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\$5.25M verdict in DeKalb shooting

FAULT IS APPORTIONED to apartment complex, not criminals, in shooting attack on resident using path

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Criminals who shot a man in the back weren't responsible for the attack, but the man's apartment complex was, a DeKalb County jury found in awarding a \$5.25 million verdict.

The jury assigned none of the blame for the shooting to the attackers, instead holding the apartment complex 87 percent liable for being negligent in providing security. The plaintiff, whose injuries made him a walking paraplegic, was apportioned 13 percent of fault, reducing the amount of the award he will collect to about \$4.5 million.

Attorneys for the plaintiff persuaded the jury that the apartment complex was to blame because it didn't complete construction of a fence or warn residents following other attacks in the area.

After surveying focus groups, the lawyers found that jurors could be swayed if they viewed the attackers as the instrument of the shooting but the apartment complex as the responsible party for failing in its duty to ensure the safety of its residents, said Nelson Tyrone III, who represented plaintiff Nathaniel Polite.

"It's kind of like blaming the rabid pit bull who has attacked people before rather than the owner who lets him out of the yard or off the leash," Tyrone said in an interview. "The more that regular people understand that the defense is trying to blame the pit bull, and that by doing that property owners are trying to avoid their responsibility and duty under the law ... jurors don't believe that's just."

The defendants, apartment owner Double View Ventures and manager Westdale Asset Management, will probably appeal, said their attorney, Warner Fox of Hawkins Parnell Thackston & Young.

"The defense did expect that a portion of the fault would be apportioned to the criminals," Fox wrote in an email. "We think the verdict may be inconsistent because the jury apportioned fault to the plaintiff, but not to the criminals."

The jury of 11 women and one man reached its verdict Sept. 14 following a five-day trial before DeKalb State Court Judge Johnny Panos. Tyrone described the jury as affluent, with a doctor, a lawyer, a therapist, two systems analysts and a private wealth manager.



Richard Jones and Nelson Tyrone, who represented the plaintiff, argued that the apartment owner and manager were aware of frequent security issues but did nothing.

The attack occurred on May 30, 2007, when Polite walked on a dirt path from Stonebridge Apartments to a Chevron store to buy chips and cigarettes, according to a pre-trial order. On his way back to his apartment, two men hiding behind a fence confronted him and threw liquid bleach at his face, temporarily blinding him.

Polite, who was 24 years old at the time of the attack, ran several steps toward his apartment when he was shot in the back, leaving him with loss of some sensation

and motor control of his legs, plus bowel and bladder problems, the order said. Polite rotates his hips and swings his legs to step forward with the help of a four-pronged cane, and his doctors expect him to have to use a wheelchair by the time he's 45 years old. The attackers were never apprehended.

Polite's lawyers worried that even though they might win the battle over liability, they could lose the war on apportionment, said co-counsel D. Richard Jones, who has handled inadequate security cases for 20 years.

"It's just wrong to say that you can blame the criminal. Once it's foreseeable, [property owners and managers] have to make the property safe," Jones said in an interview.

One witness in particular resonated with the jury: a security guard who had been warning the apartment complex's managers about the dangers of the gate connecting it with the Chevron station, Tyrone said.

"He was desperately worried about what was going to happen with all these nonresidents flooding onto this property, and he was trying to get them to shut the path down," Tyrone said. "From that point on, the jury had a sense that it was inevitable that someone was going to get hurt."

Jones said he used three analogies and a simplified verdict form to address the risk of apportionment to the criminals.

Along with the comparison to the pit bull owner, the plaintiffs also told the jury that the defendants were like a school that left its back door unlocked in a neighborhood with predators, or like a resort where a guest had been eaten by sharks but no warning signs or fences were put in place, Jones said.

In Polite's case, the apartment complex didn't tell its residents about other prior violent robberies on the same path Polite used, near the path or at the complex's front gate, Tyrone said.

Also, the apartment's managers made the attack easier by building an unlockable gate into the wooden fence that was on the nearby Chevron station's property, which allowed easy access for criminals to reach tenants, Tyrone said. A wrought-iron and chain-link fence surrounded most of the apartment property, but the apartment's managers saved about \$10,000 by not extending the fence for 457 feet near Chevron's wooden fence.

The jury verdict form may have made a difference because it separated the issues of contributory negligence and apportionment of fault, Jones said. The form first asked whether the jury found for the plaintiff and by what amount, noting that the amount shouldn't be reduced based on degree of fault. Then the jury was asked to apportion fault among the plaintiff, the defendants and the criminals.

"The jury got the idea of why you don't blame the criminal. It's obvious that that's the very harm against which they must guard," Jones said. "In this day of apportionment, you can lose 90 percent of the verdict to the criminals. What good does that do?"

But Fox said that his interviews with several jurors indicated that they may have

been confused between the concepts of fault and negligence.

"They perceived the criminals not as being 'at fault' because they weren't negligent. They saw them as criminals who acted intentionally," Fox said.

The defense attempted to place blame on Polite, who was unemployed at the time of the crime, by suggesting that he knew his attackers or that he was hiding something, Tyrone said. When Polite arrived at the hospital, he had \$700 in his pocket that his assailants didn't take.

The verdict was for general damages including pain and suffering, Jones said.

Polite, who lives with his mother, sister and daughter, told his attorneys that his family was in danger of having their power turned off while the case was pending because they couldn't afford to pay for it, Tyrone said. After receiving the verdict, Polite said he wants to use part of the money to buy his family a small house.

The award will be held in a trust that will be managed to provide for Polite's needs for the rest of his life, Jones said.

The case is *Polite v. Double View Ventures*, 09-A-05619.

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