly over the manhole), removing the asbestos and then replacing the manhole and deconstructing the containment area (in that precise order). Plaintiff and another worker completed the removal, but instead of first replacing the manhole, they deconstructed the containment area first (with the manhole still open). Before they could replace the manhole, plaintiff fell into the hole (10 feet).

Firm Results – Continued

Plaintiff sued alleging common law negligence and violations of Labor Law §§200, 240(1) and 241(6). All parties moved for summary judgment and the trial court ultimately granted defendants motion and dismissed the case, finding plaintiff's actions to be the sole proximate cause of his injures. A divided Appellate Division affirmed, finding that plaintiff was provided with a "nearby and readily available" safety device, i.e., the manhole cover, and plaintiff's own actions were the sole proximate cause of his injuries because he disregarded his supervisor's instruction to replace the manhole cover before dismantling the containment enclosure.

The Court of Appeals reversed, finding that the absence of a guardrail around the manhole was the proximate cause of plaintiff's injuries. Justice Stein issued a dissenting opinion, holding that the motions should have been denied as a question of fact existed as to sole proximate cause and with respect to whether defendants violated the statute. Justice Read dissented, holding that the First Department decision should have been reinstated and plaintiff's case dismissed as he was the sole proximate cause of his own injuries.

Another interesting aside was that the Court of Appeals noted that it was assuming for the purposes of the appeal that the 10 feet that plaintiff fell constituted a fall from height. The Court thought enough of the issue (which was not briefed), to address it in the decision but did not dispose of this issue by noting that a fall from 10 feet is per se a fall from height.

Of Interest

ADM had not fielded a softball team since the "Murderers Row" days of the late '80's and '90's. This season, Rick Soller, after persuading Vinny Ambrosino and Frank Pecorelli to come out of retirement, grabbed the reins and entered ADM in the Long Island Litigation League. Soller's band of young guns and two old men got off to a slow start but managed to finish the regular season in third place and went on to win the championship in convincing fashion. The team vows to be back next season even securing a few more bottles of Centrum Silver for its elder statesmen.

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Ahmuty, Demers & McManus traces its origins to 1946. The Firm as it now exists was formed in 1983 and quickly evolved to its present size of more than seventy attorneys serving the legal needs of clients throughout New York and New Jersey. As experienced litigators with decades of proven results, our attorneys demonstrate daily the tenacity, creativity, energy and commitment required to defend the wide spectrum of complex legal issues that confront our clients.

Perhaps the best indication of the Firm's abilities and dedication to service is manifested by the fact that we have continued to represent many of the same clients over the years, despite management changes within those companies and corporations. As the Firm and its clientele continue to grow proportionately, the Firm remains committed to the core value of taking a personalized approach to the needs of our clients.

Clients of the Firm recognize the commitment of all Ahmuty, Demers & McManus attorneys to handle legal matters efficiently and expeditiously, while at the same time providing the highest quality legal representation at a reasonable cost. The Firm works closely with its clients, utilizing a team approach in the defense of legal matters. The Firm prides itself on understanding the needs and philosophy of our clients and is highly experienced in resolving cases through trial, early resolution, ADR or motion practice. Since no single approach is best suited for all clients or cases, this versatility is a benchmark of the Firm. The legal staff includes some of the finest trial and appellate lawyers in New York, thereby allowing Ahmuty, Demers & McManus to handle any case regardless of complexity.

With over eighty-five attorneys, Ahmuty, Demers & McManus is uniquely qualified to provide superior and cost effective legal services to all of our clients. Perhaps the best indication of the Firm's abilities and reputation is demonstrated through the long term relationships the Firm maintains, even when many of our clients have experienced management changes. Ahmuty, Demers & McManus is committed to diversity in all hiring practices.

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