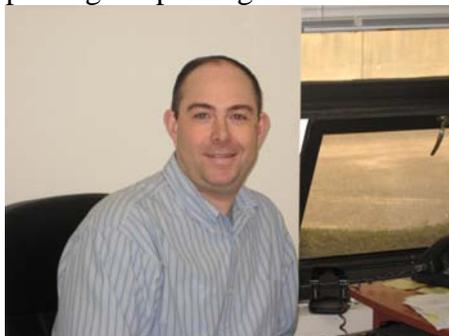


## **DeLuca v Creda-An amputation case Motion granting SJ Affirmed 2009 NY SlipOp 01769**

We were successful in defending DeLuca v Creda (*brief and oral argument by Shawn O'Shaughnessy, Esq.*) This case involved a tow truck exiting a parking lot directly into our client's motorcycle. His passenger is the plaintiff, a Nassau County police officer. She suffered a traumatic amputation of her leg left below the knee along with fractures and a collapsed lung. Our client was traveling in the right lane of Long Beach Road. We secured a deposition of a witness who confirmed that the tow truck driver did not stop before exiting the parking lot. The tow truck operator testified that he only made a rolling stop. The client saw the tow truck in the parking lot and was in the process of passing the parking lot when he was struck by the truck.



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Justice Murphy granted our motion for summary judgment on liability. The plaintiff and co-defendant appealed. The court, in its decision of March 10, 2009, held that our client was entitled to a judgment as a matter of law. Our client was found to be the driver who had the right of way and that he was entitled to anticipate that the tow truck would obey the traffic law by coming to a complete stop before entering the roadway. The Court held that the plaintiff failed to raise a question of fact and was

negligent for failing to avoid the accident when he only had seconds to react. The Court recognized that the plaintiff suffered from amnesia regarding the accident. She would not be held to a high degree of proof but "she is not relieved of the obligation to provide some proof from which negligence can reasonably be inferred..."

### Comments and Analysis

DeLuca v Creda held that the client motorcyclist did not have an opportunity to avoid the accident. The client, who was traveling in the right lane, had a right to believe that the tow truck operator would stop before exiting the parking lot into the flow of traffic. In this case, the court cited Rak v Kossalowski, 24 Ad 3d 1191(4<sup>th</sup> Dept, 2005) as support for our client's right to anticipate that the tow truck operator would follow the rules of the road and stop before exiting the parking lot. The Court in Rak, held, in sum, that the plaintiff allegedly sustained injuries in a motor vehicle accident when a vehicle driven by the driver struck the driver's side of plaintiff's vehicle while plaintiff was attempting to make a left turn from a parking lot. The appeals court found that the Supreme Court properly granted the driver's motion for summary judgment dismissing the complaint against him. He met his burden by establishing that he was driving within the speed limit, that he did not have time to avoid the collision, and that plaintiff was entering the roadway from a parking lot. The driver was entitled to anticipate that other vehicles would obey traffic laws requiring them to yield. The Court, in DeLuca effectively applied a stop sign to the vehicle exiting the parking lot.

### **Campbell v Dennis--Defendant's Verdict**

Jim Bruckner tried this case, in Suffolk County, to a defendant's verdict. The plaintiff was struck by our client's vehicle after she hit a puddle of water drained from a basement into the roadway. The plaintiff claimed that she was required to undergo a cervical diskectomy and fusion surgery. The case was defended on proximate cause of the alleged injuries given the plaintiff's long history of prior neck and back injuries and problems. The plaintiff had significant prior treatment including recommendations of surgery for her neck and back. The focus of our defense was that the treatment post accident was not any different than prior to the accident. She had similar symptoms and treatment prior to the accident.

The jury agreed and dismissed the case for failing to show a serious injury that was proximately caused by the accident.

### **Swain v Kidd –Defendant's Verdict**

Chris Lanigan, Esq. tried the above mentioned case to a defendant's verdict in Queens Supreme Court with Justice Siegel. This was Summary Jury trial. The case involved an intersection accident on Merrick Blvd. The plaintiff and her husband were traveling on Merrick Blvd. Our client had a stop sign. We presented a non-party witness who established that the plaintiff operator was speeding and ran a red light at the intersection just before the site of the accident. Chris established on cross-examination that Ms. Swain had all the lights on Merrick Boulevard were green. (including the one the witness had her going through on the red). She claimed that the accident occurred on a Thursday evening and 6:00pm. The plaintiff testified that there were three cars in the right lane ahead of her. On cross, she was asked why none of those vehicles were struck by the client as her van traveled across Merrick Boulevard. She said, "They were lucky". Swain testified that she saw my client's van on 109 Avenue and that it did not stop at the stop sign. The jury rendered a verdict in about an hour. The jury was unanimous in finding that my client was not negligent.

## **DeSena & Sweeney**

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## Sapienza v Ruggiero-affirmed 2008 NY SlipOp 09773

The Court in Sapienza v Ruggiero, \_\_\_\_\_ AD3d \_\_\_\_\_, 2008 NY SlipOp 09773 (2d Dept, Dec 9, 2008) affirmed the lower court's decision granting our motion for summary judgment on the issue of serious injury. The plaintiff alleged that he suffered cervical, thoracic and lumbar sprains and strains along with a disc herniation at L5-S1. The Bill of Particulars stated that the disc herniation was accompanied by "slight degenerative narrowing". The plaintiff was a high school student at the time of the accident and played on the wrestling team. He claims he was out of school for a month.

The court rejected a variety of unsworn records submitted by the plaintiff. The court noted that the plaintiff's treating physician failed to set forth any objective testing or medical findings which revealed the existence of any limitations in the plaintiff's cervical or lumbar spine. The plaintiff's treating chiropractor failed to explain the gap in plaintiff's treatment from when he stopped treating to a re-examination in support of the initial motion. The Court noted that plaintiff's chiropractor found neck and back injuries but never addressed that the plaintiff was involved in a wrestling accident one year prior to the accident that injured his neck and back in a similar manner as in the claims made in the subject accident. "These failures rendered speculative his conclusions [the chiropractor] that the plaintiff's cervical and lumbar injuries noted by him were the result of the subject accident."

The affirmation of the plaintiff's radiologist merely established a herniated disc at L5-S1. The court reiterated the standard of "The mere existence of a herniated disc is not evidence of a serious injury..."

This case and the court's methodical handling of each and every doctor's narrative was a very good example of an analysis of a gap in treatment created by a cessation of treatment and a re-examination for purposes of responding to a motion. It is also addressed the issue of proximate cause at it relates to prior injuries and simple findings of herniation without connection to the subject accident.

**SAPEINZA**  
REAFFIRMS:  
THE AFFIRMATION  
OF THE PLAINTIFF'S  
RADIOLOGIST  
MERELY ESTABLISHED  
A HERNIATED DISC  
AT L5-S1. "THERE  
MERE EXISTENCE OF A  
HERNIATED DISC IS  
NOT EVIDENCE OF A  
SERIOUS INJURY..."

## The Ice Cream Truck Case-Ramos v Raza

The plaintiff was riding his bicycle and ran into the back of the client's ice cream truck. The plaintiff claimed that the driver of the ice cream truck stopped when someone hailed him, pulled backwards, and struck him on his bicycle. The client and a non-party witness testified that the plaintiff was riding his bicycle and calling to the non-party witness (in not so gentlemanly manner). He was looking at the witness and she saw him ride his bike into the left rear of the STOPPED ice cream



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truck. Our client testified that he was already out of his seat and making his way to the window to help a customer when the plaintiff slammed into the rear of the truck. The plaintiff instituted a suit in Suffolk County. We made a motion to Justice Peter Fox Cohalan on liability grounds. The case was heard on oral argument and dismissed.

## Intersection Right of Way

In a recent case, from the First Department, Nevarez v S.R.M. Management Corp., defendants argued that plaintiff was negligent as a matter of law as the evidence established that plaintiff allegedly failed to yield the right-of-way in violation of [Vehicle and Traffic Law § 1140](#). When a driver, who approaches an intersection with a stop sign, fails to yield the right-of-way to another driver who approaches the same intersection from another street without a traffic control device, he/she violates [Vehicle and Traffic Law § 1140](#) and is thus guilty of negligence as a matter of law citing Perez v Brux Cab Corp 251 AD 2d 157, 159-60 (1st Dept, 1998).

The Court found that the plaintiff raised an issue of fact as to whether defendant had the right-of-way even though she had a stop sign. Plaintiff testified not only that she stopped at the stop sign, but that she observed no cars at or near the other side of the intersection before she proceeded to drive into the intersection. The Court found that while the defendant testified that he had the right-of-way at the time he entered the intersection, the dispute about which car arrived at and left the intersection first raises factual issues to be resolved by the trier of fact. The jury is free to reject Rodriguez's allegations that plaintiff failed to properly yield to crossing traffic before proceeding into the intersection and attribute the cause of the accident to defendant's conduct of entering the intersection when he did not have the right-of-way at trial.

The point of impact between the two vehicles appears to have had a lot to do with the court's decision and a finding of a question of fact. The plaintiff's vehicle had already entered the intersection and had crossed the double yellow line in the middle. The point of impact was to the rear of the plaintiff's vehicle.

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