MILLIONS

The Making of the Largest Jury Award in Summit County History

By Richard Weiner

It took seven months, but a very careful Judge James R. Williams finally signed a judgment entry in the largest jury award case in Summit County history.

Last September, a Summit County jury granted a nearly $213 million award against the former Fairlawn company, Telxon Corporation. The largest Summit County jury award ever, it blasted the previous county record ($8 million in 2002) by a factor of nearly 30 and, so far, is the sixth largest jury award in the country this year according to the National Law Journal. [Telxon v. Smart Media of Delaware, Inc., et. al. Case No. CV-1998-12-4664].

But for all of you solo and small firm practitioners out there, the award itself is only a part of the story. Thirty-nine year old Gregory Melick, a "transplanted" South Jersey native who came to Cleveland via Temple University Law School and Philadelphia, and who once dated fictional trial attorney Calista Flockhart (Ally McBeal) in high school, conducted the entire trial and pretrial proceedings himself, without a secretary, paralegal or legal assistant, and with only one other co-counsel (who was representing another individual party in the action). Because of his late entry into the case as Smart Media's trial counsel ? and just five months before the trial actually began ? Melick simply did not have the time or resources to interview and hire staff, equip an office, etc., and to simultaneously "get up to speed" in time for trial in this complex commercial case.

Despite these odds, however, Melick demonstrates that "where there's a will, there's a way", and that even smaller practices can achieve big results through hard work and perseverance.

This is a highly complex case, with plenty of twists and turns, but here are some of the high points.

Telxon is a wholly-owned subsidiary of Long Island, New York, publicly held corporation Symbol Technologies. Symbol purchased Telxon on December 1, 2000 for $456 million, but posted information on its web site last year indicating that Telxon was worth only around $60 million, with $17 million of income for 2002. This lawsuit was pending when Telxon was purchased by Symbol in a stock-for-stock merger.

The original case was actually filed by Telxon against Smart Media in 1998 in the form of a declaratory judgment action, and as an apparent attempt to head off a lawsuit that was then being threatened by Smart Media ("SMI") against Telxon. The jury award in this case was thus actually based on SMI's counterclaims.

The operative facts of the case, as argued to the jury by Melick, are essentially as follows: Dennis Blaeuer, the founder of SMI, together with his technical team invented and developed a product that eventually became known as the "Smart Handle," a shopping cart mounted media delivery device (advertising) for use in retail grocery stores, and began looking for a strategic partner to help manufacture and market the product in the mid-1990's. Among other things, the sum total of which are proprietary to SMI, the Smart Handle incorporates a bar code reader in the handle of a shopping cart which allows consumers to self-checkout, check prices, add up their grocery costs, and do a number of other "user friendly" things during the shopping experience. Importantly, the Smart Handle also delivers point-of-sale advertising to the consumer as the consumer scans items.

In late 1995 and early 1996 SMI was meeting with representatives Symbol Technologies about such a possible strategic partnership. Symbol, the leading manufacturer of hand-held bar code scanners in the world, was Telxon's primary competitor at that time.

In the Spring of 1996, and according to SMI documents, Blaeuer was approached by Telxon representatives who wanted to preempt SMI's potential deal with Symbol with a proposal of their own. In short, Telxon representatives told SMI that the Kroger Company (Cincinnati), one of Telxon's largest clients/customers, was on the verge of investing $50 million in new in-store self-scanning technology, and that a proposed partnership or joint venture with SMI would ideally suit it's client's needs. Telxon's proposal was to fund, develop, manufacture and co-market a final product for eventual rollout into stores, in exchange for an equity interest in SMI. SMI enthusiastically accepted Telxon's proposal, and shelved their discussions with Symbol. Preliminary deal point documents were generated and signed by Telxon in the summer of 1996, and SMI waited for the "final" closing paper work from Telxon.

The promised documents and funding, however, never came.

According to court documents over the course of a total of approximately eighteen months, a pattern developed in the dealings between Telxon and SMI wherein Telxon made repeated promises of its readiness, ability and willingness to perform its end of the deal, and then would suddenly either go silent, or make plausible excuses for its failure to perform. In each instance, SMI would threaten to go back to Symbol or seek another strategic partner, and Telxon would promise immediate funding again. Internal Telxon documents reveal that Telxon held SMI off in this way expressly for the purpose of keeping SMI away from Symbol.

Apparently, and unbeknown to SMI, Telxon either never had the cash, or could not justify to its shareholders an investment in a start-up company. This conclusion is based on the fact that, many months after promising to fund SMI, Telxon brought into the deal its own investment bankers, the Private Merchant Banking Group, and other affiliated technology distributor (Pricer) as "new white knights" to perform Telxon's end of the bargain for it. This was followed by new, "richer" promises of up to $65 million for 47 percent of SMI (never happened) and, in the end, by a promise of a half million quick investment, which also never happened.

The other possible reason behind Telxon's delays could have been that Telxon was developing a smart handle of its own, using confidential information gleaned from its negotiations with SMI.

In this vein, after the parties' deal had broken off in the Spring of 1997, a Telxon representative told William Dupre, an individual counterclaimant in the case, that Telxon was going to "go ahead" with the development of the Smart Handle "with or without" SMI. In fact, Symbol Technologies now has a product almost identical to the Smart Handle, according to a report in the Akron Beacon Journal.

Telxon was and has for many years been represented by the Cleveland law firm of Goodman, Weiss, Miller LLP. According to public documents, one of the firm's principals, Robert Goodman, has been on Telxon's Board of Directors for many years, and has also personally consulted to the company. Lead trial counsel for Goodman, Weiss was firm partner Steven Miller, Esquire, who was assisted by associate attorneys James Wertheim and Kimberly Smith.

The Goodman firm was contacted for this story, but informed us that Telxon would not allow them to comment on the case.

At the time that the suit was originally filed, SMI was represented by the Cleveland law firm of Keller & Kehoe, which is a boutique complex commercial litigation firm that was formed by two former litigation partners from Hahn Loeser & Parks. Melick had also worked at Hahn Loeser with Ren Keller and Bob Kehoe, and had joined them in the summer of 1999 when they opened their own firm. Prior to that, Melick himself had only lived in Cleveland since 1995, after having practiced law in Philadelphia and southern New Jersey for about six years. Although Melick initially worked on the case while with Keller & Kehoe, he had not done any work on the case since he left K&K's employ in January, 2002. At that time, Melick had opened the Cleveland office of Philadelphia-based litigation firm of Kelley, Jasons, McGuire & Spinelli. Over time, however, Melilck had become personally friendly with SMI founder Dennis Blaeuer, and the two of them kept in touch periodically while Melick worked toward running the KJMS start-up office.

After Melick had worked with the Kelley firm for about ten months, in September of 2002, Blaeuer came to Melick and asked him to get involved in the case once again as the trial approached. Melick asked the Kelley firm for permission to do so on a part-time basis, in conjunction with Keller & Kehoe, but was denied that permission. Melick had done the start-up well, and the Kelley firm's asbestos defense practice in Cleveland was taking off.

Melick had been presented with a choice-stay comfy in his asbestos practice, or take a real leap into the unknown.

Knowing that the file was enormous, and that the trial was coming up in less than a year, Melick also knew that, if he nevertheless quit Kelley Jasons and participated in the case on his own, it would take all of his time, there was no guarantee of success, and that it could potentially cost him everything he had, including his legal career/future, together with his financial security.

Nevertheless, and driven by a strong belief in both the case and in Blaeuer, he left the Kelley firm and agreed to participate in the case. Keller & Kehoe subsequently withdrew as counsel of record for SMI, but continued representing individual counterclaimant William Dupre, while Melick took the entire SMI case himself as in-house trial counsel to SMI.

When you think of potentially huge, high profile, big-money corporate cases, you hardly think of two or three attorneys doing all of the work. The Goodman firm, for its part, staffed the case with three attorneys, two paralegals and at least one audio-visual technician during the entire course of the trial, with the three attorneys sharing the roles of opening and closing, direct examination and cross-examination of the twelve live witnesses, and reading into evidence the deposition transcripts of another half-dozen witnesses. This, all for a case that Telxon described as being valued at "defense cost(s)".

Although SMI's counterclaims encompassed several causes of action against Telxon, Melick decided early on to focus the jury primarily on only one ? promis-

sory estoppel. "I wanted to keep it simple, both for myself and for the jury" he said. "I decided that I could get all of the facts out to the jury by telling a story of promissory estoppel, and then let the jury decide if the facts of that story also rose ? in their opinion ? to the level(s) of negligent misrepresentation, intentional misrepresentation or fraud on the 'bad conduct' continuum".

Notably absent from the case were more complex causes of action, including patent infringement, which SMI decided was/were to be more appropriately pursued later in different venues.

"I put this case together without very much help, but with as much hands hands-on help from the client as logistics would permit", said Melick. That included doing all of his own research, typing, copying, binding, and exhibit preparation, all with limited resources or resources (of SMI) that were hundreds of miles away. Without a secretary, he eventually have the reception staff at the Quaker Square Marriott helping him during the course of the trial with copying and faxing, and persuaded them to essentially let him take over their business office in the evenings after trial.

Going into the trial, Melick was questioned by friends, family and colleagues about going it alone, and about potentially sacrificing his legal career and/or financial stability on a perceived long shot. "I was told by many people that I couldn't, and should not, do it," he said. At times, Melick admits that the sacrifices he was personally making to get the case to trial did not seem "worth it", and he often questioned his own judgment in that regard.

Finally, and on August 25th, the trial began. When questioned by Telxon's counsel upon his entering the courtroom ? accompanied only by his client ? whether or not Melick was going to "seek a continuance" of the trial, Melick responded negatively, stating "we've all lived with this case long enough; let's get it going".

During the course of the trial Telxon used the most modern electronic trial technology available to showcase its evidence, while Melick used blown up copies of documents as exhibits mounted to poster board, together with chalk and a blackboard.

The trial concluded on Thursday, September 4th, and the eight-member jury was charged the next day. Immediately after the jury was charged, Melick went out for a long-overdue jog around the University of Akron track to "relax". Nearly as soon as he got there, however, he received a call from Judge Williams' bailiff, who told him that the jury wanted to take the jury instructions into the deliberation room with them. Approximately one half hour later, and while still jogging, Melick got another call from the bailiff inquiring whether or not the jury could have a calculator, which they had requested.

Melick called Blaeuer. Although, of course, no one knew what was going on in the jury room, Melick said to his client, "you don't need a calculator to calculate zero."

What the jury did come up with, on Wednesday, September 10th, was an award verdict in favor of SMI and against Telxon in the amount of $212,340, 880.00. The jury also awarded individual counterclaimant Bill Dupre $6.2 million in his own right.

Symbol Technologies held a press conference the very next day, denouncing the jury award and opining ? very defensively ? that it was not legally responsible for any part of the award against its wholly-owned subsidiary.

For several months after the jury verdict, there were a flurry of post- trial motions filed with the Court, including Telxon's motions for a new trial, a judgment notwithstanding the verdict and for remittitur. For seven months, no word from the Court.

In the meantime (which is a different story), Symbol settled and paid over $35 million in a class action suit against Telxon in New York State. That could mean, to Melick, one of two appositive things-Symbol acknowledged ownership of Telxon's prior obligations, and was ready to settle; or, that was it for Telxon paying anyone anything. Of course, no one on the other side was talking.

Finally, Judge Williams signed and sent out his order on May 6th. The Williams Judgment Entry signed off on the jury verdict for the entire amount. It dismissed all motions for a new trial, remittitur, judgment n.o.v, and all other motions made by Symbol and Telxon (except that the Court did deny prejudgment interest). It also held Symbol liable for the entire amount, even though Smart Media had earlier dismissed its claim against Symbol. And the Judgment Entry apparently invalidated the entire concept of a "reverse triangular merger" (yet another story) letting an acquiring company off the hook for the liabilities of the acquired company by structuring a merger through a holding company.

Symbol and Telxon immediately filed a motion to stay execution with the Ohio Ninth District Court of Appeals. The Court of Appeals ordered a Stay-as long as Symbol and Telxon came up with a $50 million bond. This is yet another story, but, besides the largest jury award in County history, Symbol agreed to post the largest appeal bond in the county's history.

Now the case moves to the Appellate Court. Round Two commences, Symbol continues to sell a similar product to Smart Media's and the Smart Media legal team, slightly expanded, and Symbol's legal team, greatly expanded to include several Akron law firms, which is a different story, goes back to work.

The $50 Million Appeal Bond

The largest jury award in area history certainly needed the largest appeal bond in memory, and Judge Williams did not disappoint. Although there was a little tussle along the way, Telxon and Symbol have posted a $50 million bond in the case, along the way earning Summit County a $50,000 fee.

Although, during the first official conference following the jury verdict, Judge Williams had indicated to all parties that an appeal bond was an issue that needed to be discussed, nevertheless there was no mention of such a bond in his Judgment Entry. As it turned out, the money posted by the appealing party was in the form of cash. $50 million.

The Smart Media legal team, which has begun to expand to meet the necessities of the appellate process, was in a position to simply execute on the judgment had Telxon and Symbol not acted immediately after Williams signed the Order. With no recourse back to the trial court, Symbol and Telxon immediately filed a Motion with the Ninth District Court of Appeals to stay execution on the judgment, dated May 7th. The Motion was signed by trial attorney Steven Miller, and by Orville Reed of Akron's Buckingham, Doolittle & Burroughs and by two Jones, Day attorneys, among others, on behalf of Telxon. Attorneys John C. Fairweather and Clair E. Dickinson, from Brouse McDowell, signed on behalf of Symbol. The memorandum in support of the Motion runs eight pages.

On May 10th, the appellate court ruled that, "[e]xecution on the trial court's judgment and all proceedings in aid thereof shall be automatically stayed upon the posting of a surety bond in the amount of $50 million with the clerk of the trial court."

That was an amount of money that the Clerk of Courts for Summit County, Donna Zaleski, had never seen before. It was, in her words, "amazing."

Back to Judge Williams' court they went. Meetings to discuss the format that the appeal bond (or other security) would take the morning of May 11th. In what may have been a surprise (but no one is really talking), Symbol had simply agreed to post the entire maximum bond amount -- $50 million -- in cash. There was no effort to change the amount. The only question would be what form that security would take. Discussions continued at the courthouse and via teleconference for several days.

Posting a bond actually wound up being the least palatable way to effectuate the appeal security requirements. Discussions showed that the premium for such a bond would have been $1 million, the appellants would have had to post $50 million cash as collateral, and there would be no interest earned on the money.

Another issue that needed to be determined was the Clerk of Courts' fee. By statute, said Zaleski, the Clerk would be entitled to poundage on the security in the amount of 2 percent of the first $10,000 and 1 percent thereafter. "It would have been $500,100 under the statute," said Zaleski. Judge Williams told Zaleski to make a deal with Symbol and Telxon, and warned her that, if she couldn't come to an agreement with them, she ran the risk of not receiving anything. "I worked the numbers over the weekend," she said. "I took it to a half percent, then to a quarter percent, which was still $125,000," an amount that Zaleski still felt was more than the parties would agree to.

On the morning of May 17, Zaleski and Fairweather began their negotiations (Fairweather declined comment on this conversation and on the entire case). Zaleski said that she offered the ¼ percent, and was met with silence. Then she asked what Fair-weather would find acceptable, and he replied with a figure of $50,000. "That was the amount that I had thought would be reasonable, when I was thinking about it over the weekend," said Zaleski. The two agreed on that amount, and Williams put his Order on later that afternoon.

The money, said Zaleski, "was the largest in my tenure here. It was a pretty good amount, and it was better, I thought, than nothing," which was what Williams had indicated may have happened without the agreement. The money is earmarked for the County's General Fund.

The cash itself, all 50 million, was wired into a special account set up at National City Bank. The special account will act more as a trust than as a bond. Ant settlement or other financial distribution will come out of this money first, and all interest will be redeposited. The money is also exempt from bankruptcy, and no liens can be placed on it.

Attorneys for Telxon and Symbol had no comment on any of these proceedings and Smart Media attorneys were limited in what they would say.