

Litigators of the Week: Morgan Lewis Duo Win the Moral High Ground for PBS

"With this jury verdict for PBS, companies now have another tool in their arsenal to ensure a safe and respectful workplace culture," said Morgan Lewis partner Grace Speights.

By Jenna Greene

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Our Litigators of the Week are Morgan, Lewis & Bockius partners Grace Speights and Brad Nes, who notched a win for PBS in a high-profile fight with former late night host Tavis Smiley, whose show was pulled in late 2017 amidst allegations of sexual misconduct.

Companies owned by Smiley sued PBS, seeking millions in damages for breach of contract and other business torts. On behalf of PBS, Speights and Nes countersued for breach of the "morals clauses" in the show's production and distribution agreements, which specifically prohibited Smiley from doing anything that might tend to bring himself into public disrepute or reflect unfavorably on PBS.

Such clauses are common in the entertainment industry, but according to Morgan Lewis, their applicability has never been litigated before a jury. Until now. After a three-week trial, Speights and Nes on Wednesday persuaded a jury in the District of Columbia's Superior Court to side with PBS across the board. The jurors rejected Smiley's breach of contract claims and ordered TS Media to pay PBS almost \$1.5 million.

Speights and Nes discussed the win with *Lit Daily*.

Who is your client and what was at stake?

Grace Speights: Public Broadcasting Service, better known as PBS. For 50 years, PBS has been known for its kid-friendly programming, breaking news, and commitment to producing thoughtful and diverse content that is available to everyone. It has a hard-earned reputation for public trust. It was up to us to protect PBS's brand.

How did this case come about?

Grace Speights: PBS launched The Tavis Smiley Show, a late-night weekday half-hour television program in 2004, and renewed it for 14 consecutive years.

But on November 21, 2017, PBS both terminated the distribution of The Charlie Rose Show based on allega-



Morgan Lewis partners Grace Speights, left, and Brad Nes, right.

tions of his sexual misconduct, and received a serious complaint of inappropriate behavior from a former subordinate of Mr. Smiley.

Mitchell, Silberberg & Knupp, our co-counsel in this case, investigated the allegation and discovered numerous other women who worked with Mr. Smiley had similar stories of his sexual harassment and verbal abuse. So in December 2017, PBS announced that it was suspending distribution of The Tavis Smiley Show and three months later terminated its contracts with TS Media under the morals clause.

Mr. Smiley's companies sued PBS for breach of contract and various business torts.

How did this trial regarding competing breach of contract claims involve the #MeToo movement?

Brad Nes: This was a precedent-setting case as morals clauses have been an important component of media and entertainment industry contracts for almost a century, but their interpretation is rarely litigated.

In fact, this is the very first case testing the applicability of the morals clause to go to a jury trial. For several weeks, the jury heard extensive testimony that Mr. Smiley had multiple sexual encounters with subordinates, sexually harassed and verbally abused other subordinates, violated the terms of his

own employee handbook, and never told PBS about any of it and in fact actively misled PBS about it.

Then, after PBS learned of these allegations and suspended his show, we presented evidence that Mr. Smiley went on national television and lied about his past conduct, while disparaging PBS.

This all took place just as the critically important #MeToo movement was taking shape. After hearing testimony from almost 20 witnesses, including six women who testified by video deposition that Smiley had engaged in a pattern of sexual and other workplace misconduct, the jury found that such actions did in fact violate the morals clause.

What challenges did you face?

Grace Speights: This case involved serious sexual misconduct allegations and other allegations of misbehavior by Mr. Smiley. We wanted to make sure that the women who came forward and shared their stories were heard and were protected. PBS not only wanted to stand up for what was right, but also for any woman who felt threatened or harassed.

They believed so strongly in this, that three of their top executives, including Paula Kerger, PBS's president and CEO, testified in the case. The testimony of the executives reinforced the seriousness the company placed in the morals clause violations and gave more weight to the allegations of a very diverse set of women, whose stories shared the same patterns of misconduct.

But most of the misconduct the women shared fell outside of the contract periods in question, so we had to establish a way to make them a relevant part of the case. Mr. Smiley did that for us. He went on Good Morning America and the JAM, making disparaging remarks about PBS and denying that he had ever harassed anyone.

He used his public platform in direct violation of the morals clause and that is how the court admitted testimony about his past misconduct into this contract's dispute. Jurors said after the verdict that they found the women's experiences very compelling.

What were the counterclaims for which the jury awarded PBS \$1.5 million?

Brad Nes: When Mr. Smiley and his companies sued PBS for breach of contract and various business torts, PBS countersued TS Media alleging violations of the morals clause in two separate contract years.

The jury agreed, and the court will decide the amount of liquidated damages. PBS also succeeded in proving that

TS Media failed to send payments owed to PBS under two additional accounting counterclaims. The jury awarded PBS approximately \$1.5 million in damages against TS Media for those claims.

Who was opposing counsel?

Brad Nes: TS Media's trial counsel was Ronald S. Sullivan, Jr., the former director of the Public Defender Service for the District of Columbia, who currently teaches trial advocacy at Harvard Law School, and Los Angeles-based litigator John K. Rubiner, a former assistant United States attorney who currently practices employment law with Barton, Klugman & Oetting, both very experienced trial lawyers.

Who were the members of your team?

Grace Speights: Brad and I tried the case along with our co-counsel Kevin Gaut from Mitchell Silberberg & Knupp. The trial team also included Morgan Lewis associates Amanda Robinson and Elliott Brown, and our paralegal Tiffany Guzzi.

While we each brought our own unique and complementary trial skills to the table, what stands out to me more than anything was the "no-drama" nature of our team. Despite the pressures of trying one of the first (if not the first) high-profile civil #MeToo cases to go to a jury verdict, the team maintained its friendly, collaborative and supportive demeanor throughout the trial.

I think that really resonated with the jury. This was the best trial team, by far, that I have worked with during my 37 years in practice. It also helps when you have an amazing client in your corner like our friends at PBS.

How might this case affect the media and entertainment industry going forward?

Grace Speights: With this jury verdict for PBS, companies now have another tool in their arsenal to ensure a safe and respectful workplace culture. Especially in the media and entertainment industry, the enforcement of the morals clauses in contracts hadn't been previously tested at trial.

This jury verdict will likely impact the next wave of litigation in the #MeToo era. But we're also likely to see talent push back on broad morals clauses in contracts. While it's important for companies to cover as much as possible in their morals clauses, talent may ask for tighter language.

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