UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0198

September Term, 2015

KERRI BUTLER, ETC., ET AL.

v.

MELISSA ABBETT

Wright,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: April 5, 2016

This appeal arises from the Circuit Court for St. Mary's County's denial of a motion for a new trial following a jury verdict in favor of appellee, Melissa Abbett, on one count of negligence. Appellants, Douglass Butler and Keri Butler, brought a negligence action on behalf of their eight-year-old daughter, Molly Butler, after she was injured at the Abbetts' home on April 19, 2011.

The Butlers filed a complaint on August 21, 2012, against Mrs. Abbett and her husband, Mark Abbett, who was subsequently dismissed from the action. A third-party complaint was filed by Mrs. Abbett against Mr. Butler on October 26, 2012, but was eventually voluntarily dismissed.[1] A three-day trial in the circuit court began on February 9, 2015, after which the jury found for Mrs. Abbett.

The Butlers moved for a new trial on February 20, 2015, then filed an amended motion for a new trial on February 27, 2015. Their motion was denied on March 9, 2015.

We have combined and rephrased the Butlers' questions on appeal as follows:[2]

[1] Mrs. Abbett moved to bifurcate the trial on the issue of liability and damages on February 4, 2014. While the Butlers initially filed an opposition to this motion, they ultimately consented to the bifurcation, and the motion was grated on April 21, 2014.

[2] The Butlers' presented their issues as:

1. The evidence did NOT show that Molly Butler, an eight year old child, was guilty of contributory negligence, and thus the circuit court abused its discretion in denying Appellants' motion for new trial.

2. The evidence did NOT show that Molly Butler, an eight year old child, had assumed the risk, and thus the circuit court abused its discretion in denying Appellants' motion for new trial.

(continued…)

1. Did the circuit court err in denying the Butlers' motion for a new trial because the evidence at trial did not show that Molly either was contributorily negligent or had assumed the risk of her actions?

2. Did the circuit court err in denying the Butlers' motion for a new trial because the evidence at trial showed that Mrs. Abbett was negligent either in her supervision of Molly or breached her duties to Molly as a social guest?

3. Did the circuit court err when it denied the Butlers' motion *in limine* that permitted Mr. Butler to testify about the picture taken by Mrs. Abbett of Molly in the tree and his comments about the picture the night before the accident?

4. Did the circuit court err when it denied the Butlers' motion *in limine* that permitted Molly to testify at trial about her assumption of risk posed by climbing the tree when the Butlers' could not rebut this evidence?

For the reasons discussed below, considering the posture of the case on appeal, we do not find that the circuit court committed error when it denied the motion for a new trial and the motions *in limine* and, therefore, we affirm its judgment.

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3. The evidence DID show that Appellee was negligent in either her supervision of Molly Butler OR in her parallel duties to Molly Butler when she was a social guest on Appellee's premises, and thus the circuit court abused its discretion in denying Appellant's motion for new trial.

4. The circuit court abused its discretion in denying the motion *in limine* pertaining to Douglas Butler and thus allowing Appellee to call Mr. Butler to the stand to introduce evidence that Molly [sic] parents viewed photos (taken by Mrs. Abbett) – the evening before the incident – and any comments on those photos on his part, in Appellee's efforts to shift responsibility for the incident onto Molly's parents.

5. The circuit court abused its discretion in denying the motion *in limine* pertaining to Molly Butler, in allowing Appellee to call Molly to the stand in an obvious attempt to show Molly's supposed above average awareness, directed at the defense of assumption of risk, when Appellants were not permitted to rebut this evidence, and thus the Appellants were also denied their right to a fair trial.

FACTS

On April 18, 2011, eight-year-old Molly was brought to the Abbetts' residence for a play date with the Abbetts' daughter, Megan, who was Molly's friend and second grade classmate. In the late afternoon, Molly and Megan began to climb a large tree on the Abbetts' property. The tree, named "Shakespeare" by the family, was a favorite of the Abbett children and their friends. Megan testified that the tree was easy to climb, and she and Mrs. Abbett both testified that neighborhood children regularly climbed the tree.

On the night of the play date, Molly climbed to the upper reaches of the tree while Megan went only a short way up. Mrs. Abbett, who had been inside while the girls were playing, came out and saw the girls in the tree and took a picture of them on her cellphone, with Molly high up in the tree that evening. Molly and Megan both descended safely from the tree. Mrs. Abbett then called Mrs. Butler to ask if Molly could have a sleepover that night with Megan. Mrs. Butler agreed, but since Molly did not have any sleepover clothes, she told Mrs. Abbett that she would send Mr. Butler over to deliver some of Molly's things.

At around 8:00 p.m., Mr. Butler arrived at the Abbetts' residence. While he and Mrs. Abbett were talking, Mrs. Abbett took out her cellphone and showed Mr. Butler the picture of Molly high up in the tree. Mr. Butler did not "voice any objection" to Mrs. Abbett about Molly climbing the tree, nor did he pull Molly aside at that time to talk to her about climbing the tree. Mr. Butler later called Mrs. Butler from his car, told her about the photo and Molly playing high in the tree. Later that night, Mrs. Abbett called

Mrs. Butler about a different matter, but Mrs. Buttler did not voice any objections or concerns about what her husband had shared with her or about Molly climbing the tree.

Mrs. Butler called Mrs. Abbett the next morning, April 19, 2011, to tell her that she would be by to pick up Molly; again, Mrs. Buter did not tell Mrs. Abbett during this conversation that she would not like Molly to climb the tree. Mrs. Butler testified that she did not believe at that time that Molly would climb the tree that day because she was going to be picking her up early in the morning.

After Molly and Megan had breakfast at the Abbetts, they went outside to play while Mrs. Abbett was inside. Megan and Mrs. Abbett testified that at this time, Mrs. Abbett neither encouraged nor discouraged Molly to climb the tree. Molly decided to climb up the tree again that morning while Megan was on the ground. Megan testified that she saw Molly at the same height she had reached the evening before, and that she heard something and turned around to see that Molly had fallen off the tree to the ground. Megan testified that she then approached Molly to make sure she was okay and then ran inside to tell Mrs. Abbett about the incident. Mrs. Abbett came outside to check on Molly and then called 911. Molly was ultimately flown to the University of Maryland Shock Trauma in Baltimore.

Additional facts may be set forth in our discussion of the issues as necessary.

DISCUSSION

I. The circuit court did not abuse its discretion in denying the Butlers' motion for new trial.

a. Standard of Review

The granting or denial of a motion for new trial is a matter within the sound discretion of the trial court. *I.O.A. Leasing Corp. v. Merle Thomas Corp.*, 260 Md. 243, 249 (1971). Thus, "the standard of review for the denial of a motion for a new trial is abuse of discretion." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Miller v. State*, 380 Md. 1, 92 (2004)). "[A] claim that the verdict is against the weight of the evidence requires assessment of credibility and assignment of weight to evidence-a task for the trial judge." *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 60 (1992).

b. The evidence was sufficient for the jury to find that Mrs. Abbett acted reasonably in supervising Molly during her visit.

The Butlers ask us to disturb the jury verdict. "Ordinarily, this court will not interfere with a jury verdict, even one that is inconsistent." *Travel Committee, Inc.* v. *Pan American World Airways, Inc.*, 91 Md. App. 123, 149 (1992). "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Id.* (citing *Eagle Pitcher v. Balbos*, 84 Md. App. 10, 35-36 (1990)).

On April 18th through the 19th, which staying at the Abbett's home, Molly was a social guest. The circuit court instructed the jury that Mrs. Abbett's duty to Molly was as that to a social guest in her home:[3]

[3] There is no heightened duty for the host if the social guest is a child. *Laser v. Wilson*, 58 Md. App. 434, 444 (1984) (citation omitted). "The responsibility for supervision of a child may be relinquished or obtained only upon the mutual consent, expressed or implied, by the one assuming the responsibility. Such (continued…)

> The duty owed to a social guest is to exercise reasonable care to make the premises safe or to warn the guest of known dangerous conditions that cannot reasonably be discovered by the guest.

The Butlers argue that the danger of climbing the tree was hidden to Molly, and Mrs. Abbett, therefore, had a duty to warn her. We disagree.

In *Laser v. Wilson*, 58 Md. App. 434, 445-46 (1984), we stated:

> The parental duty of supervision looking to the care and welfare of a child includes protecting the child from known or obvious dangers. That duty may not be imposed upon, or assumed by, another without mutual consent. It follows that if a condition is open and obvious rather than latent or obscure, no greater duty is imposed upon a host of a child under parental supervision than would be owed to the parent.

The danger of climbing and falling off a tree is a dangerous condition that can indeed "reasonably be discovered by the guest," including by Molly. Mrs. Abbett testified to this point:

> Q. Would you agree that anything that might injure or kill them, that you're aware of as an adult, might be a good time to say or reinforce it or warn them because they are only eight years old or do you take it as a categorical they're eight, they know?
>
> A. If it were something that I thought they didn't know, yes, I would warn them.
>
> Q. Why did you think Molly Butler knew about the Shakespeare tree?
>
> A. Because I never met an eight year old that didn't know they could get hurt if they fell.

parent may not impose the responsibility of supervision of his or her minor child on a third person unless that person accepts the responsibility, and a third person may not assume such responsibility unless the parent grants it." *Id.* at 445.

In order to increase the parental duty of supervision, the Butlers suggest that Mrs. Abbett's duty in this incident was similar to *in loco parentis*. A person *in loco parentis* is one who "has assumed the obligations of a parent without formally adopting the child." BLACK'S LAW DICTIONARY 1324 (10th ed. 2014). "A person *in loco parentis* to a child is one who means to put himself in the situation of the lawful [parent] of the child with reference to the [actual parent's] office and duty of making provision for the child . . . . There must be some indication, in some form, of an intention to establish it. It is a question of intention." *Pope v. State*, 284 Md. 309, 322 (1979) (citing *Von der Horst v. Von der Horst*, 88 Md. 127, 130-31 (1898)). The Butlers do not explain their claim that Mrs. Abbett was in an *in loco parentis* role to Molly at the time Molly was staying in their house beyond a bald assertion. However, the Butlers have overextend the meaning of the term. *In loco parentis* is a responsibility much greater than supervision on a play date or a sleep over, but it is the equivalent of taking custody of a child.[4]

[4] We have defined the role of *in loco parentis* as:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control. Restatement (Second) of Torts § 320. Comment a. to § 320 indicates that the rule stated in § 320 is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, to teachers or other persons in charge (continued…)

b. The evidence was sufficient for the jury to find that Molly was contributory negligent and assumed the risk of climbing the tree.

Mrs. Abbett's affirmative defenses to that the Butlers' negligence claim were the doctrines of contributory negligence and assumption of risk at trial. The defenses were properly before the jury, and enough evidence was presented for the jury to find both contributory negligence and assumption of risk.

i. Contributory negligence

On appeal, the Butlers aver that the issue of contributory negligence should not have been considered by the jury because they "could not find any reported appellate case in Maryland" where a child under the age of eleven years old was found to be contributorily negligent. Age eleven has not been held as a threshold age, and Maryland courts have by no means closed the door to the possibility of finding a younger child contributorily negligent. *See Stein v. Overlook Joint Venture*, 246 Md. 75, 82 (1967) (an eight-year-old child was above age at which she could not ordinarily have been guilty of contributory negligence); *State for Use of Taylor v. Barlly*, 216 Md. 94, 102 (1958) (a five-year-old child may be guilty of contributory negligence).

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of a public or private school, persons operating a private hospital or asylum, and to lessees of convict labor.

Molock v. Dorchester Cty. Family YMCA, Inc., 139 Md. App. 664, 673 (2001) (finding that the YMCA was not *in loco parentis* because there was "no evidence that would show that the YMCA ever took custody of [the child]. At all times [the child] was free to leave or stay at the YMCA—as he pleased."

The only consideration for the circuit court is whether the child "is of sufficient age, intelligence, and experience to understand the risks of a given situation," at which time "he is required to exercise such prudence in protecting himself, and such caution for the safety of others, as is common to children similarly qualified." *Taylor v. Armiger*, 277 Md. 638, 649 (1976). There was, therefore, no error in submitting the matter to the jury to determine whether the facts amounted to contributory negligence. *See id*. at 50-51. ("Contributory negligence, like primary negligence, is relative in nature and not absolute, and being relative, it necessarily depends on the particular circumstances of each case . . . . If the evidence is conflicting, the question of contributory negligence of the child should be resolved by the jury." (Citations omitted)).

Here, the jury determined that Molly was contributorily negligent after hearing testimony, reviewing exhibits, and hearing argument from both parties. It is undisputed that Molly voluntarily climbed the tree on April 19, 2011, without encouragement from any other person. There was no evidence that she was competing with Megan to see how high she was going, or that she was trying to impress Megan or anyone else. There was also no evidence that she engaged in role playing or was acting out an imaginative, fantasy scene. There was, however, evidence that Molly had previously climbed trees in the past and that she was a smart, active eight-year-old who played on monkey bars and climbed up slides.

In order to make their determination, the jury had to decide that Molly failed to act with the same degree of care that an ordinary eight-year-old of similar intelligence,

experience, and development would have used in the same circumstances. It had sufficient evidence to determine that on the morning of April 19, 2011, Molly made a mistake, failed to exercise the appropriate care that an eight-year-old would ordinarily exercise, and as a result fell from the tree.

ii. Assumption of risk

In Maryland, it is well settled that in order to establish the defense of assumption of risk, the defendant must show that the plaintiff: (1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger. *ADM P'ship v. Martin*, 348 Md. 84, 90-91 (1997) (citations omitted). "The doctrine of assumption of risk rests upon an intentional and voluntary exposure to a known danger and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward [her] and to take [her] chances from harm from a particular risk." *Id.* (citing *Rogers v. Frush,* 257 Md. 233, 243 (1970)).

The inquiry, therefore, is a subjective one, "geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence." *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 112 (2011) (citing W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 68 at 487 (5th ed. 1984); *accord The American Law of Torts* § 12:53, at 431-33 (2008) (stating that "[t]he standard to be applied is a *subjective* one – what the particular plaintiff, in fact, sees, knows, understands, and appreciates – as distinguished from the objective standard which is applied to contributory negligence") (emphasis in original)). A child,

however, "[i]f, because of [his] age or lack of information or experience, does not comprehend the risk involved in a known situation, [the child] will not be taken to consent to assume it." *Id.* (citations omitted). [5]

The Butlers, although acknowledging that "children as young as seven or eight have been held to assume the risk," seek to limit its scope to only when "an open and obvious danger is assumed, namely an open body of water, a steam [sic], or a swimming pool." *See, e.g., Casper v. Charles F. Smith & Son, Inc.*, 71 Md. App. 445 (1987). We disagree with their conclusion that assumption of risk is limited to cases involving bodies of water merely because the Maryland appellate courts have often opined on those types of cases. [6]

[5] As to a child between the ages of seven and fourteen, "there is no presumption that the child did not did not exercise due care or does or does not have sufficient capacity to recognize danger or to observe due care." *Jackson v. Young*, 187 S.E. 2d 564, 566 (Ga. App. 1972). For children between these ages, these issues hinge on the circumstances of the case and the capacity of the particular child. *Id*. Nevertheless, there is no bar to applying assumption of the risk, as a matter of law, to the conduct of a child between these ages when the evidence shows that the danger was obvious, that the child knew of the danger and was able to appreciate the risks associated with it, and the child voluntarily chose to run the risk. *Abee v. Stone Mountain Mem. Assn.*, 314 S.E. 2d 444, 445 (Ga. 1984).

[6] "Generally, the dangers of fire, water, and falling from heights are considered to be understood even by a young child absent factors creating additional risks which could not be appreciated by the child. No danger is more commonly realized or risk appreciated, even by children, than that of falling; consciousness of the force of gravity [is almost instinctual]. Certainly a normal child [of 11] years of age . . . knows that if it steps or slips, from . . . [an] elevated structure, it will fall to the ground and be hurt . . . . *Goodman v. City of Smyrna*, 497 S.E. 2d 372, 374 (Ga. App. 1998) (internal citations omitted).

At trial, Molly testified that she did in fact appreciate the danger of climbing up a tree at the time:

> Q. Molly, did you know that if you climbed up the tree it was possible to fall out of the tree? Did you know that when you were at Megan Abbett's house before you fell?
>
> [The Butlers' counsel]: Objection.
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> The Court: Overruled.
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> [Molly]: Yes, sir.[7]

Based on the evidence presented at trial, Molly had knowledge of the risk of the danger, appreciated the risk, and voluntarily confronted the risk of danger when she climbed high up the Shakespeare tree at the Abbett's that day.

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[7] This testimony was produced during Molly's cross-examination by the Butlers' counsel. After she said that she knew it was possible to fall out of the tree at the time she climbed it, the Butlers' counsel asked Molly if she remembered her deposition taken two years ago and the answer she gave to that question at the time, to which she answered "No." He then refreshed her memory with a copy of the deposition:

> [The Butlers' counsel]: Molly, isn't it true that when [Ms. Abbett's counsel] asked you that question you said no?
> Can you speak up?
> [Molly]: Yes, sir.

The jury was thus able to hear Molly's testimony the day of trial as well as what she had said two years previously in her deposition. It is the jury's task, as fact-finder, to resolve any conflicting evidentiary inferences. *State v. Smith*, 374 Md. 527, 547-48 (2003); *see also Smith v. State,* 403 Md. 659, 665 (2008) (explaining that the jury has the right and duty of choosing to believe a witnesses in-court or out-of-court testimony, if the two are not consistent). The jury chose to believe Molly's testimony as she gave it the day of trial, and "the appellate court defers to that fact-finder" instead of "conducting its own weighing of the conflicting inferences to resolve independently any conflicts it perceives to exist." *Smith*, 374 Md. at 547.

II. The circuit court did not abuse its discretion by denying the Butlers' motions *in limine*.

a. Standard of Review

"An evidentiary ruling on a motion in limine 'is left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion.'" *Ayala v. Lee*, 215 Md. App. 457, 475 (2013) (citing *Malik v. State,* 152 Md.App. 305, 324 (2003)).

b. Motion in limine *as to Mr. Butler*

The Butlers argue that the circuit court erred in denying their motion *in limine* that sought to prevent any introduction of evidence from the Butlers or from Mrs. Abbett about the Butlers' conduct on the evening before Molly's fall. This includes testimony about Mr. Butler not commenting to Mrs. Abbett about not wanting Molly in the tree seeing the picture she took and not subsequently warning Molly not to do that again.

"The admission of evidence is committed to the sound discretion of the trial court and will not be reversed unless there is clear abuse of discretion." *Barksdale v. Wilkowsky*, 192 Md. App. 366, 387 (2010) (citation omitted), rev'd on other grounds, 419 Md. 649 (2011). Here, evidence of the Butlers' reactions to learning about Molly climbing the tree is relevant not because the jury was tasked with determining whether the Butlers themselves were negligent, but because they could use the Butlers' actions as a way of determining the reasonableness of Mrs. Abbett's supervision, which was the issue in this case.

Even if the jury believed that the Butlers themselves acted negligently, the circuit court properly instructed the jury not to impute the negligence of the parents to the child.[8] Further, Mrs. Abbett's attorney explained during closing argument that the actions of the Butlers were not at issue. Thus, we find no abuse of discretion in allowing Mr. Butler's testimony to be heard by the jury regarding what he said or did not say to Mrs. Abbett and Molly the night before the accident.

c. Motion in limine *as to Molly's testimony*

Finally, the Butlers aver that the circuit court erred when it denied the Butlers' motion *in limine* that sought to prevent Molly from testifying at trial about her assumption of risk posed by climbing the tree because the Butlers' could not rebut this evidence at this trial.[9] They assert that Mrs. Abbett called Molly to the stand "not only to

[8] The circuit court ruled that it would instruct the jury on the imputation of negligence during the cross examination of Mrs. Butler by Mrs. Abbett's attorney when asking about Mr. Butler's alleged negligence while supervising Molly in the past.

[9] Because the trial was bifurcated and the issues of damages and injury were not part of this particular trial, the Butlers argue that they "were restricted in rebutting that contention," meaning Molly's intellect and wellbeing, if Mrs. Abbett put her on the stand. However, the circuit court addressed this issue with the Butlers during the motions hearing on December 3, 2014:

> [T]he motion in limine to prohibit the defense from calling Molly is denied. However, if I concluded at the end of Molly's testimony that there was an effort to engage in jury nullification to present Molly as well when she may not be, I would allow the plaintiff to show she's not well.
>
> ***
>
> If I thought that the defense when they sat down had engaged in improper examination of Molly, we're going to have a meeting in (continued…)

show that Molly supposedly understood that one could be seriously injured by falling out of a tree, it was also that Molly had recovered and that she has an above average intellect, that is, before the incident and after the incident . . . . This had the effect of showing to the jury that Molly was fine – and so, no harm, no foul." However, Molly's testimony, even in light of the motion *in limine*, was appropriate for several reasons.

First, the Butlers did not preserve the issue for appellate review because they did not object when Molly was called as a witness by Mrs. Abbett. Even when a party has filed a motion *in limine*, and the trial judge has made a ruling to admit the evidence, "the party opposing the admission of the evidence must subsequently object at trial when the evidence is offered to preserve his objection for appeal." *Reed v. State*, 353 Md. 628, 635 (1999) (citing *Prout v. State,* 311 Md. 348, 356 (1988)); *see also Beghtol v. Michael*, 80 Md. App. 387, 393 (1989) ("The Court of Appeals has enunciated the rule that '[i]f the trial judge admits the questionable evidence, the party who made the motion [*in limine*] ordinarily must object at the time the evidence is actually offered to preserve his objection for appellate review.'" (citing *Prout*[], 311 Md. [at] 356[])). A motion *in limine* alone does not serve as a continuing objection. *Beghtol*, 80 Md. App. at 393 (citations

> chambers or at the bench and the plaintiff is going to be allowed to show different, that there are, the injuries, without getting into damages . . . .

The circuit court did not find Mrs. Abbett's counsel to step over the line in Molly's questioning, or that Molly's presence on the witness stand created a disproportionate advantage to Mrs. Abbett's side, and thus found nothing for the Butlers to "rebut" as far as Molly's injuries.

omitted). By failing to object for the same purposes they provided in their motion *in limine*, the Butlers failed to preserve this issue.

Nevertheless, even assuming that the issue is preserved, there is no indication in the record that Molly was called for any other reason than to provide testimony as to her understanding of the risk of climbing the tree at the time she fell. The testimony was relevant to Mrs. Abbett's affirmative defenses. Molly's questioning by Mrs. Abbett's counsel was limited to the accident and whether she remembered being asked during her deposition about her fall and about her appreciation of the risk. While the Butlers contend that Molly was called to the stand by Mrs. Abbett to show the jury "that Molly had recovered and that she has an above average intellect," nothing in Mrs. Abbett's counsel line of questioning, phrasing, or comments suggest this intent. In fact, as Mrs. Abbett points out in her brief, "Molly testified that she did not remember the questions from her deposition . . . [and t]he jury may have inferred from this testimony that Molly had a serious problem with her memory," which would have had the opposite effect of what the Butlers are now asserting. The Butlers thus fail to provide any support for the argument that Molly was called as a witness for any reason other than providing testimony as to her perception of the danger of falling off a tree.

Further, the Butlers contest the circuit court preventing them from introducing Molly's second grade reading assignment on the book series, *The Magic Tree House*, which they argue "if admitted, would have provided the jury crucial evidence of Molly's imagination and her limited ability – despite her intelligence – to appreciate the risk of

climbing up a tree as tall as the Shakespeare tree, as she lived out the fantasy of being in a magic tree." During the trial, Mrs. Butler testified that climbing that high in the Shakespeare tree was not conduct typical of Molly, and that she may have been inspired by *The Magic Tree House* series because "[t]hat's what eight-year-olds do, that's, they live in a fantasy land, they read books like that. She had just done that. She was in her own adventure, I guess."

The Butlers argue that the books were "important evidence as to how an eight-year-old child could be drawn to the height of a tree and yet be oblivious to its dangers." However, they did not point to any evidence, either in any of the books themselves or in any of Molly's school assignments, which was in any way connected to Molly climbing the tree on April 19, 2011. Therefore, the admission of the books in general and Molly's assignments on the books would only ask the jury to speculate as to the connection and influence the books had on Molly. *See Feigley v. Balto. Transit Co.*, 211 Md. 1, 12 (1956) ("Merely speculative evidence should not be submitted as the basis for a finding by a jury."). Accordingly, it was not an abuse of judgment for the circuit court to exclude the evidence from the jury's consideration.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.