

DAILY REPORT

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Defense uses 'Reptile' strategy against Keenan

MANUAL FOR PLAINTIFFS'

LAWYERS teaches to focus on jurors' survival instincts; Keenan says strategy didn't apply to case

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FOR \$95, plaintiffs' lawyers can buy a book that teaches them how to appeal to jurors' basic survival instincts, those that emanate from humans' "Reptilian" brains.

"When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community," write co-authors Don C. Keenan, an Atlanta plaintiffs' lawyer, and David Ball, a North Carolina jury consultant.

But in a DeKalb County wrongful death trial last month, Keenan found that defense lawyers will also buy the book, "Reptile: The 2009 Manual of the Plaintiff's Revolution"—and use it against him.

Representing a movie theater and a security company accused of not doing enough to prevent a fatal gang shooting in the theater parking lot, W. Winston Briggs and Matthew G. Moffett read from the book and referred to it during closing arguments.

One of their PowerPoint slides read, "Let's see if we can scare them/It could have been anyone killed out there ... because it's a public danger there ... but if you give us \$ that will somehow eliminate this danger/ They call this their 'reptile' strategy."



ZACHARY D. PORTER/DAILY REPORT

Winston Briggs, left, and Matthew Moffett successfully represented Regal Hollywood 24 and a security company accused of not doing enough to prevent a fatal gang shooting in the theater parking lot.

After two weeks of testimony and three-and-a-half hours of deliberation, the jury found for the defense.

"You've got to be careful what you put in writing," said Moffett. "We knew the arguments he was going to make, because the arguments were in print."

Keenan, who plans an appeal, disputed Moffett's assessment of the case and the defense's use of "Reptile."

"There were a good 30 specific things that they said I was going to do that I didn't do," Keenan said.

"I never intended to use the 'Reptile' concepts in this case," he said, because the trial strategies outlined in the book didn't apply to the facts.

The man killed in the parking lot was targeted by the gang, said Keenan, while "Reptile" is focused on suits for the victims

of random accidents. He added that the “Reptile” strategy better fits a related case from the shooting that he is bringing.

Gang violence

The case stems from a September 2006 incident in which 21-year-old Jesus Silencio was shot to death in the parking lot of the Regal Hollywood 24 movie theater on Interstate 85. Silencio’s sister, Claudia, was shot in the abdomen during the incident and recovered.

Keenan filed suit on behalf of Silencio’s father, Carlos Pacheco, saying Regal Cinemas and its security company, Perfections Management Solutions, knew about the dangers of gang violence in their parking lot because of numerous previous incidents. They failed to take appropriate steps to stop the violence and are responsible for Jesus Silencio’s death, he argued.

Moffett, of Gray, Rust, St. Amand, Moffett & Brieske, and Briggs, of W. Winston Briggs Law Firm, argued that Regal and Perfections Management provided adequate security, that the attack happened too quickly for security to respond and that Silencio and his brother had triggered the violence by yelling hostile words at the gang members.

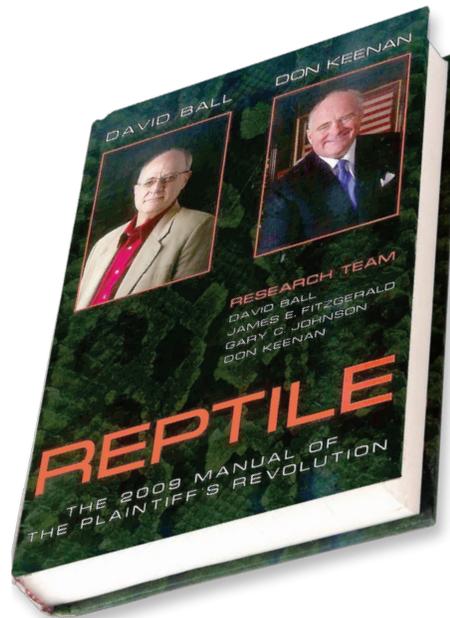
“Either [Silencio’s family] brought their history with the gang onto the Regal property, and Regal is not in the business of letting people fight on their property, or if they didn’t have a history, but nevertheless chose to engage in a fight with a gang on our property, they didn’t have a right to do that either,” Moffett said.

Keenan said he will appeal on at least one issue, that DeKalb State Court Judge Alvin T. Wong should have granted the plaintiff’s motion to bar the defense from putting up any evidence because the defense lost a videotape of the parking lot recorded during the incident.

Regal sent the tape to its headquarters in Knoxville, Tenn., said Keenan, and when he cross-examined the attorney for Regal, he found out for the first time that “they lost the tape.”

Under the doctrine of spoliation, Keenan said, if an important piece of evidence is destroyed, then the court has the remedy to have prohibited Regal from putting up any evidence.

“We’ve got two appellate cases right on that point, that the action was to strike the



Keenan said the “Reptile” concept, detailed in his book, is better suited for a related case.

defense to not permit them to argue about it,” said Keenan.

He acknowledged that the tape may not show the attack, but “Regal said this whole thing happened in a matter of seconds. Our position is that it happened over the course of six or eight minutes and that would have been shown by the videotape.”

Briggs said that Wong read a charge to the jury saying that if a party has access to evidence, in this case the videotape, and the party does not produce the evidence for the trial, then the jury can presume that the evidence was negative toward that party.

Proper use of ‘Reptile’

Keenan has a separate, related case that he also intends to pursue to trial, in which Claudia Silencio was shot during the same incident. That case, Keenan said, more closely tracks the legal strategies that he and Ball outline in “Reptile.”

Claudia Silencio was the victim of random violence because she was running from the movie theater to her family’s vehicle after the shooting began, Keenan said.

“The ‘Reptile’ concept is based on the indiscriminate victim,” Keenan said. “In these cases, there is no targeting of the victim going on. It’s about the malpractice victim who’s in the wrong place at the wrong

time. That lends itself to the argument that this could happen to anybody.”

The case filed on behalf of Jesus Silencio’s father “didn’t lend itself to ‘Reptile,’” Keenan said. A Hispanic gang targeted Jesus in the parking lot because he was a young Hispanic man and decided they would attempt to “initiate” him into their gang.

“Our gang experts said this was a typical gang initiation,” Keenan said. “A gang was beating up on Hispanic kids to get them to be members of their gang. How in the name of heaven could I argue that this could happen to anybody? It couldn’t happen to anybody. It could only happen to a Hispanic youth.”

With Claudia Silencio, “Regal’s guards are on record saying that Claudia wasn’t anything other than a bystander, an unintended victim,” Keenan said. “She was hit by a stray bullet that almost killed her. That’s Reptilian.”

The case marked the first time in about five years that Keenan had tried a case before a jury in metro Atlanta, Keenan said. Keenan’s docket over the next several weeks includes trials to be held in Arkansas, Ohio and Texas.

Several attorneys who represent plaintiffs in civil actions sat through portions of the trial in the Pacheco case, Moffett said. Moffett said he noticed lawyers Lloyd N. Bell, Keith E. Fryer, R. Adams “Adam” Malone and Geoffrey E. Pope sitting in the courtroom behind Keenan’s counsel table.

“It was like there was a Georgia Trial Lawyers Association convention behind Keenan,” Moffett said. “There wasn’t an empty seat behind Keenan.”

Efforts to reach Bell, Fryer, Malone and Pope were unsuccessful.

Keenan said that he believed the plaintiffs’ attorneys attended the jury trial because he’s an experienced lawyer whom other attorneys want to observe in action and because he so infrequently tries cases in metro Atlanta.

Attorneys Robert F. Glass of Briggs’ firm and Laura M. Forrest of Moffett’s firm worked with Briggs and Moffett on the case.

The case tried last month was *Pacheco v. Regal Cinemas*, No. 08A99832. The related case is *Silencio v. Regal Cinemas*, No. 08A95494. ☞