UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL POWERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

C21-0517 TSZ

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Defendant's unopposed request for judicial notice, docket no. 71, is GRANTED, and the Court will consider Exhibit Q to the Declaration of Frank J. Anders, docket no. 71-2.

(2) Defendant's motion to strike, docket no. 89, is GRANTED in part, and DENIED in part, as follows:

(a) With regard to plaintiff's Notice of Errata RE Audio Recordings, docket no. 84, and Notice of Filing Paper or Physical Materials with the Clerk, docket no. 85 (concerning a disc labeled Exhibit 4A), defendant's motion to strike is GRANTED as to fourteen (14) audio files[1] not cited in plaintiff's briefs in

[1] (1) 12-11-44_05-02-19_D4s.wav; (2) 12-11-50_05-02-19_D3s.wav; (3) 12-15-30_05-02-19_D5s.wav; (4) 12-15-35_05-02-19_D3s.wav; (5) 12-16-41_05-02-19_D2s.wav; (6) 12-18-24_05-02-19_D2s.wav; (7) 12-23-02_05-02-19_D1s.wav; (8) 12-38-38_05-02-19_D7s.wav; (9) 12-38-52_05-02-19_D6s.wav; (10) 12-38-58_05-02-19_D3s.wav; (11) 12-39-15_05-02-19_D16s.wav; (12) 12-39-32_05-02-19_D7s.wav; (13) 12-39-41_05-02-19_D3s.wav; and (14) 19-W2776 Fire EMS Radio.wav. In connection with the pending motions, the Court will not consider the audio files listed in this footnote.

support of his motion for partial summary judgment, docket nos. 72 & 82, and DENIED as to nine (9) audio files[2] cited in plaintiff's reply, docket no. 82.

(b) With regard to plaintiff's praecipe, docket no. 86, attached to which is a revised version of plaintiff's response to defendant's motion to dismiss, which contains the corrections outlined in the redlined version, docket no. 92-1, filed at the Court's direction, defendant's motion to strike is DENIED. The changes are not substantive and the Court will consider the revised response, docket no. 86.

(3) Plaintiff's motion for partial summary judgment, docket no. 72, is DENIED in part, and DEFERRED in part, as follows:

(a) With regard to whether the United States Coast Guard owed a duty to plaintiff or breached any such duty, plaintiff's motion is DENIED. Genuine disputes of material fact preclude summary judgment. *See* Fed. R. Civ. P. 56(a).

(b) With regard to whether defendant may, as a matter of law, pursue a comparative negligence defense, plaintiff's motion is DENIED. "The relevant negligence of the person rescued is . . . that which, *whether occurring before or after the accident*, relates to the rescue and either worsens the victim's condition or hinders the rescue." *Berg. v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1431 (9th Cir. 1985) (emphasis added). Whether plaintiff was comparatively negligent in failing to activate the radio in his boat as he set out in the dark during inclement weather or in any other manner constitutes a factual question that must await trial.

(c) With regard to whether defendant can carry its burden of proving that the "discretionary function" exception applies, plaintiff's motion is DEFERRED, and will be decided in conjunction with defendant's motion to dismiss, docket no. 69.

---

[2] (1) 12-11-54_05-02-19_D22s.wav; (2) 12-12-19_05-02-19_D10s.wav; (3) 12-16-03_05-02-19_D6s.wav; (4) 12-16-12_05-02-19_D5s.wav; (5) 12-16-31_05-02-19_D7s.wav; (6) 12-20-35_05-02-19_D3s.wav; (7) 12-21-55_05-02-19_D6s.wav; (8) 12-22-05_05-02-19_D18s.wav; and (9) 12-22-31_05-02-19_D8s.wav. The Court has reviewed the transcripts of these audio files, and they are consistent with the United States Coast Guard Case Study ("USCG Report") dated September 18, 2019, filed by defendant as Exhibit H to the Declaration of Frank J. Anders (docket no. 70-8). The Coast Guard presumably considered these recordings in preparing the USCG Report, and defendant was not prejudiced by plaintiff's failure to cite these materials in his opening brief in support of his motion for partial summary judgment.

(4) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Dated this 18th day of January, 2023.

Ravi Subramanian
Clerk

s/Laurie Cuaresma
Deputy Clerk