

--- N.Y.S.3d ----, 2018 WL 6779382
(N.Y.A.D. 2 Dept.), 2018 N.Y. Slip Op. 08921

**This opinion is uncorrected and subject to revision
before publication in the printed Official Reports.**

*1 Halina A. Imran, respondent,
v.
R. Barany Monuments, Inc., et
al., appellants, et al., defendants.

OPINION

Supreme Court, Appellate Division,
Second Department, New York
2016-04376, (Index No. 21083/12)
Decided on December 26, 2018

REINALDO E. RIVERA, J.P., JOHN M.
LEVENTHAL, SYLVIA O. HINDS-RADIX,
VALERIE BRATHWAITE NELSON, JJ.

APPEARANCES OF COUNSEL

Picciano & Scahill, P.C., Westbury, NY (Francis J. Scahill
and Andrea E. Ferrucci of counsel), for appellants.
Irwin & Poznanski, LLP (Joshua Brian Irwin and Pollack,
Pollack, Isaac & DeCicco, LLP, New York, NY [Brian J.
Isaac], of counsel), for respondent.

DECISION & ORDER

In an action to recover damages for personal injuries,
the defendants R. Barany Monuments, Inc., and Randy
R. Barany appeal from an order of the Supreme Court,
Queens County (Martin E. Ritholtz, J.), entered March
23, 2016. The order granted the plaintiff's motion pursuant
to [CPLR 4404\(a\)](#) to set aside a jury verdict on the issue of
damages in the interest of justice and for a new trial.

ORDERED that the order is affirmed, with costs.

On April 17, 2012, the plaintiff was involved in a four-
vehicle collision. At the time of the accident, the plaintiff
was a passenger in the front-most vehicle. In the bill
of particulars, the plaintiff alleged, inter alia, that she
sustained injuries to the cervical and lumbar regions of
her spine and both knees as a result of the accident. In an
order dated January 7, 2015, the Supreme Court granted
the plaintiff's motion for summary judgment on the issue
of liability against the defendants R. Barany Monuments,

Inc., and Randy R. Barany (hereinafter together the
defendants).

On June 5, 2015, the matter proceeded to a jury trial
on the issue of damages against the defendants. During
that trial, the defendants presented the testimony of
a biomechanical engineering expert, Joseph McGowan.
McGowan testified regarding delta-v, which is the change
in velocity of a vehicle during a collision. Relying on
certain photographs of the vehicle occupied by the
plaintiff, a Honda CR-V, and the second front-most
vehicle, a Ford Focus, which struck the Honda CR-V,
damage repair estimates for both vehicles, and a crash
test involving a Honda CR-V, McGowan concluded that
the delta-v for the collision between the two vehicles was
5.7 miles per hour. He then utilized different crash tests
to determine what happens to occupants in crashes with
a similar delta-v. He concluded that the impact from
the second front-most vehicle to the vehicle occupied by
the plaintiff would not have caused the plaintiff's alleged
injuries to the lumbar region of her spine or her knees.

Thereafter, the jury returned a verdict in favor of the
defendants on the issue of damages, finding that the
plaintiff did not sustain a serious injury under either the
permanent consequential limitation of use or significant
limitation of use categories of [Insurance Law § 5102\(d\)](#)
*2 as a result of the accident. Subsequently, the plaintiff
moved pursuant to [CPLR 4404\(a\)](#) to set aside the jury
verdict on the issue of damages in the interest of justice
and for a new trial, arguing, inter alia, that McGowan's
testimony on causation should have been precluded. The
Supreme Court granted the motion, and the defendants
appeal.

Under the circumstances of this case, we agree with the
Supreme Court's determination to grant the plaintiff's
motion pursuant to [CPLR 4404\(a\)](#) to set aside the
jury verdict on the issue of damages (*see Dovberg v*
Lauback, 154 AD3d 810). “An expert's opinion must be
based on facts in the record or personally known to the
witness” (*Pascocello v Jibone*, 161 AD3d 516, 516, quoting
Hamsch v New York City Tr. Auth., 63 NY2d 723, 725).
Here, a proper foundation was lacking for the admission
of McGowan's opinion (*see Parker v Mobil Oil Corp.*, 7
NY3d 434, 447). Among other things, McGowan failed
to calculate the force exerted by all four vehicles, the
crash test he utilized to determine the delta-v differed
in several significant respects from the instant accident,

and he reviewed simulations in which the weight of the dummies was not similar to that of the plaintiff.

ENTER:

The defendants' remaining contentions either are without merit or need not be reached in light of our determination.

Aprilanne Agostino

Clerk of the Court

RIVERA, J.P., LEVENTHAL, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

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