The *Greenemeier* Ghost

By Henry Miniter

This article is an overdue obituary for the decision in *Greenemeier by Redington v. Spencer*.[1] This opinion held that when one defendant settled in a multi-defendant civil action, the fact of the settlement but not the amount was to be made known to the jury. Unfortunately, this ghost still haunts the courthouses of Colorado. This article exorcises this ghost from our cases.

Before the advent of pro rata liability, a settlement with one defendant in a multi-defendant civil action operated as a set-off to a jury verdict.[2] Based on that fact, the Colorado Supreme Court held that: absent special circumstances, the fact of settlement, but not the amount, should be made known to a jury.[3] Then pro rata liability became law, the legal landscape shifted, and the logic of *Greenemeier* died, or should have. Unlike the ghost king in Shakespeare's Hamlet, *Greenemeier* has no useful information to impart.

The Colorado Supreme Court noted the death of the logical underpinnings of *Greenemeier* in *Zufelt.* In that case, the Colorado Supreme Court agreed with a unanimous decision by the United States Supreme Court, which held that the liability of non-settling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, rather than by giving non-settling defendants credit for the dollar amount of settlement.[4] The Colorado Supreme Court reasoned that the amount of money collected by an injured party from a settling defendant was of no concern to a non-settling defendant.[5] Specifically, the Colorado Supreme Court held that in all instances in which a settlement agreement is reached with one or more parties in order to avoid exposure to liability at trial, the trial verdict shall be reduced by the amount equal to the cumulative percentage of fault attributed to the settling nonparties, regardless of the amount of the settlement.[6] This logic eliminates the rationale for the *Greenemeier*, rule because it solidifies pro rata liability in lieu of a set-off. If there's no set-off, there is no purpose in telling the jury of a settlement.

But, for unarticulated reasons, the opinion fails to specifically address *Greenemeier,* which may explain the confusion that has allowed this anachronistic idea to skulk about and cast a specter of uncertainty over civil actions.

The narrow use of *Greenemeier*, (simply allowing a jury to learn of the fact of settlement but not the amount) misses a basic tenet of the opinion. The justices, in *Greenemeier,* contemplated jury instructions which advised a jury that:

> It must return an award that fully compensates the plaintiff for all of his injuries without regard to the fact that the plaintiff may have received compensation from others as a result of the settlement. Finally, the jury should be instructed that "when the sum representing full compensation is returned, it will be apportioned as the law dictates among the defendant or defendants found responsible by the jury and the other persons who have made settlements with the plaintiff."[7]

These contemplated jury instructions don't exist as pattern instructions. If they did, such jury instructions would be invalid under the law of pro rata liability and would fail to accurately reflect the law regarding post-verdict apportionment.

The Justices never intended for a trial court to apply the rule of *Greenemeier*, so narrowly. Instead, they wrote the rule to operate as one part of the concept of set-off. They wanted a jury to understand, through the jury instructions, that a trial court would apportion the verdict; that a trial judge would prevent unjust enrichment. Through the instructions, a jury would presumably understand that the plaintiff, by operation of law, sought to be made whole, nothing more. Instead of this intended effect, its modern use (without the set-off rule and the attendant jury instructions) leads the jury to believe that the plaintiff seeks a double recovery. A result never contemplated by the Colorado Supreme Court at the time they issued the opinion.

The Colorado Court of Appeals, in 1995, specifically rejected the idea that a trial court should instruct a jury in conformance with *Greenemeier*.

> We reject the Conference's argument that the jury should have been instructed in accordance with *Greenemeier v. Spencer,* 719 P.2d 710 (Colo.1986). That case was decided prior to the present statutory scheme relating to apportionment of damages with designated non-parties and contributions among

joint tortfeasors. *Winkler v. Rocky Mountain Conf. of United Methodist Church*, 923 P.2d 152, 162–63 (Colo. App. 1995).

Yet, some courts continue to breathe life into the ghost, to the detriment of justice.

The *Greenemeier* threat discourages settlement, it sews uncertainty. It threatens a trial on prejudice rather than a trial on the merits. Pro rata liability compels a defendant to put in evidence of the liability of a settling defendant, a designated non-party. But *Greenemeier* allows a defendant to cast aspersions without relevant facts in evidence. "*The plaintiff has money already, the plaintiff settled with_____...etc.*" A defendant can sidestep: the designation of a non-party, the prima facie case needed to prove a non-party claim, a motion for a directed verdict on the non-party claim, and any associated post-trial motions. Instead of litigating the merits of a non-party claim, a defendant can assert the fact of settlement at every stage of a trial, draw inferences from it in their closing argument, and invite a verdict on an improper basis.

In the present day, when a trial judge resurrects this dead precedent, jurors hear of a settlement of some unspecified amount and assume that some exorbitant amount of money has already changed hands (insert latest headline verdict here). This irrelevant half-truth makes the plaintiff seem greedy or even vindictive. The Plaintiff(s) then suffer an unfair prejudice which can predetermine the outcome. The jurors, operating on partial information, come to believe that the plaintiff is proceeding unjustly.

Here's one example of such dialogue during jury selection:

Juror # 1: Didn't he already sue the other dentist?

Attorney: Yes.

Juror # 1: And he got money for that?

Attorney: He settled with the other dentist.

Juror # 1: Okay. So I would say no.

Attorney: No to?

Juror # 1: Any more.

Attorney: Okay. And that's without hearing any evidence at all?

Juror # 1: He's already got money.

Attorney: Okay. Anybody else feel the same as she does?

Juror # 2: I do to a certain degree.

The unfair prejudice is obvious. The jury hears evidence unconnected to any claim or defense at issue and receives no guidance from the court on what they should do with the information. Under Colorado law, there is no proper application of the fact of settlement because the law of pro rata liability controls. So, the jury is left to unjustly speculate about the amount of settlement, the culpability of the settling defendant with no evidence presented, the motives of the settling defendant, and the incentives of the plaintiff.

Hopefully, this article proves helpful in burying this dead precedent. ▲▲▲

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Endnotes:

[1] *Greenemeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986).

[2] *Smith v. Zufelt*, 880 P.2d 1178, 1182 (Colo. 1994.

[3] *Greenemeier*, 719 P.2d at 713.

[4] *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211 (1994)

[5] *Zufelt* 880 P.2d at 1188.

[6] *Id*. at 1178.

[7] *Greenemeier*, 719 P.2d at at 716