

# The Reptile Strikes Again: Lessons Learned from the \$55M Emotional Distress Jury Verdict Awarded to Erin Andrews

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Even ESPN reported this legal “victory” – a Tennessee jury awarded sports reporter Erin Andrews \$55 million, all noneconomic damages, in her trial against hotel companies and a stalker for secretly recording a nude video of her in 2008. The jury agreed the groups were guilty of negligence and invasion of privacy in connection with the surreptitious filming of her in her room at the Nashville Marriott.

While hindsight is always 20/20, important lessons stem from this jury trial which apply to cases across the country. This article assesses the Andrews trial and provides four “lessons” for businesses, insurance professionals, and defense counsel to avoid runaway jury verdicts: (1) Spot and Slay the

Reptile; (2) Accept Responsibility for Something; (3) Always Give a Number, Even When Seeking a Defense Verdict; and (4) Proceed Delicately.

## \$55 Million Jury Verdict

Ms. Andrews filed the lawsuit in December 2011 in Nashville, Tennessee against defendants (1) Marriott International, (2) Michael David Barrett (the stalker), (3) West End Hotel Partners LLC (hotel franchisee), and (4) Windsor Capital Group (hotel management). Her 3<sup>rd</sup> Amended Complaint filed in October 2015 asked for \$75 million in damages. The Court dismissed Marriott International before Trial. The Court found Marriott was not responsible for security or the actions of the hotel’s employees at the hotel as it was independently operated by West End Hotel Partners LLC and managed by Windsor Capital Group.

At the close of evidence, the Court found Defendant Barrett at fault. The jury was only asked to determine if defendants West End Hotel Partners LLC and Windsor Capital Group were at fault. If so, they were to apportion fault among the defendants and award damages. After a full day of deliberations, the jury of seven men and five women awarded Ms. Andrews \$55 million in emotional distress damages. The jury found Barrett was responsible for 51% of the verdict, and the two hotel companies were jointly

responsible for 49%, totaling nearly \$26 million.

## Undisputed Facts

Ms. Andrews, currently age 37, was employed as a reporter for ESPN at the time of the incident in 2008. She currently hosts FOX College Football for Fox Sports and also works as a co-host of ABC’s “Dancing with the Stars.” Barrett, an insurance executive from the Chicago area, targeted Ms. Andrews because she was “trending” on Yahoo. Barrett flew to Nashville knowing Ms. Andrews was there working at a college game.

Barrett was able to book a room adjacent to hers, modify the peephole to her room, and insert a small video camera within the hole to tape her nude as she exited the bathroom after a shower. After unsuccessfully attempting to sell the 4.5-minute video to TMZ, he posted three video clips to an internet site from which it rapidly spread. In 2009, after having been arrested by the FBI, Barrett pled guilty to felony stalking charges and was sentenced to 2.5 years. At the time of the trial, he was living with his father in Oregon driving a food truck. Barrett did not appear in the lawsuit, but his deposition was videotaped and played for the jury during the trial.

## Plaintiff’s Evidence – Ms. Andrews Is A “Very Changed Person”

Ms. Andrews contended the hotel was negligent in (1) confirming she was staying at the hotel, (2) not adequately protecting her room number, (3) granting Barrett's request to book the specific room adjacent to Ms. Andrews, and (4) not discovering the modifications made by Barrett to the peephole.

Ms. Andrews left the courtroom when the video was shown to the jury. Experts testified Ms. Andrews was distressed, humiliated, and panicked about the video being taken and put online. Barrett's release from prison triggered Ms. Andrews's trauma all over again. "She could not get through the day peacefully." Ms. Andrews was diagnosed with adjustment disorder and some symptoms of Post-Traumatic Stress Syndrome. Other experts testified a conservative estimate of 16.8 million people watched the video between July 2009 and January 2016. During the month of July 2009 "Erin Andrews" was the top searched term, and someone watched the video every 1.5 minutes.

Ms. Andrews's mother and father testified regarding the impact of the incident on Ms. Andrews's life. Her mother characterized her daughter as "easy-going" and loved to talk to people at sports games. Now, she is "very, very frightened" and refuses to interact unless she has protection with her. Her father testified: "I didn't know if she was safe. I didn't know who was doing this. I didn't know if someone was

going to hurt her, or even more. After I saw what was happening, I thought, there's a stalker out there that could easily kill her. I was terrified for her safety." Over time Ms. Andrews became a "shell of the person" she was before the incident. "My daughter has been scared for eight years. Eight years she has been terrified that there's something else out there. That there's someone else looking for her." He also noted, "She's mad. She's terrified. She's depressed. She cries. She's full of anxiety. She's a very, very changed person. She's not the girl that we used to know at all."

Ms. Andrews's testimony over two days was emotional and tearful. She first learned of the videos uploaded to the internet when called by a friend. She had no idea where or when it was filmed, was terrified by the stalker, and was afraid she would never get the video off the internet. She testified, "I called my parents. I was just screaming, that I was naked all over the Internet. And I didn't know what it was."

For the first few months after the videos appeared on the internet, there were rumors it was all a publicity stunt, which "ripped [Ms. Andrews] apart." "Because there wasn't an arrest, because we didn't know where this happened, my bosses at ESPN told me before you go back on-air for college football, we need you to give us a sit-down interview. That was the only way I was going to be allowed back." Ms. Andrews and her family could

not say anything about the FBI investigation because they did not want to tip off Barrett.

In closing, Ms. Andrews's attorney argued the hotel staff allowed Barrett to stay in the room next to Ms. Andrews because they did not want to lose his business. "The hotel must never let profits become more important than guest safety."

Ms. Andrews's attorney urged the jury to award \$1 for every person who watched or will watch the videos over the next 45 years to send a message to the hospitality industry about its responsibility for guest safety. "Barrett couldn't have done it without the negligence of the Nashville Marriott, the repeated violations, one after the other, of the standards that are there to protect all of us, our children," he said.

Ms. Andrews's attorney described her as a woman forever altered by a traumatic incident she did not choose, and said she has devoted herself to work to cope. "This is a post-traumatic stress disorder problem for which there is no 'post,'" he said. "She knows people are looking at her naked on the Internet every day."

### **Defendants' Evidence – This Was Independent Criminal Conduct**

The attorneys for West End Hotel Partners LLC & Windsor Capital Group argued Barrett alone was responsible for his criminal actions and deception. Additionally, they argued no evidence existed to establish hotel

employees knowingly placed Barrett in the room adjacent to Ms. Andrews. Defendants argued Marriott booked the room for Barrett because the hotel chain receives its reservations at a central location and the request was never transmitted to the Nashville front desk. A “hospitality” professor provided expert testimony the Nashville hotel had enough security in 2008 when the video of Ms. Andrews was originally recorded. Additionally, a forensic psychologist testified Ms. Andrews suffered from only “mild” Post Traumatic Stress Disorder because of the incident.

A video deposition of Barrett was played for the jury. Barrett claimed sole responsibility for the incident. He said he discovered Ms. Andrews’s room number by an in-house employee phone display and then requested to be next door.

The defense also played a video deposition of Ms. Andrews’s former co-worker at ESPN who testified Ms. Andrews’s work on “Dancing with the Stars” was a way to help her recover from the stress following the video. Despite being “more reserved” off camera, she was “impressive” during the broadcasts.

The defense also argued, despite the emotional trauma Ms. Andrews suffered, her career flourished since the scandal. She was cross-examined about her advancement at ESPN after the incident and later securing an even better contract with Fox Sports. She was asked in detail

about her work with Fox Sports, Dancing With The Stars, hosting the Country Music Awards in 2015 and her numerous endorsement deals (Reebok, Degree deodorant, Diet Mountain Dew, Florida Orange Juice, Victoria’s Secret, Gillette, workout brand Physique 57, SK Energy Shots, and PayPal). Finally, she was asked, “Since 2009, has your income increased?” to which she replied, “Yes.”

In closing argument, defense attorney maintained Barrett was solely responsible for the “terrible disgusting crime” and had no reason to lie. He said Barrett was an insurance executive who traveled more than 200 nights a year and knew how to deceive the system to get access to Andrews. Ultimately, “[a]re banks responsible for bank robbers?”

### **Takeaways – How to Avoid Runaway Jury Verdicts**

#### **1. Spot and Slay the Reptile**

In this case, Ms. Andrews’s counsel focused the jury on awarding damages to punish the defendants and to protect against this kind of incident in the future. Counsel also framed plaintiff’s case around a “safety rule” that no risk of harm is acceptable in the community. The jury ultimately agreed the hotel should have done everything possible to stop this heinous act.

These classic reptile tactics successfully hijack the standard of care by reframing the case from what a reasonably prudent hotel

would do to what an absolutely safe hotel would do in similar circumstances. These tactics typically begin early in discovery. Defense counsel and insurance professionals must be able to spot the reptile and shut down these strategies. The defense’s response to the reptile should begin early in discovery with corporate witness deposition preparation and deposition and continue through trial with motions *in limine* and objections in order to prevent these “absolute” arguments at trial.

#### **2. Accept Responsibility For Something**

By accepting responsibility, the defense seems reasonable to the jury and simultaneously diffuses juror anger. It also allows the defense to focus the jury on the negligent conduct of plaintiff or anyone else who has not accepted responsibility.

*Notably, it is possible to accept responsibility and still get a defense verdict.* By accepting responsibility for something, the defense does not necessarily accept responsibility for the accident or the incident that led to the lawsuit. For example, it is possible to accept responsibility for putting a safe product into the stream of commerce, highlight the extensive testing the defendant’s product underwent before entering the marketplace, and ultimately focus on how plaintiff failed to safely use the product.

Similarly, a hotel can accept responsibility for providing safe

lodging and protecting the confidentiality of guests. It can then highlight its extensive safety protocols, employee training, and independent certification the hotel's procedures complied with industry standards. Then, the defense can proceed with the theme the incident was an unforeseeable criminal act committed by a sophisticated criminal which could not have been prevented. Accepting responsibility in this way allows the hotel to reasonably argue for a defense verdict and effectively focus on the heinous third party criminal conduct.

### **3. Always Give A Number, Even When Seeking a Defense Verdict**

*Yes, it is possible to give a number and still obtain a defense verdict!*

The best way for plaintiffs to obtain a large jury verdict is to ask for it. In this case, Ms. Andrews's counsel asked the jury to award \$75 million dollars in emotional distress. The best way for the defense to avoid a runaway jury verdict is to give a reasonable defense number early to anchor the jury through trial (and then explain in closing the defense number is *not* an anchor), even when asking for a defense verdict.

Technically, there is a way to give a number such that the jury understands the evidence supports a defense verdict, defendant is seeking a defense verdict, but the defense also has an obligation to address damages. Even though the defense believes

the jury will never get to damages in deliberations, if they do, their award will be for some amount the defense has told them early and often.

In this case, the *defense* told the jury in *voir dire* that Ms. Andrews was seeking \$75 million. The defense only mentioned a much lower defense number to the jury in closing argument, when it argued the cost of future psychiatric care for Ms. Andrews would be \$5,000. To this, Ms. Andrews's counsel responded "\$5,000 and she will be all better? That tells you about their attitude. Your verdict will tell us the value of privacy, security, and protection."

The jury's final award of \$55 million demonstrates their attachment to early priming of \$75 million. A simultaneous early priming of the defense value of the case may have anchored the jury's award to a much more reasonable figure.

### **4. Proceed Delicately**

Regardless of who the plaintiff is or the issues at stake in the case, defense counsel must proceed respectfully. In this case, defense counsel was criticized for the "heartless" defense tactics used during trial. With sympathy on plaintiff's side, a jury will rarely respond positively to attacks on the plaintiff by defense counsel. It is much easier for the defense to successfully call *plaintiff's counsel's* behavior or intentions into question for the jury. The defense must strategically prepare defense themes, deposition and

trial questioning, and even which counsel will examine which witnesses at trial in order to delicately yet effectively persuade the jury.

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