

## \$7.4 Million

# Largest Ohio Plane Crash PI Verdict

### Flexibility, Hard Work – Key To Jury Decision

#### VERDICTS & SETTLEMENTS PLUS

In July of this year, a Cuyahoga County jury awarded a North Carolina man and his wife \$7.45 million for injuries the man received when a plane in which he was riding crashed into Lake Erie in November 1995. According to the attorney for the couple, this is the largest aviation-related personal injury verdict in Ohio history.

Plaintiff John White had both of his legs and his spine crushed in the crash, has had to undergo numerous surgeries to try to repair the damage, and will never be able to resume the active lifestyle he once had said his lawyer, Jamie R. Lebovitz of Cleveland. His wife, to whom he had only been married for several months at the time of the accident, quit her job so that she could stay at home and care for her husband.

The couple sued the estate of the pilot of the plane, who died in the crash, as well as the pilot's company, which owned the airplane, and the trustee of a family trust that was created after the pilot's death. The insurance company that had insured the plane, while not a defendant, was convinced by the defendants to contribute money towards paying the verdict.

The case, *White, et al. v. Estate of Derrick, et al.*, was heard before Common Pleas Judge Nancy Russo in July. The week long trial only concerned the issue of damages, however, because the issue of the pilot's li-

ability had been determined on a motion for summary judgment. The unanimous verdict included \$6.43 million for the husband's damages and \$1 million for the wife's loss of consortium.

Counsel for the defendants, George Hilborn of Michigan, and Margaret Meko of Cleveland, could not be reached for comment.

#### Choice Of Defendants

A critical decision was made at the outset of the case to sue not only the estate of the pilot and the pilot's business but also the family trust of the pilot, Lebovitz explained. "Because of the quantum of damages sustained by my clients, I felt that we had to sue not just the owner of the aircraft in terms of the [insurance] policy - since there were going to be other people making their claims on that money - but we also felt we had to bring the trust in as a defendant so that any deficit in the insurance coverage could be paid by the estate of the deceased pilot, assuming he was at fault," Lebovitz explained.

As it turned out, he continued, "we were able to recover full damages because the [trust] had monies above and beyond the coverage."

The insurance company, which was not a defendant to the case, allegedly offered \$500,000 to settle the case prior to trial. "Once the verdict was returned and we got well beyond the available insurance coverage," said Lebovitz, "the lawyers who represented the trust... threatened a bad faith action against the insurance

company for putting the trust at risk of being depleted [and] forced the insurance company to contribute money towards the settlement so as to save the trust from any exposure."

#### Pilot Negligence

The plaintiffs based their case on their belief that the crash was caused by pilot error, said Lebovitz. They produced evidence indicating that the pilot was probably trying to navigate by looking out the window rather than by looking at his instruments, which was negligent under the conditions that night.

The plane took off after sunset in a westerly direction before making a northward turn. Because it could be difficult to distinguish the horizon from the lake under those conditions, it would have been necessary for the pilot to use the instruments to gauge altitude, the plaintiffs surmised. "The standard instrument departure when you're taking off to the west on runway six is to climb about 1500 feet and then make your right



Jamie R. Lebovitz of Nurenberg Paris

\* Article from Ohio Lawyers Weekly, which appeared on the front page. Photo not part of article

towards Canada," explained Lebovitz.

In this case, the pilot made his turn after climbing only a few hundred feet and as a result, was "flying into a black hole," said Lebovitz. "Had the pilot been paying attention to his instruments, ... he would have seen that he was falling below the horizon and was descending toward the lake," he remarked.

The plaintiffs presented the testimony of a commercial pilot who had been talking with the plaintiff and his friends prior to take-off and had taken off a few moments after they did.

"He testified about the flight conditions and that there was no way you could have flown safely out of Burke [Airport] that evening unless you were watching your instruments because there were no visual references for a pilot to be able to ascertain where he was in space," said Lebovitz.

The defendants also raised several affirmative defenses, including the Ohio aviation guest statute. The plaintiffs challenged the guest statute as unconstitutional and prevailed after pointing out that a Ohio Supreme Court case, *Primes v. Tyler*, struck down the corresponding automobile guest statute in 1995.

The defendants also raised the affirmative defenses of comparative negligence and assumption of the risk, said Lebovitz, claiming that because there was some evidence that the pilot had consumed alcohol, the plaintiff was comparatively negligent for getting into a plane with him.

"We proved that [the restaurant] where they had brunch that morning ... [doesn't] serve alcohol until 1:00 in the afternoon because of their liquor license prohibitions. By 1:00, these people were at the Rock and Roll Hall of Fame, ... and there was no testimony that they had anything to drink [there]," he noted.

After striking the defenses, the plaintiffs filed a motion for summary judgment on liability. Since examination of the wreckage and other evidence showed no indicia of an emergency on the plane such as a power failure or fire, and the survivors' testimony seemed to indicate that the pilot did not realize that he was descending into the lake until it was too late, the court accepted the plaintiff's explanation and granted summary judgment on liability.

#### Contributing Factors

Lebovitz attributes the large verdict in part to the fact that the plaintiffs were sincere

and believable, and in part to the fact that their loss was so severe.

"This is a young couple, ... who within a couple of months of their wedding day, found their lives to have been irreparably damaged. Their hopes and their dreams of having a family and partaking of family life like they were accustomed to ... were essentially shattered. That is a very important issue in the case and the jury believed this. They found the plaintiffs to be very genuine," said Lebovitz.

"If these were folks who didn't seem very sympathetic and didn't seem to really care about one another, you wouldn't see a loss of consortium award of over a million dollars," he added.

Another key element in the plaintiffs' success in this case was preparation by the attorneys, which started the day they were retained and continued through the trial a year and a half later.

"This was not a case that was let to develop on its own—we worked it. There probably wasn't a day that went by that we weren't doing something in connection with this case," Lebovitz remarked.

Flexibility was also a contributing factor in the success of the case. Lebovitz explained that during trial, he and his co-counsel decided to deviate somewhat from the detailed trial plan they had devised.

They had mapped out beforehand the witnesses they wanted to testify, including family members of the plaintiffs, every physician who treated the plaintiff, and the two fishermen who rescued the plaintiff from the lake, but decided to scale back some of the witnesses to avoid cumulative evidence.

"We found that those witnesses who were testifying were convincing, were very detailed, and commanded the undivided attention of the jurors, so we decided to pull some of the witnesses out.... We found that less ended up being more," Lebovitz observed.

The testimony of one of the fishermen who saved the plaintiff was particularly riveting and dramatic, said Lebovitz.

#### Damages

In addition to testimony, he also relied heavily on demonstrative evidence. For example, using a *Fantozzi* chart (named for an Ohio Supreme Court decision, *Fantozzi v. Sandusky Cement*), Lebovitz "broke down on a big board the various elements of damages and what we believed to have been a fair amount of money to compensate the family for their loss."

For economic damages, the numbers were reached through expert testimony by an economist and a vocational expert. "Someone who showed potential of making \$60,000 a year will be lucky if he can make \$30,000 in some other type of job that is sedentary, because he won't be able to work on his feet or lift heavy objects any more," he explained.

The numbers for noneconomic damages were arrived at through a combination of experience and instinct, said Lebovitz. "One of the arguments I made to the jury [was]: '[imagine] that you pick up the classifieds ... and there's a job available: wanted, 35-year old person, both legs crushed, spine crushed, scars and burns, unable to walk on uneven surfaces, unable to play sports with children, unable to sleep but maybe two hours on any given night, in daily pain and discomfort, no time off for holidays, no vacation from any of these problems. We will pay you \$200 a day for that job.' And my point was, would any one of you [take this job] or recommend to someone this job?"

Multiplying that figure of \$200 by the plaintiff's life expectancy, which was not reduced at all by his injuries, yielded a figure of several million dollars, said Lebovitz. He also noted that the verdict covered emotional injuries relating to the crash. In particular, the plaintiff suffered post-traumatic stress disorder because a 12-year-old passenger on the plane was clinging to the plaintiff but the plaintiff, who was severely injured himself, could not prevent the boy from drowning.

"When you add up all the numbers, it came out to be about eight plus million dollars and the jury awarded just about everything I asked for," Lebovitz concluded.

#### Jury Composition

When selecting the jury, important qualities were openmindedness and fairness, said Lebovitz. "With the tort reform movement out there and the anti-plaintiffs attitude among many, you just want to be very careful about not having someone who thinks that anyone who is filing a suit is looking for a quick buck."

According to Lebovitz, defense counsel felt they had picked a jury that would be advantageous to their side because there were five women on the jury. "Women, the belief is, tend to be a little more conservative with compensatory damages, [but] that was proven to be just the opposite," he explained.

—BY KATHRYN L. KOEILER