

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MICHAEL POWERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. 2:21-00517 TSZ

PLAINTIFF’S MOTIONS FOR
PARTIAL SUMMARY JUDGMENT

NOTED FOR CONSIDERATION:
JANUARY 6, 2023

I. RELIEF REQUESTED

Plaintiff, Michael Powers, through his undersigned counsel, respectfully moves the Court for partial summary judgment and requests relief on the following:

1. The United States Coast Guard (“USCG” or “Coast Guard”) owed a duty of due care to Mr. Powers under the General Maritime Law’s Good Samaritan doctrine;
2. The Coast Guard breached the duty of due care it owed to Mr. Powers;
3. The Coast Guard has not met its burden to establish its affirmative defense under the Discretionary Function exception to its waiver of sovereign immunity and that affirmative defense should be dismissed; and
4. The Coast Guard cannot meet its evidentiary burden to establish its comparative fault affirmative defense and that affirmative defense should be dismissed.

II. FACTS

A. 911 receives a distress call from a recreational boater about a capsized vessel near Deception Pass. 911 informs the Coast Guard. Local agencies send rescue boats.

On May 2, 2019, it was the opening day of the halibut fishing derby in the Puget Sound. It was well before dawn, and many of the recreational boaters had already launched their boats into the water.

In anticipation of the increased boat traffic that morning from the opening day of the halibut derby, the Coast Guard had positioned one of its cutters (an 87-foot vessel) on halibut patrol and readied one of its helicopters. *See* Declaration of Sara Leonetti¹, Ex. 1 at 52:24-54:1, 58:25-60:1, 60:7-61:8; Ex. 2 at 42 (¶i); Ex. 3 at 1; Ex. 4 at CDO 1_957221768 (*see also* Ex. 5 at 116:25-117:17, [each discussing Ex. 4 at CDO 1_957221768]).

At 4:57 am, the local 911 operator for Whidbey Island (“911 ICOM”) received an urgent phone call from a recreational boater calling from his cell phone. Ex. 4 at 19-W2776. The caller was out on the water near the Deception Pass Bridge on Whidbey Island. His voice sounded timorous, and he told the 911 operator he believed the boat right next to him had “capsized,” that the boat had been following him, and it “disappeared” when it was right next to him. *Id.* **He said he thought he saw its “lights go down” under the water.** *Id.* Then he told the 911 operator that he “couldn’t turn around or do anything about it” because the waters were too rough to safely turn around. *Id.* The 911 operator asked if he could describe the capsized boat and how many passengers were on board, but the caller said it was “too dark to tell.” *Id.* The only description he could provide was that it was a small fishing boat, *maybe* 20-22 feet. *Id.* The caller then said someone should put out a warning about the rough sea conditions at the local boat launch to tell other boaters to “stay home, stay back.” *Id.* 911 ICOM then relayed the information to the local North Whidbey Fire & Rescue (“NWFR”), the Swinomish Tribal Police, and the sheriff’s office.

Both the North Whidbey Fire & Rescue and the Swinomish Tribal Police Department

¹ All exhibit references are to the Declaration of Sara Leonetti, filed contemporaneously with this motion.

1 launched their rescue boats shortly after they received the information about the capsized vessel.

2 911 ICOM called the local Seattle Coast Guard Command Center watch floor, which is
3 called Sector Puget Sound (“SPS”). Ex. 2 at 5 (¶8). Coast Guard SPS’s Operations Unit Watch
4 Stander Polyak (“OU Polyak”) answered the call and he asked whether local SAR agencies were
5 responding to the 911 report with assets and what their ETA was. Ex. 1 at 48:1-48:23; Ex. 4 at
6 Polyak Exhibit 1. The dispatcher told him that they were trying to launch a marine rescue asset but
7 had no ETA. *Id.*, Ex. 1 at 47:17-49:18. OU Polyak said he would speak to the reporting source
8 directly—the 911 caller—and then call ICOM back to get an update on the local agencies’ response
9 and share information. *Id.*

10 **B. Coast Guard activates Search and Rescue (“SAR”) case, takes lead role as SAR**
11 **Mission Coordinator (SMC), interviews 911 caller. KING 5 News offers to send**
12 **its helicopter to help with the search.**

13 Upon receiving the notification of a possible capsized vessel in distress from 911 ICOM,
14 the watch floor at the Coast Guard SPS then activated its Search and Rescue system and assumed
15 the role of SAR Mission Coordinator (“SMC”). Ex. 2 at 9 (¶a). When the Coast Guard declares
16 SMC, that means it is taking over as the official lead agency among those responding the search
17 and rescue incident. Ex. 6 at 17:13-18:4. And when the Coast Guard responds with other agencies,
18 as here, those other agencies are considered partner agencies for purposes of that search and rescue
19 incident. *Id.* at 16:17-17:3; *see also* Ex. 5 at 81:10-82:8. Once the SAR system is activated, the
20 SMC *must* “determine the severity of the case using information obtained from the mariner,” and
21 *must* then place the case into one of three defined emergency phases: the “uncertainty,” “alert,” or
22 “distress” phase. *Id.*, Ex. 7 at 4.1.6.1; Ex. 8 at 1-3.

23 At about 5:04 am, OU Polyak called the reporting 911 caller and stated in the form of a
24 question that he received a call from 911 that the caller made a report about a “vessel in need of
25 assistance[?].” Ex. 4 at OU 1_957213306. The 911 caller again repeated the same information he
26 told the 911 ICOM operator, which included:

- 1) The 911 caller was “right next” to the boat when it “disappeared” in “very, very rough seas;”

- 1 2) The 911 caller's fellow passenger thought he saw the boat's "lights under water;"
- 2 3) The 911 caller was not "100% sure" if it "went down or lost power;"
- 3 4) The sea was too rough (dangerous) for the 911 caller to turn around conduct a
- 4 search; and
- 5 5) The capsizing event occurred about 1,000 yards west of the Deception Pass
- 6 Bridge.

7 On the call, Chief Polyak also asked the 911 caller what kind of vessel it was, he answered:

8 It might have been something like a Hewescraft 22' or so, it was
9 dark out, I couldn't... it was running right next to us, I... I...
(stammering) it was too dark to really tell, couldn't tell how many
10 people were on board.

11 This was all the information SPS' Chief Polyak learned from the 911 caller. *Id.* Chief
12 Polyak then assured the 911 caller the Coast Guard was looking into it and asked him to report
13 back on the same phone line if he saw or heard anything. *Id.*

14 Right after the 911 call information was relayed from ICOM to the Coast Guard, SPS' OU
15 Polyak also received a call from local KING 5 News about the capsized boat at Deception Pass.
16 Ex. 4 at OU 1_957213306. KING 5 News' Mike Baker offered to help the Coast Guard with the
17 search by sending its news helicopter there to "be their eyes." *Id.* Mr. Baker said he was already
18 launching a helicopter that morning up north to report on traffic, and he could "pop it over." *Id.*
19 Mr. Baker later testified at his deposition that he heard about the capsized boat on the radio calls,
20 and he intended to actively help search for the capsized vessel. Ex. 9 at 9:9-22. He also testified
21 he could have had the helicopter there within an hour, possibly as fast as 25 minutes. *Id.* at 10:6-
22 16. OU Polyak said to Mr. Baker that the Coast Guard was still in the initial stages, and Mr. Baker
23 said he would call the Coast Guard when they "were in the air." Ex. 4 at OU 1_957213306.

24 **C. The Coast Guard fills out its Search and Rescue check sheet, puts SAR case into**
25 **"Alert" emergency phase, then changes it to "Distress" later on.**

26 About this same time, the Coast Guard filled out its initial Search and Rescue check sheet.
On the form, the Coast Guard identified the incident as a "possible capsized vessel" and initially

1 classified it in the “Alert” emergency phase. Ex. 3 at 2. At some point during the rescue mission,
2 the Coast Guard changed the SAR emergency phase to “Distress,” which is reflected in its official
3 SAR recordkeeping system called MISLE. Ex. 2 at 62. The Coast Guard considers a MISLE case
4 log to be a “legal document[]” forming “the official records of the Sector Puget Sound’s response
5 to an incident.” Ex. 10 at 40-43. SPS policy reminds watch standers that actions omitted from the
6 MISLE timeline “did not officially occur.” *Id.* At 41. Accordingly, OU watch standers must
7 accurately enter all SAR case information and actions into MISLE in real time, or “as near real-
8 time as operations permit.” Ex. 8 at 2-5. When MISLE documentation is ongoing at the time of
9 a shift change, USCG policy mandates that “[a]s part of the operations unit [OU] watch relief
10 process, all open and in progress cases shall be validated by the off going watch,” to help “ensure
11 the MISLE record is complete and accurate.” Ex. 7 at B.3.2.2.

12 There is some debate among the parties about when the classification changed from “Alert”
13 to “Distress,” but it is undisputed that the Coast Guard classified the case in its official MISLE
14 logs as “Distress.” Ex. 2 at 60-62; Ex. 5 at 57:5-57:21. This is important because, for all distress
15 cases, the Coast Guard is required to dispatch a resource. Ex. 7 at 4.1.6.1, 4.1.6.2 (“*As mentioned*
16 *in 4.1.6.1, if a case is classified as distress, the Coast Guard shall respond immediately if able,*
17 *to include broadcasting a UMIB and dispatching appropriate resources.*). Coast Guard policy
18 also states that in any SAR case, “if there is any question as to the degree of danger to persons or
19 property, the case should be classified as being in the DISTRESS phase.” *Id.* At its 30(b)(6)
20 deposition, the Coast Guard agreed that when a case is in Distress, as here, the Coast Guard should
21 take a “bias toward action” and “LAUNCH!” Ex. 11 at 24; Ex. 12 at 167:2-24.

22 **D. The Coast Guard sends an Urgent Marine Broadcast (“UMIB”) over the radio,**
23 **requesting assistance from the public.**

24 At 5:10 am, Communications Unit Watch Stander Guy (“CU Guy”), who was with OU
25 Polyak on the SPS watch floor, sent an urgent marine information broadcast (“UMIB”) to the
26 public over the radio for assistance. Ex. 3 at 1; Ex. 4 at 12-10-07 05-02-19; Ex. 2 at 6 (¶12). A

1 UMIB is “a tool used by Coast Guard SAR mission Coordinators to alert the maritime public to a
2 distress or potential distress situation.” Ex. 7 at 2.6.1. The Coast Guard’s UMIB stated:

3 PAN PAN, PAN PAN, PAN PAN, all stations... At time ... 0508
4 local, Coast Guard has received a report of a possible capsized 20-
5 foot vessel west of Deception Pass Bridge. *Any vessels in the area
6 able to assist or provide further information are requested to contact
7 this unit...*

8 Ex. 4 at 12-10-07 05-02-19.

9 **E. Coast Guard directs a civilian vessel, the P/C Kraken, to undertake a search of
10 the Deception Pass area, conduct an interview, and report back its search findings.**

11 Within one minute of the Coast Guard’s UMIB request for assistance, a civilian boater,
12 Captain Jean Clark of the P/C Kraken, who is retired Navy Master Chief, responded that he was
13 around the area of Deception Pass, and he was able to assist. Ex. 4 at 12-10-42_05-02-19_D13s;
14 Ex. 2 at 6 (¶13)

15 CU Guy told Capt. Clark to stand by, and Capt. Clark said he would start heading “back
16 toward Deception Pass.” Ex. 4 at 12-11-17_05-02-19_D4s. CU Guy informed Capt. Clark the
17 Coast Guard was treating the report as a potential capsizing and then asked him if he saw any boats
18 in the area. *Id.* at 12-11-24_05-02-19_D5s. Capt. Clark confirmed he could see another vessel’s
19 port light west of the bridge, and he was heading back in the bridge’s direction. *Id.* CU Guy told
20 Capt. Clark to report back when he got close enough to see the vessel. *Id.* at 12-12-30_05-02-
21 19_D5s.

22 Once Capt. Clark approached the vessel, he informed CU Guy that the vessel was upright
23 and heading east back toward Cornet Bay. Ex. 4 at 12-15-40_05-02-19_D14s; Ex. 2 at 6 (¶14). CU
24 Guy then asked for a description of the vessel, including, type, color, and length. Capt. Clark
25 responded the vessel was a “22-24’, white on silver hard-top boat.” Ex. 4 at 12-17-03_05-02-
26 19_D11s. CU Guy then obtained Capt. Clark’s cell phone number and told him to stand by and
the Coast Guard would be contacting him for further assistance.²

² Ex. 4 at 12-17-22_05-02-19_D7s; 12-17-31_05-02-19_D2s; 12-17-36_05-02-19_D3s; 12-17-40_05-02-19_D7s;

1 A few minutes later, at 5:19 am, both CU Guy and OU Polyak contacted Capt. Clark again
 2 and asked him to approach the vessel to talk with the people on it, which he did. Ex. 4 at 12-19-
 3 16_05-02-19_D4s; 12-19-21_05-02-19_D2s; 12-19-24_05-02-19_D10s. Capt. Clark then
 4 reported back to the Coast Guard that they were not in distress. *Id.* at 12-19-36_05-02-19_D10s;
 5 *see* Ex. 2 at 6 (¶16). CU Guy then directed Capt. Clark to ask the people on the vessel about their
 6 movements that morning, which Capt. Clark did. Ex. 4 at 12-20-20_05-02-19_D11s; Ex. 2 at 6
 7 (¶16). Capt. Clark then reported back that they had made it out to Pass Island but decided to turn
 8 around due to the bad weather. Ex. 4 at 12-21-39_05-02-19_D14s; Ex. 2 at 6 (¶17). Pass Island is
 9 directly underneath Deception Pass Bridge. *Id.* at 7 ¶ 18. Just as CU Guy was ending the call, Capt.
 10 Clark explained that earlier he also saw other boats heading out west of Deception Pass Bridge
 11 that were unaccounted for, stating “while we were waiting for daylight to make our way out ... we
 12 did see five other vessels that did make it out under the bridge and did not return.” Ex. 4 at 12-22-
 13 41_05-02-19_D15s; *see* Ex. 2 at 7 (¶19); Ex. 11 at 18. Coast Guard SPS never followed up on this
 14 information. Ex. 4 at 12-22-58_05-02-19_D3s.

15 At 5:25 am, SU Torres, who was also on the watch floor at SPS, ended her shift under the
 16 belief that the Coast Guard should have launched a rescue asset. Ex. 2 at 7 ¶ 20. She left SPS
 17 without communicating her position to any of the other watch standers. *Id.*

18 **F. Coast Guard erroneously concludes they have an “exact” match of the vessels**
 19 **based on the description from the initial 911 caller and the captain of the P/C**
 20 **Kraken, then determines the case is a false alert.**

21 At 5:22 am, the Command Duty Officer on the SPS watch floor, CDO Florscher, called the
 22 USCG District Office 13 in downtown Seattle (“D13”) to provide a brief on the SAR case. Ex. 2
 23 at 7 (¶19). The SPS officer said the 911 caller reported seeing the distressed boat underneath the
 24 Deception Pass Bridge and then he did not see it a couple minutes later. Ex. 4 at CDO
 25 1_957214409. This was not true, as the 911 caller said the capsized vessel was 1,000 yards west

26 _____
 12-17-48_05-02-19_D5s; 12-17-54_05-02-19_D8s; 12-18-05_05-02-19_D3s; 12-18-09_05-02-19_D2s; 12-18-
 16_05-02-19_D6s

1 of the bridge when he believed they saw its “lights under the water,” but the SPS officer did not
2 make any mention about the lights going under the water. *See* Ex. 11 at 24. The SPS officer also
3 told D13 that P/C Kraken’s Capt. Clark had confirmed that a boat matching the “exact” description
4 of the missing boat was safe. Ex. 4 at CDO 1_957214409. This too was obviously not true since
5 the 911 caller plainly stated he could only *guess* that he saw about a 22’ vessel, but he could not
6 be sure since it was dark, and the sea’s conditions were bad, while Capt. Clark only gave a general
7 description the boat that he approached, which was 22-24’ with a “white on silver, hard-top.” Then,
8 the SPS officer told D13 he would have the case “wrapped up shortly.” Ex. 11 at 19.

9 A couple of minutes later, at 5:28 am, SPS again briefed D13. This time SPS confirmed
10 there was no vessel in “no distress” based on Capt. Clark’s reporting, and that the vessel “was
11 definitely” the reported capsized boat described by the 911 caller. Ex. 4 at CDO 1_957214794;
12 CDO 1_957214794; Ex. 2 at 7 (¶21). Again, there was no mention about the 911 caller seeing the
13 lights go under the water, nor did SPS explain: (a) that they had little to no actual information to
14 match up descriptions of two boats, let alone an “exact match,” or (b) that Capt. Clark told them
15 there were at least five other boats that he saw leave that were unaccounted for. *See* Ex. 11 at 18-
16 20, 24. During that short call the SPS officer told D13 that the boat reported by Capt. Clark had
17 been following the 911 caller’s boat out under the Deception Pass Bridge but turned around
18 because of the weather. Ex. 4 at CDO 1_957214794. No one, including Capt. Clark, ever provided
19 the Coast Guard with this information. This was an assumption by the SPS officer, which was
20 never questioned by the D13 office. Ex. 11 at 19.

21 At 5:29 am, the SPS Command Duty Officer (“CDO”) Florscher called the SAR Mission
22 Coordinator (“SMC”), Officer Sweigert, at his home. Ex. 11 at 20; Ex. 2 at 8 (¶22); Ex. 4 at CDO
23 1_957214836. The SMC is the officer who is assigned with the final authority on a search and
24 rescue case. SMCs are typically located away from the watch floor where the inbound calls from
25 the public or agencies are fielded. In this case, the watch floor was SPS. USCG policy requires the
26 watch floor personnel to alert the SMC at the beginning of every case, but this did not happen. *Id.*

1 CDO Florscher provided what he called an “after-the-fact” brief to the SMC, requesting that the
 2 SMC close the case as a “false alert.” Ex. 4 at CDO 1_957214836; Ex. 11 at 20. The USCG Search
 3 and Rescue addendum defines a false alert as:

4 A case where the subject reported to be in distress is confirmed not
 5 to be in distress and not in need of assistance. In a false alert case,
 6 the reporting source either misjudged a situation or inadvertently
 7 activated a distress signal or beacon resulting in an erroneous
 8 request for help....

9 Ex. 7 at 3.4.10.1.

10 Mandatory D13 policy allows the SMC to close a SAR case as a “Confirmed False Alarm,”
 11 only when “the subject reported to be in distress be in distress is confirmed not to be in distress or
 12 in need of assistance.” Ex. 8 at 2-2 (emphasis in original); Ex. 6 at 34:14-18. As OU Polyak
 13 testified, “If we’re not able to say with 100 percent certainty that the party is not in need of
 14 assistance, then we cannot close the case as a false alert.” *Id.* at 35:9-11. “[A]nything less” is
 15 insufficient. *Id.* at 34:20-35:3 (SMC has no authority to close “probable false alerts”); Ex. 8 at 2-
 16 2 (“suspected false alarms” may be suspended only by D13).

17 Instead of passing along all the relevant facts accurately and identifying any assumptions
 18 he was making on that call, CDO Florscher told SMC Sweigert they already concluded they had
 19 an exact match between the suspected capsized vessel described by the 911 caller and the boat
 20 Capt. Clark interviewed, and that they “exactly” matched in three categories: “length,”
 21 “description,” and “activity.” Ex. 11 at 20; Ex. 12 at 146:7-18, 147:11-149:17; Ex. 4 at CDO
 22 1_957214836. Again, this was plainly inaccurate. The SPS officer also chose not to brief SMC
 23 Sweigert on the following facts:

- 24 • The 911 caller said he was right next to the vessel when it disappeared, and he
 25 believed his shipmate saw the lights go under the water.
- 26 • The 911 caller could only provide a very vague guess as to the description of the
 vessel due it being dark out and there being 10-15’ seas, which was that it was
 maybe a 22’ boat (it should be noted that 20-24’ is the most common recreational
 vessel size. The typical single axle trailer will typically carry up to a 22-24’ vessel
 in size).

- 1 • Capt. Clark told them he personally saw five other fishing boats that were traveling
2 west out though Deception Pass (the same direction as the capsized vessel), none
3 of which were accounted for by the Coast Guard.
- 4 • The reported capsized vessel was last seen 1,000 yards due west of the Deception
5 Pass Bridge, which was far past the point where the vessel accounted for by Capt.
6 Clark was seen.

7 Ex. 2 at 9-10 (section b).

8 SMC Sweigert never questioned any of the SPS officer's assumptions and he agreed with
9 his recommendation that the case was a confirmed "false alert." *Id.*

10 Finally, the SPS officer ended the call by telling SMC Sweigert that he just wanted to
11 inform him of the case, "especially since the news was all over it." Ex. 4 at CDO 1_957214836.
12 Indeed, KOMO News, KING 5 News, and KIRO 7 all called SPS about the report of the capsized
13 vessel that morning.

14 At 5:30 am, a reporter with KOMO News called the SPS watch floor. OU Polyak answered,
15 and he told them that the case had been closed as a false alert. Ex. 4 at OU 1_957214900. Right
16 after that, KIRO 7 also called the SPS watch floor to ask if the search for the capsized vessel had
17 been "called off," which SPS answered yes. *Id.* at OU 2_957215933.

18 **G. Coast Guard broadcasts a UMIB that there is no vessel in distress and local
19 agencies turn their boats around and end rescue efforts. KING 5 never sends the
20 helicopter based on the UMIB.**

21 At 5:33 am, Coast Guard SPS, as the lead Search and Rescue agency on the case,
22 broadcasted a UMIB that the reported capsized vessel was a false alert and that the USCG had
23 "confirmed" there was "no vessel in distress," effectively ending the search and rescue mission.
24 Ex. 4 at 12-33-21_05-02-19_D8s; 12-33-30_05-02-19_D14s. This prompted North Whidbey Fire
25 & Rescue to contact the Coast Guard directly to ensure there was no vessel in distress, to which
26 the Coast Guard confirmed it "determined there was no vessel in distress." *Id.* at 12-38-20_05-02-
19_D15s. That call ended about 5:40 am. Ex. 13 at 3.

By 5:45, and within 5 minutes of that last call with North Whidbey Fire & Rescue, all the

1 local agencies had terminated their searches. This included the following agencies who turned their
2 boats back to shore: (1) North Whidbey Fire & Rescue, which had at least one boat out on the
3 water looking for the capsized vessel and another boat that was in the process of launching, and
4 (2) the Swinomish Tribal PD's Marine Unit that had a vessel with a rescue diver out on the water
5 looking for the capsized vessel. Ex. 14 at 33:16-34:6, 38:16-39:10; Ex. 15 at 2 ("Coast Guard says
6 there is no boat in distress and [Tribal PD's] boat will be clearing. . ."); Ex. 18 ("Swinomish Marine
7 Unit was no longer needed" after "around 0540" when USCG advised that the vessel in distress
8 "did not capsize."). Sunrise occurred four minutes later, at 5:49 am.

9 Lastly, Mike Baker at KING 5 News never sent the helicopter to search for the capsized
10 vessel due to the Coast Guard calling off the search. Ex. 9 at 11:10-12:25.

11 **H. The capsized vessel and its passengers were left and abandoned. One man died,
12 the other survived for nearly 8 hours and was recovered unconscious and foaming
13 at the mouth. Both men were abandoned because the Coast Guard issued an
14 incorrect false alert.**

15 This was *no false alert*. No, the fishing boat reported by the 911 caller that morning had
16 gone *under the water*. Its two passengers, Mr. Michael Powers, and Mr. Richard Seay, were thrown
17 from the vessel into the frigid, crashing waters of Puget Sound just beyond 1,000 yards west of
18 Deception Pass Bridge. Mr. Seay's death and the story of Mr. Powers' miraculous survival are to
19 be left for trial and are not germane to this specific motion.

20 **I. Coast Guard admits it wrongly issued a false alert and it violated the standard of
21 care when its SMC failed to ask follow-up questions when it was presented with a
22 conclusion that the two reports of the vessels were an exact match.**

23 The Coast Guard's 30(b)(6) representative, Commander Mitchell, who is also testifying as
24 its liability expert, was asked whether the Coast Guard's SMC violated any professional standards
25 of care in the industry causing the erroneous false alert. He answered:

26 Okay. My opinion is that, no, he did not meet the standard of care. I
would have expected an SMC to ask more questions and more
thoroughly understand the facts of the case before considering the
case closed as a false alert.

Ex. 17 at 128:4-7.

1 And again, during Commander Mitchell’s 30(b)(6) and liability expert deposition, the
2 Coast Guard was directly asked why it failed to send any of its own assets to search for Mr. Powers
3 and Mr. Seay. The Coast Guard responded that:

4 The CDO presented a brief to the SMC. That brief led the SMC to
5 believe that there was in fact, no distress. And the SMC made the
6 decision to close the case as a false alert and take no additional
7 action.

8 *Id.* at 156:7-14.

9 III. ISSUES PRESENTED

- 10 1) Did the Coast Guard trigger the duty to act with due care under the Good Samaritan Doctrine
11 when it activated the SAR system, assumed the role of SMC, issued the UMIB, had the P/C
12 Kraken search and report on its behalf, and declared a false alert?
13 2) Did the Coast Guard breach its standard of care when:
14 a) SPS concluded the vessel reported by the 911 caller and Capt. Clark was an “exact” match
15 to determine there was no vessel in distress?
16 b) SPS declared the SAR case a false alert based on the SPS watch floor’s erroneous
17 determination that the vessels were an exact match and SMC Sweigert’s failure to
18 adequately question SPS’ determination that it was an exact match?
19 3) Can the Coast Guard prove it is entitled to the defense of sovereign immunity under the
20 Discretionary Function Exception?
21 4) Can the Coast Guard prove its defense of comparative negligence?

22 IV. EVIDENCE RELIED UPON

23 Michael Powers relies on the Declaration of Joe Pipinich and the exhibits attached
24 thereto.

25 V. ARGUMENT

26 “The purpose of summary judgment is to avoid useless trials on formal issues which
cannot be supported factually.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 167, 607 P.2d 864

1 (1980). Summary judgment is appropriate when “there is no genuine issue as to any material fact
 2 and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). The moving
 3 party has the initial burden of “showing there is no dispute as to any issue of material fact.” *Hiatt v.*
 4 *Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). “If the moving party is a defendant
 5 and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial,
 6 the plaintiff.” *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

7 As the nonmoving party here, Defendants “may not rely on speculation [or] argumentative
 8 assertions that unresolved factual issues remain” but must “set forth *specific facts* that sufficiently
 9 rebut [Plaintiffs’] contentions and disclose that a genuine issue as to a material fact exists.” *Seven*
 10 *Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added). If
 11 Defendants fail to make a showing sufficient to establish a material element of any of their
 12 counterclaims, then the Court must dismiss the entire counterclaim because ““a complete failure
 13 of proof concerning an essential element of the nonmoving party’s case necessarily renders all
 14 other facts immaterial.”” *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S.
 15 317, 322–23, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986)).

16 **A. The Coast Guard triggered the duty to act with due care when it activated the**
 17 **SAR system, assumed the role of SMC, issued the UMIB, had the P/C Kraken**
 18 **search and report on its behalf, and declared a false alert.**

19 Mr. Powers brings his admiralty law claims against the United States under the General
 20 Maritime Law’s Good Samaritan doctrine. The Good Samaritan doctrine, which falls under the
 21 guise of the Suits in Admiralty Act (“SIAA”), provides his “exclusive remedy.” *Sawczyk v. U.S.*
 22 *Coast Guard*, 499 F.Supp. 1034, 1037 (W.D.N.Y.1980)

23 The Coast Guard’s mission allows it to “perform any and all acts necessary to rescue and
 24 aid persons and protect and save property.” 14 U.S.C. § 88(a)(1). Under the General Maritime
 25 Law, just like any member of the public, the Coast Guard is not required to undertake any rescue.
 26 However, once the Coast Guard does undertake to perform acts to rescue or aid those in distress,
 it is then under a duty to act with due care. *Hurd v. U.S.*, 134 F. Supp. 2d 745, 772 (D.S.C. 2001),

1 aff'd, 34 F.App'x 77 (4th Cir. 2002) (citing *Furka v. Great Lakes Dredge & Dock Co.*, 824 F.2d
 2 330, 332 (4th Cir.1987), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988); *Berg*
 3 *v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1430 (9th Cir.1985); *Korpi v. U.S.*, 961 F.Supp. 1335,
 4 1347 (N.D.Cal.1997), *aff'd*, 145 F.3d 1338, 1998 WL 231207 (1998). “In other words, while the
 5 Coast Guard has no affirmative duty to rescue, the Coast Guard must act with due care once it
 6 undertakes a search and rescue mission.” 134 F. Supp. 2d at 773 (citing *Lacey v. U.S.*, 98 F.Supp.
 7 219, 220 (D.Mass.1951). “The rationale is that other would-be rescuers will rest on their oars in
 8 the expectation that effective aid is being rendered.” *Id.* Whether there has been an attempt to
 9 render aid is a question of fact in each case. *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d
 10 1085, 1088 (4th Cir. 1985).

11 Once the duty is triggered, the Coast Guard will be held liable when either:

- 12 (1) its negligent conduct worsens the position of the victim, or
- 13 (2) its reckless and wanton conduct in the performance of the rescue causes harm to the
 14 victim.

15 *Berg v. Chevron U.S.A., Inc.* 759 F.2d 1425, 1430 (9th Cir. 1985).³

16 Under maritime precedent, the Coast Guard is not required to physically engage in sending
 17 one of its own assets on a search and rescue mission to trigger the duty of due care. Rather, the
 18 duty can be triggered when it makes the decision to act, which includes sending out UMIBs, asking
 19 third-party ships to conduct a search on its behalf, and/or coordinating with other ships and
 20 agencies via radio to locate a distressed vessel. *Hurd v. U.S.*, 34 F.App’x 77, 82, 2002 A.M.C.
 21 1584. (4th Cir. 2002); *Huber v. U.S.*, 838 F.2d 398, 401 (9th Cir. 1988); *U.S. v. DeVane*, 306 F.2d
 22 182, 185 (5th Cir. 1962).

23 Indeed, the Coast Guard triggers the duty of due care once it takes on a search and rescue
 24 case (1) by engaging in communications with the public to help locate a distressed vessel or person

25 _____
 26 ³ “We agree with *Grigsby*, *Patentas*, and *Furka*, and hold that the proper standard of care is that a rescuer will be held
 liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in
 performing the rescue.”

1 in the water when it has a specific reason to believe someone is in danger and they know where
2 that danger is located, and (2) by engaging third-party vessels to conduct a search on its behalf.
3 *Hurd v. U.S.*, 34 F.App’x at 82. The Coast Guard can also trigger the duty to act when it chooses
4 to monitor distress radio calls from a ship in a storm, which causes other nearby ships to rely on
5 the Coast Guard to rescue that ship. *Huber v. U.S.*, 838 F.2d at 401. In addition, the Coast Guard
6 triggers the duty to act with due care when it chooses to seek help from private ships to attempt
7 communications with a missing ship, and then the Coast Guard inexplicably misinterprets a
8 message from the private ship to mean the missing vessel is safe when it was not safe. *U.S. v.*
9 *DeVane*, 306 F.2d 182, 185 (5th Cir. 1962). In other words, under *DeVane*, the Coast Guard is
10 liable for its communication errors that can mean the difference between life and death.

11 Perhaps the most instructive and analogous case is *Hurd v. United States*, 134 F. Supp. 2d
12 745. In *Hurd*, the Coast Guard received a brief radio mayday call earlier in the day, but the caller
13 never identified where they were or any other facts about the distress. About four hours later, the
14 Coast Guard received a call from a nearby pilot’s office that one of its crew heard a voice yelling
15 in the water. The pilot office informed the Coast Guard it would have its vessel go look in the area.
16 *Id.* Upon looking, the pilot reported back they did not find anything. *Id.* The Coast Guard never
17 followed up, suspended the search, and as a result, three children and a parent died. *Id.* The district
18 court found that the Coast Guard triggered the duty to act with due care when it “responded to the
19 [] distress call by using the pilot boat as its initial resource to render aid to mariners in distress.”
20 *Id.* at 759. The court also noted that “gathering information is part of the SAR process.... A Coast
21 Guard rescue involves more than simply putting a boat in the water.” *Id.*

22 The analysis by the *Hurd* court is consistent with Coast Guard policy. The Coast Guard’s
23 SAR addendum describes a mission as having five stages: *Awareness, Initial Action, Planning,*
24 *Operations, and Conclusion*. Ex. 7 at 3.1.2 – 3.1.3. Only *one* of them involves using any **physical**
25 search or rescue assets on the water: the *Operations* stage. *Id.* In this case, during its 30(b)(6)
26 deposition, the Coast Guard made it clear it agrees that gathering information and communications

1 about a search case is their way of responding and taking action:

2 In the context of the addendum and SAR professionals, when
3 we use the term “respond” and when we use the term “action,” that
4 doesn’t always mean a Coast Guard craft going to sea or taking to
5 the skies.

6 For example, the word “action” in “initial actions.” If you
7 were to ask me kind of a search-and-rescue 101 question,
8 “Commander Mitchell, what are the initial actions?” Well,
9 evaluating information to assign an emergency phase is an initial
10 action. Assigning the appropriate SAR mission coordinator is an
11 initial action. Releasing a UMIB is an initial action. And we use the
12 term “respond” in the same context. If you – you now, Coast Guard
13 response operation is not just boats and planes going into the water,
14 but it’s making additional phone calls. It’s calling a reporting a
15 reporting source to ask more information. It’s issuing that UMIB.

16 Ex. 17 at 71:6-21.

17 Here, the Coast Guard has undisputedly surpassed the basic initial actions to trigger its duty
18 of due care. Each of the following Coast Guard actions is not in dispute:

- 19 1) The Coast Guard assumed SMC, taking control as the lead agency responding to the
20 distress call, when there were at least two other agencies responding with boats in the
21 water.
- 22 2) The Coast Guard assigned an emergency phase to the case as both Alert and Distress,
23 which Coast Guard policy *requires* it to respond.
- 24 3) The Coast Guard issued a UMIB requesting assistance from the public to locate the
25 capsized vessel.
- 26 4) The Coast Guard gathered more information through a third-party vessel, the P/C
Kraken, by having it conduct interviews with another boater on its behalf.
- 5) The Coast Guard requested the P/C Kraken to search for the boat on its behalf in a
specific area, albeit the wrong area, near the Deception Pass Bridge.
- 6) The Coast Guard briefed both the District 13 office and SMC Sweigert, and all agreed
to close the case as a false alert based on an erroneous finding that the vessels were an
exact match.
- 7) The Coast Guard issued a false alert over the radio and told other agencies and the
media that it had confirmed there was no vessel in distress, which ended the ongoing
search and rescue efforts.

Not only did the Coast Guard assume the lead role and control over the entire search and

1 rescue mission by declaring SMC, but the other agencies in fact turned their vessels around once
2 the Coast Guard called off the search by issuing the erroneous false alert. And KING 5 News, who
3 had a helicopter ready to go to assist in the search, never sent the helicopter because the Coast
4 Guard told KING 5 and every other news agency that there was no vessel in distress.

5 The facts of this case are even more egregious than the other Coast Guard SAR cases cited
6 above. For example, in *Hurd v. United States*, 134 F. Supp. 2d 745, where the district court
7 awarded \$19 million to the families of the victims, the court found the duty of due care was
8 triggered when the Coast Guard obtained information from a pilot boat office that a crewmember
9 heard a voice in the water, then, the Coast Guard requested the pilot boat to search in the area. *Id.*
10 at 756-57. Once the pilot boat reported back that nothing was found, the Coast Guard made the
11 decision to suspend the search. 134 F. Supp. 2d at 760. In this case, the Coast Guard did the same
12 thing as in *Hurd*, except here, in Mr. Powers' case, it declared his case a false alert and announced
13 it over the radio. After that, everyone who was working to actively rescue Mr. Powers just stopped.
14 The local agency rescue boats turned around. KING 5, who planned to send its helicopter to the
15 area to search for the capsized vessel and any people in the water, never sent the helicopter.

16 The defense has provided no facts that would counter these undisputed facts and therefore
17 plaintiff respectfully requests this Court grant this motion establishing that the Coast Guard
18 engaged in a search and rescue mission and owed Mr. Powers a duty of due care.

19 **B. The Coast Guard breached its standard of care when (1) it erroneously concluded**
20 **the vessels to be an exact match, and (2) when SMC Sweigert failed to ask basic**
21 **questions of the SPS personnel to confirm there was no vessel in distress.**

22 The standard of due care in this case is codified, in part, in the Coast Guard SAR addendum,
23 the D13 policy manual, and has been provided by the Coast Guard's 30(b)(6) and liability expert
24 witness. The Coast Guard has breached each of these standards.

25 First, as already discussed, the D13 policy manual requires its personnel to confirm a vessel
26 is not in distress as a requirement to declare a false alert. Ex. 8 at 2-2 (emphasis in original); Ex. 6
at 34:14-18. The SAR case addendum goes so far as to require the Coast Guard to respond to a

1 distress call even if it suspects that the call is a hoax. Ex. 7 at 3.4.10. When the call is a *probable*
 2 hoax, the Coast Guard still must base its decision to declare a false alert on “several articulable
 3 factors that would lead a reasonable person to conclude that the distress is false and there is no
 4 distress.” *Id.* at 3.4.10.2. This standard does not just apply to false alerts. When asked whether the
 5 Coast Guard expects its personnel to follow the recommended actions in the addendum, often
 6 denoted by the word “should,” the Coast Guard’s 30(b)(6) witness said yes “unless there is a good
 7 articulable reason.” Ex. 12 at 32:15-33:21.

8 To do this job, some basic level of competence and common sense are reasonably required
 9 to follow the directives and make good professional decisions, especially when human lives are
 10 on the line.

11 In this case, it is not rational to conclude that the description of the vessel by the 911 caller
 12 and that of the vessel reported by the P/C Kraken could reasonably be a match under the
 13 circumstances, especially when life and death are on the line. There is not a single articulable
 14 feature about either of these vessels that would cause a professional using any reasonable judgment
 15 to conclude with any certainty that they were the same vessel. The two vessels did not share a
 16 single descriptive feature in common. Below is a table comparing the two descriptions:

| Missing Boat: 911 Caller | P/C Kraken Capt. Clark |
|---|---|
| <p><u>Length:</u> It was “too dark to really tell,” but it “might have been” “something like” 22-feet long.</p> | <p><u>Length:</u> 22-24-feet.</p> |
| <p>Ex. 4 at OU 1 957213306 at 0:00-2:50</p> | <p>Ex. 4 at 12-17-03 05-02-19 D11s.</p> |
| <p><u>Description:</u> “It might have been something like a Hewescraft, 22-foot or so. It was dark out . . . It was too dark to really tell. Couldn’t tell how many people were on board.” No description of color or build material.</p> | <p><u>Description:</u> “[W]hite on silver, hard-top boat.” No description of make or model.</p> |
| <p>Ex. 4 at OU 1 957213306 at 0:00-2:50</p> | <p>Ex. 4 at 12-17-03 05-02-19 D11s.</p> |

| | |
|---|---|
| <p>1 <u>Activity:</u></p> <ul style="list-style-type: none"> 2 • “We were coming out underneath 3 Deception, head[ing] west. He was 4 right next to us.” 5 • “He disappeared.” 6 • “My partner thought he saw the 7 [missing boat’s] lights under water.” 8 • Last seen approximately 1000 yards 9 due west of Deception Pass Bridge. 10 • Only seen traveling westbound. <p>11 Ex. 4 at OU 1 957213306 at 0:00-2:50</p> | <p>1 <u>Activity:</u></p> <ul style="list-style-type: none"> 2 • “They’re under no distress, and they’re 3 not the ones who called it in.” 4 • They got out to Pass Island and turned 5 around at that point. They were 6 headed west but decided ‘not today.’” <p>7 Ex. 4 at 12-21-39_05-02-19_D14s</p> |
|---|---|

8 When considering that life and death were on the line, these facts suggest a person would
 9 have to make up facts to create an articulable reason justifying ending the search by declaring a
 10 false alert, which is exactly what the Coast Guard did.

11 Second, the Coast Guard’s own 30(b)(6) witness, who was at the same time testifying as
 12 its liability expert admitted that the Coast Guard did not meet the basic standard of care when SMC
 13 Sweigert failed to ask basic questions about SPS’s assumption that the case was a false alert and
 14 an exact match. Commander Sweigert, the Coast Guard admits: “did not meet the standard of care.
 15 I would have expected an SMC to ask more questions and more thoroughly understand the facts
 16 of the case before considering the case closed as a false alert.” Ex. 17 at 128:4-7. The defense has
 17 presented no evidence to rebut this admission.

18 Plaintiff respectfully requests its motion establishing breach of the standard of care be
 19 granted.

20 **C. The Coast Guard has not met its burden to establish its affirmative defense under**
 21 **the Discretionary Function exception to its waiver of sovereign immunity.**

22 Even though the SIAA contains a broad waiver of sovereign immunity, the USCG asserts
 23 immunity, erroneously claiming that its conduct falls under the SIAA’s discretionary function
 24 exception to waiver. The USCG is wrong as a matter of law. To date, the Coast Guard has not
 25 provided a single factual reason why it is entitled to claim the narrow exception to waiver. Instead,
 26 it has merely relied on supplying its policy handbook, the USCG SAR addendum, as its

1 justification that it has “discretion” to act, and, therefore, it is immune. The Coast Guard’s position
2 is at odds with the law.

3 The point of the exception is to “prevent judicial second-guessing of legislative and
4 administrative decisions grounded in social, economic, and political policy.” *Berkovitz v. U.S.*, 486
5 U.S. 531, 536–37, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (internal quotation marks omitted).
6 The government bears the burden of showing that the exception applies. *See Terbush v. U.S.*, 516
7 F.3d 1125, 1128 (9th Cir. 2008).

8 The Coast Guard must satisfy a two-part test. “First, we must determine whether the
9 challenged actions involve an element of judgment or choice.” *Kim v. U.S.*, 940 F.3d 484, 487 (9th
10 Cir. 2019) (internal quotation marks omitted). If “a statute or policy direct[s] mandatory and
11 specific action, the inquiry comes to an end because there can be no element of discretion when
12 an employee has no rightful option but to adhere to the directive.” *Id.* (internal quotation marks
13 omitted). “Second, if the actions do involve an element of judgment, we must determine whether
14 that judgment is of the kind that the discretionary function exception was designed to shield,
15 namely, only governmental actions and decisions based on considerations of public policy.” *Id.*
16 (internal quotation marks omitted). “The relevant choice must be susceptible to some consideration
17 of ‘social, economic, [or] political policy.’” *Id.* (internal quotation marks omitted).

18 When reviewing the second prong of the test, courts have distinguished between decisions
19 that are made on policy and/or a system that was designed with policy considerations in mind,
20 versus the *implementation* of those procedures. *Marlys Bear Med. v. U.S.*, 241 F.3d 1208, 1215
21 (9th Cir. 2001). This is especially important when the decisions are based in professional judgment
22 or skill. “Matters of scientific and professional judgment—particularly judgments concerning
23 safety—are rarely considered to be susceptible to social, economic, or political policy.” *Whisnant*
24 *v. U.S.*, 400 F.3d 1177, 1181 (9th Cir. 2005); *see also Kennewick Irrigation Dist. v. U.S.*, 8800 F.2d
25 1018, 1031 (9th Cir. 1989).

26 When it comes to the Coast Guard in Good Samaritan cases, the Ninth Circuit has well-

1 settled law: once the Coast Guard exercises discretion and makes a decision to institute a search
2 and rescue operation, and/or render aid to distressed persons, it is obligated to use due care. *Huber*
3 *v. U.S.*, 838 F.2d at 400-01. As stated by the Ninth Circuit:

4 The government's conduct at issue here was not the result of a policy
5 decision about allocation of rescue resources, but rather the
6 allegedly negligent execution of a course of action that was already
7 chosen. At the time of the KUHUSHAN's sinking, the Coast Guard
8 had already made the policy decision to assist the KUHUSHAN, and
9 had communicated that decision to the crew, who in turn relied upon
10 the Coast Guard's actions. Then the Coast Guard failed to monitor
11 the radio channel it had instructed the KUHUSHAN to use, failed to
12 investigate when the KUHUSHAN missed the scheduled
13 communication check, and, apparently, forgot about the
14 KUHUSHAN in the chaos of the evening. This is not a case where
15 the Coast Guard decided to conserve its resources by not assisting
16 vessels in certain situations. Instead, the Coast Guard decided to aid
17 the KUHUSHAN, and then allegedly did so in a negligent manner.

18 *Id.*

19 In addition to *Huber*, the case of *Hurd v. U.S.*, 134 F. Supp. 2d 745, is again instructive. In
20 *Hurd*, the court determined that the discretionary function exception did not apply when the Coast
21 Guard suspended a search after it received a report of someone calling for help in the water. The
22 Coast Guard relied on a private pilot boat to inspect the area. When it reported back that it did not
23 find anything, the Coast Guard simply chose to do nothing. As a result, three children and a parent
24 died because they were abandoned out to sea. The court, in evaluating the discretionary function
25 exception, relied on *Huber* when it ruled that once the Coast Guard made the policy decision to
26 help render aid, it had a duty to do so with due care. *Id.* at 769 (“...once Sass made the decision to
render aid, his actions were not discretionary because Coast Guard policy specifically prescribes
a course of action for him to follow.”). The court noted that the Coast Guard received a distress
call and, under its own policy, it is required to take appropriate action to aid the people in distress.
Id. at 760. Thus, the court found the Coast Guard was merely implementing the mandates of the
Coast Guard, which were objective criteria. *Id.*

1 Here, the actions relevant to Mr. Powers' claims include the fact that the Coast Guard
2 breached the standard of due care when it failed to adequately confirm a false alert. There is simply
3 no policy-based reason for the Coast Guard's failure to adequately compare two different
4 descriptions of two different vessels when (1) it was a matter of life and death, and (2) the Coast
5 Guard has admitted the only reason it did not send its own assets was that it issued a false alert,
6 and for no other reason. Ex. 17 at 156:7-157:16.

7 The Coast Guard policy guides and directs the Coast Guard to do the following:

- 8 1. To classify a case as distress if there is any question as to the degree of danger to
9 persons or property. Ex. 7 at 4.1.6.1.
- 10 2. If a case is distress, the Coast Guard shall respond immediately if able, to include
11 broadcasting a UMIB and dispatching appropriate resources. *Id.* at 4.1.6.2.
- 12 3. The D13 policy manual requires USCG personnel to confirm a vessel is not in
13 distress as a requirement to declaring a false alert. Ex. 7 at 2-2 (emphasis in
14 original); Ex. 6 at 34:14-18.
- 15 4. When there is insufficient information to establish where and when a distress
16 occurred, "known facts must be clearly labeled as such. Even more importantly,
17 assumptions must be labeled and treated as such." Ex. 7 at 3.3.3.1.
- 18 5. When the Coast Guard receives a call for assistance, the SMC shall evaluate the
19 circumstances to determine the severity of the case using information obtained from
20 the mariner. *Id.* at 4.1.6.1.
- 21 6. In Figure 4-1 on page 4-17 of the Coast Guard Addendum, there is an entire
22 decision-making flow chart directing Coast Guard how to do their job when they
23 are called for assistance from the public. Notably, following it leads to launching a
24 suitable "Coast Guard Asset." *Id.* at 4-17.

25 None of these directives are policy-based. Just like in *Hurd*, the Coast Guard has prescribed
26 a course of conduct that they have simply failed execute as a matter of skill and basic professional
judgment. For these reasons, Plaintiff respectfully requests that the Court dismiss the Coast
Guard's Discretionary Function defense.

**D. Summary judgment dismissal of the Coast Guard's comparative fault affirmative
defense is proper.**

The Coast Guard's comparative fault affirmative defense fails as a matter of law, as no
evidence suggests that Mr. Powers was negligent after the Coast Guard became involved in this

1 case. Additionally, no evidence suggests that any alleged negligence by Mr. Powers proximately
2 caused his alleged damages. For these reasons, summary judgment is appropriate.

3 When a plaintiff alleges that a defendant was negligent in providing aid or service, the
4 defendant may not contend that the plaintiff contributed to his own injuries by causing the situation
5 that necessitated the defendant's aid or service. *U.S. v. DeVane*, 306 F.2d 182, 187 (5th Cir. 1962);
6 *Hurd*, 134 F. Supp. 2d at 774; *Michelle v. South Correctional Entity*, NO. 2:21-cv-00140-JHC,
7 2022 WL 15522213, at *3 (W.D. Wash. Oct. 26, 2022) (finding that "[a] healthcare provider may
8 not avoid liability for negligent treatment by asserting that the patient's pre-treatment actions
9 contributed to their injuries"); Restatement (Third) of Torts: Apportionment of Liability § 7 cmt.
10 M (2000). In such cases, any alleged comparative negligence by the plaintiff that precedes the
11 defendant's actions is irrelevant. *Hurd*, 134 F. Supp. 2d at 774. For example, in a medical
12 malpractice action for the negligent treatment of an injury, a doctor may not support a comparative
13 fault affirmative defense by claiming that the plaintiff's negligence caused or worsened the
14 plaintiff's injury prior to the plaintiff's presentation at the hospital. "To determine otherwise would
15 violate the well-settled tort law principle that a tortfeasor takes the plaintiff as they find them."
16 *Michelle*, 2022 WL 15522213 at *3.

17 Courts have reiterated this principle in negligence cases where the Coast Guard is a
18 defendant, finding that any negligence by the plaintiff that precedes Coast Guard action is
19 irrelevant and cannot support a comparative fault defense. *Hurd*, 134 F. Supp. 2d at 774; *U.S. v.*
20 *DeVane*, 306 F.2d at 187. When analyzing the Coast Guard's comparative fault claim, the
21 factfinder may consider only the plaintiff's actions that precede the Coast Guard's alleged
22 negligence, that "relate[] to the rescue," and that cause harm by either "worsen[ing] the victim's
23 condition or hinder[ing] the rescue." *Hurd*, 134 F. Supp. 2d at 774; *see also U.S. v. DeVane*, 306
24 F.2d at 187. Put another way, the factfinder "analyz[es] a plaintiff's conduct in terms of the rescue
25 effort." *Hurd*, 134 F. Supp. 2d at 774. The reasonably prudent person standard applies. *Id.*

26 *United States v. DeVane*, 306 F.2d at 187, is instructive. There, the plaintiff alleged that

1 the USCG negligently cancelled a SAR. The USCG asserted comparative fault, alleging that the
 2 plaintiff was negligent “in failing to properly equip his vessel, in failing to heed the warnings of
 3 adverse weather, and in failing to lash the supplies and flares to [his] life raft.” *Id.* The Fifth
 4 Circuit held that none of these theories could support a comparative negligence affirmative
 5 defense, as a matter of law. It explained that when two unrelated causes contribute to an injury,
 6 and when one of them is a “direct cause” while the other “merely . . . give[s] rise to the occasion
 7 by which the injury was made possible, the former will alone be regarded as responsible for the
 8 result.” *Id.* (quoting 86 C.J.S. Torts § 30).

9 Here, the Coast Guard’s comparative fault affirmative defense fails as a matter of law for
 10 the same reasons articulated in *DeVane* and *Hurd*—the Coast Guard has only alleged negligence
 11 that precedes its own involvement in this case, and it has provided no evidence to support its
 12 affirmative defense.

13 VI. CONCLUSION

14 Plaintiff Michael Powers respectfully requests the Court grant each of its four separate
 15 motions for partial summary judgment.

16 DATED this 15th day of December, 2022.

17
 18 **PETERSON | WAMPOLD**
ROSATO | FELDMAN | LUNA

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated: December 15, 2022.

/s/ Dana Vizzare
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