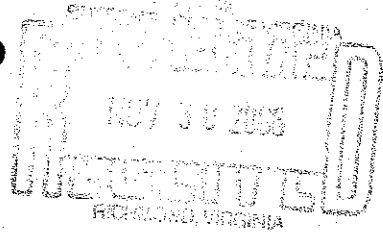


Green #3173

In The
Supreme Court of Virginia

RECORD NO. 060739



GEORGE INGRAM,¹

Appellant,

v.

**STEPHEN T. HARPER AND
KATINA GREEN, CO-ADMINISTRATORS OF
THE ESTATE OF CHRISTIE D. GREEN,**

Appellees.

BRIEF OF APPELLEES

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¹ In addition, Defense Technology Corporation of America, a Delaware corporation, is a defendant in this bifurcated litigation.

SUBJECT INDEX

| | Page |
|---|------|
| TABLE OF CITATIONS | iii |
| QUESTIONS PRESENTED ON THE APPELLANT'S ASSIGNMENTS OF ERROR..... | 1 |
| ASSIGNMENT OF CROSS-ERROR | 2 |
| QUESTION PRESENTED ON THE APPELLEES' ASSIGNMENT OF CROSS-ERROR | 2 |
| FORMAT OF THIS BRIEF | 3 |
| STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW | 4 |
| FACTS | 5 |
| SUMMARY OF ARGUMENT | 9 |
| STANDARD OF REVIEW | 13 |
| PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES RELATING TO THE APPELLANT'S ASSIGNMENTS OF ERROR..... | 16 |
| 1. Concerning the jury's finding of fact that Sgt. Ingram was grossly negligent, it was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. (Assignment of error #3)..... | 16 |
| a. Introduction..... | 16 |
| b. This Court's prior ruling establishes that Sgt. Ingram was grossly negligent. | 18 |
| c. At the trial on remand, Green presented yet more evidence that Sgt. Ingram was grossly negligent..... | 21 |
| d. Sgt. Ingram's testimony was disputed, and the jury could have found his self-serving statements not credible | 24 |
| e. Conclusion | 33 |

| | | |
|---|--|----|
| 2. | There was evidence to support either or both of the following, when the evidence and all reasonable inferences are viewed in the light most favorable to Green: (a) that the first #22 TKO shot did not strike Ms. Green; or (b) that Sgt. Ingram was grossly negligent in firing the first of the five shots. (Assignment of error #1)..... | 37 |
| 3. | Concerning the jury's finding of fact that Sgt. Ingram's gross negligence was a proximate cause of Ms. Green's death, it was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. (Assignment of error #2)..... | 43 |
| PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES RELATING TO THE APPELLEES' ASSIGNMENT OF CROSS-ERROR | | 49 |
| 1. | The trial court was wrong to exclude excerpts from the periodical <i>Police: The Law Enforcement Magazine</i> solely because it was published in January of 1999, whereas Sgt. Ingram killed Ms. Green on December 29, 1998. (Assignment of cross-error #1)..... | 49 |
| CONCLUSION..... | | 50 |
| CERTIFICATE..... | | 51 |
| ATTACHMENTS | | |

TABLE OF CITATIONS

| | Page(s) |
|---|---------------|
| Federal Cases | |
| <i>Lieberman v. American Dietetic Ass'n</i> , 1996 WL 490779 (N.D. Ill. 1996) | 50 |
| <i>McReynolds v. Bigler</i> , 1990 WL 129454 (D.Kan. 1990) | 50 |
| <i>Nelson v. American Home Products Corp.</i> , 92 F.Supp.2d 954 (W.D.Mo. 2000) | 49 |
| <i>Spruill v. Boyle-Midway, Inc.</i> , 308 F.2d 79 (4 th Cir. 1962) | 18, 33 |
| State Cases | |
| <i>Alfonso v. Robinson</i> , 257 Va. 540, 514 S.E.2d 615 (1999) | 35 |
| <i>American Oil Co. v. Nicholas</i> , 156 Va. 1, 157 S.E. 754 (1931) | 18, 33 |
| <i>Atrium Unit Owners Ass'n v. King</i> , 266 Va. 288, 585 S.E.2d 545 (2003) | 48 |
| <i>Beale v. Jones</i> , 210 Va. 519, 171 S.E.2d 851 (1970) | 29, 30, 48 |
| <i>Bitar v. Rahman</i> , 272 Va. 130, 630 S.E.2d 319 (2006) | 9, 13, 24, 27 |
| <i>Bivens v. Manhattan for Hire Car Corp.</i> , 156 Va. 483, 159 S.E. 395 (1931) | 14 |
| <i>Blondel v. Hays</i> , 241 Va. 467, 403 S.E.2d 340 (1991) | 46, 48 |
| <i>Blue Ridge Service Corp. of Virginia v. Saxon Shoes, Inc.</i> , 271 Va. 206, 624 S.E.2d 55 (2006) | 47 |

| | |
|---|----------------|
| <i>Bostic v. Whited</i> , 198 Va. 237, 93 S.E.2d 334 (1956)..... | 29 |
| <i>Chapman v. City of Virginia Beach</i> , 252 Va. 186, 475 S.E.2d 798 (1996)..... | 17, 18, 33, 34 |
| <i>Colby v. Bolton</i> , 241 Va. 125, 400 S.E.2d 184 (1991)..... | 36 |
| <i>Green v. Ingram</i> , 269 Va. 281, 608 S.E.2d 917 (2005)..... | passim |
| <i>Griffin v. Shively</i> , 227 Va. 317, 315 S.E.2d 210 (1984)..... | 35 |
| <i>Henderson v. Gay</i> , 245 Va. 478, 429 S.E.2d 14 (1993)..... | 14 |
| <i>Interstate Veneer Co. v. Edwards</i> , 191 Va. 107, 60 S.E.2d 4 (1950)..... | 48 |
| <i>Lane v. Scott</i> , 220 Va. 578, 260 S.E.2d 238 (1979)..... | 13-14 |
| <i>Medical Center Hospitals v. Sharpless</i> , 229 Va. 496, 331 S.E.2d 405 (1985)..... | 28 |
| <i>Molchon v. Tyler</i> , 262 Va. 175, 546 S.E.2d 691 (2001)..... | 11, 46, 48 |
| <i>Norfolk and Portsmouth Belt Line Railroad Co. v. Barker</i> , 221 Va. 924, 275 S.E.2d 613 (1981)..... | 29 |
| <i>Parker v. Elco Elevator Corp.</i> , 250 Va. 278, 462 S.E.2d 98 (1995)..... | 41 |
| <i>Ragland v. Rutledge</i> , 234 Va. 216, 361 S.E.2d 133 (1987)..... | 29, 30 |
| <i>Surface v. Johnson</i> , 215 Va. 777, 214 S.E.2d 152 (1975)..... | 47, 48 |
| <i>Taboada v. Daly Seven, Inc.</i> , 271 Va. 313, 626 S.E.2d 428 (2006)..... | 18, 33 |

| | |
|---|--------|
| <i>Terry v. Fagan</i> , 209 Va. 642, 166 S.E.2d 254 (1969)..... | 34 |
| <i>Thornton v. Glazer</i> , 271 Va. 566, 628 S.E.2d 327 (2006)..... | 30 |
| <i>Wooldridge v. Echelon Service Co.</i> , 243 Va. 458, 416 S.E.2d 441 (1992)..... | 46, 48 |

State Statutes

| | |
|--|----------------|
| <i>Virginia Code Annotated</i> § 8.01-401.1 (1950, as amended) | 12, 15, 21, 49 |
| <i>Virginia Code Annotated</i> § 8.01-680 (1950, as amended) | 14 |

Other

| | |
|---|-------------------|
| Constitution of Virginia | 13 |
| Rule 5:17(c) of the Supreme Court of Virginia | 8, 10, 28, 29, 43 |
| Rule 5:25 of the Supreme Court of Virginia..... | 28 |

**QUESTIONS PRESENTED
ON THE APPELLANT'S ASSIGNMENTS OF ERROR**

1. Concerning the jury's finding of fact that Sgt. Ingram was grossly negligent, was it plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green?

(Assignment of error #3).

2. Was there evidence to support either or both of the following, when the evidence and all reasonable inferences are viewed in the light most favorable to Green:

(a) that the first #22 TKO did not strike Ms. Green; or

(b) that Sgt. Ingram was grossly negligent in firing the first of the five #22 TKOs?

(Assignment of error #1).

3. Concerning the jury's finding of fact that Sgt. Ingram's gross negligence was a proximate cause of Ms. Green's death, was it plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green? (Assignment of error #2).

ASSIGNMENT¹ OF CROSS-ERROR

1. The trial court wrongly excluded excerpts from the periodical *Police: The Law Enforcement Magazine*.

QUESTION PRESENTED ON THE APPELLEES' ASSIGNMENT OF CROSS-ERROR

1. Whether the trial court was wrong to exclude excerpts from the periodical *Police: The Law Enforcement Magazine* solely because it was published in January of 1999, whereas Sgt. Ingram killed Ms. Green on December 29, 1998? (Assignment of cross-error #1).

¹ Green hereby withdraws the second assignment of cross-error. This is because it relates only to Sgt. Ingram's fifth assignment of error, which he abandoned by not including it in his petition for rehearing.

FORMAT OF THIS BRIEF

Attached at the back of this brief is a copy of each exhibit mentioned in this brief. As to those exhibits that are not black and white, because of the difficulty in making color copies of the actual exhibits, counsel has made color copies of the identical images from documents in his file and affixed exhibit numbers to these new color copies to match the numbers on the actual exhibits in the appendix. As to those exhibits that are black and white, counsel has copied them from the appendix.

This brief refers to the plaintiffs as “Green,” the plaintiffs’ decedent Christie D. Green as “Ms. Green,” the defendant as “Sgt. Ingram,” pages in the appendix as “App.” (followed by the page number), and the transcript of Sgt. Ingram’s videotaped deposition by the page of the appendix at which it appears followed by the words “video deposition” and the page and line numbers in the deposition transcript.

**STATEMENT OF THE NATURE OF THE CASE
AND MATERIAL PROCEEDINGS BELOW**

Through this appeal Sgt. Ingram seeks reversal of a jury verdict that found that he was grossly negligent and that his gross negligence proximately caused the death of Ms. Green. In 2005, this matter was before this Court when, after the jury deadlocked, the trial court granted Sgt. Ingram's motion to strike based upon the issue of gross negligence. The plaintiff appealed and this Court reversed the trial court, holding as a matter of law that "the administrator presented sufficient evidence to constitute a jury question on the issue of gross negligence." *Green v. Ingram*, 269 Va. 281, 291, 608 S.E.2d 917, 923 (2005).

At the trial on remand, once the jury returned a verdict for Green, Sgt. Ingram was left with two limited options for attacking the jury's verdict: (1) argue that the evidence presented at the second trial was different from the evidence at the first trial and that this difference somehow rendered the jury's verdict for Green factually unsupported; or (2) re-frame his arguments to attack something else, such as proximate cause. In his post-verdict motion to set aside the jury's verdict, Sgt. Ingram pursued both of these options. In response, as to the issue of gross negligence, the trial court commented, "I think, frankly, that I'm bound pretty much by what the Supreme Court did before, and I think this case is substantially the same." (App. 809:20-809:23). As to the issue of proximate cause, the trial court observed, "I think that's probably a jury question." (App. 810:2-810:3). This appeal followed.

FACTS

On December 29, 1998, Ms. Green died when Sgt. Ingram, an employee of the Richmond Police Department, shot her by mistake when he fired five #22 TKO shotgun rounds into the wooden kitchen door of an occupied apartment. (App. 553:11-553:14). His goal was to breach the door's lock and thereby gain entrance so that the police could serve a high-risk search warrant. (App. 722, video deposition 8:1-8:10 and App. 621:8-621:14). When Sgt. Ingram killed Ms. Green, she was eighteen years old. (App. 301:20-301:24).

It was a classic and tragic case of “wrong place/wrong time.” With her daughter Kevasha on her hip, Ms. Green had gone to the apartment to meet and talk with her friend Charnte Anderson. (494:10-495:3). Ms. Anderson was also visiting the apartment. (App. 494:7-494:9). Less than fifteen minutes after arriving, Ms. Green was dead. (App. 494:17-494:19 and 495:20-496:4). Sgt. Ingram has admitted that Ms. Green had no criminal record and that she had no alcohol or illegal drugs in her system. (App. 552:25-553:10). For more background, please see *Green v. Ingram, supra*, where this Court remanded the matter for trial after reversing the trial court's decision to strike the plaintiff's evidence as to Sgt. Ingram's gross negligence.

At the conclusion of the trial on remand, the jury returned a verdict in favor of Green, awarding \$750,000 to each of Ms. Green's two minor daughters and \$5,258.91 as funeral expenses.

At the trial on remand, Green presented an even stronger case as to Sgt. Ingram's gross negligence than in the first trial. Thus on remand Green called expert witnesses in the fields of forensic pathology, metallurgy and material science, ballistics

and firearm testing, and the use of #22 TKOs. No such experts had testified in the first trial against Sgt. Ingram. In contrast, despite his contacts within the law enforcement community and the resources of the City of Richmond, at the trial on remand Sgt. Ingram did not call a single expert witness.

In addition, at the trial on remand Green presented proof that Sgt. Ingram was grossly negligent in three different ways:

1. In violation of his own police department's written aiming instructions and the standard of care, he did not aim his second, third, fourth, or fifth shots at the deadbolt's latchbolt;
2. In violation of instructions that Lt. Bennett had given him and the standard of care, he aimed all five of his shots approximately straight ahead and not at a 45 degree angle into the jamb; and
3. In violation of common sense, he did not turn the knob after he started shooting, or shoot the knob's latch, expecting instead that the knob's latch would "disintegrate with just the pressure of the round coming through and knocking holes in the door...." (App. 731, video 56:20-57:3).

Please see the three demonstrative aids attached as the last three attachments to this brief, illustrating these acts of gross negligence. (App. 102-104.)² In contrast, in the first trial against Sgt. Ingram, Green's primary theory of gross negligence was the first one -- failure to aim his second, third, fourth, or fifth shots at the door's hardware.

² At the trial on remand, Green's counsel covered over the letters "FBI" in the demonstrative aid at App. 102. This was because Green did not present evidence that the Richmond Police Department had obtained this aiming rule from the FBI.

When we turn to Sgt. Ingram's statement of the facts, we see that most of the alleged facts he recited were based solely on his own testimony. Yet as the trial court instructed the jury without objection, the jury was free to conclude that Sgt. Ingram was not credible and on this basis to discard all of these alleged facts.

Several other representations in Sgt. Ingram's statement of the facts deserve reply. On page 8 of his brief, Sgt. Ingram wrote that "[a]iming at a forty-five (45) degree angle at the door jamb was not taught at all after 1996...." The record, however, at most only ambiguously implied this to be a fact. (App. 559:8-560:5 and App. 587:11-587:22). Regardless, what really matters is that, before Sgt. Ingram killed Ms. Green in 1998, his superior with the Richmond Police Department Lt. Bennett actually instructed him to aim at a 45 degree angle into the door jamb. (App. 559:8-560:5). Unfortunately for Ms. Green, Sgt. Ingram did not follow these instructions.

It is irrelevant that Sgt. Ingram testified that, while he was attempting to breach the kitchen door, he heard shots fired from inside. (App. 630:19-630:25). This evidence came solely from Sgt. Ingram, whose self-serving testimony the jury could discard as not credible. Furthermore, Sgt. Ingram conceded that the shots from inside did not cause him to change his course of action in any way. (App. 637:6-637:11).

In the footnote at the bottom of page 3 of his petition for rehearing, Sgt. Ingram complained that, at the beginning of the defense argument to set aside the jury's verdict, the trial judge asked rhetorically if defense counsel thought the trial judge was "crazy enough to set this aside and let them go ahead and reverse me like they did before," and that this Court "would think we're a bunch of idiots over here if I did that." (App. 802:8-802:12). Thereafter, however, the trial judge listened attentively as defense counsel

argued his post-verdict motions for more than five pages of transcript. (App. 801:24-807:13). During that argument, the trial court obviously paid attention, interrupting defense counsel's argument as to gross negligence to comment, "[t]hat is a credibility question as to why he did that." (App. 803:6-803:7). Defense counsel replied, "To some extent, Your Honor." (App. 803:8). The trial judge then asked Green's counsel whether Sgt. Ingram was grossly negligent in firing the first of his five shots and, after considering counsel's response, denied the defense motions. In doing so, the trial judge reasoned that, as to gross negligence, "I think this case is substantially the same" as it was when this Court held that the evidence of gross negligence created a question of fact for the jury. (App. 809:23) The trial judge then addressed causation and concluded, "I think that's probably a jury question." (App. 810:2-810:3). Seen in this context, the trial judge's initial comments can fairly be characterized as an attempt at humor following a hard fought trial and not an abdication of responsibility to consider whether sufficient evidence supported the jury's verdict. Furthermore, Sgt. Ingram did not assign error alleging abdication of such responsibility. As a result, Sgt. Ingram has waived any such argument. Rule 5:17(c) of this Court, stating "Only errors assigned in the petition for appeal will be noticed by this Court."

Additional facts important to this appeal are recited in the argument of the various assignments of error and cross-error, below.

SUMMARY OF ARGUMENT

Because there was evidence to support the jury's findings as to gross negligence and proximate cause, Sgt. Ingram's appeal must fail. Each of Sgt. Ingram's assignments of error challenges findings of fact made by the jury in the proper discharge of its fact finding function. In this context the controlling principles of appellate review are that "[a]rmed with a jury verdict approved by the trial court, [Green] stands in 'the most favored position known to the law;'" that Green is "entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable to [Green];" and that the "judgment of the circuit court will not be set aside unless it is 'plainly wrong or without evidence to support it.'" *Bitar v. Rahman*, 272 Va. 130, 137, 630 S.E.2d 319, 323 (2006).

Assignment of error #1 (gross negligence and Sgt. Ingram's first shot).

This assignment of error fails because there was evidence that Sgt. Ingram's first shot did not strike Ms. Green. For example, Charnte Anderson, the only occupant of the apartment to testify, told the jury that she and Ms. Green were in the living room when the shooting started. (App. 453:21-455:1). In addition, Sgt. Ingram testified that he started shooting almost immediately after the signal to begin shooting was given. (App. 627:9-628:10). In contrast, the physical evidence is that all of Sgt. Ingram's shots went into the kitchen and not into the living room. (Plaintiffs' Exhibits 6B, 6E, 7, 9, and 14B, documenting that Sgt. Ingram shot essentially straight ahead into the kitchen and that the living room is beside the kitchen and not behind it). In the alternative, there is evidence that Sgt. Ingram was grossly negligent in firing the first # 22 TKO.

Assignment of error #2 (proximate cause).

Although it is difficult to understand, Sgt. Ingram's second assignment of error appears to concede that the evidence of proximate cause was sufficient if there was evidence that he was grossly negligent in firing his first shot, or if there was evidence that his first shot did not strike Ms. Green. If this is the correct interpretation of the second assignment of error, it must fail without further analysis because there was evidence that Sgt. Ingram was grossly negligent in firing his first shot and because there was evidence that his first shot did not strike Ms. Green. Sgt. Ingram's brief appears to expand his appeal beyond the scope of this assignment of error in order to challenge broadly the sufficiency of Green's evidence of proximate cause, yet this is not allowed. Rule 5:17(c), stating, "Only errors assigned in the petition for appeal will be noticed by this Court."

In the alternative, even if Sgt. Ingram's second assignment of error can fairly be read to challenge broadly the sufficiency of Green's evidence of proximate cause, it still fails. This is because there was evidence to support the jury's finding as to proximate cause. For example, if Sgt. Ingram had aimed the fatal shot at a 45 degree angle into the metal door jamb (as Lt. Bennett had instructed him to do) instead of straight ahead (as he did), the fatal shot would not have struck Ms. Green. This is for two reasons. First, if aimed at a 45 degree angle into the jamb, the fatal shot would squarely have struck substantial metal (App. 450:6-450:8 "It's a metal jamb" and Plaintiffs' Exhibit 11 depicting a rusted jamb) where it would have disintegrated into a fine powder (first paragraph of Defendant's Exhibit 1, stating that the #22 TKO "disintegrates into a fine powder upon impact with the target"). Second, if aimed at a 45 degree angle into the jamb instead of straight ahead, the fatal shot would have followed a markedly different

trajectory such that it would not have struck Ms. Green as she stood in front of the kitchen cabinet. Plaintiffs' Exhibits 6D, 6E, 7, 9, and 14B depict either the front of this cabinet or else its location. *Molchon v. Tyler*, 262 Va. 175, 182, 546 S.E.2d 691, 696 (2001), stating, "when the evidence does not wholly exclude a defendant's negligence as a contributing cause of the plaintiff's injuries as a matter of law, proximate causation becomes a question of fact for the jury's determination."

Assignment of error #3 (gross negligence).

In the discharge of its proper fact finding function, the jury could reasonably have concluded that Sgt. Ingram was grossly negligent in connection with each of his five shots. Please see the last three attachments to this brief for demonstrative aids illustrating Sgt. Ingram's gross negligence. (App. 102-104).

In *Green v. Ingram*, this Court held that Green's evidence created a jury question as to gross negligence. On remand, Green presented an even stronger case. For example, on remand Green put in evidence a photograph depicting the destructive power of a #22 TKO when shot through an identical door without striking metal. Please see Plaintiffs' Exhibit 8 and note the three cookie cutter-like holes in the test door and the dowel that starts in one of those holes and then follows the path of the corresponding shot through the test door and then through two "witness boards" made of solid pine or birch, each three-quarters of an inch thick. (App. 420:22-422:3).

In addition, on remand Green presented evidence addressing two comments made by the dissent in *Green v. Ingram*. One such comment was that "[f]iring in this manner was consistent with Sergeant Ingram's training." 269 Va. at 295, 608 S.E.2d at 925. In response, on remand Green presented evidence that before Sgt. Ingram killed Ms. Green

he had read the Richmond Police Department's aiming instructions for breachers stating, "AIM SHOTGUN...AT THE LATCHBOLT..." (Plaintiffs' Exhibit 16 and App. 555:2-555:5). Also on remand Green called Lt. Bennett (Sgt. Ingram's instructor), who told the jury that no later than 1996 he himself had instructed Sgt. Ingram to aim the #22 TKO at a 45 degree angle into the jamb when attempting to breach a lock on a wooden door. (App. 559:1-560:5). A second comment of the dissent was that "the presence of only fragments on and in the decedent's body suggests that the rounds that struck her also partially hit metal." *Id.* In response, on remand Green presented evidence that just one round struck Ms. Green and that it did not hit metal at all.

Finally, in arguing his post-trial motions, opposing counsel conceded that Sgt. Ingram's defense as to gross negligence was "to some extent" based on Sgt. Ingram's credibility. (App. 803:8). This was a pivotal concession because the significance of Sgt. Ingram's testimony as to his own carefulness presupposed that the jury found him to be a credible witness.

Assignment of cross-error #1 (exclusion of excerpts from a periodical published just days after Sgt. Ingram killed Ms. Green).

As a matter of law, the trial court was wrong to exclude excerpts from *Police: The Law Enforcement Magazine* offered by Ms. Green as "reliable authority" pursuant to [Va. Code Ann. § 8.01-401.1](#) (1950, as amended). The trial court reasoned that, because the magazine was published in January of 1999, whereas Sgt. Ingram killed Ms. Green on December 29, 1998, the article was not admissible. (App. 482:3-483:24). The defect in the trial court's reasoning is that Ms. Green presented evidence that the excluded excerpts stated the standard of care that had been in force for years. (App. 484:2-484:14).

STANDARD OF REVIEW

When considering Sgt. Ingram’s attempt to set aside the jury verdict, one must keep foremost in mind Green’s right to trial by jury, guaranteed by the Constitution of Virginia. It directs that “in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.” Va. Const., Art. I, § 11. Respect for this historic, constitutional right requires courts to treat jury verdicts with great deference.

Because each of Sgt. Ingram’s three assignments of error assails a finding of fact made by the jury, the standard of review for each is whether, as a matter of law, the jury’s finding of fact is plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. *Bitar v. Rahman*, 272 Va. at 137, 630 S.E.2d at 323, affirming a jury’s verdict for the plaintiff in a medical malpractice action, explaining:

we are guided by well-established principles of appellate review. Armed with a jury verdict approved by the trial court, [the plaintiff] Rahman stands in “the most favored position known to the law.” [Citation omitted.] She is entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable to her. [Citations omitted.] The judgment of the circuit court will not be set aside unless it is “plainly wrong or without evidence to support it.”

If there is a conflict in the testimony on a material point, or if reasonable persons may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, a court may not substitute its conclusion for that of the jury merely because the court would have returned a different verdict if its members had been on the jury. *Lane v. Scott*, 220 Va. 578, 582, 260 S.E.2d

238, 240 (1979), reversing the decision of the trial court to set aside a defense verdict in a wrongful death action arising out of a scuffle on a farm, explaining, “when conflicting inferences have been resolved by a jury and those necessarily underlying the conclusion reflected in the verdict are reasonably deducible from the evidence, a trial judge should not set the verdict aside;” accord *Henderson v. Gay*, 245 Va. 478, 481, 429 S.E.2d 14, 16 (1993), reversing a decision by the trial court, where the trial court had set aside a jury verdict on grounds that the plaintiff was contributorily negligent as a matter of law, explaining, “the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury.” See also *Va. Code Ann. § 8.01-680* (1950, as amended), stating that “the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.”

In his statement of the standard of review, Sgt. Ingram cited *Bivens v. Manhattan for Hire Car Corp.*, 156 Va. 483, 485, 159 S.E. 395 (1931), for the proposition that “[i]t will be proper also to accept as facts proved such evidence as is not in conflict with plaintiff’s evidence and which is not inherently incredible.” *Bivens*, however, is distinguishable. There, it does not appear that credibility of witnesses was an issue. In contrast, without objection the trial court instructed the jury that it could “discard” all testimony of any witness that the jury deemed not credible. (App. 761:20-762:17). Citing this instruction, in closing argument Green’s counsel told the jury, “If you feel that Sergeant Ingram has not dealt squarely with you, then you can discard all his testimony.” (796:7-796:9).

Green's assignment of cross-error challenges the trial judge's exclusion of excerpts from a periodical offered as "reliable authority" pursuant to *Va. Code Ann. § 8.01-401.1* (1950, as amended). This assignment of cross-error also presents this Court with a question of law.

**PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES
RELATING TO THE APPELLANT’S ASSIGNMENTS OF ERROR**

This brief addresses Sgt. Ingram’s assignments of error in the same order in which he addressed them: third, first, and second.

1. Concerning the jury’s finding of fact that Sgt. Ingram was grossly negligent, it was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. (Assignment of error #3).

a. Introduction.

Beginning at page 13 of his brief, Sgt. Ingram addressed this assignment of error (his third). In sum, Sgt. Ingram relied primarily upon his own testimony to support his argument that, as a matter of law, he was not grossly negligent.

To the contrary, for the reasons explained below, the evidence on remand created a question of fact for the jury to resolve as to whether Sgt. Ingram was grossly negligent in the following respects:

1. In violation of his own police department’s written aiming instructions and the standard of care, he did not aim his second, third, fourth, or fifth shots at the deadbolt’s latchbolt;
2. In violation of instructions that Lt. Bennett had given him and the standard of care, he aimed all five of his shots approximately straight ahead and not at a 45 degree angle into the jamb; and
3. In violation of common sense, he did not turn the knob after he started shooting, or shoot the knob’s latch, expecting instead that the knob’s latch would “disintegrate with just the pressure of the round coming through and knocking holes in the door....” (App. 731, video 56:20-57:3).

Please see the three demonstrative aids attached as the last three attachments to this brief, illustrating these acts of gross negligence. (App. 102-104.)

The trial court instructed the jury as follows as to the meaning of “gross negligence”:

Number 11. Gross negligence is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of another person. It is such negligence as would shock fair-minded people; although, it is something less than willful recklessness.

(App. 764:18-764:25).

In deciding whether the jury could reasonably have concluded that Sgt. Ingram’s conduct constituted gross negligence, the comments of the Court in *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996), are instructive. That litigation involved a wrongful death action, brought by the parents of a child killed in a tragic and bizarre accident in which the child’s head became entrapped between two metal bars in a gate, resulting in the asphyxiation of the child. The jury returned a verdict for the parents, the trial court set the verdict aside, and the parents appealed. The Court remanded for a new trial, holding that the evidence supported the jury’s finding of gross negligence but remanding because of the admission of inadmissible expert testimony. In remanding the Court commented:

Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another’s safety. [Citation omitted.] Deliberate conduct is “important evidence on the question of gross negligence.” [Citation omitted.] Whether gross negligence has been established is usually a matter of fact to be decided by a jury.

252 Va. at 190, 475 S.E.2d at 801.

Because the #22 TKO is highly lethal, Sgt. Ingram had a duty to exercise special care when he fired it. *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 325, 626 S.E.2d 428, 434 (2006), stating, “negligence is a relative term and the degree of care in fact should be greater or less commensurate with the circumstances;” *American Oil Co. v. Nicholas*, 156 Va. 1, 10, 157 S.E. 754, 757 (1931) (gasoline sold as kerosene by mistake), stating that “[t]he common law requires a higher degree of care and vigilance in dealing with a dangerous agency than is required in the ordinary affairs of life and business which involve small risk of injury;” *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 84 (4th Cir. 1962), quoting with approval the passage from *American Oil Co. v. Nicholas*, above, and stating, “[w]e have no doubt but that under the circumstances of its use the courts of Virginia would regard Old English Red Oil Furniture Polish as a dangerous agency.”

b. This Court’s prior ruling establishes that Sgt. Ingram was grossly negligent.

This assignment of error conflicts with the precedent of this very case and consequently must be dismissed. *Green v. Ingram*, 269 Va. at 291, 608 S.E.2d at 923, holding that the plaintiff “presented sufficient evidence to constitute a jury question on the issue of gross negligence,” and remanding for retrial. At the trial on remand, Green’s evidence included much of what this Court found persuasive when Green’s case was before this Court before. For example, at the trial on remand Green presented the following evidence:

- Plaintiffs’ Exhibit 16 (from the Richmond Police Department lesson plan for breaching doors) was explicit: “AIM SHOTGUN. . . AT THE LATCHBOLT BETWEEN THE LOCK AND THE FRAME.” (App. 144).
- With each of his last four shots, Sgt. Ingram violated the aiming rule of Plaintiffs’ Exhibit 16 when he fired below where the latchbolt had been, in a pattern that extended downward vertically (App. 729, video deposition 48:5, “Vertical, more or less vertical, yes, sir”) as he was “working my way down” an “[i]nch at a time maybe” (App. 727, video deposition 42:10-42:14). The jury could reasonably have disbelieved his alleged rationale (that he was aiming where he thought the latchbolt had somehow fallen, App. 630:5-630:18) and concluded that his disregard of his own employer’s aiming rule was wildly dangerous.³
- Sgt. Ingram knew this aiming rule well. The Richmond Police Department had incorporated it into its lesson plan for breaching doors. (App. 740, video deposition 101:7-102:2 and Plaintiffs’ Exhibit 16). On more than a dozen occasions he had even taught others to breach doors and, in doing so, had emphasized that it was important to aim the frangible round at the latchbolt between the lock and the doorframe. (App. 742, video deposition 129:16-129:21 and video deposition 131:5-131:13).

³ Sgt. Ingram’s alleged rationale raises more questions than it answers. For example, how could Sgt. Ingram honestly have thought that one end of the latchbolt remnant had been “knocked...down this way” (App. 630:6-630:7) within the body of the solid laminate door (App. 333:1), being “knocked...down this way” lower and lower with each successive shot, each an inch or so beneath the other, at the same time that the opposite end of the remnant was holding the door shut by extending into the pocket in the jamb? For a photograph of the pocket in the jamb into which the deadbolt extended when the door was locked, please see Plaintiffs’ Exhibit 11. And even if he honestly thought that somehow this was the case, why wasn’t he aiming at the **other** end of the remnant—the end that was extending into the pocket in the jamb and thereby holding the door shut, as Lt. Bennett had instructed him to do?

- Sgt. Ingram also knew well the performance characteristics of the #22 TKO. He had fired it at least ten times before he killed Ms. Green. (App. 742, video deposition 112:20-113:5).
- When Sgt. Ingram fired each of his five shots in the raid in which he killed Ms. Green, he assumed that there might be someone on the other side of the door. (App. 734, video deposition 76:9-76:10).
- Before Sgt. Ingram fired the first of his five shots that night, he knew that the #22 TKO was “potentially lethal.” (App. 741, video deposition 107:14-107:17).
- His shotgun was equipped with a light kit, allowing him as he shot to see “really well” a “real bright” area of the door’s surface that was approximately the size of a grapefruit. (App. 744, video deposition 152:17-153:18).
- After his first shot he saw that his first shot had made a hole in the door “about the size that a 12 gauge would make, maybe quarter size or less,”⁴ and that his first shot had “penetrated the door....” (App. 727, video deposition 37:8-37:21).
- Even after realizing that his first shot had penetrated the door, he shot into the door four more times.
- It did not concern Sgt. Ingram that his five shots had blown a hole in the door four to six inches high, since “that’s what we’re looking for. That’s what it’s supposed to do, it’s supposed to knock the lock and debris and make a hole in things so we can knock locks off doors.” (App. 734, video deposition 74:24-75:5). He even agreed that, from his

⁴ Thus the hole that Sgt. Ingram made with his first shot is similar in appearance to the holes that Green’s ballistics expert Mr. Martin made when he shot the test door depicted in Plaintiffs’ Exhibit 8.

perspective, the #22 TKO had done exactly what it was supposed to do. (App. 734, video deposition 75:6-75:9).

- He did not think that the door's knob (which he neither turned nor shot) was keeping the door from opening. This was because he considered the knob latch (pictured in Plaintiffs' Exhibit 14D) to be "insignificant," such that "they disintegrate with just the pressure of the round coming through and knocking holes in the door...." (App. 731, video deposition 56:20-57:3). This is irrational and showed indifference to the safety of those inside such as Ms. Green.

In sum, as this Court has previously held, these facts alone are sufficient evidence of gross negligence to create a question of fact for the jury to resolve.

c. At the trial on remand, Green presented yet more evidence that Sgt. Ingram was grossly negligent.

Even so, at the trial on remand Green presented yet more evidence that Sgt. Ingram was grossly negligent. For example, at the trial on remand, for the first time Green proved that Sgt. Ingram fired every #22 TKO he had in his shotgun and that it was only when his shotgun was empty that he used the ram. (App. 554:7-554:11 and App. 731, video deposition 56:3-56:19). Also at the trial on remand, for the first time Green presented the testimony of an expert as to the standard of care as to the angles to be used when shooting breaching rounds (such as the #22 TKO) to breach the doors of occupied dwellings.⁵ (App. 478:5-478:8 and 479:12-479:13.) This expert was William Kenneth

⁵ In addition, Green proffered an excerpt from *Police: The Law Enforcement Magazine*, pursuant to the "learned treatise" provisions of *Va. Code Ann. § 8.01-401.1* (1950, as amended). The trial court ruled that this excerpt was not admissible, and this ruling is the subject of Green's assignment of cross-error.

Katsaris, former Sheriff of Tallahassee, Florida, former commander of a SWAT team, and (at the time of the trial on remand) a sworn police officer and trainer of police, both in the Tallahassee area and nationally. (App. 471:10 - 471:19 and 473:3 - 474:2.)

According to Mr. Katsaris, the standard of care required breachers to shoot #22 TKOs only at a wooden door's hardware. (App. 485:2 - 485:9.) Mr. Katsaris explained that this was:

because it will penetrate and destroy the wood and go through. The purpose of the round is to destroy the wood and then get the hardware -- and then destroy the hardware. It's quite obvious if it will destroy the wood before the hardware [*e.g.*, the wood in which the deadbolt was encased, between Ingram's gun barrel and the deadbolt] and knock the hardware out, it's going to destroy all wood.

(App. 485:11 - 485:16). Also, Mr. Katsaris testified that the standard of care required Sgt. Ingram to aim "at a 45-degree angle towards the door jamb" where "[t]he actual throw for the lock would be going into the door frame." (App. 485:23-486:6). This is "because to be effective it has to take the latch bolt away from the door frame itself because that's where it's secured, so straight in would not do that. And second would be to take the debris field off to the side and not in front of the door." (App. 486:10-486:14). In violation of this standard of care, Sgt. Ingram aimed essentially straight ahead (Plaintiffs' Exhibits 6E, 7, 9, 14B, and 14C) and not (to quote Mr. Katsaris) where "[t]he actual throw for the lock would be going into the door frame...where it's secured." As a result, even with his first shot Sgt. Ingram never hit the 1.75 inch piece of steel that was the latchbolt, but instead struck only the metal housing that connected the key mechanism to the latchbolt. (App. 516:20-517:21 and Plaintiffs' Exhibit 14C).

Corroborating in part this testimony by Mr. Katsaris as to the applicable standard of care, Lt. Linwood Bennett testified that no later than 1996 he himself had instructed Sgt. Ingram to aim into the door jamb at a left/right angle of “approximately 45 degrees.” (App. 559:8 - 560:5). Lt. Bennett was a 31 year veteran with the Richmond Police Department. (App. 558:15 - 558:25). He did not testify at the initial trial against Sgt. Ingram.

The testimony of Mr. L. S. Martin added yet more evidence as to Sgt. Ingram’s gross negligence. He did not testify at the initial trial against Sgt. Ingram. Mr. Martin was an expert in ballistics and firearm testing. (App. 415:11- 415:13). At Green’s request he fired nine #22 TKOs at an identical door, using a shotgun and aiming angles identical to those used by Sgt. Ingram. (App. 415:15-419:12). Plaintiffs’ Exhibit 8 shows the “backside” of Mr. Martin’s test door following his third shot. (App. 420:1- 420:7). Please note the three cookie cutter-like holes in the test door and the dowel that starts in one of those holes and then follows the path of Mr. Martin’s third shot through the test door and then through two “witness boards” made of solid pine or birch, each three-quarters of an inch thick. (App. 420:22–422:3). The jury could reasonably have concluded that damage this dramatic put Sgt. Ingram on full notice of the highly lethal character of the #22 TKO when it did not squarely strike substantial metal. After all, before the raid in which he killed Ms. Green, Sgt. Ingram had fired a #22 TKO at least 10 times. (App. 742, video deposition 112:20-113:5).

George Langford, Sc.D. also testified at the trial on remand but not at the initial trial against Sgt. Ingram. The trial court recognized Dr. Langford as an expert in the general principles of physics, in metallurgy (both physical and mechanical), and in

material science. (App. 512:11-512:14 and 514:2-514:4). He received his doctorate at the Massachusetts Institute of Technology. (App. 511:1-511:5). Dr. Langford explained how a #22 TKO could fragment as the fatal one fragmented after hitting the side of a preexisting hole and without hitting metal. (App. 529:18-530:19). This testimony addressed the comment of the dissent in *Green v. Ingram* that “the presence of only fragments on and in the decedent’s body suggests that the rounds that struck her also partially hit metal.” [269 Va. at 295, 608 S.E.2d at 925](#).

d. Sgt. Ingram’s testimony was disputed, and the jury could have found his self-serving statements not credible.

Sgt. Ingram’s argument in support of setting aside the jury’s verdict relies almost entirely upon his own testimony. Based upon the evidence before it and the instructions given, the jury had ample reason to conclude that Sgt. Ingram was not credible and, on that basis, to discard all of his self-serving testimony. As a result, this Court should measure the sufficiency of the jury’s finding as to gross negligence without reference to the core evidence on which Sgt. Ingram relied in defending what he did—namely, his own self-serving testimony as summarized in the paragraphs that begin with the words “First, Ingram testified” and “Ingram further testified” on pages 14 and 15 of his brief. [Bitar v. Rahman, supra](#), stating that an appellee such as Green, armed with a jury verdict approved by the trial court, “is entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable” to the appellee.

At page 16 of his brief, Sgt. Ingram suggested that there was no evidence as to the angles at which he aimed his five shots. This is not accurate. Green’s ballistics expert Mr. Martin testified that the test shots he fired under similar circumstances “did

not deviate from the aim path.” (App. 419:24-419:25). To the same effect, Green’s MIT-trained expert Dr. Langford testified that during Mr. Martin’s testing (which he observed) there was “virtually no deflection” up, down, or to the side between the angle at which the #22 TKOs entered and exited the test door. (App. 520:8-520:22). Eugene Provost completed Green’s proof as to the angles at which Sgt. Ingram aimed his five shots. As a forensic detective with the Richmond Police Department, Mr. Provost investigated the scene where Sgt. Ingram killed Ms. Green. (App. 326:12-326:19 and 328:2-328:11). He determined the trajectory of shots fired by Sgt. Ingram once they exited the door in question, and then recorded his findings in a document that is in evidence as Plaintiffs’ Exhibit 7. (App. 334:18-336:16). Please see the dashed lines that start near the top of Plaintiffs’ Exhibit 7 and extend downward, representing Mr. Provost’s findings as to the left-to-right trajectory of Sgt. Ingram’s shots. (App. 355:16-355:21). At the top of the drawing these dashed lines begin at the holes Sgt. Ingram shot in the kitchen door and then travel down to the front of the cabinet depicted or located in Plaintiffs’ Exhibits 6D, 6E, 9, and 14B. One can see what the jury saw—namely, that the left/right aiming angle of these shots is, at most, only slightly toward the door jamb.

Sgt. Ingram’s “empty chair” defense has no merit. At page 17 of his brief, Sgt. Ingram launched this defense, apparently hoping to deflect this Court’s attention from his fault to the alleged fault of the manufacturer.⁶ There, he suggested that the words “target” and “impact” in Defendant’s Exhibit 1 (the #22 TKO product literature) misled him into believing that the #22 TKO would disintegrate into harmless powder even if it

⁶ Green sued both the manufacturer and Sgt. Ingram, alleging joint and several liability, but the trial judge bifurcated the trial against the manufacturer from the trial against Sgt. Ingram.

hit only wood. At the trial on remand he tried this same gambit on the jury for more than four pages of transcript. (App. 780:12-785:2). Having failed to convince the jury, he is now trying to convince this Court. The difficulty he faces is that this defense is factual in nature, turning on his own credibility, since his own testimony is the only source of evidence that he relied on the manufacturer's literature. As a result, Sgt. Ingram's "empty chair" defense must fail once again.

Why would the jury have found Sgt. Ingram not credible and evaluated his testimony accordingly in deciding whether to accept or reject his "empty chair" defense? The jury could reasonably have found Sgt. Ingram not credible, due to his bias as a party, as the trial judge instructed the jury, without objection, that it could do. (App. 761:20-762:17). Also, the jury could reasonably have considered the context in which the manufacturer used the words "target" and "impact" in the #22 TKO product literature and on this basis discarded Sgt. Ingram's self-serving testimony that these terms misled him. That context included the statement in this same literature that, "When properly applied, this round is capable of defeating door lock mechanisms, door knobs, hinges, dead bolts, safety chains, and padlocks...." Taking this context into account, the jury could have understood this literature to mean that the #22 TKO would disintegrate into harmless powder only to the extent that it squarely struck substantial metal. Also, the jury could reasonably have considered the words "target" and "impact" in the context of Plaintiffs' Exhibit 8 and on this basis discarded Sgt. Ingram's self-serving testimony that these terms misled him. Plaintiffs' Exhibit 8 is a photograph that showed the jury the destructive power of a #22 TKO when Mr. Martin fired it into an identical test door without hitting metal. This #22 TKO went completely through the test door plus two

pine or birch boards each three-quarters of an inch thick. (App. 415:15-422:3). This photograph gave the jury dramatic, visual proof that Sgt. Ingram, having shot at least ten #22 TKOs before killing Ms. Green (App. 742, video deposition 112:20-113:5), was on full notice that the manufacturer's literature did not mean that the #22 TKO would turn to harmless powder if it struck wood only. Also, the jury could reasonably have accepted the argument of Green's counsel at App. 794:16-794:24 that common sense told Sgt. Ingram that the #22 TKO did not turn to powder upon striking wood. Otherwise it would never have been able to do what it was designed to do, and what Sgt. Ingram's first shot did in this case--namely, blast its way through the wood that encased the deadbolt and, after having done so, still retain enough destructive power to cut its way through the deadbolt. Please see Plaintiffs' Exhibit 14C for a photograph of the damaged deadbolt. The jury could reasonably have concluded that to think otherwise was nonsense. Each of these explanations is a legitimate reason why the jury, in the proper discharge of its fact finding function, could have rejected Sgt. Ingram's "empty chair" defense. Therefore this Court has no reason to disturb the jury's decision. *Bitar v. Rahman, supra*, stating that an appellee such as Green, armed with a jury verdict approved by the trial court, "is entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable" to the appellee.

There is no merit to Sgt. Ingram's argument, made in footnote 3 at the bottom of page 14 of his brief, that Green is bound by so much of Sgt. Ingram's testimony as is clear, reasonable, and uncontradicted. This is because this argument conflicts with the following jury instruction, given without objection:

You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, **their bias**, and if any has been shown, their prior inconsistent statements **or whether they have knowingly testified untruthfully as to any material fact in the case.**

You may not arbitrarily disregard believable testimony of a witness. However, **after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.** You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

(App. 761:20-762:17, emphasis added).

Because Sgt. Ingram did not object to this instruction, he can not object now.

Thus, he can not complain if the jury followed this instruction, found him untrustworthy, and discarded all of his self-serving testimony. Rule 5:17 (c) of this Court, stating, “Only errors assigned in the petition for appeal will be noticed by this Court;” Rule 5:25 of this Court, stating:

Rule 5:25. Questions to Be Considered.

Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

See Medical Center Hospitals v. Sharpless, 229 Va. 496, 498, 331 S.E.2d 405, 406

(1985), holding that “[t]he instruction, given without objection, was the law of the case.”

It is true that, at the trial on remand, Sgt. Ingram did tender an instruction stating:

The plaintiff called the defendants [sic] as an adverse witness. The plaintiff is bound by as much of the defendant's testimony given as an adverse witness as is clear, logical, reasonable and uncontradicted.

The plaintiff is not bound by any of the defendant's testimony given as an adverse witness that conflicts with any of the other evidence in the case.

(App. 83). However, the trial court refused this instruction and Sgt. Ingram did not assign error to this refusal. As a result, the legal principles recited in this instruction, which the trial court refused, do not apply to this appeal. Rule 5:17(c), stating, "Only errors assigned in the petition for appeal will be noticed by this Court;" *Norfolk and Portsmouth Belt Line Railroad Co. v. Barker*, 221 Va. 924, 928, 275 S.E.2d 613, 615 (1981), stating "[n]o error was assigned to the jury instructions, and the definition of negligence contained in those instructions is the law of this case;" *Bostic v. Whited*, 198 Va. 237, 239, 93 S.E.2d 334, 335 (1956), stating, "[t]here being no assignment of error directed to the giving of the instructions, they became the law of the case and are binding upon us irrespective of their correctness."

Even if considered, Sgt. Ingram's argument in footnote 3 on page 14 of his brief fails to support overturning the jury's verdict. There, Sgt. Ingram cited *Ragland v. Rutledge*, 234 Va. 216, 361 S.E.2d 133 (1987) and *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970), for the proposition that Green was bound by Sgt. Ingram's deposition testimony presented as part of Green's case in chief. Even so, even if Sgt. Ingram had not waived the benefits of this rule by not objecting to the general jury instruction as to credibility, and by not assigning error to the trial court's refusal of his adverse witness instruction, the rule of *Ragland* and *Beale* could have bound Green only

to Sgt. Ingram's deposition testimony. *Thornton v. Glazer*, 271 Va. 566, 572, 628 S.E.2d 327, 329-330 (2006), stating:

when a defendant testifies as an adverse witness, the plaintiff is bound by **that** testimony to the extent that **such testimony** is reasonable and uncontradicted by the plaintiff's evidence. [Citations omitted.] However, the plaintiff does not make the adverse party his own witness.

(Emphasis added.) Thus rule of *Ragland* and *Beale*, even if applicable, could **not** have bound Green to Sgt. Ingram's testimony given as part of Sgt. Ingram's own case in chief. For example, the rule of *Ragland* and *Beale* could not have bound Green to Sgt. Ingram's testimony in his own case in chief as to his "belief" that "the dead bolt was still in action and I had somehow jammed the door and knocked this mechanism down this way" and that he aimed each of his five shots where he believed the latchbolt was. (App. 630:5-630:18). Neither could it have bound Green to Sgt. Ingram's testimony in his own case in chief that he thought the #22 TKO product literature meant that "this round...would pulverize into a fine powder upon contact with a surface, like wood...." (App. 618:7-618:12).

Credibility is a fundamental jury issue, and the jury had ample reason to find Sgt. Ingram not credible and on that basis to discard all of his self-serving testimony. As a party he had an obvious "interest in the outcome of the case"--one of the factors enumerated by the trial court in the jury instruction that authorized the jury to "discard all or part of the testimony of a witness as you think proper." (App. 761:20-762:17).

In addition, there were repeated conflicts between Sgt. Ingram's testimony and Green's evidence, each of which implicated Sgt. Ingram's credibility. Thus:

- Sgt. Ingram repeatedly suggested that there had been changes in the production of the #22 TKO, affecting its performance. (App. 615:5-615:16; 618:7-618:20; and 629:2-629:7). In contrast, Dr. Langford, Green’s MIT-trained expert in metallurgy and material science, testified that there were “no changes in the production, method, or composition of the slug....” (App. 535:23-535:24).
- Sgt. Ingram testified that “those door knobs are generally insignificant, they disintegrate with just the pressure of the round coming though and knocking holes in the door....” (App. 731, video deposition 56:25-57:3). In contrast, a photograph of the knob latch, in evidence as Plaintiffs’ Exhibit 14D, made obvious that this was nonsense. Dr. Langford confirmed what Plaintiffs’ Exhibit 14D shows when he testified that “if the slug doesn’t hit the actual mechanism, it’s not going to damage the mechanism.” (App. 531:21-532:5). Sgt. Ingram’s superior Capt. Buckovich testified to the same effect. (App. 596:14-596:21).
- Sgt. Ingram testified that the Richmond Police Department had tested the #22 TKO by firing it into “doors themselves,” and that each time this was done “[t]he round disintegrated into a powder, as the manufacturer said in the paper that we received.” (App. 580:23-581:9). In contrast, Captain Larry Beadles, the Commander of the Richmond SWAT team from 1992 until at least late 1996, testified as a rebuttal witness called by Green that in the testing done by the Richmond Police Department no one ever intentionally aimed a # 22 TKO at a portion of a door that was not thought to contain hardware. This was “[b]ecause we were testing to see what it would do to a locking mechanism. We had no intention of shooting the round through the door.” (App. 641:17-642:17).

- Sgt. Ingram was asked if he remembered the training to which Lt. Bennett had testified, to the effect that the #22 TKO should be shot into the jamb at a 45 degree angle. In response he testified, “I have no recollection of that at all, sir.” (App. 619:22-620:2). In contrast, Lt. Bennett testified that he himself had instructed Sgt. Ingram to aim the #22 TKO towards the jamb of the door at an angle of 45 degrees. (App. 559:12-560:5).
- Sgt. Ingram testified that he expected the #22 TKO to disintegrate into harmless powder upon contact with the surface of a wooden door. (App. 618:7-618:20). In contrast, common sense told Sgt. Ingram that the #22 TKO does not turn to powder upon striking wood. Otherwise the #22 TKO would never have been able to do what it was designed to do, and what Sgt. Ingram’s first shot did in this case--namely, blast its way through the wood that encased the deadbolt and, after doing so, still retain enough destructive power to cut its way through the deadbolt. For a photograph of the deadbolt after Sgt. Ingram shot it, please see Plaintiffs’ Exhibit 14C.

In closing argument, Green’s counsel invited the jury to find Sgt. Ingram not trustworthy and on that basis to discard Sgt. Ingram’s testimony. He did so by highlighting these same conflicts between Sgt. Ingram’s testimony and the other evidence. (App. 793:1-795:6). He then quoted the sentence in the general credibility instruction, “[y]ou may accept of [sic] discard all or part of the testimony of a witness as you think proper.” (App. 796:5-796:6). He concluded by telling the jury, “If you feel that Sergeant Ingram has not dealt squarely with you, then you can discard all his testimony.” (App. 796:7-796:9).

The trial judge himself acknowledged that Sgt. Ingram’s credibility was key, and in response to Sgt. Ingram’s argument to set the verdict aside because Sgt. Ingram had

allegedly shown “some care,” indicated that he was denying the motion because “[t]hat [as to whether Sgt. Ingram was grossly negligent] is a credibility question as to why he did that.” (App. 803:6-803:7). In response, defense counsel conceded, “To some extent, Your Honor.” (App. 803:8).

This was a pivotal concession. It destroyed Sgt. Ingram’s challenge to the sufficiency of the evidence as to whether he was grossly negligent. It confirmed that the jury was within bounds to “discard” all of his testimony as to any care or diligence or prudence that he allegedly exercised in connection with the raid in which he killed Ms. Green.

e. Conclusion.

When we put the law and these facts together, we see that the jury’s finding of fact as to gross negligence was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. #22 TKOs were lethal, and Sgt. Ingram knew this. Also, he conceded that “[y]ou always assume that there might be somebody on the other side of the door....” As a result, he had a duty to exercise a high degree of care. *Taboada v. Daly Seven, Inc., supra*; *American Oil Co. v. Nicholas, supra*; and *Spruill v. Boyle-Midway, Inc., supra*. Sgt. Ingram made three types of fatal errors (shooting into pure wood, failing to shoot at a 45 degree angle into the jamb, and expecting the knob latch to “disintegrate with just the pressure of the round coming through and knocking holes in the door”), and repeated these three fatal errors multiple times as he shot five #22 TKOs. In *Chapman v. City of Virginia Beach, supra*, the Court was explicit that “[s]everal acts of negligence which

separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety.” Each of the five shots was a deliberate act, and in *Chapman* the Court made clear that “[d]eliberate conduct is ‘important evidence on the question of gross negligence.’” With four of his five shots Sgt. Ingram disregarded his own employer’s aiming rule to “aim...at the latchbolt,” and with all five he violated the instruction that Lt. Bennett had given him to shoot at a 45 degree angle into the jamb. He claimed to have thought that there was no need to turn or shoot the knob latch since “those door knobs are generally insignificant, they disintegrate with just the pressure of the round coming through and knocking holes in the door....” His shotgun was equipped with a light kit that allowed him to see precisely the dimensions of the hole that he was making, penetrating the door and growing larger and larger with each of his five shots. Even so, he kept shooting and stopped only when his shotgun was at last empty. He claimed that alleged ambiguities in the #TKO’s product literature misled him, but the jury had sound reason to find this self-serving testimony not credible and on this basis to discard it.

In the context of these facts, this Court’s decision in *Green v. Ingram, supra*, is the definitive benchmark as to whether the facts present a question for the jury as to Sgt. Ingram’s gross negligence. Cf. *Chapman v. City of Virginia Beach, supra*, holding that the plaintiff’s evidence as to gross negligence presented a jury question, where such evidence was that the supervisor of a city department in charge of maintaining a gate to a boardwalk had failed to order that the gate be secured or repaired in spite of three reports that it was broken, intending instead to wait six months or so later until spring, prior to the tourist season; *Terry v. Fagan, 209 Va. 642, 166 S.E.2d 254 (1969)*, holding that the

plaintiff's evidence as to gross negligence presented a jury question, where such evidence was that a hot ember from a cigarette fell on the defendant's shirt and burned him while he was driving a car, in response to which he took his hands off the steering wheel and his eyes off the road for 6 to 10 seconds, in disregard of his passenger's warning of danger, allowing the car to strike a tree.

Decisions dealing with willful and wanton conduct are also instructive, even though they deal with a higher standard of care, for they highlight the importance of evidence that the defendant violated safety instructions or acted in the face of a known danger, or both. In *Alfonso v. Robinson*, 257 Va. 540, 546-47, 514 S.E.2d 615, 619 (1999), the Court upheld the trial court's ruling that it was for the jury to decide whether a truck driver's conduct in failing to deploy safety flares and safety triangles constituted willful and wanton negligence. In doing so the Court emphasized that the defendant, a professional truck driver, "had received specialized safety training warning against the very omissions he made prior to the accident." In *Griffin v. Shively*, 227 Va. 317, 322, 315 S.E.2d 210, 213 (1984), the trial court struck the plaintiff's evidence on grounds that the plaintiff's decedent was guilty of contributory negligence as a matter of law. The plaintiff's decedent, knowing that the defendant Shively was deathly afraid of snakes and had a pistol, flung a black belt toward Shively, who shot at it, unintentionally killing the prankster. On this facts the Court concluded that the evidence presented a question for the jury as to whether Shively's acts constituted willful and wanton negligence, entitling the plaintiff to a verdict in spite of the prankster's contributory negligence, and reversed the trial court's decision to strike the plaintiff's evidence, explaining:

We conclude that the evidence in the present case presents a jury issue whether Shively was guilty of willful and

wanton negligence. The undisputed evidence is that Shively consciously discharged a deadly weapon in close proximity to a number of people in a relatively small room. We believe a jury reasonably could find that this conduct, in light of the surrounding circumstances, established willful and wanton negligence. On the other hand, a jury reasonably could conclude that Shively's conduct did not rise to that degree of culpability.

The various items of evidence recited by Sgt. Ingram, beginning at page 14 of his brief, do not convert the issue of gross negligence from an issue of fact to an issue of law. Most of that evidence was based solely on Sgt. Ingram's testimony, the trial court instructed the jury that it could "discard" the testimony of any witness it deemed not trustworthy, and the jury had ample reason to conclude that Sgt. Ingram was not trustworthy.

Colby v. Bolton, 241 Va. 125, 400 S.E.2d 184 (1991), is easily distinguishable. In that case, the Court affirmed the trial court's determination that an officer who caused an automobile collision did not act with gross negligence in what otherwise appeared to be a typical motor vehicle accident. The officer had activated his lights and siren. His speed was no more than five miles over the speed limit, and he swerved and braked in an attempt to avoid the collision. The plaintiff's appeal focused on a failed argument that the officer could be held liable for simple negligence and, after that argument was rejected, the issue of whether the officer had been grossly negligent did not appear to be in serious dispute.

For these reasons Green asks this Court to conclude that the jury's finding of fact as to gross negligence was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green, and to dismiss Sgt. Ingram's third assignment of error.

2. There was evidence to support either or both of the following, when the evidence and all reasonable inferences are viewed in the light most favorable to Green:
(a) that the first #22 TKO did not strike Ms. Green; or
(b) that Sgt. Ingram was grossly negligent in firing the first of the five shots.
(Assignment of error #1).

Beginning at page 18 of his brief, Sgt. Ingram argued this assignment of error (his first). In sum, Sgt. Ingram contends that there was no evidence that he was grossly negligent in firing his first shot.

There was abundant credible evidence that Sgt. Ingram's first shot did not strike Ms. Green, thereby rendering moot the question of whether he was grossly negligent in firing his first shot. For example, the external wound pattern (that is, the alignment of the entrance wounds) is evidence that his first shot hit exactly where he aimed--namely, at the deadbolt--and never struck Ms. Green.

To understand the significance of the external wound pattern, it may be helpful to summarize what the evidence shows about Sgt. Ingram's five shots. Sgt. Ingram testified that, in connection with his first shot, he placed his sights "on the lock, the area between the dead bolt lock and where the frame is," as he aimed for the deadbolt. (App. 726, video deposition 33:11-33:24). His shotgun was equipped with a light kit, allowing him as he shot to see "really well" a "real bright" area of the door's surface that was approximately the size of a grapefruit. (App. 744, video deposition 152:17-153:18). One shot, presumably his first, hit the deadbolt housing, just below centerline, as Plaintiffs' Exhibit 14C shows, and the deadbolt mechanism shows no evidence of ever having been hit again. Sgt. Ingram fired the five #22 TKOs in a pattern that was "more or less vertical" (App. 729, video deposition 48:5) as he was as he was "working my way down" an "[i]nch at a time maybe" (App. 727, video deposition 42:10-42:14). In short, his five

shots created a hole in the door, beginning at the level of the deadbolt and from there extending downward vertically, each shot an inch or so below the shot that preceded it. This explains the pattern of damage depicted by Plaintiffs' Exhibits 6A, 14A, and 14C. The knob latch was never struck, as Plaintiffs' Exhibit 14D makes clear. Also, Sgt. Ingram testified that the "forensic people" and "the detectives involved in the case" told him that "**one** of the rounds I fired did in fact strike her," and that he had no evidence to the contrary. (App. 743, video deposition 144:5-144:19, emphasis added). To the same effect is Sgt. Ingram's statement on page 9 of his petition for rehearing that Ms. Green was "struck by several fragments from **one** of the 22 TKO rounds." (Emphasis added). Thus there was evidence that only one of the five #22 TKOs struck Ms. Green.

In the context of these facts, let us return to the topic of the wound pattern. According to the testimony of Green's MIT-trained expert in metallurgy and material science Dr. Langford, the fragments of the #22 TKO that struck the deadbolt housing depicted in Plaintiffs' Exhibit 14C were deflected downward in a **vertical** plane. (App. 522:18-523:4 and 546:1-546:7). In contrast, Dr. Langford told the jury that the fragments of a #22 TKO that struck the side of a hole made in the door by a previous shot of Sgt. Ingram were deflected **horizontally**. (App. 529:18-530:19). The external wound pattern across Ms. Green's chest is **horizontal**. (Plaintiffs' Exhibit 1 and App. 303:10-303:20, stating that there were four entrance wounds in the chest, each located at a distance of eleven to twelve inches below the top of Ms. Green's head). Consequently, because the first shot struck the metal deadbolt housing below centerline, spraying fragments downward in a **vertical** plane, the **horizontal** nature of the external wound pattern supports the conclusion that Sgt. Ingram's first shot did not strike Ms. Green.

It is true (as Sgt. Ingram wrote at page 21 of his brief) that Ms. Green “had descending wounds caused by fragments of a slug....” This language describing “descending wounds,” however, was referring to the wound path within Ms. Green’s chest cavity after the fragments entered her chest. (App. 375:5-375:8, where Green’s forensic pathologist Jack Daniel, M.D. testified that “the path of the projectiles in her body” was “downward through her body”). According to Dr. Daniel, this wound path was explained by the fact that, when struck with the fatal round, Ms. Green “must have been in what I call a crouching position leaning towards the origin of the shots.” (App. 375:10-375:11.) The alignment of the entrance wounds (or external wound pattern), however, is **horizontal**, supplying the jury with visual evidence that Sgt. Ingram’s first shot (which sprayed fragments in a **vertical** plane) did not strike Ms. Green.

Sgt. Ingram’s left-to-right aiming angle, coupled with the sequence of events, is also evidence that his first shot did not strike Ms. Green. All of Sgt. Ingram’s shots went into the kitchen and not into the living room. Thus, Plaintiffs’ Exhibits 6D, 6E, 7, 9, and 14B document that Sgt. Ingram shot essentially straight ahead into the kitchen and that the living room was beside the kitchen and not behind it. Charnte Anderson, the only occupant of the apartment to testify, told the jury that, when the shooting started, she and Ms. Green were standing in the living room, near a photograph of Jesus that was on the wall. (App. 453:21-455:1; Plaintiffs’ Exhibits 6B and 9, Plaintiffs’ Exhibit 9 being a diagram of the first floor of the apartment where Sgt. Ingram killed Ms. Green).⁷ Sgt.

⁷ According to the testimony of Robert Lee, an investigator hired by Green, the red circle on Plaintiffs’ Exhibit 9 indicated the location of the lock mechanism on the kitchen door that Sgt. Ingram was attempting to breach. (App. 447:16-447:21). Also according to Mr. Lee, the red line on Plaintiffs’ Exhibit 9 indicated the location of the damaged cabinet front depicted in Plaintiffs’ Exhibit 6E (photograph #364). (App. 447:22-448:13).

Ingram testified that the sound of breaking glass caused by the “rake and brake” diversion was the signal to him and to the other police breacher⁸ to begin firing. (App. 627:9-627:17). Perhaps thinking that the kitchen was the safest place to be (since the other breacher was shooting at the front door that opened into the living room, where Ms. Anderson and Ms. Green were standing), Ms. Anderson “jumped on the floor and crawled my way to the kitchen.” (App. 455:16-455:17.) Ms. Green followed. (App. 455:21-456:2). If Ms. Green was in the living room when Sgt. Ingram began shooting, and if all of Sgt. Ingram’s shots went into the kitchen, then his first shot did not strike her.

Finally, Ms. Anderson testified that Ms. Green was in the kitchen when she first said that she had been wounded, and this is yet more evidence that Ms. Green was in the kitchen when she was struck and consequently that Sgt. Ingram’s first shot was not the fatal one. Ms. Anderson agreed that, when Ms. Green said that she had been hit, Ms. Green was in front of the cabinet pictured in Plaintiffs’ Exhibit 6D, beside the “short wall.” (App. 459:1-459:20). Plaintiffs’ Exhibit 6E also depicts this wall and is a clearer photograph of the front of this cabinet. Plaintiffs’ Exhibit 14B also depicts the front of this cabinet. *See also* App. 459:21-460:25 (where Ms. Anderson agreed that Ms. Green was in front of the red line on Plaintiffs’ Exhibit 9 when she said that she had been hit)

⁸ The police who raided the apartment were divided into two teams. (App. 724, video 27:5-27:14). One team was assigned to the front (or living room) door, and Sgt. Ingram’s team to the back (or kitchen) door. Please see Plaintiffs’ Exhibit 9 for the floor plan, where the numbers 6 and 7 indicate the location of the two doors. Sgt. Wallis was the other breacher. (App. 623:20-623:23). Each of the two breachers was given five #22 TKOs. (App. 624:24-625:9). Their signal to begin was the sound of the breaking glass caused by the “rake and break” diversion. (App. 627:9-627:17).

and App. 462:7-462:14 (where on cross-examination Ms. Anderson denied that “Ms. Green was saying she was hit at the end of the wall before she got into the kitchen”). These exhibits and testimony gave the jury ample facts on which to conclude that Ms. Green was not struck until after she entered the kitchen, and that consequently Sgt. Ingram’s first shot did not strike her. (Ms. Anderson did testify at App. 456:12-456:15 that Ms. Green “was already struck when she was coming towards the kitchen.” Yet once Plaintiffs’ Exhibit 6D refreshed her memory, Ms. Anderson agreed at App. 459:16-459:18 that when Ms. Green said she had been hit “she was basically in front of this kitchen cabinet that’s got the three holes,” depicted in Plaintiffs’ Exhibit 6D, shown more clearly in Plaintiffs’ Exhibits 6E and 14B.)

Even if we ignore this abundant evidence, we still see that there was only one chance out of five (a twenty percent likelihood) that it was the first shot that killed Ms. Green, and four chances out of five (an eighty percent likelihood) that the fatal shot was either the second, third, fourth, or fifth.

It is also true that the evidence does not show whether it was the second, third, fourth, or fifth shot which killed Ms. Green. This is not, however, dispositive of Sgt. Ingram’s appeal. As pointed out above beginning at page 16, Green presented evidence that Sgt. Ingram was grossly negligent in firing each of those last four shots, and under those circumstances the law does not require Green to specify which of the last four was the fatal one. *Cf. Parker v. Elco Elevator Corp.*, 250 Va. 278, 281, 462 S.E.2d 98, 100 (1995), holding that the plaintiff did not have to show which specific elevator defect caused the elevator’s excessive speed of descent, where the plaintiff contended that the defendant was negligent in not removing the elevator from service in the first place; and

Jury Instruction No. 12, stating that a proximate cause is “a cause without which the death would not have occurred” (App. 765:1-765:6).

In the alternative, as explained above beginning at page 16 in connection with Sgt. Ingram’s third assignment of error, there is evidence to support the conclusion that he was grossly negligent in firing the first of the five #22 TKOs, when the evidence and all reasonable inferences are viewed in the light most favorable to Green.

Accordingly, Sgt. Ingram’s first assignment of error must fail.

3. Concerning the jury’s finding of fact that Sgt. Ingram’s gross negligence was a proximate cause of Ms. Green’s death, it was not plainly wrong or without evidence to support it, when the evidence and all reasonable inferences are viewed in the light most favorable to Green. (Assignment of error #2).

Beginning at page 19 of his brief, Sgt. Ingram addressed this assignment of error (his second). This assignment of error states:

In the absence of sufficient evidence that the first round fired was grossly negligent, the circuit court erred when it failed to rule as a matter of law that Plaintiffs’ evidence of proximate cause was insufficient because the evidence revealed at most only a 50% probability that the round that caused the death of Plaintiffs’ decedent resulted from Ingram’s alleged gross negligence.

What does this second assignment of error mean? It appears to mean that, if there was evidence that Sgt. Ingram was grossly negligent in firing his first shot, or if there was evidence that his first shot did not strike Ms. Green, then he does not challenge the sufficiency of Green’s evidence as to proximate cause. If this is what Sgt. Ingram’s second assignment of error means, it fails without further analysis. This is because (as explained above beginning at page 16) there was evidence that Sgt. Ingram was grossly negligent in firing his first shot and because (as explained above beginning at page 37), there was evidence that his first shot did not strike Ms. Green. Assignments of error limit the scope of an appeal. Rule 5:17(c) of this Court stating, “Only errors assigned in the petition for appeal will be noticed by this Court;” *accord*, order of this Court at App. 107 granting Sgt. Ingram’s petition for rehearing, stating with respect to Sgt. Ingram’s assignments of error that “This appeal, however, is limited to the consideration of assignments of error Nos. 1, 2 and 3 which read as follows....”

In the alternative, for purposes of this brief Green will go further and assume that Sgt. Ingram's second assignment of error makes a broader challenge to the sufficiency of the evidence as to proximate cause.

To begin with, Sgt. Ingram admitted that "Ms. Green died as a proximate result of one or more frangible rounds fired by George Ingram on December 29, 1998." (App. 553:11-553:14). With this admission in mind, let us examine the evidence of the three ways that, according to Green's allegations, Sgt. Ingram was grossly negligent.

First, there was evidence from which the jury could reasonably have concluded that Sgt. Ingram failed to aim shots two through five at the deadbolt's latchbolt and that this was a proximate cause of Ms. Green's death. Please see the demonstrative aid attached to the back of this brief and at App. 102, depicting the space between the horizontal deadbolt and the horizontal knob latch. It was into this space, consisting of pure wood only, that Sgt. Ingram fired shots two, three, four, and five. Also, Sgt. Ingram testified that, once he had emptied his shotgun of its five rounds, "I called the ram and **one tap**, the door did come open." (App. 731, video deposition 56:18-56:19, emphasis added). When the jury put this evidence together, it could reasonably have concluded that Ms. Green would never have been struck if instead Sgt. Ingram had shot only along the line of deadbolt's latchbolt until he had destroyed the deadbolt at the point that it joined the door to the jamb, and then either shot the knob latch or used the ram.

Second, there was evidence from which the jury could reasonably have concluded that Sgt. Ingram aimed all five shots approximately straight ahead and not at a 45 degree angle into the jamb and that this was a proximate cause of Ms. Green's death. Please see the demonstrative aid attached to the back of this brief and at App. 103, and *compare*

panel 2 of this demonstrative aid (illustrating the actual damage that Sgt. Ingram's first shot could have done to the deadbolt) *with* panel 4 (illustrating the damage that Sgt. Ingram's first shot could have done if fired with a left/right angle of 45 degrees toward the jamb). For several reasons the jury could have concluded that aiming straight ahead was a proximate cause of Ms. Green's death. First, if aimed at a 45 degree angle into the jamb, the fatal shot would squarely have struck substantial metal (App. 450:6-450:8 "It's a metal jamb" and Plaintiffs' Exhibit 11 depicting a rusted jamb), where it would have disintegrated into a fine powder (first paragraph of Defendant's Exhibit 1, stating that the #22 TKO "disintegrates into a fine powder upon impact with the target"). Second, if aimed at a 45 degree angle into the jamb instead of straight ahead, the fatal shot would have followed a markedly different trajectory such that it would not have struck Ms. Green as she stood in front of the kitchen cabinet (depicted or located in Plaintiffs' Exhibits 6D, 6E, 7, 9, and 14B). Third, if Sgt. Ingram had shot at 45 degrees into the jamb at the deadbolt until he had destroyed the deadbolt at the point that it joined the door to the jamb, and then either shot the knob latch or used the ram, he might never have fired the fatal shot.

Finally, there was evidence from which the jury could reasonably have concluded that Sgt. Ingram would not have killed Ms. Green if he had turned the knob after his first shot, or if he had shot the knob's latch after his first shot.⁹ Please see the demonstrative aid attached to the back of this brief and at App. 104, showing how the intact knob latch held the door shut even after his fifth. For example, on this evidence the jury could

⁹ Sgt. Ingram testified that he did not turn the knob after he started shooting (App. 731, video deposition 56:3-56:7). Plaintiffs' Exhibit 14D shows that he never shot the knob's latch.

reasonably have concluded that Sgt. Ingram would have gotten the door open without killing Ms. Green if he had aimed his first shot at a 45 degree angle into the jamb at the level of the deadbolt latch and his second shot at a 45 degree angle into the jamb at the level of the knob latch. If Sgt. Ingram had done this, his second shot could have destroyed the only hardware holding the door shut following the first shot, any part of the second #22 TKO that did not strike the knob latch would have disintegrated into a fine powder upon impact with the metal jamb, and the third, fourth, and fifth shots would have been obviated.

These facts entitled Green to have a jury resolve the issue of proximate cause. *Molchon v. Tyler*, 262 Va. at 182, 546 S.E.2d at 696, *supra*, affirming a jury verdict in favor of the plaintiff in a wrongful death action brought against a psychiatrist after a police officer fatally shot the psychiatrist's patient and stating, "when the evidence does not wholly exclude a defendant's negligence as a contributing cause of the plaintiff's injuries as a matter of law, proximate causation becomes a question of fact for the jury's determination;" *Wooldridge v. Echelon Service Co.*, 243 Va. 458, 416 S.E.2d 441 (1992), a wrongful death action brought against a building's security service for failing to pursue or investigate a suspicious person running in the building, holding that there was sufficient circumstantial evidence that inaction by the security guard was a proximate cause of the decedent's death. *Cf. Blondel v. Hays*, 241 Va. 467, 474, 403 S.E.2d 340, 344 (1991), teaching that:

[I]f a plaintiff's evidence has shown that the defendant's negligence has destroyed any substantial possibility of the patient's survival, then there is sufficient evidence of proximate cause to go to the jury, and a motion to strike the evidence on that ground should be overruled.

.... The plaintiff's burden, however, was simply to prove that the particular time and manner of the patient's death resulted from the defendant's negligence. In that respect, his burden is no different from that attendant upon any other actions for personal injuries or wrongful death.

Cf. Surface v. Johnson, 215 Va. 777, 214 S.E.2d 152 (1975), holding that the facts were sufficient to create a jury issue as to whether the defendant's negligence was a proximate cause of an airplane crash, even though the "precise reason" for the crash was not known, where the defendant, an inexperienced student pilot, undertook a night flight, under extremely adverse weather conditions, over rugged and mountainous terrain, despite the fact that his student license did not permit him to transport passengers without prior approval of his instructor.

On page 20 of his brief, Sgt. Ingram attempted a probability analysis, as follows:

Because three of the five rounds did not strike the decedent and at least the first shot, if not all five, was not fired with gross negligence, the evidence leaves at best a 50% probability that the 22 TKO round that produced the fragments which struck Plaintiffs' decedent resulted from Ingram's alleged grossly negligent firing."

This probability analysis fails for several reasons, each explained above: it fails because there was evidence to support the conclusion that Sgt. Ingram's first shot did not strike Ms. Green; it fails because there was evidence to support the conclusion that Sgt. Ingram was grossly negligent in firing the first of his five shots; and it fails because it wrongly assumes that, in order to recover, Green must show which of the last four shots was the fatal one.

Beginning at page 21 of his brief, Sgt. Ingram cited four decisions in support of this assignment of error. Three of them are distinguishable: *Blue Ridge Service Corp. of Virginia v. Saxon Shoes, Inc.*, 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006), where there

was no evidence as to what caused a fire; *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 296, 585 S.E.2d 545, 549 (2003), where there was no evidence that a thief had used the key of the defendant condominium association to gain entrance to a condominium that had been robbed; and *Beale v. Jones*, 210 Va. at 522, 171 S.E.2d at 853, where there was no evidence of impact (direct or indirect) between the host car and the defendant's car and no evidence that the operation of the defendant's car had contributed to cause the wreck that injured the plaintiff. These three decisions are distinguishable because in each there was no evidence at all causally linking the plaintiff's loss and the actions or inactions of the defendant or the defendant's agents. In contrast, Sgt. Ingram has admitted that he killed Ms. Green (App. 553:11-553:14), thereby creating a question of fact for the jury as to the sufficiency of the evidence of causation linking his gross negligence and her death. *Molchon v. Tyler*; *Wooldridge v. Echelon Service Co.*; *Blondel v. Hayes*; and *Surface v. Johnson*.

Interstate Veneer Co. v. Edwards, 191 Va. 107, 60 S.E.2d 4 (1950), the last of the four decisions relied upon by Sgt. Ingram, supports Green's position. There the Court affirmed the trial judge's decision to enter judgment based on the jury's verdict, since "We cannot say that reasonable men could not reach that conclusion [*i.e.*, that the negligence of the corporate defendant's driver contributed to cause the motor vehicle accident] from the evidence as a whole and the allowable inferences from it." 191 Va. at 116, 60 S.E.2d at 8-9. Based on similar reasoning, Green asks this Court to dismiss Sgt. Ingram's second assignment of error.

**PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES
RELATING TO THE APPELLEES' ASSIGNMENT OF CROSS-ERROR**

1. The trial court was wrong to exclude excerpts from the periodical *Police: The Law Enforcement Magazine* solely because it was published in January of 1999, whereas Sgt. Ingram killed Ms. Green on December 29, 1998. (Assignment of cross-error #1.)

Because excerpts from the periodical *Police: The Law Enforcement Magazine* were published in January of 1999, whereas Sgt. Ingram killed Ms. Green on December 29, 1998, the trial court excluded this evidence. (App. 482:25-483:24). Green offered this evidence as “reliable authority” pursuant to *Va. Code Ann. § 8.01-401.1* (1950, as amended) and proffered the article into evidence after establishing through Mr. Katsaris that it stated “the standard of care with respect to aiming angles that had been in force for years before Christie Green was killed.” (App. 484:2- 485:1). In pertinent part this article stated that “Breaching rounds are fired point-blank from the breaching shotgun directly at a door’s locks, cross-bolts and/or hinges to defeat them” and “into the doorjamb, door or window bar bolt at a 45-degree angle and 45-degrees, up or down....” (App. 148). It concluded by admonishing that “[f]ailure to follow these rules may result in serious injuries or death to anyone on the other side.” *Id.*

It was error for the trial court to exclude this article simply because it was published after Sgt. Ingram killed Ms. Green. Those courts which have examined the issue have found that the publication date itself is not a determinative factor. *Nelson v. American Home Products Corp.*, 92 F.Supp.2d 954, 973 (W.D.Mo. 2000), holding that the plaintiffs’ causation experts’ opinions were “no more than untested hypotheses” and hence not admissible but stating in footnote 3 at page 965:

While this article was published after Nelsons’ optic neuropathy occurred, it remains relevant as a possible basis for the Nelsons’ experts’ causation opinions.

Lieberman v. American Dietetic Ass'n, 1996 WL 490779, at *2 (N.D. Ill. 1996), holding that the plaintiff was entitled to present expert testimony from witnesses who relied upon articles published after the alleged tort, since “the mere fact that an article was published after [the alleged tort] does not in itself establish that the article is based on scientific principles that came to light after [the alleged tort];” *McReynolds v. Bigler*, 1990 WL 129454 (D.Kan. 1990), denying a defense motion to exclude reference to any treatise or learned articles regarding the standard of care that were published after the date of the alleged tort, explaining, “The publication date of a treatise or article is obviously a factor, but not the sole one, in determining the relevance and admissibility of the information and material found therein.”

These excluded excerpts provide additional support for Green’s contention that Sgt. Ingram was grossly negligent in failing to shoot the #22 TKOs only at the latchbolt or knob latch, and only at a 45 degree angle into the jamb. Consequently, Green asks this Court to take these excerpts into account in considering the sufficiency of Green’s evidence to prove that Sgt. Ingram was grossly negligent.

CONCLUSION

For these reasons, Green asks this Court to affirm the verdict of the jury and the decision of the trial court to enter final judgment upon it.

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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of this Court, I hereby certify that on November 30, 2006, I caused twenty copies of this brief to be filed in the office of the Clerk of this Court and three copies to be mailed or delivered, on or before the date on which the brief is filed, to opposing counsel, as follows:

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