PREPARED BY THE COURT

PAUL MASSEY, Plaintiff, v. UNITED PARCEL SERVICE, INC., NILSON VALDEZ, RYDER INCORPORATED, and/or "JOHN DOES 1-10 (ficticious names), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY Docket No.: BER-L-6408-15 CIVIL ACTION **ORDER**

FILED
APR 13 2018
GREGG A. PADOVANO, J.S.C.

THIS MATTER having been brought before the court by way of the following three motions filed by Ansa Assuncao, LLP and Mintzer Sarowitz Zeris Ledva & Meyers, LLP, counsel for defendants United Parcel Service, Inc., Nilson Valdez, and Ryder Truck Rental, LLC i/p/a Ryder Incorporated (collectively "Defendants"): 1) motion for summary judgment seeking dismissal of plaintiff's complaint; 2) motion for summary judgment of plaintiff's punitive damages and direct liability claims; and 3) motion for leave to file an amended answer to plaintiff's complaint. Opposition for each motion was submitted by Lynch Lynch Held Rosenberg, P.C., counsel for plaintiff Paul Massey ("Plaintiff"). Oral argument was conducted and the court considered all documents submitted in support of and in opposition to the motions and good cause having been shown and for the reasons set forth further and identified within the rider attached hereto;

IT IS ON THIS 13th DAY OF APRIL 2018;

ORDERED that Defendants' motion seeking summary judgment dismissing Plaintiff's complaint with prejudice is **GRANTED**; and it is further

ORDERED that Defendants' motions seeking partial summary judgment dismissing Plaintiff's punitive damages and direct liability claims and motion for leave to file an amended answer are moot and are therefore **DISMISSED**; and it is further

ORDERED that a true copy of hereof shall be served upon all counsel of record electronically via eCourts Civil.

GREGG A. PADOVANO, J.S.C.

(X) Opposed

MASSEY
v.
UNITED PARCEL SERVICE, INC., NILSON VALDEZ and RYDER INCORPORATED

Docket No.: BER-L-6408-15

RIDER TO ORDER DATED APRIL 13, 2018[1]

Before the court are the following three motions filed by Ansa Assuncao, LLP and Mintzer Sarowitz Zeris Ledva & Meyers, LLP, counsel on behalf of defendants United Parcel Service, Inc. ("UPS"), Nilson Valdez ("Valdez"), and Ryder Truck Rental, LLC i/p/a Ryder Incorporated ("Ryder") (collectively "Defendants"): 1) motion for summary judgment seeking dismissal of plaintiff's complaint; 2) motion for summary judgment of plaintiff's punitive damages and direct liability claims; and 3) motion for leave to file an amended answer to plaintiff's complaint. Opposition for each motion was submitted by Lynch Lynch Held Rosenberg, P.C., counsel for plaintiff Paul Massey ("Plaintiff"). Oral argument was conducted and the court has considered all documents submitted in support of and in opposition to the motions.[2]

This matter arises from a motor vehicle accident which occurred on December 23, 2014 in Elmwood Park, New Jersey involving an automobile operated by Plaintiff and a tractor-trailer operated by and/or on behalf of Defendants (the "Accident"). Plaintiff filed a complaint on July 13, 2015 seeking damages resulting from the Accident. The undisputed facts presented reveal that Plaintiff was intoxicated at the time of the Accident. Plaintiff's own toxicology expert, John Brick,

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[1] Not for publication without the approval of the committee on opinions (See R. 1:36-1).
[2] Plaintiff initially failed to submit written opposition to Defendants' motion for partial summary judgment of seeking to dismiss Plaintiff's claims for punitive damages and direct liability. The court, during oral argument, permitted Plaintiff to submit supplemental opposition papers which were accepted with regard to the motion for partial summary judgment.

PhD., testified during deposition that Plaintiff's blood alcohol content ("BAC") at the time of the Accident was between 0.11% and 0.21%. See Exhibit "B" to Defendants' Brief, 38:15-40:6. Dr. Brick specifically testified that Plaintiff "was intoxicated and he was impaired. . ." Id. at 26:9. Dr. Brick testified further that

> there is no dispute in my mind as to whether or not [Plaintiff] was intoxicated. He was. He could have been as intoxicate (sic) as high as .21 or .23 percent as [Defendants' toxicology expert] opined or even higher, if you want to use a particularly high rate of elimination and so on, and we've been over this many times, but simply being intoxicated does not mean that you caused an event, and -- and that -- that I think is recognized not only by experts but by the courts; otherwise, I mean, that would be a net opinion if you simply said, [w]ell, the person was intoxicated, therefore, they caused this event. [Id. 102:18-103:4.]

The parties agree, and the undisputed facts reveal, that Plaintiff was not charged with, did not plead guilty to and was not convicted of any alcohol related offense under N.J.S.A. 39:4-50 in connection with the Accident.

Defendants argue that Plaintiff's complaint should be dismissed pursuant to N.J.S.A. 39:6A-4.5(b) which provides that

> [a]ny person who is convicted of, or pleads guilty to, operating a motor vehicle in violation of R.S.39:4-50, section 2 of P.L.1981, c.512 (C.39:4-50.4a), or a similar statute from any other jurisdiction, in connection with an accident, shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.

N.J.S.A. 39:4-50(a) provides, in pertinent part, that

> a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol

concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject:

(1) For the first offense:

(i) if the person's blood alcohol concentration is 0.08% or higher but less than 0.10%, or the person operates a motor vehicle while under the influence of intoxicating liquor, or the person permits another person who is under the influence of intoxicating liquor to operate a motor vehicle owned by him or in his custody or control or permits another person with a blood alcohol concentration of 0.08% or higher but less than 0.10% to operate a motor vehicle, to a fine of not less than $250 nor more than $400 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of three months;

(ii) if the person's blood alcohol concentration is 0.10% or higher, or the person operates a motor vehicle while under the influence of narcotic, hallucinogenic or habit-producing drug, or the person permits another person who is under the influence of narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control, or permits another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle, to a fine of not less than $300 nor more than $500 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than seven months nor more than one year;

(iii) For a first offense, a person also shall be subject to the provisions of P.L. 1999, c.417 (C.39:4-50.16 et al.).

. . .

Defendants assert that the undisputed facts reveal that Plaintiff was intoxicated beyond the "legal limit" identified under N.J.S.A. 39:4-50 at the time of the Accident. Defendants' Brief at 3. Defendants assert that both Plaintiff's and Defendants' toxicology experts have determined Plaintiff's BAC to be greater than 0.08% at the time of the accident. Id. Defendants argue that Plaintiff's expert, Dr. Brick, testified that Plaintiff's BAC at the time of the Accident was between .11% and .21% and that Defendants' toxicology expert, Elizabeth Spratt, M.S., calculated Plaintiff's BAC at the time of the accident between 0.212% and 0.232%. Id.

Conceding the fact that Plaintiff was not charged with a violation of N.J.S.A. 39:4-50, Defendants argue that N.J.S.A. 39:6A-4.5(b) applies and that Plaintiff's claim must be barred and dismissed accordingly. Defendants argue that a purely literal interpretation of N.J.S.A. 39:6A-4.5(b) creates an unjust and absurd result, inconsistent with the overall purpose of the statute, and contrary to public policy. Id. at 9 (references omitted). Defendants assert that the subject statute must be applied to the Plaintiff's operation of his vehicle while intoxicated and therefore his claim for economic and non-economic damages must be dismissed. Id. at 11.

Defendants rely upon the holding in Caviglia v. Royal Tours of Am., 178 N.J. 460, 474 (2004) where the Supreme Court held that "[a] motorist may not pursue a personal injury action if he was intoxicated at the time of the accident." Id. at 3. Defendants argue that the purpose of the bar against recovery under the subject statute is to reduce lawsuits by drunk drivers and to thereby deter drunk driving. Id. at 4. Defendants assert that the "Statement of the Act" identified under the bill prior to the enactment of N.J.S.A. 39:6A-4.5 reveals that the New Jersey Legislature determined that "[t]he bill provides that a person who operates an automobile without insurance, while drunk or with intent to injure another shall have no cause of action to recover economic or

noneconomic loss." See Exhibit "F" to Defendants' Brief, Statement 1997 N.J. Sess. Law Serv. Ch. 151 (S. 2223) at 42:40-42. Defendants assert that

> during a public hearing on the legislation, the Act's sponsor, Senator Gerald Cardinale, discussed a problem the legislation sought to rectify: there was 'no downside to bringing suit' and by contrast, there was 'very strong incentive for all involved to game the system,' explaining: '[t]he high costs associated with lawsuits must be built into the insurance premium. It is ironic that over 80 percent of motorist do not ever abuse the system, but the minority who do cause the premiums to rise for everyone.'
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> [Defendants' Brief at 4, quoting Defendants' Brief Exhibit "G", Public Hearing Before Senate Commerce Committee, Automobile insurance including the Governor's automobile insurance plan, uninsured motorists, automobile insurance fraud, and other recommendations on improving insurance in New Jersey, at 5-6 (Statement of Senator Gerald Cardinale, Chairman).]

Defendants also rely upon the holding in Voss v. Tranquilino, 413 N.J. Super. 82, 93-94 (App. Div. 2010), aff'd, 206 N.J. 93 (2011) wherein the appellate court held that "[o]ur courts have long recognized the 'senseless havoc and destruction caused by intoxicated drivers,' and the strong public policy in 'the immediate removal of drunk drivers from the highways'". Defendants' Brief at 5 (citations omitted).

Defendants assert that the canons of statutory interpretation apply generally and explicitly by the New Jersey Supreme Court. Defendants' Brief at 5. Defendants, relying upon citing Perrelli v. Pastorelle, 206 N.J. 193 (2011), argue that the court can and should look to the purpose of the subject statute and dismiss Plaintiff's complaint. Id. at 5-7. Defendants argue that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Id. at 5 (emphasis provided), citing Perrelli, supra, 206 N.J. at 200. Defendants argue that courts have repeatedly "rejected a literal reading of N.J.S.A. 39:6A-4.5 in order to effectuate the overall statute's purpose." Id. at 6. Defendants argue that the Appellate

Division in Voss, supra, held that suits by drunk drivers against liquor establishments are permitted because the literal interpretation of a statute barring a cause of action was rejected in favor of achieving the statute's purpose of deterring drunk driving. Id. at 7. Defendants rely upon the holding in Voss where the appellate court held that

> [i]n our view, a literal reading would be contrary to the meaning intended by the Legislature . . . The Legislature could not have thought it could reduce the number of drunk drivers by immunizing liquor establishments from their claims and thus providing a disincentive to the licensees, who possess the expertise and the statutory and regulatory responsibility to avoid serving visibly intoxicated patrons, thus increasing their degree of intoxication before turning them loose on the highways.
> [Id., quoting Voss, supra, 413 N.J. Super. at 93-94.]

Defendants also rely upon the holding in Camp v. Lummino, 352 N.J. Super. 414, 418 (App. Div. 2002) where the appellate court determined that "N.J.S.A. 39:6A-4.5(b) cannot be understood to affect the right of a driver who is under the legal drinking age . . . to bring an action against a host who illegally served intoxicating beverages." Id. Defendants argue that in Camp, the court, relying upon the legislative intent, found that despite the statute's language barring plaintiff's claim, in order to effectuate the purpose of the statute, an underage drunk driver was permitted to bring an action against the host who illegally served plaintiff. Id.

Plaintiff argues in opposition that his complaint is not barred by N.J.S.A. 39:6A-4.5 because he was not charged with, did not plead guilty to and/or was not convicted of a violation of N.J.S.A. 39:4-50 as specifically identified under the statute. Plaintiff's Brief at 10.[3] Plaintiff argues that the undisputed facts, with regard to the application of N.J.S.A. 39:4-50, render N.J.S.A. 39:6A-4.5(b) inapplicable to Plaintiff's complaint. Id. Plaintiff argues that his BAC was not

[3] Plaintiff's Brief did not contain page numbers. For purposes of this rider, the court identifies the page entitled "introduction" as page "1" with all subsequent pages numbered sequentially.

determined at the time of the Accident and that it was only measured almost five hours after the Accident. Id. at 8.

Plaintiff argues further that the subject statute is unambiguous and "[t]o expand this statute to include all instances, where in a civil case, under a different burden of proof, there is [to] be a finding of intoxication, regardless of fault, would be a major change in existing law." Id. at 9. Plaintiff asserts that Defendants' reliance upon the language of legislative history sponsor statement(s) is unpersuasive as the language relied upon by Defendants was not included in the bill as enacted into law Id. at 10. Plaintiff argues that

> [i]f the Legislature wanted all persons who were found in a civil case to be barred from bringing a cause of action, the Legislature would have stated that in the statute [but] [i]nstead, the Legislature did not do that and only provided for those individuals who were convicted of or plead guilty.
> [Id. at 11.]

Plaintiff concludes that

> [i]t would be improper for the court to enlarge the specific language of N.J.S.A. 39:6A-4.5(b) as [D]efendants suggest. The plain language of the statute clearly does not apply to [Plaintiff] as he was neither convicted nor pled guilty of a DUI or similar related charge, and he did not refuse to submit to a breath or blood test.
> [Id. at 12-13.]

Defendants argue in reply that "[t]he only issue before this Court is whether the subject statute, N.J.S.A. 39:6A-4.5, should be interpreted literally or whether it should be interpreted so as to effectuate its purpose." Defendants' Reply Brief at 2. Defendants argue further that "[o]ur courts have repeatedly disregarded the literal language of the statue when following its literal terms would have produced a result inconsistent with the overall purpose. See e.g. Perrelli [supra], 206 N.J. at 199; Voss [supra] at 93; Camp [supra] at 416; []." Id. Defendants contend that Plaintiff

has not disputed the relevant facts presented and that summary judgment is appropriate here. Id. at 3.

New Jersey's standard for summary judgment as set forth in Brill v. Guardian Life Ins. Co. Am., 142 N.J. 520, 540 (1995) entitles a movant to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a dispute whose resolution in its favor will entitle him to judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged[.]" R. 4:46-2(c). If the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill, 142 N.J. at 529. "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Amer. Arbitration Association, 67 N.J. Super. 384, 399-400 (App. Div. 1961) (citing Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958)). The Court in Brill encouraged trial courts not to hesitate in granting summary judgment when the appropriate circumstances are presented, such that the "evidence is so one-sided that one party must prevail as a matter of law. Brill, supra, 142 N.J. at 540.

The Brill Court encourages courts to grant summary judgment, stressing the importance of not sending "worthless" cases to a jury. Id. at 541. In deciding whether there is a genuine issue of fact for trial, the motion judge should consider whether the competent evidence submitted on the motion, viewed in the light most favorable to the non-moving party, is sufficient to allow a rationale fact-finder to resolve the fact issue in favor of the non-moving party. Brill, 142 N.J. at 540; R. 4:46-2(c). The motion judge therefore, should weigh the evidence for its sufficiency, and

where the evidence is so one-sided that one party must prevail as a matter of law, the court should not hesitate to grant summary judgment. Id. at 540. Therefore, the opponent of a summary judgment motion must show controverting facts, not merely bare assertions, representations, or allegations in pleadings without affidavit or other evidentiary support to establish the existence of a genuine issue of material fact. The failure to discharge this duty entitles the movant to summary judgment. Judson, 17 N.J. at 75. The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. "[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (internal quotation marks and citation omitted).

The undisputed facts presented here reveal that Plaintiff was intoxicated at the time of the Accident. The facts reveal that Plaintiff's BAC at the time of the Accident, as admitted by his own toxicology expert, was above the minimum limit identified under N.J.S.A. 39:4-50. Plaintiff's expert concluded in his report and deposition testimony that Plaintiff's BAC was, at a minimum .11%. The "legal limit" or minimum for presumption of intoxication during operation of a motor vehicle under N.J.S.A. is .08%. Given the undisputed circumstances here, no rational fact finder could determine that Plaintiff was not intoxicated at the time of the Accident. The court is not persuaded by Plaintiff's argument that testing Plaintiff's BAC level at 12:08am (5 hours after the Accident which occurred at 7:26pm) would somehow produce inaccurate or unreliable results simply because the alcohol test was not checked at the time of the Accident. There has been no evidence or factual basis presented which disputes the fact that Plaintiff was intoxicated while he

operated his vehicle at the time of the Accident. There is no evidence or assertion that the Plaintiff's BAC could have or may have been less than .08% at the time of the Accident.

The court is now faced with reconciling the facts presented with the application of N.J.S.A. 39:6A-4.5(b). When interpreting the language of N.J.S.A. 39:6A-4.5(b), the court has attempted to "ascertain the intent of the Legislature." See Hardy v. Abdul-Matin, 198 N.J. 95, 101 (2009); see also Marino v. Marino, 200 N.J. 315, 329, (2009); Lee v. First Union Natl. Bank, 199 N.J. 251, 258 (2009). The court recognizes that generally, "the best indicator of that intent is the statutory language" itself. DiProspero v. Penn, 183 N.J. 477, 492, (2005). The Supreme Court has held that reviewing courts should "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole." Hardy, supra, 198 N.J. at 101. Recognizing that the court, in determining the Legislature's intent, should "look at the plain language of the statute," the court here cannot ignore the fact that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Hubbard v. Reed, 168 N.J. 387, 392 (2001) (quoting Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999)); see also New Jersey Builders, Owners, & Managers Ass'n. v. Blair, 60 N.J. 330, 338 (1972) ("Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."); Dvorkin v. Twp. of Dover, 29 N.J. 303, 315 (1959) ("[T]he spirit of the legislative direction prevails over its terms."). Thus, "the matter of statutory construction . . . will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." Jersey City Chapter, P.O.P.A. v. Jersey City, 55 N.J. 86, 100 (1969). To that end, "when a 'literal interpretation of individual statutory terms or provisions' would lead to results 'inconsistent with

the overall purpose of the statute,' that interpretation should be rejected." Hubbard, supra, 168 N.J. at 392-93; see also Lee, supra, 199 N.J. at 258.

The court recognizes that Plaintiff was not charged with, plead guilty to, or convicted of any alcohol related offense in connection with the Accident as identified under N.J.S.A. 39:6A-4.5(b). However, the court cannot ignore the fact that one of the purposes of N.J.S.A. 39:6A-4.5 is to reduce lawsuits by drunk drivers and deter drunk driving. The court here looks to the purpose of N.J.S.A. 39:6A-4.5(b) to determine whether the statute applies to Plaintiff. In Caviglia v. Royal Tours of Am., our Supreme Court clearly notes that N.J.S.A. 39:6A-4.5 was amended by the Legislature to

> bar three classes of people from suing for personal injuries in automobile accident cases: (a) persons who operate automobiles without insurance; (b) persons who drive while under the influence of alcohol or drugs; and (c) persons who act with the intent to injure others while driving. 178 N.J. 460, 470.

The Court in Caviglia also determined that "[o]ne public policy rationale behind N.J.S.A. 39:6A-4.5 is to deter drunk driving [and] the intentional use of automobiles as weapons. . ." Id. at 474. In Voss, supra, the New Jersey Appellate Division held that

> [o]ur conclusion is bolstered by a public policy consideration. Our courts have long recognized the 'senseless havoc and destruction caused by intoxicated drivers', State v. Tischio, 107 N.J. 504, 512 (1987), appeal dismissed 404 U.S. 1038 (1988), and the strong public policy in 'the immediate removal of drunk drivers from the highways.' Voss, supra, 413 N.J. Super. at 93, quoting In re Kallen, 92 N.J. 14, 28 (1983).

The court in Voss, supra, also concluded that "[d]iscouraging drunk driving is surely a purpose of [N.J.S.A. 2A:22A-1 (Dram Shop) and N.J.S.A. 39:6A-4.5]." Id.

This court finds that, based upon the undisputed facts presented, permitting Plaintiff's complaint under purely a literal reading of N.J.S.A. 39:6A-4.5(b) produces a manifestly absurd result and would be against the firmly and long established public policy of dissuading or preventing drunk driving. The facts presented do not reveal why Plaintiff was not charged with a violation of N.J.S.A. 39:4-50, but the court finds that the issue of whether Plaintiff was charged to be irrelevant here since the undisputed facts reveal Plaintiff was intoxicated. It cannot rationally be conceived that the Legislature intended that the act of adjudication is to be the sole trigger for the bar to Plaintiff's claims, but it is rather the underlying driving while intoxication that is the wrong to be prevented. The fact that the language of the statute states "convicted of, or pleads guilty to" cannot be the basis to disregard the intended purpose of the statute, that is to prevent those who operate a motor vehicle on the roadways of New Jersey while undisputedly impaired and intoxicated from being permitted to pursue damages in resulting accidents.

This court cannot ignore the simple, undisputed fact that Plaintiff was intoxicated when he operated his vehicle and was involved in the Accident. Plaintiff's affirmative decision to operate a vehicle while intoxicated, undisputedly, above the minimum threshold established under N.J.S.A. 39:4-50 now bars his attempt to recover economic and/or non-economic damages in accordance with the statutory provisions and intent of N.J.S.A. 39:6A-4.5(b).

Based upon the argument of counsel and the aforementioned reasons and granting every inference to the Plaintiff as the non-moving party, the court finds that the undisputed facts presented reveal that summary judgment is appropriate at this time based upon the undisputed fact that Plaintiff was intoxicated at the time of the Accident and is therefore prohibited from maintaining a claim for economic and/or non-economic damages in accordance with N.J.S.A. 39:6A-4.5(b). Defendants' motion for summary judgment is **GRANTED.** Plaintiff's complaint is dismissed with prejudice.

Based upon the court's conclusion and determination regarding Defendants' motion for summary judgment, the Defendants' motion for partial summary judgment on Plaintiff's punitive damages and direct liability claims and motion for leave to file amended answers to Plaintiff's complaint are moot and are hereby dismissed.