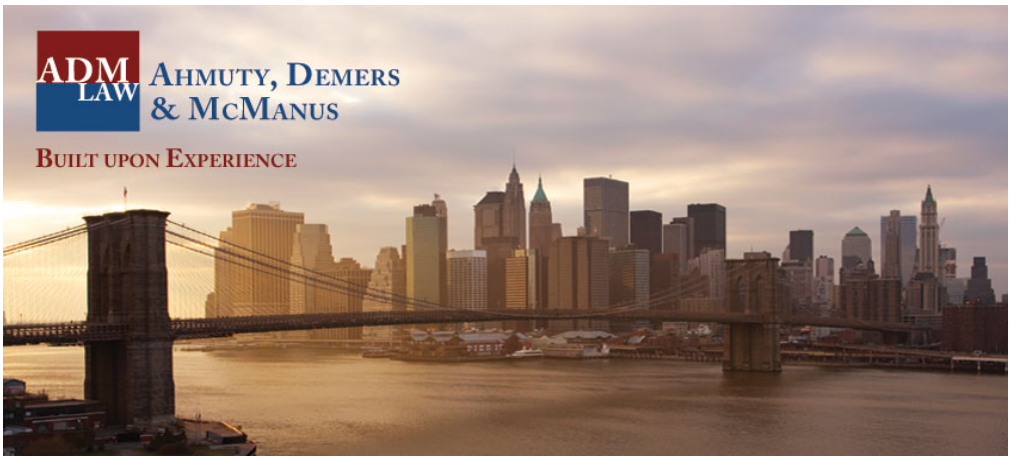
ADM Quarterly Update



VOLUME 3
FALL 2015

In this Edition

Trivial Defects: Where Character and Circumstances Count, Not Size.
By: Catherine R. Everett, Esq., Associate, Albertson Office

In *Hutchinson v. Sheridan Hill House Corp.*,[1] the Court of Appeals recently revisited the doctrine of "trivial defects" after almost twenty years since its landmark decision in *Trincere v. County of Suffolk*.[2] The recent decision clarifies the breadth of the doctrine and resolves any question as to what evidence defendants need on a motion for summary judgment to establish that a defect is trivial as a matter of law. This decision makes it clear that early and thorough investigation, including photographs of the defect, is vital to a successful defense.

The Trivial Defect Doctrine

The doctrine of trivial defect is a narrow defense, available to both private property owners and municipalities alike, and in locations involving interior and exterior accidents, including stairways. As was explained by the *Hutchinson* court, "[t]he trivial defect doctrine is grounded on a fundamental principle that spans all types of liability: that if a 'defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence,' and yet an accident occurs that is traceable to the defect, there is no liability."[3]

Expanding on its holding in *Trincere*, the *Hutchinson* court specifically stated that "[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact."[4] The defendant must present clear and distinct photographs or expert testimony must be presented that establish the dimensions of the alleged defect.[5] Further, a defendant moving for summary judgment in a slip/trip-and-fall case is not obligated to demonstrate lack of notice if it can prevail on another ground.[6]

It remains that the owner of a public passageway "may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection."[7] However, there is "no minimal

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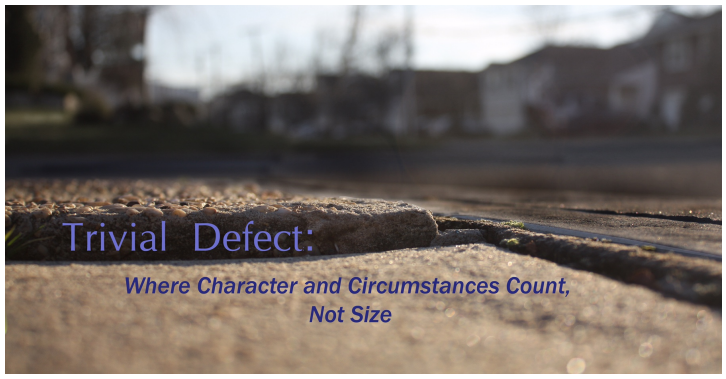
[1] *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66 (2015).
[2] *Trincere v. County of Suffolk,* 90 N.Y.2d 976 (1997).
[3] *Hutchinson,* 26 N.Y.3d at 81.
[4] *Id.* at 79.
[5] *Id.* at 82-83.
[6] *Id.* at 83.
[7] *Id.* at 78.

dimension test" or "per se rule that a defect must be of a certain minimum height or depth in order to be actionable."[8] As such, a grant of summary judgment on the dimensions of the defect alone is unacceptable.[9]

As recognized in *Trincere*, and upheld by the *Hutchinson* court, while generally a question for a jury, a defect may be trivial as a matter of law where the holding of triviality is based on all of the specific facts and circumstances of the case, not size of the defect alone.[10] Hence, a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian.[11] This is true in instances where the surrounding circumstances or intrinsic characteristics make the defect difficult to see or to identify as a hazard or difficult to traverse safely on foot.[12]



Hutchinson makes clear that liability does not turn on whether the hole or depression constitutes "a trap" or "a snare," concepts upon which many Appellate Division decisions rely, noting that there are many ways a small defect may be actionable i.e., a jagged edge;[13] a rough, irregular surface;[14] the presence of other defects in the vicinity;[15] poor lighting;[16] or a location—such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet.[17]

The test is not whether a defect was capable catching a pedestrian's shoe but whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances.[18] "[I]n deciding whether a defendant has met its burden of showing prima facie triviality, a court must—except in unusual circumstances . . .—avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere."[19]

Specifically, the *Hutchinson* court looked at three cases which had been dismissed on the ground that the defect alleged was too trivial to be actionable were decided, namely *Hutchinson v. Sheridan Hill House Corp.* (metal cylindrical object protruding from the sidewalk); *Zelichenko v. 301 Oriental Boulevard, LLC* (chip missing from the nosing of interior stairway); and *Adler v. QPI-VIII, LLC* (clump or protrusion on the step tread of interior stairway that had been painted over). The dismissal of *Hutchinson* was affirmed, while the decisions in both *Zelichenko* and *Adler* were reversed. Below is a review of *Hutchinson's* analysis of each.

Hutchinson v. Sheridan Hill House Corp.

In reviewing the *Hutchinson* matter, the Court of Appeals found that the defendant had met its burden that the cylindrical projection was trivial as a matter of law as the dimensions of the defect together with evidence of the surrounding circumstances were properly set out in the record including photographs showing ruler measurements. The record indicated that the defect was only one quarter of an inch in height and about five-eighths of an inch in diameter. The *Hutchinson* court ruled that the object was trivial, not based on the dimensions alone, but because it also "was in a well-illuminated location approximately in the middle of the sidewalk and in a place where a pedestrian would not be obliged by crowds or physical surroundings to look only ahead. The object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as a hazard. Its edge was not jagged and the surrounding surface was not uneven."[20] Therefore, it was held that the dismissal of the action should be affirmed.[21]

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[8] *Id.* at 77.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 78.
[12] *Id.* at 79.
[13] *Id.* at 78-79 *citing Lupa v. City of Oswego,* 117 A.D.3d 1418, 1419 (4th Dep't 2014); *Jacobsen v. Krumholz,* 41 A.D.3d 128, 128–129 (1st Dep't 2007).
[14] *Hutchinson,* 26 N.Y.3d at 78-79 *citing Tese–Milner v. 30 E. 85th St. Co.,* 60 A.D.3d 458, 458 (1st Dep't 2009).
[15] *Hutchinson,* 26 N.Y.3d at 78-79 *citing Young v. City of New York,* 250 A.D.2d 383, 384 (1st Dep't 1998).
[16] *Hutchinson,* 26 N.Y.3d at 78-79 *citing McKenzie v. Crossroads Arena,* 291 A.D.2d 860, 860–861 (4th Dep't 2002).
[17] *Hutchinson,* 26 N.Y.3d at 78-79 *citing Brenner v. Herricks Union Free Sch. Dist.,* 106 A.D.3d 766, 767 (2d Dep't 2013); *Wilson v. Time Warner Cable,* 6 A.D.3d 801, 802 (3d Dep't 2004); *George v. New York City Tr. Auth.,* 306 A.D.2d 160, 161 (1st Dep't 2003); *Glickman v. City of New York,* 297 A.D.2d 220, 221 (1st Dep't 2002); *Argenio v. Metropolitan Transp. Auth.,* 277 A.D.2d 165, 166 (1st Dep't 2000); *Jacobsen,* 41 A.D.3d 128, 128–29 (1st Dep't 2007); *Tesak v. Marine Midland Bank,* 254 A.D.2d 717, 718 (4th Dep't 1998).
[18] *Hutchinson,* 26 N.Y.3d at 80.
[19] *Id.* at 84.
[20] *Id.* at 90.
[21] *Id.*

Zelichenko v. 301 Oriental Boulevard, LLC

After first establishing that the trivial defect doctrine applies equally to private landlords and municipalities with regard to sidewalks as well as stairways, the *Hutchinson* court's review of *Zelichenko* explained that reversal was warranted. Specifically, it held that the Appellate Division's dismissal because the "chip," of irregular shape on the stair, 3.25 inches in width and at least one-half inch in depth, was located almost entirely on the edge of the step and not on the walking surface of the step tread, was trivial and not actionable, was error.[22]

Hutchinson based its holding in part upon the testimony of an expert who opined that when descending a stairway, a human "foot can make contact with the end of the nosing" so that the walking surface of a step tread extends to the nosing. It noted that photographs in the record of a foot positioned next to the "chip," showed that the toe of the shoe extends across and over the nosing in a way that does not appear forced or unnatural.[23] The expert also explained that a break in the tread of a step can lead to falls as "when our gait on stairs is disrupted or altered we can lose our balance or stumble especially when a defect is unsuspected, unknown or unanticipated."[24]

The *Hutchinson* court further noted that what counts is not whether a person could avoid the defect, but whether a person would invariably avoid the defect while walking in a manner typical of human beings descending stairs.[25]

After examining all the pertinent facts and circumstances of the case, as required, the *Hutchinson* court concluded that a material triable issue of fact existed regarding whether the defect was trivial.[26] It was also found that issues of fact existed as to actual and constructive notice of the alleged defect.[27]

Adler v. QPI-VIII, LLC

Because the defendants in *Adler* did not submit expert testimony as to the dimensions of the defect, nor distinct photographs that the court could use to determine the dimensions of the alleged defect, the Court of Appeals ruled that the defendants did not meet their prima facie burden. Specifically, the *Hutchinson* court determined that "[w]ithout evidence of the dimensions of the 'clump,' it is not possible to determine whether it is the kind of physically small defect to which the trivial defect doctrine applies."[28]

The *Hutchinson* court's analysis of the evidence, or lack thereof, in *Adler*, stresses the need for the inclusion in a motion for summary judgment of comprehensive evidence, including color photographs of the defect which show the dimension of the defect, or expert testimony as well as deposition testimony that specifically describes the dimensions of the defect.

Conclusion

The trivial defect doctrine continues to survive in New York although its application is narrow. The size of the defect alone is not determinative, nor is it determinative that the injured party could have placed his or her foot elsewhere. All surrounding facts and circumstances of the plaintiff's fall must be examined and explored at the plaintiff's deposition to determine if the alleged defect can be considered "trivial" as a matter of law. Photographs or expert testimony are key to establishing the dimensions of the defect and are essential to meet ones *prima facie* burden when moving for summary judgment. Hence, early investigation which includes clear and distinct photographs which show the dimensions of the alleged defect should take place whenever possible.

[22] *Id.* at 81.
[23] *Id.* at 81-82.
[24] *Id.* at 75.
[25] *Id.* at 82 *citing Puma v. New York City Tr. Auth.*, 55 A.D.3d 585, 586 (2d Dep't 2008).
[26] *Hutchinson,* 26 N.Y.3d at 82.
[27] *Id.*
[28] *Id.* at 82-83.

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

Sean Hutchinson, an associate in our Albertson office and **Jennifer Casey**, a partner in our Albertson office, successfully moved for summary judgment on behalf of a client in a matter arising from an alleged violation of General Municipal Law Section 205-e, a provision that establishes a cause of action for police officers whose injuries are directly or indirectly caused by a defendant's violation of a statute, regulation or other governmental provision.

The plaintiff, a New York City Detective, slipped while exiting his police car as he responded to a report of a motor vehicle accident. The defendant had crashed his car into a parked vehicle while exiting from a Mid Town Manhattan parking garage, causing damage to the building scaffolding. The police officer claimed that defendant's violations of various Vehicle and Traffic Law Provisions, including sections that prohibit reckless driving and intoxicated driving, directly and indirectly caused the accident. Jennifer and Sean successfully argued that plaintiff could not recover because the causal connection was too remote, as in all prior cases, the underlying statutory violations in some way created or contributed to the danger that caused the plaintiff's accident. The court concurred and dismissed the case, finding that the defendant's purported Vehicle & Traffic Law Violations did not directly or indirectly cause the plaintiff's accident as the causal connection was too tenuous to satisfy even the General Municipal Law Section 205-e very lenient causation standard. This decision is notable as almost all prior court decisions provided a very broad interpretation of Section 205-e affording police officers a near limitless to right to recover for injuries sustained while responding to a defendant's alleged statutory violation, no matter how tenuous the connection.

Sean Hutchinson successfully moved for summary judgment on behalf of a commercial/retail store tenant in a case where the plaintiff claimed she tripped and fell on a sidewalk cellar door only a few steps after she exited her apartment building located on New York's upper westside. Plaintiff claimed that our client was responsible for the accident because it used the sidewalk cellar doors to access storage space in the basement, which was part of the premises leased from the co-defendant building owner.

The court granted Sean's motion in all respects. The Court dismissed plaintiff's Complaint against all parties and also dismissed the landlord's cross claims against the tenant. The court dismissed plaintiff's direct claims against the tenant because pursuant to Administrative Code Section 7-210, it is the landowner, and not the tenant who has a non-delegable duty to maintain a public sidewalk abutting the premises. The Court further concluded that the tenant's use of the sidewalk doors did not create a dangerous condition. The court also dismissed claims against all parties including the landlord on the basis that the condition did not constitute a trap or snare as the sidewalk cellar doors, which protruded approximately ½ inch above the sidewalk, was an unactionable trivial defect.

The court also dismissed the landlord's cross-claim against the tenant concluding that Article 18.09 of the lease, which obligated the tenant to "make all necessary repairs and replacements" to the sidewalk, did not require the tenant to make repairs to the sidewalk that were unrelated to its presence on or operation of the leased premises. As such, the leases indemnification provision, which required indemnification for claims arising from the tenant's negligence, did not apply. The tenant was not required to make any repairs to the sidewalk cellar door since it remained unchanged throughout the time period of tenancy.

Thomas Montiglio, a partner in our Albertson office, recently obtained a defendant's verdict for a Suffolk County School District. The plaintiff, an 18-year-old senior enrolled in night school, was playing floor hockey during a gym class. The gym teacher was actively participating in the game. The teams pitted the plaintiff and two girls against his gym teacher and two girls.

The plaintiff claimed the game morphed into a rough and competitive encounter between the gym teacher and him. Plaintiff alleged that during the course of the game, the teacher attempted a slap shot (a shot which requires the shooter to raise his stick parallel to the floor and follow through in a forward motion). He attempted to block by reaching his stick forward with his right hand. At this point, the teacher's stick came in contact with the plaintiff's finger causing a fracture.

Slap shots are prohibited in gym floor hockey. The teacher alleged that he did not take a slap shot but took a wrist shot 12 feet from the goal when the accident happened. The teacher conceded that the game was competitive but stated that the girls were involved in the game never became rough.

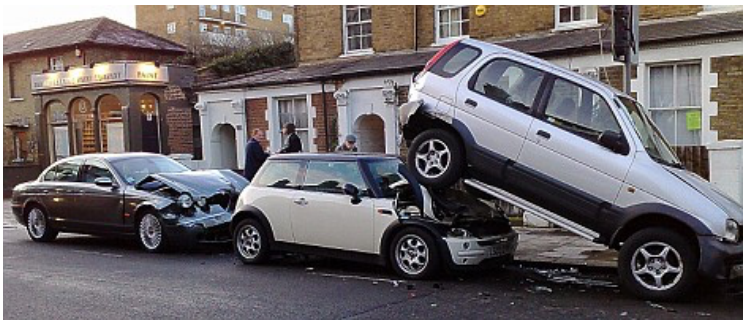
The plaintiff called an expert witness at trial who testified the gym teacher would not be able to participate in the game and adequately supervise the children in the class.

The jury found that the School District was not negligent and dismissed the case. The plaintiff sustained a fractured index finger requiring two surgeries; limitation of motion was confirmed by defendant's doctor. The plaintiff demanded $150,000.00 to settle, no offers were made.

Firm Results – Continued

Kevin Langevin, an associate in the firm's Albertson office moved for summary judgment to dismiss the plaintiff's Complaint and all defendants' cross-claims in a case arising out of a three vehicle chain reaction, motor vehicle accident at a red light intersection. Kevin's client was the operator of middle vehicle which was struck from behind and pushed into the rear of the plaintiff's vehicle.

Kevin successfully argued that our client could not be held liable for the plaintiff's injuries because the rear most vehicle in the accident failed to maintain a safe distance between his vehicle and our client's vehicle setting a chain reaction in motion. In opposition, the co-defendant argued that our client stopped too closely behind the rear of the plaintiff's vehicle and that tree limbs obstructed his view of the traffic light. The Court, however, determined the co-defendant's arguments were insufficient to overcome our client's right to summary judgment as a matter of law.



CARDASCIA'S CORNER

As reported by **Andria Kelly** in the Spring edition, the use of social media can be quite advantageous in the defense of a mater but a recent First Department decision is a clear indication that the social media issue is still fluid.

In *Forman v. Henkin*, the First Department, 2015 NY Slip OP 09350 (1st Dep't 2015), addressed the issue of whether a defendant was entitled to disclosure of photographs and postings from plaintiff's Facebook account.

The plaintiff alleged personal injuries sustained when she fell off a horse. She claimed cognitive and physical injuries that limited her ability to participate in social and recreational activities. The defendant sought an order compelling plaintiff to provide an unlimited authorization to obtain records from her Facebook account. The Supreme Court granted the motion but limited the disclosure to all photographs she privately posted on Facebook before the accident that she intended to introduce at trial; all photographs she privately posted after the accident that did not show nudity or romantic encounters, and an authorization for Facebook records showing each time she posted a private message after the accident.

On appeal, the First Department modified that order and vacated those portions that directed plaintiff to produce photographs posted after the accident that she did not intend on introducing at trial and that directed her to provide the authorization for the private messages. The majority of the court found that the defendant' requests were speculative.

A lengthy dissent was authored by Justice Saxe. Justice Saxe discusses at length the history of social media cases. He contended that traditional discovery rules should be applied to social media. We expect that the defendant will seek leave to appeal to Court of Appeals. If granted, we will advise you of the outcome.

Premises Liability - Slip and Fall on Black Ice

In a slip-and-fall case, where the plaintiff alleges falling because of black ice, or ice from a recent storm, a property owner will only be liable if it created the icy condition or had actual or constructive notice of it. The mere fact that a plaintiff opposes the motion by relying on an affidavit from an expert will not always serve to create a triable issue of fact. Courts routinely find that the expert's affidavit was speculative and conclusory. In order for the expert's opinion to not be deemed speculative or conclusory, the opinion must address the specific ice on which the plaintiff fell, not just the ice in the general vicinity. See *Koelling v. Central Gen. Comm. Svcs. Inc.*, 2015 NY Slip Op. 07477 (2d Dep't 2015).

Comparative Negligence and Damages

The First Department's decision in *Waring v. Sunrise Yonkers SL, LLC.* is interesting for two reasons: 1) it provides an example of a slip-and-fall trial where the defendant was not entitled to a comparative negligence charge; and 2) it is another guide for assessing sustainable jury verdicts for neck and back injuries.

The facts are simple: the plaintiff, 22 years old, slipped and fell on a snow-covered ramp leading to a storage shed at work.

The trial court refused to charge the jury on comparative negligence and the First Department agreed. The reason: there was no evidence in the record to support a finding that the plaintiff could have been negligent. Specifically, the court noted that the defendant did not show that the plaintiff took any actions that could be construed as negligent, such as rushing, nor did the defendant show that the plaintiff should have taken reasonable steps to avoid the accident (he wore boots and the ramp was the only means of accessing the shed, where he was given a direct order to go.)

Cardascia's Corner – Continued

Damages:

Plaintiff sustained two bulging cervical discs and three lumbar herniations with impingent and with epidural injections. There was testimony that he was in daily pain, still under treatment, will require surgery and/or a spinal cord stimulator, and must restrict his activities but he could perform sedentary work. The appellate court affirmed the jury's verdict of $100,000 for past pain and suffering and $500,000 for future pain and suffering over 31 years.

Labor Law §240(1):

Falling object and Collateral estoppel effect of WCB determination - In *Vega v. MTA*, 133 A.D. 3d 518 (1st Dep't 2015), the plaintiff, a laborer, was injured when a coworker operating an excavator dropped concrete debris on him. The mere fact that a worker was injured by a falling object does not automatically result in a violation of §240(1). In *Vega*, the First Department affirmed the denial of plaintiff's summary judgment motion and held that plaintiff "did not 'show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of a kind enumerated in the statute'" (*Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). The court found that the hoisting equipment did not malfunction, but rather it served its core objective and the concrete debris that fell on Vega was purposefully released from the excavator. Therefore, to prove a violation of Labor Law 240, a plaintiff must show that the accident occurred because of the absence or inadequacy of an enumerated safety device.

In addition, in *Vega*, the defendants moved to dismiss plaintiff's claim of complex regional pain syndrome, or RSD, because this issue was raised and conclusively litigated in a Workers' Compensation Board proceeding, in which the Board determined that Vega did not sustain these injuries in this accident. The First Department affirmed the order that granted this relief and dismissed these damage claims.

Discovery:

Videotaping of IME's not allowed absent court order - In *Bermejo v. NYC Health & Hospitals Corporation*, 2015 NY Slip OP 08374 (2d Dep't 2015), the Second Department held that a plaintiff's representative was not allowed to videotape an independent medical examination without a prior court order allowing the videotaping. First, the court noted that there is no express authority for videotaping examinations. If a party wants to videotape an examination, an application must be made and the party must show "special and unusual circumstances" to warrant such a request. Second, the court noted that although an attorney may be present at an examination, the attorney's role is limited to protecting the legal interests of his client but the attorney has no actual role in the examination. In this case, the fact that the attorney videotaped the examination without seeking prior court permission was grounds, in and of itself, to exclude the video. The court found that the attorneys' improper conduct was further compounded by not disclosing the video at any time prior to trial in violation of CPLR 3101(i).

Of Interest

ADM Supports The Fight

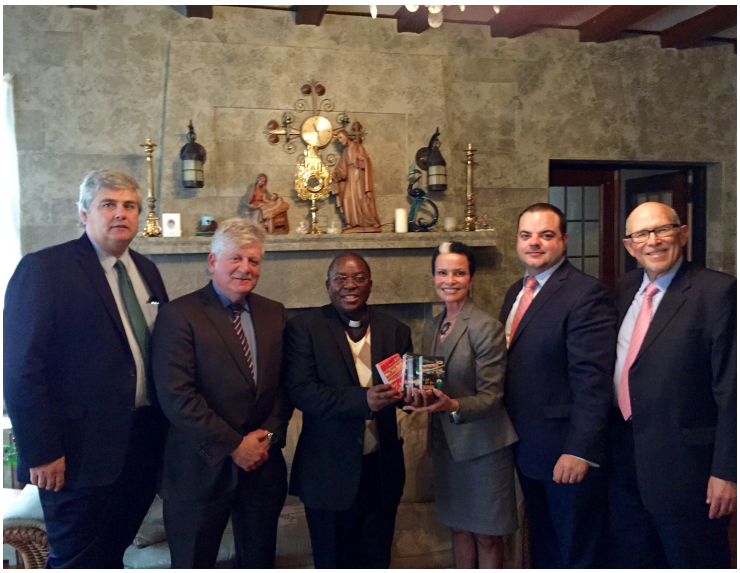
For the eighth time in as many years, ADM ditched the dress pants in favor of jeans in support of LEE National Denim Day.

Lee National Denim Day has helped raised more than $93,000,000 for the fight against breast cancer. Donations made to the American Cancer Society save lives by funding ground breaking breast cancer research; providing free, comprehensive information and support to those touched by breast cancer; in helping people take steps to reduce their breast cancer risk or find it early when it is most treatable. Thanks in part to the ACS's efforts and their dedicated supporters, breast cancer death rates have declined by 35 percent since 1999 and the overall cancer death rate has declined by 22 percent over the past two decades.

Pictured above are some of ADM's NYC support staff modeling their finest denim. All monies raised by ADM employees were matched by the firm. ADM is proud to be a sponsor of such a worthy cause.

Bronx Advocates for Justice Carry on with Good Deeds

Emerging from the work of community activists and the progressive legal community, the Bronx Advocates for Justice is a loud voice in the fight for social justice and the need of the communities less fortunate. Pictured above is Bob Shaw, partner, New York office and co-president of the Bronx Advocates for Justice presenting $2,000.00 of Thanksgiving gift cards to Father Nestorio, the Pastor of St. Angela Merici Church to help provide meals for needy South Bronx families during the holidays.



The Bronx Advocates for Justice fight against discrimination based on sex, national original, disability and sexual orientation. ADM is proud of Bob's steadfast efforts.

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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 ninety 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 ninety 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