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Re: ***Butler v. Manso v. Jester***
C.A. No. 00C-02-004-RFS

Dear Counsel:

In this personal injury case, the plaintiff, Lynne M. Butler, seeks damages for injuries sustained by her son, Matthew J. McCarville. McCarville was shot in the eye by a BB gun on March 20, 1998. The shooter is alleged to be Michael Manso. After service of the complaint, Manso sued McCarville's stepfather, Jerry Butler for indemnification and/or contribution. The substance of this third party claim is that Butler failed to properly supervise McCarville, Manso and Mark Jester who were all minors on the day in question.

Butler has filed a motion for summary judgment, claiming no material facts are in dispute and that he is entitled to judgment as a matter of law. An affidavit attesting that he had no knowledge or reason to know of the use of the BB guns is attached to the motion. Manso did not file a counter affidavit. A 90 page transcript of arbitration testimony from McCarville, Jester, Manso's mother, Manso and Butler was presented. The key factual component of the third party claim is whether Butler knew or had reason to know that the three minors were using BB guns.

Summary judgment principles are well known and require no citation. Once the moving party presents evidence disputing the adverse party's claim, the burden shifts to the non-moving party to demonstrate by affidavit or other evidence that viable issues of material fact remain for the jury. Some evidence supporting the non-moving party's claim must be shown where that party has the burden of proof at trial.

Here, Butler has met his burden. Manso must present evidence showing a material fact dispute as well as proof to support the third party complaint. Manso has failed to do so, and, for this reason, summary judgment is entered in favor of Butler and against Manso on

the third party complaint.

The undisputed factual record is that McCarville and Jester were playing in Butler's yard without BB guns. They came into the house and asked if they could go to Jester's home. Butler agreed. Butler was on the couch in the living room, watching TV. He would doze off at times. Manso then came over with BB guns. He gave a pistol to Jester and kept a rifle. After shots were fired in an enclosed shed, McCarville went to the back door area of the house and got his BB gun. He had been shot in the back and foot at the shed. Returning to the yard, McCarville was struck in the eye within a minute. Butler heard the back door slam but did not see the BB gun. He thought McCarville had forgotten clothing to take to Jester's. Butler did not know Manso had arrived and that BB guns were involved until after the shooting. Shots from BB guns could not be heard in an insulated house.

Viewing the evidence in the light most favorable to Manso, no rational fact finder could find Butler knew or had reason to know of the use of BB guns, nor has Manso come forward with sufficient evidence to show Butler failed to properly supervise these minors. The law does not make Butler an insurer.

Considering the foregoing summary judgment is granted.

IT IS SO ORDERED.

Very truly yours,

RFS/cv
cc Prothonotary