IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

---

**NARJESS GHANE, Individually and on Behalf of the Wrongful Death Beneficiaries of SHAPOOR ALEXANDER ("Alex") GHANE, JR.,** **Appellant**

**VS.** **Cause No. 2012-TS-00125** CA SCTT

**MID-SOUTH INSTITUTE OF SELF DEFENSE SHOOTING, INC., a Tennessee Corporation; JFS, LLC, a Mississippi Limited Liability Company; JOHN FRED SHAW; DONALD ROSS SANDERS, JR.; JIM COWAN; and JOHN DOE(S) 1-100,** **Appellees**

---

# BRIEF OF APPELLANT, NARJESS GHANE

---

Respectfully Submitted,

TAYLOR JONES TAYLOR

Benjamin L. Taylor MSB#[redacted]
961 Main Street
Southaven, MS 38671
(662) 342-1300

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

---

**NARJESS GHANE, Individually and on Behalf of the Wrongful Death Beneficiaries of SHAPOOR ALEXANDER ("Alex") GHANE, JR.,** **Appellant**

**VS.** **Cause No. 2012-TS-00125**

**MID-SOUTH INSTITUTE OF SELF DEFENSE SHOOTING, INC., a Tennessee Corporation; JFS, LLC, a Mississippi Limited Liability Company; JOHN FRED SHAW; DONALD ROSS SANDERS, JR.; JIM COWAN; and JOHN DOE(S) 1-100,** **Appellees**

---

## CERTIFICATE OF INTERESTED PERSONS

---

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Narjess Ghane, Appellant;
2. Benjamin L. Taylor and Taylor, Jones, & Taylor, Attorneys for Appellant;
3. Mid-South Institute of Self Defense Shooting, Inc., JFS, LLC, John Fred Shaw, Donald Ross Sanders, Jr., and Jim Cowan, Appellees;
4. Honorable Jay Atkins, Esquire and Bob Whitwell, Esquire, attorneys for Appellees;
5. Honorable Robert Chamberlin, appellant judge.

Benjamin L. Taylor, Attorney of Record for Appellant

TABLE OF CONTENTS

Certificate of Interested Persons.....i

Table of Contents.....ii

Table of Authorities.....iii

Statement of Issues.....1

Statement of the Case.....2

A. Procedural History.....2

B. Statement of Facts.....3

Summary of the Argument.....5

Argument.....7

A. Standard of Review.....7

B. Statement of the Law.....8

C. Issue: WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT APPELLANT'S LAWSUIT IS NONJUSTICIABLE DUE TO THE POLITICAL QUESTION DOCTRINE?.....10

1. Appellant's claims do not violate the separation of powers.....11

2. Appellant's claims can be adequately addressed using common law tort standards.....15

3. Appellant's claims do not involve deferential concerns.....19

Conclusion.....20

Certificate of Service.....21

TABLE OF AUTHORITIES

CASES CITED: Pages

*Baker* v. *Carr*, 369 U. S. 186, 217 (1962)) ..... 9, 10, 11, 12, 17

*Carmichael v. Kellogg, Brown & Root Servs., Inc.*,
564 F.Supp.2d 1363, 1369 (N.D. Ga. 2008) ..... 11

*Getz v. Boeing Co.*, http://www.findforms.com/pdf_
files/cand/198863/109.pdf ..... 15

*Harris v. Kellog, Brown & Root Servs., Inc.*,
618 F.Supp.2d 400, 430 (W.D. Pa. 2009) .....15

*Japan Whaling Assn. v. American Cetecean Society*,
478 U.S. 221, 230 (1986) ..... 8

*Klingoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49-50 (2d Cir. 1991) ..... 18

*Koohi v. United States*, 976 F.2d. 1328 (9th Cir. 1992). .....18

*Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008)..... 8, 11, 13, 17

*Lessin v. Kellogg Brown & Root*, 2006 U.S. Dist.
LEXIS 39403, at *3 (S.D. Tex. 2006)..... 9

Marbury v. Madison, 1 Cranch 137 (1803)..... 8

*McMahon v. Presidential Airways, Inc.*, 502 F.3d
1331, 1357 (11th Cir. 2007) ..... 9, 12, 20

*Nixon* v. *United States*, 506 U. S. 224, 228 (1993)..... 8

*Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982). .....14, 19

*Potts v. Dynacorp Int'l LLC*, 465 F.Supp.2d 1245 (M.D. Ala. 200..... 11, 12

*Whitaker v. Kellogg Brown & Root, Inc.*, 444 F.Supp.2d
1277, 1291 (M.D. Ga. 2006)..... 11, 17

*Williamson, ex rel. Williamson v. Keith*, 786 So.2d 390, 393
(Miss.2001)..... 7

*Zivotofsky v. Clinton*, 566 U.S. 5 (2012)..... 8

RULES: Pages

Rule 56(c) M.R.C.P..... 7

PUBLICATIONS:

Fritz W. Scharpf, Judicial Review and the Political Question:
A Functional Analysis, 75 YALE L.J. 517, 566 (1966)..... 19

## STATEMENT OF ISSUES

1. WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT APPELLANT'S LAWSUIT IS NONJUSTICIABLE DUE TO THE POLITICAL QUESTION DOCTRINE?

## STATEMENT OF THE CASE

**A. Procedural history:**

Mrs. Narjess Ghane, the Appellant in this appeal, filed a lawsuit in the Circuit Court of DeSoto County, Mississippi on January 30, 2009, for the wrongful death of her son, Shapoor Alexander ("Alex") Ghane (hereinafter "Alex"). (R. 12). Alex was a member of the United States Navy SEAL Team 5 and died on January 30, 2008, in the line of duty as a result of a gunshot wound to the chest while he and the other members of SEAL Team 5 were conducting live fire exercises in a "ballistic" shoothouse in Lake Cormorant, Mississippi owned and operated by the Defendants Mid-South Institute of Self Defense Shooting, Inc. (hereinafter "Mid-South"); JFS, LLC; John Fred Shaw; Donald Ross Sanders, Jr.; and Jim Cowan. (R. 15-17). Mrs. Ghane based her claim for damages against the Defendants on the legal principles of strict liability (ultrahazardous activity), strict liability (products liability), gross negligence, negligence, negligence per se, negligent infliction of emotional distress, negligent hiring, negligent supervision, negligent misrepresentation, intentional misrepresentation and/or fraud, premises liability, violation of the Tennessee Consumer Protection Act of 1977, res ipsa loquitur, and lastly alleged that there was NO COMPARATIVE FAULT on the part of any party not already specifically named in the lawsuit. (R. 17-21).

On or about September 23, 2011, Defendant's filed a Motion for Summary Judgment alleging Plaintiff's lawsuit and her claims were nonjusticiable by the Circuit Court by virtue of the "Political Question Doctrine". (R. 704). This Motion was granted by the Circuit Court of DeSoto County, Mississippi. (R. 1755). Thereafter, Plaintiff filed the instant appeal herein. (R. 1764)

**B. Statement of Facts:**

Alex was a member of Seal Team 5 under orders from the United States Navy to participate in live fire exercises in the southern "Shoot House" on the premises of Mid-South. (R. 428) Mid-South is a private firearms training facility in Lake Cormorant, Mississippi. (R. 424). Mid-South was under contract with the US Navy to provide training in "ballistic shoothouses" which Mid-South advertised as being suitable for Room Entry CQB type training. (R. 425). The houses were advertised to have "ballistic" interior and exterior walls. (R. 425).

The term "ballistic" means stopping of bullets. (R. 1011, 1341-42, and 1436). The Navy required shoot houses with "ballistic" walls for their live fire training exercises. (R. 1532). Mid-South advertised that the walls offered ballistic protection to the Navy. (R. 1011). The Defendants knew the Navy required all shoot house's to have walls that bullets couldn't go through. (R. 1377). Defendants represented to Alex, the Navy and the public at large that the walls of the live fire house on the premises of Mid-South were "ballistic" and capable of preventing ammunition up to .308 caliber from passing through. (R. 1528). Mid-South advertised and represented the walls of their shoot house to be ".308 capable" in brochures. (R. 1526). This was a false representation and should not have been made. (R. 1526).

On January 30, 2008, Alex was mortally wounded by a .223 caliber round (a/k/a 5.56mm NATO) which passed through one of the alleged "ballistic" walls of the live fire house. (R. 340-343). The cause of Alex's death was a defective

"Shoot House" wall that did not provide the ballistic protection advertised by Mid-South and paid for by the Navy. (R. 435).

At the early stages of this litigation the Appellant, by and through counsel, requested the Appellees to identify and name all witnesses in this matter. (R. 602). The Appellant requested the Appellees to identify any other person whom they contend were negligent and contributed to Alex Ghane's injuries. (R. 617-18). The Appellees responded by incorporating the names of individuals contained in their Response to Appellant's Interrogatory No. 1. (Id.) During the deposition of John Shaw, Mr. Shaw was specifically asked who he felt caused or contributed to the death of Alex Ghane. (R. 1198). Mr. Shaw testified that he felt two people, who had never been identified previously to the Appellant, were responsible. (Id.). Mr. Shaw initially could not identify any one else who he believed caused or contributed to the death of Alex Ghane. (R. 1199).

Mr. Shaw then blamed the Range Safety Officers and asserted that they caused or contributed to the death of Alex Ghane because "they didn't see a gun go off in there, yes, sir." (R. 1199). Mr. Shaw testified that he does not know of anything else the Range Safety Officers did or did not do that contributed to the death of Alex Ghane. (R. 1208). Alex Ghane did not do anything wrong to contribute to his death. (R. 1190-91).

Lastly, the cause of Alex's death were two (2) bullet fragments that penetrated a wall that was supposed to be bulletproof. (R. 340-343, 435). The wall in question was designed and manufactured by Mid-South. (R. 1377-1381). Appellant filed her lawsuit alleging that the proximate cause of Alex's death was

a defective "Shoot House" wall that did not provide the ballistic protection advertised by Mid-South, paid for by the Navy and relied upon by the members of SEAL Team 5 during their training together. (R. 12).

## SUMMARY OF THE ARGUMENT

Appellant will begin by stating that upon information and belief the issue presently before the Court is a case of first impression. Appellant could find no Mississippi caselaw or other binding state precedent that dealt with a Defendant in a tort suit alleging comparative fault against a non-party and then arguing to the Court that due to the non-party being either the military or military personnel then the Court no longer has subject matter jurisdiction and could no longer hear the case because of the "political question doctrine." That is exactly what was done by the Appellees in this case and the lower court went along with it and dismissed the Appellant's only lawsuit against the individuals she believes (and many others believe) are responsible for the death of her only son; leaving her with absolutely no remedy at law and therefore: no justice.

Appellant will begin by stating that at the very least the public policy of this State should not allow this result. The lower court's ruling effectively closes the door to the courthouse for the Appellant and gives the Appellees an easy "get out of jail free card" in not only this case but potentially others now and in the future. The result being that as long as they can point the finger in some way to another branch of government then they are free to do whatever they want without any accountability for their actions in a Court of Law. That was certainly not the intent

of our forefathers with regards to the separation of powers, but unfortunately it is the current reality for Mrs. Ghane as she fights for justice over the loss of her son.

There should be no doubt that the trial court erred in granting Appellee's Motion for Summary Judgment and thereby dismissing Appellant's lawsuit as nonjusticiable due to the "political question doctrine." Appellant's claims do not violate the separation of powers, the Appellant's claims can be adequately addressed using common law tort standards, and Appellant's claims do not involve deferential concerns which would render the claims nonjusticiable. The Appellee's offered no admissible evidence regarding any comparative fault of the U.S. Navy or Naval personnel. In fact, when asked directly Mr. Shaw could not articulate one sensible thing the Navy did or did not do to contribute to this tragedy. The proximate cause of Alex's death was a wall that was supposed to be bulletproof actually wasn't. The Court, in its ruling, held that "the factfinder will be required to evaluate decisions made by the Navy such as the placement of targets, how the soldiers would conduct their exercises, the ammunition, the orders of the Navy as to the building ...". It is the Appellant's position that each of these decisions are completely IRRELEVANT to her claims and the uncontroverted evidence in this case: That Alex Ghane died as a result of a defective wall that did not do what it was advertised to do! If the wall would have worked properly it wouldn't have mattered where the targets were placed, or how the SEAL's lined up, or what the Navy's orders were. The Appellees are trying to create issues involving the Navy which are complete non-issues in this case and

totally IRRELEVANT to the *sine qua non* of Alex's death so they can invoke the "political question doctrine" and get away scot free! Lastly, the lower court found it lacked judicially discoverable and manageable standards for resolving this case due to discovery issues the Appellee's, again, caused in this case. Would the lower court have come to the same conclusion had Alex been a member of the Mississippi Highway Patrol training in the shoot house when the wall failed? The Highway Patrol is a part of the Executive Branch of Mississippi government. Would this set of facts also create a "nonjusticiable political question" for the Circuit Court requiring dismissal of the case?

## ARGUMENT

### A. STANDARD OF REVIEW

The appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. [1] The Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. with the evidence viewed in the light most favorable to the party against whom the motion has been made and if, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor; otherwise, the motion should be denied. [2] In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving

[1] *Williamson, ex rel. Williamson v. Keith*, 786 So.2d 390, 393 (Miss.2001).

party. That is, the non-movant should be given the benefit of the doubt. [3]

## B. STATEMENT OF THE LAW

In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." [4] Precedents have identified a narrow exception to that rule known as the "political question" doctrine. [5] The United States Supreme Court has explained that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" [6]

Since *Marbury v. Madison*,[7] the Supreme Court has recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." [8] That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." [9]

The political question doctrine relates directly to the U.S. Government's separation of powers. [10] The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations

---

[2] *Id.*
[3] *Id.*
[4] *Zivotofsky v. Clinton*, 566 U.S. 5 (2012)(quoting *Cohens v. Virginia*, 6 Wheat 264, 404 (1821)).
[5] *Id.* (See e.g. *Japan Whaling Assn. v. American Cetecean Society*, 478 U.S. 221, 230 (1986)
[6] *Nixon* v. *United States*, 506 U. S. 224, 228 (1993) (quoting *Baker* v. *Carr*, 369 U. S. 186, 217 (1962)).
[7] 1 Cranch 137 (1803).
[8] *Id.* at 177.
[9] *Zivotofsky v. Clinton*, 566 U.S. 7 (2012)(quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983).
[10] *Lane*, 529 F.3d at 559 ("[T]he purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government.")

constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." [11] The doctrine originates in Article III of the Constitution, which limits the judicial power to "cases" or "controversies." [12] No justiciable "controversy" exists when the issue to be adjudicated is "political" in nature.[13]

Furthermore, "[b]ecause political questions are nonjusticiable under Article III of the Constitution, courts lack jurisdiction to decide such cases." [14] The doctrine serves to "prevent federal courts from overstepping their constitutionally defined role." [15] Correspondingly, the political question doctrine performs an important function in protecting the separation of powers.

The most important U.S. Supreme Court case regarding the political question doctrine is the 1963 case *Baker v. Carr.* [16] In *Baker*, the Court held that the determination of whether a matter has been committed to another branch of the Federal Government "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." [17] The *Baker* case delineated six criteria to be used in determining the existence of a political question:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

---

[11] *Lessin v. Kellogg Brown & Root*, 2006 U.S. Dist. LEXIS 39403, at *3 (S.D. Tex. 2006) (quoting *Japan Whaling Ass'n*, 478 U.S. at 230).
[12] U.S. Constitution, Article III.
[13] *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).
[14] *Id.* (citing Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978)).
[15] *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007)(citing *Baker*, 369 U.S. at 210).
[16] 369 U.S. 186 (1963).
[17] *Baker*, 369 U.S. at 211.

2. a lack of judicially discoverable and manageable standards for resolving it; or
3. the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or
4. the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [18]

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. [19]

**C. ISSUE: WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT APPELLANT'S LAWSUIT IS NONJUSTICIABLE DUE TO THE POLITICAL QUESTION DOCTRINE?**

*Baker v. Carr* sets out three basic categories of factors to determine a court's application of the political question doctrine to render suits against private military contractors (PMC's): 1. the separation of powers, 2. the applicability of judicial standards, and 3. prudential concerns triggered in litigating cases involving military affairs. All of these categories involve three characteristics of suits against PMC's that weigh in favor of justiciability. Namely, the suits are against corporations and not the U.S. government; the suits are for damages as opposed to injunctive relief; and the suits are common law tort claims instead of constitutional claims.

[18] *Baker*, 369 U.S. at 217.
[19] *Baker*, 369 U.S. at 217.

1. Appellant's claims do not violate the separation of powers.

In the instant case, the Appellant is seeking damages against a private party. She is not challenging the legitimacy of any executive decision and her lawsuit does not require the Court to exert direct control over any military planning. She is challenging "actions taken and omissions made only by" [20] Mid-South and its employees. Most importantly, the Appellant is seeking damages based on common law and statutory tort claims as opposed to some form of equitable relief.

Court's have applied the first *Baker* factor [21] and found suits nonjusticiable by highlighting the degree of control exercised by the U.S. Army over the contractor at issue.[22] However, in the instant case, the U.S. Navy had no command and control relationship over Mid-South or its employees with regard to the shoothouse in question or the events that led up to Alex's untimely death. [23] In *Potts v. Dynacorp Int'l, LLC* [24] the court noted that in such a situation, the PMC's "own internal policies regarding procedures, training and management controlled its conduct in Iraq." [25]

Further, the extent of the contractual relationship between the U.S. military and a PMC doesn't impact the degree of military control over PMC conduct. In *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007)

---

[20] *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008).
[21] See *Baker v. Carr*, 369 U.S. 186, 217 (1962)(describing the first factor as "a textually demonstrable constitutional commitment of the issue to a coordinate political department").
[22] *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F.Supp.2d 1277, 1291 (M.D. Ga. 2006)(finding the PMC was "subject to the military's orders, regulations, and convoy plan.") and *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F.Supp.2d 1363, 1369 (N.D. Ga. 2008)(finding the army controlled PMC-convoy operations "at the most granular level.")
[23] R. 1443.
[24] 465 F.Supp.2d 1245 (M.D. Ala. 2006).

Presidential was to provide "all fixed-wing aircraft, personnel, equipment, tools, material, maintenance, and supervision necessary to perform" for the military. Id. at 1360. The court in *McMahon* ruled that Plaintiff's claims against Presidential – a private corporation, not the U.S. Military – that they "negligently staffed, equipped, and otherwise operated the flight in question" [26] clearly did not touch upon a "textually demonstrable constitutional commitment of the issue to a coordinate political department." [27]

In the instant case, the Appellant has alleged in her Complaint that the Appellees "negligently and/or recklessly owned, controlled, entrusted, maintained, serviced, modified, repaired, altered, designed, manufactured, built" the "ballistic shoothouse" [28] and further the Appellees fraudulently and/or recklessly and/or negligently misrepresented the walls of the shoothouse to be "ballistic" and these acts and omissions proximately caused Alex's death. [29] It is undisputed the Navy exercised absolutely no control over the "ownership, control, or maintenance" of the ballistic shoothouse. Additionally, the Navy exercised no control over the misrepresentations made by the Appellees regarding their shoothouse or its "ballistic" walls. The Navy merely rented what they thought – based on the Appellees representations and assurances – was a "ballistic shoothouse" with ".308 capable walls". We know now that the Navy did not get what they paid for, and that is the essence of the Appellant's case.

---

[25] *Potts*, 465 F.Supp.2d at 1250.
[26] *McMahon*, 502 F.3d. at 1360.
[27] *Id.* at 1358-62 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).
[28] Complaint page 5
[29] Complaint page 8-9

Now let's assume for argument's sake that there was a high degree of Navy control of the Appellees activities. Even then, this Court should allow the Appellant to develop the record to determine if military regulations were strictly observed. The Appellees failure to follow the Navy's instructions may be evidence of negligence or recklessness in and of itself. If the Navy's instructions were not followed the trial court would not be forced to examine a military decision. Again, the only actions under scrutiny would be those of the Appellees. If the failure to follow the Navy's instructions constitutes negligence and/or recklessness then what is presented to the trial court is a garden variety tort suit for damages. [30]As such "the textual commitment factor actually weighs in favor of resolution by the judiciary." [31] In fact, the instant lawsuit (i.e. wrongful death action) can only be resolved by the judiciary. The Appellant has no other recourse.

Lastly, let's assume for argument's sake that one or two decisions by Navy personnel do become relevant and are somehow introduced properly by the Appellees at trial. The fact that Navy personnel did or didn't do something doesn't immediately mandate dismissal. In *Peterson v. United States* [32] the Eighth Circuit refused to consider whether negligence claims against the United States following a B-52 training mission triggered a political question. [33] In *Peterson*, bombers were engaged in a "training mission" designed to "simulate

---

[30] *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008)(citing *Klingoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49-50 (2d Cir. 1991)).
[31] *Id.* The *Lane* court goes on to say "[i]t is an extraordinary occasion, indeed, when the political branches delve into matters of tort-based compensation." Id.
[32] 673 F.2d 237 (8th Cir. 1982).
[33] *Peterson*, 673 F.2d at 242 (ordering the district court to "find the Government negligent and determine plaintiff's damages" without examining the political question doctrine).

wartime conditions," wherein "bombers were to simulate bomb drops at specified target sites," when one of the pilot's radar and navigational equipment failed causing him to fly off course. [34] The pilot was also violating Federal Aviation Administration regulations and North Dakota law by flying below the acceptable altitude. [35] When the pilot flew over the plaintiff's farm, the noise from the jet frightened plaintiff's cows that in their excited state physically injured themselves and the Plaintiff causing some of the cows to die and forcing the plaintiff to eventually sell his dairy herd. [36] In overruling the district court, the Eighth Circuit held the government acted negligently and remanded the case for a determination of damages only. [37]

As in *Peterson*, the Appellant's claim is one for money damages. The Ninth Circuit addressed the crucial role the remedy sought by a plaintiff has on justiciability in *Koohi v. United States*. [38] In *Koohi,* the U.S. Navy fired upon a civilian Iranian aircraft during the Iran-Iraq War. [39] The Navy mistakenly took the airliner for an enemy fighter, resulting in 290 deaths. [40] In response, the families of the victims sued the U.S. government and the PMC's that manufactured the air defense system. [41] Most importantly, the court refused the defendant's argument that the case involved a nonjusticiable political question. [42] In continuing the suit against the government, the court noted that "[a] key element in our conclusion

---

[34] *Id.* at 238-39.
[35] *Id.* at 240-41.
[36] *Id.* at 238.
[37] *Id.* at 242.
[38] 976 F.2d. 1328 (9th Cir. 1992).
[39] *Koohi*, 976 F.2d at 1330.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1332 n.3.

that the plaintiff's action is justiciable is the fact that the plaintiffs seek only damages" as opposed to an injunction. [43] This has been followed by *Harris v. Kellogg, Brown & Root Servs., Inc.* [44] and *Getz v. Boeing Co.* [45]

2. Appellant's claims can be adequately addressed using common law tort standards.

The basis of Appellant's lawsuit is that the failure of the Appellee's "ballistic" wall to perform as represented was the *sine qua non* of Alex Ghane's untimely death. The actions or inactions of the Navy as raised by the Appellants are really irrelevant to the Appellant's lawsuit.

For example: suppose the Navy contracted with a skydiving company for the SEAL teams to practice HALO exercises and other parachute drills. Suppose further that part of the contract includes the skydiving company providing the Navy a pre-packed "guaranteed" parachute for each SEAL to use when training. As you can imagine with this example, if one of the chutes did not open and one of the SEAL's dies or is seriously injured then there would be a clear cut case against the skydiving company. Questions about how the SEAL's perform their jumps, where they line up, where they intend to land, the orders of the Navy with respect to the training, etc. would have absolutely nothing to do with the *sine qua non* of the accident.

The Appellees point to similar questions involving the Navy in their argument, and the lower court made the finding "[t]the factfinder will be required

---

[43] *Id.* at 1332.

[44] 618 F.Supp.2d 400, 430 (W.D. Pa. 2009)(relying on *Koohi*, noting damages action "weighs in favor of judicial resolution").

to evaluate decisions made by the Navy such as placement of the targets, how the soldiers would conduct their exercises, the ammunition, the orders of the Navy as to the building and maintenance and building of the walls of the shoothouse, and continuing the training after allegations that the walls had been breached earlier in making a determination of causation and comparative fault." As the previous example points out; any decisions of the Navy with regard to the training has nothing to do with the wall not performing as warranted.

Further, the Appellees did not show or even allege that any of these decisions by the Navy contributed to Alex Ghane's death, either by Affidavit or in their deposition. In fact, counsel for Appellant asked for this same information over the course of this litigation and Appellees never, either in written discovery or at their depositions, explained what the Navy did or did not do that caused the death of Alex Ghane. It appears the lower court came up with the "decisions" made by the Navy that will require evaluation by the factfinder from counsel for Appellees in his argument in his Motion for Summary Judgment. This conclusion is reached because these "decisions" appear nowhere else in the record of this case except opposing counsel's argument. (R. 724-27).

The issues addressed under *Baker* factor two [46] regarding the applicability of judicially manageable standards are, for the most part, dependent on *Baker* factor one. When a court finds that claims against the government contractor do not require examination of a decision by the military, but rather examination of a

---

[45] http://www.findforms.com/pdf_files/cand/198863/109.pdf (relying on *Koohi*, noting relief sought is relevant to political question analysis).

[46] The second *Baker* factor is "a lack of judicially discoverable and manageable standards for resolving [the issue]." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

decision by the government contractor, the court is likely to hold that *Baker* factor two does not render the case nonjusticiable. [47] On the other hand, if the court finds that claims against a government contractor require review of military decisions, the court will look to the degree of control by the military over the contractor's actions in question and whether or not a standard applies which would be modified to such a degree that it becomes unmanageable. [48]

In the lower court's Order dismissing Appellant's case, the lower court addressed "difficulty with discovery the Plaintiffs and Defendants are having and issues of protective orders" and ruled that, as a result, the lower court "has a lack of judicially discoverable and manageable standards for resolving this case at least as to the fault of the military." [49] As with the causation argument and list of "decisions" created by defense counsel for Appellee; any discovery difficulties and issues of protective orders have been solely fabricated by counsel for Appellees in an apparent attempt to bolster their nonjusticiability argument. (See Appellant's Motion to Compel [R. 591]). The record is crystal clear. The first time a true discovery dispute arose involved the "Course Sign In Sheets" provided by counsel for Appellees at the deposition of Donald Ross Sanders, Jr. [50]

The United States Constitution [51] and the Mississippi Constitution [52] set out that the judiciary is charged with adjudicating common law tort claims. No

---

[47] See *Lane*, 529 F.3d at 567 (holding that since no examination of military decisions was required then suit weighed in favor of justiciability).
[48] See *Whitaker*, 444 F.Supp.2d. 1277, 1279-82 (M.D. Ga. 2006)(finding under second *Baker* factor that examination of military decision would require court to apply unmanageable standard of "what a reasonable driver in a combat zone, subject to military regulations and orders, would do").
[49] R. 1761.
[50] R. 1477-1500.
[51] See, e.g., U.S. CONST. Art. III, §1, clause 1 (vesting "[t]he judicial Power ... in one supreme Court").

other branch of government can adjudicate such claims. Suits at common law evolve through judicial precedent which provides later courts with a framework to address claims arising from new situations. This framework provided the Second Circuit with "judicially discoverable and manageable standards" to adjudicate an individual's claims against a foreign terrorist group for the highjacking of an Italian cruise ship and the murder of one of its passengers. [53] According to the Second Circuit, "the common law of torts provides clear and well-settled rules on which the district court can easily rely." [54] Therefore, the case did not "require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" [55]

As discussed earlier, Circuit courts have also held that suits against the U.S. government could be addressed using common law tort standards, including a claim against the Navy regarding their decision to fire upon a passenger plane because they thought it was an enemy fighter. [56] They can also be used in a case against the government involving a B-52 pilot who was flying too low and off target during a training mission. [57] Even if a framework needs to be developed by the judiciary, history has shown that "the Court is generally willing and able to define realistic and flexible substantive standards which will accommodate the legitimate demands of economic, social, political and military practice." [58]

---

[52] See, e.g., MS CONST. Art. 6, §144 (vesting "[t]he judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution").
[53] *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d. 44 (2d Cir. 1991)(quoting *Baker*, 369 U.S. at 217)
[54] *Id.* at 49.
[55] *Id.* (quoting *Baker*, 369 U.S. at 217).
[56] *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992).
[57] *Peterson v. United States*, 673 F.2d 237, 241-42 (8th Cir. 1982).
[58] Fritz W. Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L.J. 517, 566 (1966).

3. Appellant's claims do not involve deferential concerns.

Appellants lawsuit for money damages against Appellees do not involve any deferential concerns to the extent the Court should render the suit nonjusticiable under the political question doctrine. [59] Suits for injunctive relief in cases involving military matters are consistently held non-justiciable under the political question doctrine based in large part upon deferential concerns because granting such relief would bring the courts into direct conflict with the Commander in Chief.

Deferential conflicts are alleviated in claims for money damages against the government as discussed supra. When private contractors are the sued for money damages any deferential concerns are insignificant since there is little impact on either the military or the executive branch. Lastly, the decision by the government to not intervene in the instant suit "despite an invitation to do so", [60] in and of itself, is an indication that the case does not involve a political question.[61]

---

[59] Deferential concerns involve *Baker* factor three: "the impossibility of deciding without an initial policy determination"; factor four: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; factor five: "an unusual need for unquestioning adherence to a political decision already made"; and factor six: "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[60] *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007); see also *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F.Supp.2d 400, 431 (W.D. Pa. 2009)(noting prudential concerns do not render suit nonjusticiable because of Army's lack of expressed concern or attempt to intervene).

[61] "The apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question." *McMahon*, 502 F.3d at 1365.

## IV. CONCLUSION

The Appellants tort suit contains all three characteristics of suits against private contractors that weigh in favor of justiciability. Namely, the Appellant's tort suit is against a private corporation and not the U.S. government; Appellant's tort suit is for money damages as opposed to injunctive relief; and the Appellant's tort suit involves and addresses common law tort claims instead of constitutional claims. Tort suits, like the Appellant's, are handled exclusively by the judiciary and a holding by the Court of nonjusticiability would leave the Appellant without any remedy at law and affirm in the Appellee's minds that they are above the law and not subject to accountability for their actions in a court of law.

For the foregoing reasons, the Appellant herein respectfully requests this Court review the lower Court's decision to dismiss Appellant's lawsuit as outlined above and grant the relief requested and/or for any further relief to which she may be entitled in the premises.

This the 9th day of January, 2013.

Respectfully submitted,

TAYLOR JONES TAYLOR

By: 

Benjamin L. Taylor (MSB [redacted]
P.O. Box 188
Southaven, MS 38671
Attorney for Appellant, Narjess Ghane

## CERTIFICATE OF SERVICE

I, Benjamin L. Taylor, do hereby certify that a true and correct copy of the above and foregoing Brief of the Appellant has been forwarded this day to the following:

Original and three (3) copies
Via Federal Express:

Honorable Kathy Gillis
Supreme Court of Mississippi
450 High Street
Jackson, MS 39201-1082
(601) 359-3694

One (1) copy
Via U.S. Mail, postage prepaid:

Honorable Judge Robert Chamberlin
DeSoto County Courthouse
2535 Highway 51 South
Hernando, MS 38632-8182

Bob Whitwell, Esquire
P.O. Box 1789
Oxford, MS 38655

Jay Atkins, Esquire
1202 Office Park Drive, Suite B
Oxford, MS 38655

This the 9th day of January, 2013.

Benjamin L. Taylor
Certifying Attorney