

--- 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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