

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

Docket No. 2259 EDA 2007



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**DENISE COOL, Personal Representative  
of the Estate of KIMBERLY COOL,  
Plaintiff-Appellee,**

**vs.**

**GENERAL MOTORS CORPORATION, CHAMPION CHEVROLET-  
MAZDA,  
Defendants-Appellees,**

**and**

**CHARLES RICHARD ALTEMOSE,  
Defendant-Appellant.**

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**BRIEF OF APPELLEE GENERAL MOTORS CORPORATION**

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*Appeal from the Order of the Court of Common Pleas of Philadelphia County  
July 2004 Term, No. 2291, Entered on May 14, 2007*

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*Of Counsel:*

Eileen Penner  
(motion for admission *pro hac vice* pending)  
Kevin Ranlett  
(motion for admission *pro hac vice* pending)  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, DC 20006  
(202) 263-3000

William J. Ricci  
Attorney Identification No. 27708  
LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO  
190 North Independence Hall West  
Suite 500, 6th and Race Streets  
Philadelphia, PA 19106  
(215) 627-0303

*Counsel for Appellee General Motors Corporation*

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## COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

After a one-car accident in which the single passenger died, the passenger's estate sued the driver for negligence and the manufacturer of the car for negligent and defective design. The manufacturer asserted a cross-claim for contribution against the driver on the ground that he was negligent and a joint tortfeasor. Before trial, the plaintiff's estate executed a *pro tanto* release of its claims against the driver. Although the driver pleaded the existence of the release in an amended new matter and showed the release to the trial judge, his counsel neither sought to introduce the release into evidence nor filed a dispositive motion invoking it as a ground for a judgment in his favor prior to the verdict. At the close of the plaintiff's evidence, the driver consented to entry of a directed verdict against him. The jury found the driver solely responsible for the accident and awarded the passenger's estate \$2,000,000 in damages. Citing the release, the driver then filed a motion for judgment notwithstanding the verdict, which the trial court denied because the driver's counsel had stated he had no objection to the entry of directed verdict against him.

(1) Did the trial court abuse its discretion in holding that the driver had forfeited his right to seek judgment notwithstanding the verdict on the basis of the release in his favor? *Answer below: No.*

(2) In the event of a retrial, would the manufacturer be precluded from asserting its right to contribution from the driver? *Not addressed below.*

## COUNTER-STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

A trial court's decision whether to grant judgment notwithstanding the verdict ("JNOV") may be reversed only if the appellate court "find[s] an abuse of discretion or an error of law that controlled the outcome of the case." *Campisi v. Acme Markets*, 915 A.2d 117, 119 (Pa. Super. 2006) (quoting *Janis v. AMP, Inc.*, 856 A.2d 140, 143-44 (Pa. Super. 2004) (quoting in turn *Capital Care Corp. v. Hunt*, 847 A.2d 75, 81-82 (Pa. Super. 2004))). When an appellant contends that he was entitled to judgment as a matter of law, the appellate court must conclude that, "even with all factual inferences decided adverse to the [appellant], the law nonetheless requires a verdict in his favor." *Id.*

The interpretation and effect of a release are questions of law that are reviewed de novo. *Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth.*, 916 A.2d 1183, 1188 (Pa. Super. 2007). The trial court's determination that an issue has been waived, however, is a factual one that is reviewed only for an abuse of discretion. *Humphreys v. DeRoss*, 737 A.2d 775, 781 (Pa. Super. 1999), *rev'd on other grounds*, 567 Pa. 614, 790 A.2d 281 (2002). "An abuse of discretion is not merely an error of judgment." *Id.* at 776. An abuse of discretion will be found only "if, in reaching a conclusion, the [trial ] court over[ode] or misapplie[d] the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias, or ill-will." *Id.*

The "scope of review with respect to whether JNOV is appropriate is plenary, as with any review of questions of law." *Rohm & Haas Co. v. Cont'l Cas. Co.*, 566 Pa. 464, 471, 781 A.2d 1172, 1176 (2001). But the scope of review of the trial court's evidentiary findings is limited: the reviewing court defers to the trial court's weighing of the evidence. *Birt v. Firstenergy Corp.*, 891 A.2d 1281, 1285 (Pa. Super. 1996).

## COUNTER-STATEMENT OF THE CASE<sup>1</sup>

According to plaintiff-appellee's complaint and the undisputed evidence at trial, late at night on January 25, 2003, Kimberly Cool was riding in the front passenger seat of her 1999 Chevrolet Cavalier Z-24 as Charles Richard Altemose drove it down Hanover Street in Oxford Township, Pennsylvania. R.5a (Compl. ¶¶ 7-9); R24b-26b, 30b-31b (Tr. 12/13/06 PM, at 11, 15, 18, 54-55).<sup>2</sup> Altemose was speeding and drunk. R.32a (Compl. ¶ 145); R.30b, 32b (Tr. 12/13/06 PM, at 54, 62). He lost control of the car, which veered off the road and hit a series of trees. R.5a (Compl. ¶ 10-11); R.27b-29b, 31b (Tr. 12/13/06 PM, at 26, 32-33, 55). Cool died in the accident. R.5a (Compl. ¶ 14); R.24b, 26b (Tr. 12/13/06 PM, at 11, 18).

In July 2004, Cool's mother, plaintiff Denise Cool, filed this wrongful death and survival action against Altemose, alleging that he negligently caused Cool's death. R.32a-34a (Compl. ¶¶ 144-54). Ms. Cool, the Plaintiff-Appellee, also named General Motors Corporation ("GM"), the manufacturer of the car, as a defendant, asserting strict liability and negligence counts and alleging that the design of the car seats in the Cavalier was not crashworthy. R.10a-21a (Compl. ¶¶ 51-103). In turn, GM asserted a cross-claim against Altemose for contribution or indemnification in the event that the jury would find GM liable. R.22b-23b (GM Answer ¶¶ 165-68).

On November 1, 2004, the plaintiff executed a "PRO TANTO JOINT TORTFEASOR RELEASE" in Altemose's favor in exchange for the stated consideration of "\$150,000." R.40a-41a (Exhibit to Altemose New Matter). The release states that it "releases and discharges

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<sup>1</sup> GM agrees with Altemose's procedural statement at App. Br. 1, 3-4.

<sup>2</sup> Because Altemose filed the reproduced record before giving GM an opportunity to designate the materials that it wanted to be included, as Rule of Appellate Procedure 2154 requires, GM has included those materials in a supplemental reproduced record.

CHARLES RICHARD ALTEMOSE from all liability for any past, present or future claims arising out of the January 25, 2003 automobile accident which caused fatal injuries to Kimberly Louise Cool and which is the subject matter of a lawsuit pending in the Philadelphia County Court of Common Pleas.” *Id.* The release specifies that if Altemose “is judicially determined to be a joint tortfeasor, sharing joint and several liability” for any judgment against GM, “Cool’s recovery on the judgment shall be reduced only by \$150,000, the consideration paid for this release, without regard to any determination concerning pro rata shares of liability.” *Id.*

The case proceeded to trial in December 2006. The undisputed evidence at trial established that Altemose was speeding and drunk when the one-car accident occurred. R.24b–26b, 30b–32b (Tr. 12/13/06 PM, at 11, 15, 18, 54–55, 62). Altemose’s counsel waived any opening and closing argument and rested rather than presenting any testimony or other evidence to the jury. R.34b, 38b (Tr. 1/8/07 PM, at 77, 156). Toward the end of the trial, on January 4, 2007, Altemose filed an Amended New Matter that raised the release and asserted that it constituted an affirmative defense to plaintiff’s claims against him. R.37a (Altemose Amended New Matter ¶¶ 162–64). The next morning, Altemose’s counsel attempted to place the release into the record outside the presence of the jury, but the trial court delayed doing so in order to give GM’s counsel an opportunity to review the release. R.55a–56a (Tr. 1/5/07 AM, at 4–5). That afternoon, after all parties indicated that they had no objection, the trial court permitted the release to be entered into the record as an exhibit outside the presence of the jury. R.57a (Tr. 1/5/07 PM, at 46).

GM moved for a directed verdict against Altemose following the close of the evidence, arguing that the uncontradicted evidence showed that Altemose’s negligence (his speeding and drunk driving) caused Cool’s death. R.58a (Tr. 1/8/07 PM, at 83). Altemose’s counsel indicated that he had “[n]o objection, other than the exhibit I raised.” *Id.* Rather than rule on the motion

immediately, the trial court conducted a colloquy on the effect the motion might have on the proposed verdict form. R.35b-37b (Tr. 1/8/07 PM, at 83-85). The trial court then again asked whether anyone had "any objection if [the court] grant[ed] the motion for directed verdict with respect to Altemose at this time." R.37b (Tr. 1/8/07 PM, at 85). Altemose's counsel responded "[n]o, your honor." *Id.* Accordingly, the trial court stated that "since there is no opposition, I will grant the motion for directed verdict against Charles Richard Altemose." *Id.*

On January 10, 2007, the jury returned its verdict in favor of GM and against Altemose, deeming him to be solely responsible for Cool's death. R.39b-41b (Executed Verdict Slip, at 1-3). The jury awarded the plaintiff \$2,000,000 in damages from Altemose on that verdict. R.41b (Executed Verdict Slip, at 3). Altemose filed a motion for JNOV, arguing that the release bars the judgment against him. R.44a-45a (Altemose JNOV at 1-2). At the hearing on that motion, Altemose's counsel emphasized that the "judgment" from which he sought relief was "between the plaintiff and Altemose, not [him and] codefendant [GM]." R.43b (Tr. 5/9/07, at 66). To allay the trial court's concern that granting Altemose the JNOV he requested might prejudice GM in its ability to recover against Altemose in contribution if the verdict for GM were overturned and if GM were found liable on retrial, Altemose explained that granting the requested post-trial relief would not "preclud[e] any cross claim or some other type of action by [GM] against Altemose." R.45b (Tr. 5/9/07, at 68). Judge Sheldon Jelin nonetheless denied Altemose's motion (R.49b (Order of 5/9/07)), explaining in his Pa.R.A.P. 1925(a) opinion that Altemose's failure to object to the entry of directed verdict against him forfeited any entitlement to JNOV. R.60a (Op. at 2). After the plaintiff requested the entry of a \$2,000,000 judgment on the verdict against Altemose (R.52a-53a (Notice of Praecipe for Final Judgment)), Altemose appealed (R.50b-75b (Altemose Notice of Appeal)).

## SUMMARY OF ARGUMENT

Altemose has forfeited the right to the relief he seeks. The plaintiff released her claims against Altemose more than two years before trial, but he waited to mention that fact until the trial's final days. Although he then pleaded the existence of the release in an amended new matter and showed a copy of it to the trial judge outside the presence of the jury, he never sought to introduce it (or anything else) into evidence so as to provide the jury some basis for not awarding the plaintiff a substantial verdict against him. His counsel also failed to file a motion for summary judgment or directed verdict, or any other dispositive motion invoking the release as a bar to judgment on the plaintiff's claims against him until after the jury had awarded a verdict against him. The post-trial motion seeking a JNOV that his counsel filed—the denial of which Altemose appeals here—came too late. Rule of Civil Procedure 227.1(b) declares that post-trial relief such as a JNOV is available only if the grounds for it were raised “in pre-trial proceedings or by \* \* \* appropriate method at trial.” Because Altemose's counsel failed to seek judgment on the plaintiff's claims against him before the verdict or to present the release to the jury, the trial court did not abuse its discretion in ruling that Altemose had forfeited the right to obtain such a judgment post-trial.

If the Court nonetheless chooses to relieve Altemose of his forfeiture, the Court should clarify that granting Altemose JNOV on the plaintiff's claims against him would not undermine GM's cross-claim against Altemose for contribution if plaintiff were to prevail in both her separate appeal of the verdict for GM and on retrial of her claims against GM. Under the Uniform Contribution Among Joint Tortfeasors Act, which Pennsylvania has adopted, the plaintiff's *pro tanto* release of her claims against Altemose does not bar a joint tortfeasor's claim against him for contribution. Moreover, Altemose has consistently conceded, and continues to concede on appeal, that a directed verdict was properly entered against him on the question whether he was

liable for Cool's death. *See* page 12, *infra*. Even without those concessions, the evidence at trial, which Altemose could not and did not refute, established that Altemose negligently caused the accident in which Cool died by driving drunk and speeding. Because that unrefuted evidence and Altemose's concession that entry of a directed verdict was proper unequivocally established that Altemose is a tortfeasor, GM would be entitled to contribution if it were found to be a joint tortfeasor in a retrial and the plaintiff were to collect from GM a greater share of the common liability than the jury attributed to it.

If the Court were to conclude that granting Altemose the JNOV he seeks on Cool's claims against him would preclude GM from obtaining contribution in the event of a retrial (which, as Altemose himself argued below, it should not), that prejudice to GM's contribution rights is another reason to affirm the judgment below. Because the case law is well-established that Altemose's release does not bar contribution, he should not be permitted to avoid contribution by using the release to obtain a judgment that would somehow bar contribution.

#### ARGUMENT

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING AL-  
TEMOSE JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE HE  
FAILED EITHER TO REQUEST RELIEF BEFORE THE JURY REACHED ITS  
VERDICT OR TO ATTEMPT TO PLACE THE RELEASE INTO EVIDENCE  
FOR THE JURY'S CONSIDERATION.**

Altemose attacks the trial court's ruling that he forfeited entitlement to JNOV on the basis of the release in his favor by failing timely to raise the issue. Far from being an abuse of discretion, however, that ruling was correct. Rule of Civil Procedure 227.1(b) bars an award of post-trial relief, such as the judgment notwithstanding the verdict that Altemose requested, unless the grounds for that relief were raised "in pre-trial proceedings or by \* \* \* appropriate method at trial." Altemose had ample opportunity to seek judgment on the basis of the release before the jury reached a verdict but failed to do.

Altemose obtained the release in November 2004—more than two years before trial commenced in December 2006. *See* page 3, *supra*. But Altemose failed to alert the court to the release until the closing days of the trial, when he pleaded the existence of the release in an amended new matter and showed a copy of the release to the trial court outside the presence of the jury. *See* page 4, *supra*. Not only did Altemose fail to explain why he waited so long to plead the existence of the release in his favor, he also failed to take the critical next step of filing a dispositive motion invoking the release and seeking the dismissal of the plaintiff's claims against him.

Having let slip the opportunity to file a dispositive motion, Altemose also failed to seek to introduce the release into evidence so that he could establish his affirmative defense to plaintiff's claims against him. Indeed, before the jury reached its verdict against him, Altemose presented no evidence and, as the trial court observed, "made no argument whatsoever" in his defense. R.60a (Op. at 2). Altemose's counsel waived the right to present opening and closing argument and rested rather than present a case to the jury. R.34b, 38b (Tr. 1/8/07 PM, at 77, 156). Although Altemose now claims that the "release was not admissible in evidence" (App. Br. 6), the very statute that he cites provides that releases are admissible "in an action"—such as this one—"in which final settlement and release has been pleaded as a complete defense." 42 Pa. C.S. § 6141(c) (cited at App. Br. 7 n.1).<sup>3</sup> *See also Ammon v. Arnold Pontiac-GMC*, 361 Pa. Su-

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<sup>3</sup> The other authorities that Altemose cites—*Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. 2003) and Rule of Evidence 804—are likewise inapposite because they both address the prohibition of introducing settlement negotiations into evidence for reasons unrelated to establishing that a release constitutes a complete defense to the claims at issue. *Reading Radio*, which was a lawsuit about one radio station's tortious hiring of another station's sales employees, did not involve the admission into evidence of a release of the claims in that case, but rather testimony about the defendant's settlement of a prior case, which the plaintiff likely presented in order to imply that the defendant was the sort of repeated violator for whom a large punitive award

(cont'd)

per. 409, 418, 522 A.2d 647, 652 (1987) (rejecting argument that a release “may not be admitted into evidence at trial” because the defendant alleged “that the release was a general release barring action against him”). Because Altemose did not request relief on the basis of the release until after the jury’s verdict against him, the trial court correctly refused to grant post-trial relief under Rule of Civil Procedure 227.1(b).

Moreover, that the trial court’s ruling was not an abuse of discretion follows from this Court’s decision in *Ammon v. Arnold Pontiac-GMC*, *supra*. Like this case, *Ammon* involved the driver of a car in an accident who received a release from his injured passenger. 361 Pa. Super. at 411, 522 A.2d at 648. When the passenger sued the third party in the accident and that party impleaded the driver as an additional defendant, the driver asserted the release in his answer and filed a motion for judgment on the pleadings. *Id.* The trial court never ruled on that motion, however, and the case proceeded to trial, at which the jury awarded a large verdict against both defendants and specifically held the driver to bear 60 percent responsibility for the accident. *Id.* at 411, 417, 522 A.2d at 648, 651. When the trial court denied the driver’s post-trial motion for JNOV, this Court affirmed, explaining that it “was incumbent upon [the driver] to pursue further relief after no ruling was made on his motion for judgment on the pleadings. For him to allow the entire trial to pass, without again raising the complete defense of general release until post-verdict motions, results in the waiver of the defense.” *Id.* at 418, 522 A.2d at 652. Accordingly,

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(... cont’d)

would be appropriate. *See id.* at 215–16. As for Rule of Evidence 804, it merely provides that settlement negotiations are inadmissible to prove “liability for or invalidity of the claim or its amount”—not that a party with a release covering the claims at issue cannot show it to the jury to avoid a verdict against him. Indeed, the comment to that rule explains that the rule is “consistent with 42 Pa. C.S. § 6141”—which, as discussed above, permits the introduction of a release into evidence to establish that the release constitutes a complete defense.

Altemose too should be deemed to have waived any defense afforded by his release. Indeed, because he cannot even claim that he so much as filed (let alone pursued) a motion for judgment on the pleadings, his claim that he sufficiently raised the release before the verdict is even weaker than the claim of the driver in *Ammon* that this Court rejected. The trial court's ruling that Altemose is not entitled to post-trial relief therefore was not an abuse of discretion.

**II. ALTEMOSE'S RELEASE CANNOT FORECLOSE GM'S RIGHT OF CONTRIBUTION FROM HIM.**

Altemose's failure timely to raise the release aside, the release cannot be used to interfere with GM's right to contribution from Altemose if Cool prevails in her appeal from the verdict for GM and on re-trial. It is well-established that the *pro tanto* release of one tortfeasor does not exempt that tortfeasor from contribution to joint tortfeasors. And there is no question that Altemose is a tortfeasor: he chose not to dispute the evidence presented at trial that his negligence caused the accident in which Cool died and he conceded at trial and continues to concede on appeal that the trial court properly entered directed verdict against him on liability for Cool's death on the basis of that evidence. *See* R.34b, 38b (Tr. 1/8/07 PM, at 77, 156); R.37b (Tr. 1/8/07 PM, at 85); App. Br. 5, 8. Accordingly, however the Court disposes of Altemose's appeal, the Court should clarify that Altemose is not relieved of that directed verdict establishing that he is a tortfeasor or otherwise exempted from contribution if GM is ever found to be a joint tortfeasor.

Whatever the effect of the release, it is established in Pennsylvania that it cannot bar a contribution claim against Altemose by GM. Under the Uniform Contribution Among Joint Tort-feasors Act, a "release by the injured person of one joint tort-feasor does not relieve him of liability to make contribution to another joint tort-feasor unless the release \* \* \* *provides for a reduction to the extent of the pro rata share of the released tort-feasor of the injured person's damages recoverable against all other tort-feasors.*" 42 Pa. C.S. § 8327 (emphasis added). Al-

temose's release, however, is a "pro tanto" rather than a "pro rata" release—i.e., it reduces any recovery against other joint tortfeasors only by the amount of the consideration paid for the release rather than to the full extent of Altemose's share of responsibility for Cool's death. See pages 3–4, *supra*. As the Pennsylvania Supreme Court has explained, "in a strict liability case where a settling defendant has executed a *pro tanto* release, and the amount of consideration paid for the release is less than what the jury ultimately determines to be the settling defendant's share of liability, the non-settling defendant must pay the plaintiff for this shortfall but may sue the settling defendant in contribution." *Taylor v. Solberg*, 566 Pa. 150, 158–59, 778 A.2d 664, 669 (2001); see also *Baker v. AC&S, Inc.*, 562 Pa. 290, 306 n.8, 755 A.2d 664, 672 n.8 (2000) (same).<sup>4</sup>

Thus, as Altemose concedes in his brief on appeal (App. Br. 6), his release did not free him from participating in the trial of the claims against GM. Such participation was necessary to allow the jury to determine if he and GM were joint tortfeasors and, if so, to apportion comparative liability between them in order to set the stage for any future claims for contribution.<sup>5</sup> Alte-

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<sup>4</sup> These principles also apply in crashworthiness cases. As the Pennsylvania Supreme Court has confirmed, in such a case, a strictly liable car manufacturer shares joint-tortfeasor status with any "negligent tortfeasor whose concurrent conduct also served as a substantial factor in producing the additional harm." *Harsh v. Petroll*, 584 Pa. 606, 621, 887 A.2d 209, 218 (2005); see also *McMeeking v. Harry M. Stevens, Inc.*, 365 Pa. Super. 580, 585, 530 A.2d 462, 465 (1987) ("we find the Uniform Act may properly be applied so that joint tortfeasors may obtain contribution from each other, despite the fact that the one joint tortfeasor has been found liable in negligence and the other in strict liability") (footnote omitted); *Svetz v. Land Tool Co.*, 355 Pa. Super. 230, 242, 513 A.2d 403, 409 (1986) (same).

<sup>5</sup> See *Davis v. Miller*, 385 Pa. 348, 352, 123 A.2d 422, 424 (1956) (released defendant's "continuance in the case" against the other defendant remains "necessary" to determine "whether she was a joint tortfeasor"); *Herbert v. Parkview Hosp.*, 854 A.2d 1285, 1288–89 (Pa. Super. 2004) (same); *Nat'l Liberty Life Ins. Co. v. Kling P'ship*, 350 Pa. Super. 524, 504 A.2d 1273, 1276–77 (1986) (same); see also *McMeekin v. Harry M. Stevens, Inc.*, 365 Pa. Super. 580, 593, 530 A.2d 462, 468–69 (1987) (prescribing procedure under which jury determines (1) whether product

(cont'd)

mose does not argue that the release barred the entry of directed verdict against him. To the contrary, he concedes that his counsel “could not ethically oppose GM’s Motion For A Directed Verdict against [him]” (App. Br. 5), presumably because the evidence that Altemose’s negligence caused the accident in which Cool died was unrefuted. The directed verdict establishes that Altemose is a tortfeasor.

Even without Altemose’s concessions on appeal, the trial court’s entry of directed verdict against him should be sustained. As the trial court observed (R.60a (Op. at 2)), in direct response to the court’s inquiry, Altemose’s counsel waived any objection to the directed verdict (R.37b (Tr. 1/8/07 PM, at 85)). Moreover, even if Altemose’s counsel had objected to the directed verdict, a reasonable jury would have had no basis to find in Altemose’s favor because he waived the opportunity to present any argument or evidence (R.34b, 38b (Tr. 1/8/07 PM, at 77, 156)) that might rebut the showing (R.24b–31b (Tr. 12/13/06 PM, at 11, 15, 18, 26, 32–33, 54–55, 62)) that he had negligently caused Cool’s death through his drunk driving and speeding.

In any event, because Altemose does not dispute that he was properly determined to be a tortfeasor, and the *pro tanto* release of plaintiff’s claims does not bar claims for contribution, the Court should emphasize that GM’s right to contribution in the event of a retrial will not be affected by the Court’s resolution of Altemose’s appeal. To begin with, Altemose took the position below that granting his JNOV would not “preclud[e] any cross claim or some other type of action by [GM] against Altemose” in the event of a retrial. R.45b (Tr. 5/9/07, at 68).

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(... cont’d)

manufacturer and negligent third party are “joint tortfeasors,” (2) the “amount of damages on the common liability,” and then, (3) “by means of special interrogatories, the percentage share of [liability of] each to satisfy counts \* \* \* requesting contributions”).

Moreover, because plaintiff's release of her claims against Altemose does not bar GM's right to contribution, neither should a judgment on the basis of the release. A joint tortfeasor's right to contribution is distinct from the underlying plaintiff's right to recover damages. As the Pennsylvania Supreme Court has put it, "[c]ontribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done." *Puller v. Puller*, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955). Thus, the culmination of a tortfeasor's release into a judgment in his favor on the plaintiff's claims against him does not protect him from making contribution to any joint tortfeasors. Indeed, even tortfeasors against whom plaintiffs cannot recover by reason of other affirmative defenses may not avoid contribution claims. *See id.* (contribution permitted even though plaintiff's recovery barred by inter-spousal immunity); *Kovalchik v. B.J.'s Wholesale Club*, 774 A.2d 776, 778 (Pa. Super. 2001) (noting in dicta that a bar on a plaintiff's "direct recovery against" one joint tortfeasor because of "untimely joinder \* \* \* does not exclude the potential for contribution or indemnification by [that tortfeasor] to [other joint tortfeasors]"); *Oviatt v. Automated Entrance Sys. Co.*, 400 Pa. Super. 493, 500, 583 A.2d 1223, 1227 (1990) (explaining that "[i]t is well settled that a joint tort-feasor's right to contribution is distinct from the original action," and so "the statute of limitations applicable to [the plaintiff's] underlying claim \* \* \* has no effect on [the original defendant's] ability to enforce a contribution claim against them"). Accordingly, the Court should clarify that if plaintiff prevails in both her separate appeal and on retrial and collects from GM a greater share of the judgment for which GM and Altemose bear joint and several liability than apportioned to GM by the jury, GM would be entitled to recover contribution from Altemose as a joint tortfeasor.

If the Court were to conclude, however, that the JNOV would preclude GM from obtaining contribution in the event of a retrial (which it should not), that prejudice to GM's contribu-

tion rights provides an independent basis for affirming the judgment below. Because Altemose's release does not bar contribution, he should not be permitted to avoid contribution by using the release to obtain a judgment that would bar contribution. Indeed, to do so would flatly contradict Altemose's representation below that the JNOV would not bar contribution. *See* page 12, *supra*.

### CONCLUSION

GM respectfully requests that the Court affirm the judgment of the Court of Common Pleas. If the Court decides to reverse the judgment below, GM respectfully requests that the Court clarify that granting Altemose the relief he seeks would not prejudice GM's contribution rights against him should a retrial be ordered on other grounds.

Respectfully submitted,

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William J. Ricci  
Attorney Identification No. 27708  
LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO  
190 North Independence Hall West  
Suite 500, 6th and Race Streets  
Philadelphia, PA 19106  
(215) 627-0303

*Of Counsel:*  
Eileen Penner (motion for admission *pro hac*  
*vice* pending)  
Kevin Ranlett (motion for admission *pro hac*  
*vice* pending)  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

**PROOF OF SERVICE**

I hereby certify that I am this day serving two copies of the Brief and Supplemental Reproduced Record of Appellee General Motors Corporation, upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by First Class Mail addressed as follows:

William A. Atlee, Jr., Esquire  
Jaime D. Jackson, Esquire  
Atlee, Hall & Brookhart, LLP  
8 North Queen Street  
P.O. Box 449  
Lancaster, PA 17608-0449  
(717) 393-9596  
Attorneys for Plaintiff-Appellee

Jonathan D. Herbst, Esquire  
Michael P. McKenna, Esquire  
Margolis Edelstein  
The Curtis Center – Fourth Floor  
Independence Square West  
Philadelphia, PA 19106  
(215) 922-1100  
Attorney for Defendant-Appellant,  
Charles Richard Altemose

LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO

By: \_\_\_\_\_



William J. Ricci, Esquire (PA. I.D. 27708)  
190 North Independence Mall West  
Suite 500, 6th and Race Streets  
Philadelphia, PA 19106  
(215) 627-0303  
Attorney for Appellee,  
General Motors Corporation

Dated: December 13, 2007

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