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Assessing the crash's toll

Families seek compensation for financial, emotional losses

By Andrew Wolfson

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Brian Byrd, who had boarded Comair Flight 5191 on his way to be married on a Caribbean island, was burned alive when the plane crashed, his family's lawyers say. He was found with his arm wrapped around his fiancée, Judy Rains.

Salutatorian of her senior class at Lexington's Henry Clay High School and a magna cum laude graduate of the University of Virginia, Marcie Reynolds Thomason, 25, a certified public accountant, would have made more than \$20 million in her lifetime, her family's lawyers say.

Joan Winters watched her 16-year-old daughter Paige board the doomed flight at Lexington's Blue Grass Airport, then for hours desperately tried to reach Paige by cell phone. Nobody would tell her why the airport had suddenly closed.

Filed among more than 3,000 court pleadings, pretrial memorandums for the families of victims of Comair Flight 5191 provide new details about their horrific deaths nearly two years ago -- and the families' suffering and loss since.

Lawsuits filed for the estates of Byrd, Thomason and Paige Winters have been settled, but three sample Comair cases are scheduled for trial a week from tomorrow in U.S. District Court in Lexington, where a jury will be asked to fix liability for the disaster and to award compensatory and punitive damages.

The plaintiffs allege that Capt. Jeffrey Clay and First Officer James Polehinke committed a series of inexcusable blunders before they took off from the wrong runway and crashed on Aug. 27, 2006, killing all aboard except for Polehinke.

The families also allege that Comair was negligent in training both pilots and in hiring Polehinke in 2002 without discovering that he'd been convicted of drunken driving in the early 1990s and was involved in a 1999 domestic dispute that ended with his wife shooting him.

Comair has admitted its pilots made errors but has blamed the 2006 crash in part on the Federal Aviation Administration, for violating its own rules by having only one controller on duty. The controller has said he turned his back as the aircraft was taxiing to work on administrative chores.

The airline's claims against the airport and a company that makes airport diagrams were dismissed. The families' lawsuits name Comair and Polehinke as defendants; some families also have filed claims against the U.S. government over the FAA's role.

In a statement issued last week, Comair spokeswoman Kate Marx said there is "no question that that accident has had a tremendous effect" on the families of victims, among others. She declined to respond to the lawsuits' specific assertions about economic damages or injuries.

The National Transportation Safety Board said last year that pilot errors were the probable cause of the crash, but a contributing factor was the FAA's failure to require air traffic controllers to issue specific clearances to cross runways.

Airline disaster lawsuits rarely get to trial, and opposing counsel in the Comair cases have negotiated a flurry of settlements in the past few weeks. Only 10 of 47 suits were still pending as of Friday, and it is possible that the balance will be resolved this week, averting the Aug. 4 trial.

The settlements are confidential, but Chicago lawyer Robert Clifford, whose firm resolved cases for five victims, said Comair "treated my clients fairly."

Yet Kathleen Moscoe, whose daughter Cecile Moscoe, 29, was killed as she headed to New Orleans to help Hurricane Katrina victims, said in an interview that her recent settlement provides little solace.

"I don't think anything would," she said, declining to provide settlement specifics.

Setbacks for Comair

Experts outside the litigation say Judge Karl Forester's decision in June to allow the jury to consider whether Comair's management was responsible for the crash -- and potentially award punitive damages -- spurred the airline and its insurer to settle.

"Comair didn't want its reputation dragged all over the street," said Arthur Alan Wolk, a Philadelphia aviation lawyer not involved in the case.

Comair, based in Erlanger, Ky., emerged from bankruptcy in the spring of 2007 with its parent company, Delta, and like other airlines, it has experienced financial problems since. The regional airline told employees this month that it would cut about 20 percent of pilot and flight attendant jobs beginning this fall.

But in pleadings related to the Lexington crash, Comair has said it has more than enough insurance to cover all claims, including for punitive damages.

Even so, other potentially damaging rulings against the airline may have spurred settlements.

For example, overruling Comair's objections, Forester held that the plaintiffs could introduce evidence that Polehinke ordered two beers at Lexington's Radisson Hotel on the eve of the crash, violating a Comair rule against drinking within 12 hours of a flight.

There was no evidence Polehinke was impaired the next morning, but the plaintiffs said his conduct showed Comair's "culture ... to pay lip service to regulations." Forester said it was "highly relevant."

He also said the jury could hear the cockpit voice recording, which includes expletives, exclamations and crash noise.

Comair argued that the recording would "play on the jury's sympathies," but the federal government said in a brief that it "reveals a cockpit full of levity and laughter," as if the pilots "were out for a drive or a bike ride."

Forester said the pilots' "tone and pitch and inflection" showed their approach to the flight and was germane.

About the only pretrial ruling won by Comair was an order barring the plaintiffs' lawyers from referring to the airline as "Comedy Air."

Lost earnings

The size of the settlements struck so far is a closely guarded secret, but briefs filed by the plaintiffs claim huge economic losses in some cases and horrendous pain and suffering in others.

For example, according to court documents, Lyle Anderson, who was a 55-year-old senior vice president and portfolio manager for T.D. Waterhouse in Ottawa, Canada, had averaged \$842,524 a year in income in the 10 years before the crash and would have made another \$12.5 million over his lifetime.

CPA and consultant Timothy Snoddy, 51, of Lexington, one of the few forensic accountants in Kentucky, earned \$600,000 in the last year of his life and would have gone on to earn another \$15 million, lawyers for his estate say.

The pleadings also show that several passengers survived the initial crash, then died in the ensuing fire.

They include George Brunacini, 60, who was one of two passengers whose body was discovered outside the plane. A medical expert for his estate concluded he survived long enough to drag himself out of the aircraft -- and to suffer "substantial fear and terror as well as excruciating pain and suffering" before he burned to death.

Brunacini, a father of four, was a successful real estate developer and horseman who bred the winner of the 2005 Travers Stakes, for which he was named breeder of the year.

Chicago trial lawyer Thomas DeMetro, who isn't involved in the case, said proof that a passenger initially survived the crash would dramatically increase the value of a case.

"It is a horrible way to die," he said.

Emotional cost

The pretrial memos also detail the devastating emotional impact of the passengers' deaths on their families, especially surviving children. For example:

Clarence Wayne "C.W." Fortney II's son, though only 2½, "cried incessantly for a considerable period" after being told about the death of his father, a pilot for AirTran who was flying to Atlanta to meet his own plane.

Brenna Mackenzie Threet, who was 5 when her father Greg was killed, writes letters to him and draws pictures of him with wings in heaven. She is one of three children; the youngest was 7 weeks old at the time of the crash.

J.T. Washington of Richmond cannot bring himself to do things he once did with his wife, Victoria, who died in the crash. They used to attend University of Kentucky basketball games together, for example, and he hasn't been able to bring himself to attend since.

"The death of his wife has completely destroyed his world," his family's lawyers, William Garmer and James Osteen, have written. "Vicky had cared for his every need, and the loss of her has left a void in his life."

Thomason, the University of Virginia graduate and CPA, was headed back to work in Washington after spending a few days in Lexington working out the final details of her wedding planned the next month to her college sweetheart. She died from massive trauma and severe burns.

"The loss of a child, a sister, a bride can never be understood or forgotten," her estate's lawyers, David Royse and Kenneth Nolan, have written. "The anguish continues and will never end."

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