

# LAW WEEK

## COLORADO

Vol. 5 / No. 27 / \$6

1905 SHERMAN ST., SUITE 245, DENVER, COLORADO 80203 ◀ 303-292-1212 ▶ www.lawweekcolorado.com

Week of July 2, 2007

## Jurors Return \$10M Med-Mal Judgment

By Carolyn Matthews  
LAW WEEK COLORADO

DENVER — A medical negligence case recently reeled in one of the largest malpractice verdicts in Colorado history, projected to go as high as \$11.3 million. The defendant in the case pushed to settle for \$1 million or less, but the doctor's insurer, COPIC, opted to go to trial in what the plaintiff's counsel described as a "meritorious" case from the beginning.

Two weeks ago, a Denver District Court jury returned a \$10.1 million verdict in the medical negligence case of Dr. Nancy Carlson, who failed to diagnose then 9-year-old Edden Bargai with a brain tumor in 2005.

### Jury 'Frequently Asked Questions'

The jury was composed of three women and three men. The foreman was a compliance officer at a large securities firm. The three women included one grandmother and an expecting mother.

"The jury was very bright. They asked questions frequently

### Doctor's Insurer Rejected Far-Lower Settlement



in writing of the witnesses, oftentimes very perceptive," said Jim Chalat, who represented Bargai and his mother, Neta Bargai, Ph.D. Associate Christopher Koupal served as co-

counsel.

In June 2006, the plaintiffs made a statutory offer for \$1 million, the limits of the defendant's policy. The defendant consented to settle, but the insurer

refused. Carlson was defended by Peter Pryor and Kevin Ahearn of Pryor Johnson Carney Karr & Nixon. Pryor was unreachable for comment.

The trial began June 4, in Courtroom 19, with the Hon. Norman Haglund presiding. Haglund has been on the bench for less than three months. His former practice with Kelly Garnsey Hubbel and Lass focused on real estate, bankruptcy, commercial contract and insurance law.

"Judge Haglund sat on the bench, never handled a medical malpractice case in private practice. He did a very credible job," Chalat said. "He ruled often against us, but it worked out great now."

### Numerous Experts

The plaintiff's counsel offered several expert witnesses in the fields of pediatric care, neuro-oncology, cognitive impairment and life-care planning. Most of the witnesses were from the metro area, and all were from Colorado.

The defense offered a handful of local doctors as well as a neuro-oncology expert from Johns



PHOTO COURTESY NETA BARGAI

**Edden Bargai, the 11-year-old who won a \$10 million verdict for medical negligence.**

### DEFENDANT'S EXPERTS

**Paul N. Tschetter, M.D.**, Denver, pediatric standard of care.

**Kenneth Cohen, MD Ph.D.**, Johns Hopkins, Baltimore, Neuro-oncology and standard of care in pediatrics.

**Leland Albright, MD**, University of Wisconsin, pediatric neuro-surgery.

**Nancy Carlson, M.D.**, Defendant, as an expert on standard of care

**John C. Riley, M.D.**, Denver, radiology.

### PLAINTIFFS' EXPERTS:

**David Kessel, M.D.**, Arvada, pediatric standard of care.

**Michael Handler, M.D.**, Denver, pediatric neurosurgery.

**Nicholas Foreman, M.D., Ch. B.**, Denver, neuro-oncology.

**Phillip Zeitler, M.D., Ph.D.**, pediatric endocrinologist, UCHSC.

**Stefan Mokrohisky, M.D.**, Denver, pediatrician, on life expectancy.

**Jeanne Dise-Lewis, Ph.D.**, Denver, on cognitive impairment.

**Rabbi Levi Brackman, M.A.**, Denver Academy of Torah, on educational accommodations necessary.

**Rebecca Braverman, M.D.**, TCH, pediatric ophthalmologist.

**Marion Sills, M.D.**, Denver, Emergency Department attending.

**James Gracey, Ph.D.**, Denver, life care plan

Hopkins University in Baltimore and a pediatric neurosurgery physician from the University of Wisconsin.

Carlson has been practicing for 20 years. In 2004, she was selected by *5280 Magazine* as a top doctor in the Pediatric Primary Care category.

“Nothing in her record besides this isolated incident suggests she is nothing but a rock-solid specialist,” Chalot said.

Carlson did not test Bargai for juvenile pilocytic astrocytoma, a brain tumor that occurs predominantly in children. The pediatric doctor attributed symptoms such as progressive weight loss, severe headaches and dizziness to anxiety.

Bargai was eight when he was first seen by Carlson in October 2004. In May 2005, Bargai was admitted to the emergency room at The Denver Children’s Hospital. After several complications, he underwent emergency brain surgery known as right pterional craniotomy.

#### **Allegation: Diagnosis Delayed**

The complaint alleges that Bargai’s condition could have been treated with non-invasive therapy such as chemotherapy had Carlson diagnosed it sooner. Juvenile pilocytic astrocytoma is the most frequent pediatric tumor and the most treatable.

“At the heart of our case, was that the pediatrician did not

respond to acute symptoms of a potential mass in the head. We alleged, and the jury agreed, the pediatrician should have referred Edden earlier for an MRI,” Chalot said.

The witnesses for the plaintiffs, such as Dr. David Kessel of Arvada, testified that there exists a 76 percent cure

---

*“Gracey and Pacey faced some pretty stiff jury questions about the economics about the life care plan,” Chalot said. “But his medical needs and educational requirements were very well defined and jury consequently awarded Edden appropriately.”*

-Jim Chalot

---

rate when Bargai’s cancer is diagnosed prior to becoming so massive that it does damage. Treatment with chemotherapy has a 40 percent total effect cure rate and of the remaining 60 percent, safe radiation treatment has been proven over time to be statistically effective in 60 percent of cases.

Bargai has no evidence of cancer after the emergency craniotomy. But between the

surgical intervention and the bleeding of the tumor, he sustained significant damage.

Bargai is permanently and severely brain damaged and suffers from near-total blindness in the right eye, cognitive impairment, residual speech problems, left facial paralysis, grand mal seizure, episodes of sudden confusion, disorientation, fatigue and dizziness, frequent urination and other life-altering symptoms.

Among the expert witnesses presented by the plaintiffs was Rabbi Levi Brackman of the Denver Academy of Torah in East Denver, where Bargai has attended school since he moved from Israel in 2004. The institution offers a low student-to-teacher ratio of 12-15 to one.

Brackman, a teacher at the modern Orthodox, Zionist co-educational grade school, explained during trial the significant accommodations made by teachers and staff for Bargai to reach his maximum potential.

“Edden is a very lovely student,” said Brackman, who taught Bargai’s fifth grade class. “He was a great addition to my class and I am very pleased he will be getting help in the future.”

Even with his impairments, he speaks Hebrew fluently, and his English skills are fantastic, according to Chalot.

The school “has done a

fabulous job encouraging Edden to progress at his own pace and standards,” Chalot said.

The complaint says Bargai is permanently and totally disabled from any future occupation or income.

The jury awarded \$10.1 million in economic damages, \$9 million of which is reserved for medical expenses, life care expense and lost earnings. The judgment is likely to reach \$11.3 million.

The damages to the present awarded to Edden’s mother, Neta Bargai, Ph.D., totaled \$600,000, and future damages equaled \$600,000. Dr. Bargai works at the University of Colorado School of Medicine in the Kempe Center for the Prevention and Treatment of Child Abuse.

Life-care planner James Gracey of Denver provided an estimate of Bargai’s future economic needs. Patricia Pacey, Ph.D., faculty at the University of Colorado, described the quantification of damages.

Pacey has had wide and diverse experience testifying as an expert witness in state and federal courts.

“Gracey and Pacey faced some pretty stiff jury questions about the economics about the life care plan,” Chalot said. “But his medical needs and educational requirements were very well defined and jury consequently awarded Edden appropriately.”