CASE NO. 14-8062
IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY MELLON,
Appellant,

v.

THE INTERNATIONAL GROUP FOR HISTORIC AIRCRAFT RECOVERY,
and RICHARD E. GILLESPIE,
Appellees.

Originating Court:
Appeal from United States District Court for the District of Wyoming
Honorable Scott W. Skavdahl presiding
Case No. 1:13-CV-00118-SWS

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Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellee The International Group for Historic Aircraft Recovery states: The International Group for Historic Aircraft Recovery has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Statement of Prior or Related Appeals

Pursuant to 10th Cir. R. 28.2(C)(1), Appellees state that there are no prior or related appeals.

I. STATEMENT OF ISSUES

The District Court appropriately granted summary judgment to Defendants/Appellees, as there are no disputed issues of material fact, and they are entitled to judgment as a matter of law.

II. STATEMENT OF FACTS

The Appellees, The International Group for Historic Aircraft Recovery ("TIGHAR") and Richard Gillespie ("Gillespie") agree with the facts as set forth by the District Court, and restate them as follows.[1]

The case underlying this appeal arose out of an ongoing effort to investigate the 1937 disappearance of famed aviatrix Amelia Earhart and navigator Fred Noonan, along with expeditions to find artifacts from her aircraft (a Lockheed Electra Model 10E) and her last flight.[2] TIGHAR was formed in 1985 and is a non-profit organization that, in part, investigates aviation archeology and historic preservation of rare and historic aircraft. Aplt. App. at 29; 149 (27:11-15).[3] Gillespie has always been, and continues to be, TIGHAR's Executive Director. *Id*. at 10; 149 (16:15-16). In order to fund its investigations, TIGHAR raises funds through corporate sponsorships and from private donors. *Id.* at 10.

[1] The parties' statements of fact clearly differ in significant degree, however by carefully reading the admittedly complex factual record for context, this Court will determine that the parties do not disagree about material facts themselves, but instead what those facts mean as a matter of law.

[2] For consistency of terminology and ease of reference, Appellee will refer to any sort of alleged artifacts, materials or remains of Ms. Earhart, Mr. Noonan, the airplane or its contents broadly as "Earhart wreckage."

[3] Since Appellant's Appendix contains condensed transcripts with four transcript pages per page of the Appendix, any citations to those pages will include the Appendix page number followed by the transcript page and line numbers in parentheses. Any transcript pages that are not condensed will be cited with the Appendix page number and line numbers.

The most important, and most time- and cost-intensive, ongoing investigation conducted by Appellees is the search for Earhart, Noonan, their aircraft, and artifacts. *Id*. This ongoing search is now focused in the South Pacific, specifically on the island of Nikumaroro in the Republic of Kiribati (pronounced "Keer-ah-bahs"), as it is Appellees' hypothesis that Earhart and Noonan most likely landed and died on this island. *Id.*

Prior to the time Earhart and Noonan disappeared, a ship called the S.S. Norwich City was wrecked on Nikumaroro, creating a debris field along parts of the shoreline. In the time since the disappearance, Nikumaroro has been home to a Coast Guard station that operated during World War II, as well as a failed human settlement from 1939 through 1963. In 1940, a British Colonial Service officer found a partial human skeleton and a number of artifacts at "castaway camp" at one end of the island. The bones and artifacts have since been lost. Aplee's Sup. App. at 37:21-25; 38:1-10.

Since 1989, TIGHAR has conducted eleven expeditions to the island and, while there, conducted detailed surveys and searches of the island and the water surrounding it. Aplt. App. at 104-14. Since its inception, TIGHAR has operated under the policy that it will only announce the discovery of the Earhart wreckage or its belief that the mystery of Earhart and Noonan's disappearance has been solved when it finds and positively identifies "conclusive, indisputable proof that

the recovered wreckage is that of the plane or DNA of Ms. Earhart or Mr. Noonan." *Id*. at 163 (114:4-8); 174, ¶ 8. To date, TIGHAR has not uncovered such proof and has made no such announcement.

In May 2010, TIGHAR began its tenth expedition, known as NIKU VI, to the island. *Id*. at 10. This expedition included both a terrestrial archeological search of the island and an underwater search of the reef slope along the island's western shoreline, conducted by a remote operated vehicle ("ROV"). *Id*. at 11; 38-39. This ROV was equipped with both high definition and standard definition video cameras. *Id*. The search was conducted to test the hypothesis that this area of the island holds wreckage from the aircraft. During the underwater search, the ROV filmed some potentially man-made objects: a rope and what "kind of looks like a wire." *Id*. at 165 (122:15-123:22). At the time, members of the ROV team determined that the "wire" was actually whip coral. *Id*.; 144 (46:4-22). However, in an abundance of caution, Gillespie sent the ROV to the same area the next day with the stated purpose of recovering the object. *Id*. at 165 (123:16-124:19; 126:2-16). Due to technical problems, the ROV was unable to relocate the objects, despite searching for a few hours. *Id*. at 144 (47:17-48:14); 165 (124:20-126:1).

Upon returning home after the NIKU VI expedition, TIGHAR, Gillespie, and other volunteers focused on analyzing the high definition video footage. *Id*. at 11; 184-85. After doing so, TIGHAR reported that "very little man-made material

was identified[,] and none was immediately identifiable as airplane debris." *Id*. at 11; 39. Despite this finding, TIGHAR believed that the information found during NIKU VI supported its hypothesis that the aircraft wreckage could be located in the area. *Id*. at 11; 40. As part of an Exclusive Expedition Agreement with Discovery Communications, all footage from the 2010 expedition was provided to the Discovery Channel with exclusive rights to announce and publish any conclusive discoveries found therein. The Discovery Channel chose to use the segment showing the rope and "wire" (or whip coral) in a documentary that was released and eventually publicly accessible on YouTube. *Id*. at 12; 165 (123:10-14); 188:7-24.

In April 2011, Gillespie realized that standard definition footage of the NIKU VI expedition was also available, and he sent it to various individuals for analysis. One of these individuals was Jeff Glickman, an expert in forensic analysis of images and video. *Id*. at 12. After reviewing the footage, Glickman made the following interpretations of various objects:

Object 3:	Insufficient context to support interpretation.
Object 4:	*Possibly* a broken shell
Object 5:	*Possibly* a rod. *Another possibility* is that it could be a taught (sic) cable.
Object 6:	*Possibly* a rod. *Another possibility* is that it could be a taught (sic) cable.
Object 7:	*Probably* coral.
Object 8:	*Probably* rope.
Object 9:	This image is *too indistinct* to support interpretation.
Object 10:	Rope with a splice.

> Object 11: *Probably* whip coral.
>
> It should be noted that imagery associated with Object 10, Rope with Splice, shows a metal hook attached to the loop formed by the rope looping back to the splice.

Id. at 12; 42 (emphasis added). The rope, in particular, created interest at TIGHAR about any possible connection to Earhart's aircraft and convinced one board member that it "is something that would warrant the full brunt of TIGHAR curiosity." *Id*.

At this point, it must be noted that throughout that this matter, Mellon has taken information and correspondence out of context to argue his case. In this circumstance, he attempts to force the square peg of TIGHAR members' recognition of the need for further analysis into a round hole of conspiracy and deception. For example, on April 4, 2011, Gillespie sent an email to Glickman commenting that "some hotshot millionaire glory hunter" might "decide to beat us to the treasure." Aplt. App. at 66. Mellon uses this email in an attempt to demonstrate that TIGHAR knew the rope in the 2010 footage revealed the location of the Lockheed Electra and that TIGHAR and Gillespie intended to hide that knowledge. Aplt. Br. at 6.

In fact, and as is clear in the record, the April 4, 2011 email actually concerns Glickman's most recent analysis of a photograph of the "Bevington Object." The Bevington Object is an object that appears in a photograph of the

island from 1937 (after the disappearance) taken by Eric Bevington, an English Colonial Administrator, who was surveying islands in the area. Aplt. App. at 174, ¶ 11. In April 2010, Glickman first noticed the object in the photograph, and Gillespie published a research bulletin about it on TIGHAR's website on April 20, 2010. *Id*. at ¶ 12. In March 2011, TIGHAR requested and received a high-resolution scan of the photo from Oxford University in England. Glickman's analysis of the photo showed the Bevington Object to be consistent with wreckage of a Lockheed Electra's landing gear. *Id*. at ¶¶ 12-13. It was this finding, not the underwater video, that prompted Gillespie's prescient April 4, 2011.[4]

In early 2012, Gillespie sought help from Assistant Secretary of State Kurt Campbell and asked that the photograph be reviewed by government analysts and that they provide a second opinion. *Id*. at 13; 174, ¶ 12; 163 (115:2-12). The government analysis agreed with Glickman's opinion that the object was "probabl[y] from a Lockheed Electra." *Id*. at 163 (115:15-23).

After the analysts rendered their opinion, the U.S. Government began to encourage TIGHAR to undertake another expedition to the island in summer of 2012 to search for additional evidence supporting or proving the hypothesis that Earhart and Noonan landed on the island. *Id*. at 13-14; 161 (107:14-108:22); 163 (116:10-22). TIGHAR wanted additional time to prepare and fundraise for this

[4] Mellon's explanation of the April 4, 2011 email is an example of the problem set forth in footnote one.

expedition, but the U.S. State Department offered significant publicity if TIGHAR could undertake the expedition during summer of 2012. *Id*. at 14; 161 (107-108).

TIGHAR was able to do so, and on March 20, 2012, TIGHAR, Secretary of State Clinton and U.S. Transportation Secretary LaHood held a press conference discussing TIGHAR'S efforts thus far and describing TIGHAR's upcoming expedition to the island. *Id*. at 14; 162 (109). At the conference, Gillespie stated that TIGHAR had, in its opinion, compelling evidence to support its hypothesis about when and where Earhart and Noonan landed. *Id*.[5] Gillespie stated that the evidence it had at the time was strong, but also admitted that it was circumstantial and that the only evidence that would make it conclusive was finding the airplane itself. *Id*. Gillespie further stated that all TIGHAR could do was make its best effort and that actually searching for the wreckage was an important step. *Id*. at 149 (28:15-30).

TIGHAR and Gillespie fully admit that press conferences and other events like the one held on March 20, 2012 are part of TIGHAR's fundraising strategy: TIGHAR maps out its upcoming expedition and determines its projected cost. TIGHAR, like most non-profits, then makes its project, goals, and costs known to the public and explains that it will not accomplish its project goal without funds.

[5] The conference can be seen here: http://www.youtube.com/watch?v+WGbYeZAvTYk.

Finally, TIGHAR accepts the donations that are made by corporate sponsors, companies, and members of the public. *Id*. at 14; 167 (144:4-18).

After the March 2012 press conference, the Casper Star-Tribune, a newspaper with statewide distribution in Wyoming, printed a story discussing the new analysis of the Bevington Object, TIGHAR'S intention to return to the island in summer 2012 "in the hope of finding the wreckage of Earhart's plane," and Gillespie's statement that TIGHAR had strong but circumstantial evidence of the plane's location. *Id*. at 14; 127. Appellant Mellon read this article on March 22, 2012, and immediately contacted TIGHAR via email expressing his interest in providing funds for the expedition. *Id*. at 204:5-18. A few days later, Gillespie and Mellon spoke by phone, during which time Mellon spoke of his interest in the project and offered to pay roughly half of the 2012 expedition, which was around one million dollars. *Id*. at 139; 162 (109-110:11-14).

Only after this phone call, Gillespie sent Mellon materials about TIGHAR'S ongoing search, including a DVD of the Discovery Channel show featuring the clip of the rope and "wire" or whip coral. *Id*. at 101. Prior to transferring this sum to TIGHAR, Mellon made absolutely no independent investigation of TIGHAR or Gillespie, nor did he solicit any additional information from TIGHAR nor view any footage from the 2010 NIKU VI expedition that was publicly available on YouTube. *Id*. at 206-208. Additionally, other than being allowed to accompany

TIGHAR on its summer 2012 expedition, Mellon attached no conditions to his donation. *Id*. at 207:22-208:22.

In July 2012, TIGHAR'S eleventh expedition to the island ("NIKU VII") departed Hawaii. In addition to Gillespie and other TIGHAR volunteers, Mellon and a documentary crew from the Discovery Channel were onboard. *Id*. at 16. As with NIKU VI, NIKU VII involved underwater imaging and sonar. *Id*. When the expedition ended, Gillespie sent video footage to Glickman immediately, and expressed the hope that Glickman might find "something interesting" before the Discovery Channel aired a show about the expedition on August 19, 2012. *Id*. at 105. After doing a "cursory review of less than 30% of the expedition's video," Glickman found a "debris field" in the area of the Bevington Object. *Id*. at 107-108. Upon hearing this information, Gillespie told representatives from the Discovery Channel that the footage shows "what appears to be a debris field just offshore of where the 'landing gear' object appears in the 1937 Bevington Photo." *Id*.

Only upon returning home from the NIKU VII expedition, did Mellon begin to review footage from the 2010, NIKU VI, expedition. *Id*. at 211:12-25. Over the course of time and countless viewings, Mellon became convinced that the footage from the NIKU VI expedition clearly revealed the wreckage of the Lockheed Electra aircraft and various other objects, including: the plane (cockpit, landing

gear, wing sections, engine, propeller, tailwheel, and fuel tank); headset and wires; skeletal remains of Earhart and Noonan with cellophane bags wrapped around their skulls with tubes running to a bottle of nitrogen (Mellon believes the two committed suicide in this way); shoes; musical instruments and cases; a severed hand; cameras; toilet and toilet paper rolls; flyswatter; bracelet; and binoculars and field glasses. *Id*. at 215-16; 222-23. Mellon has also become convinced that TIGHAR and Gillespie knew, or should have known, that these items were visible in the NIKU VI footage, but concealed this knowledge from him, the U.S. State Department, the Discovery Channel, and, indeed, the world, in order to raise money for future expeditions. *Id*. at 220:3-8; 221:25; 222:1-2; 224:16-24.

Central to Mellon's claims of negligent misrepresentation and fraud is his assertion that, but for these alleged misrepresentations, he would not have made his donation. *Id*. at 17. On June 3, 2013, Mellon filed suit against TIGHAR and Gillespie, asserting negligence, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), negligent misrepresentation, and fraud. Compl., Dist. Ct. Docket No. 1. The District Court dismissed the RICO claims and that of negligence for failure to state a claim. Dist. Ct. Docket No. 28. After discovery was complete, TIGHAR and Gillespie filed motions for summary judgment on the remaining claims of negligent misrepresentation and fraud, as well as a third motion regarding Mr. Gillespie's individual liability. The District Court granted

the motions concerning negligent misrepresentation and fraud, while denying the motion regarding individual liability, which is not at issue before this Court. Aplt. App. at 9.

III. SUMMARY OF THE ARGUMENT

Both parties in this case agree on the material facts; the parties disagree, however, on what those facts mean. In the case below, the District Court examined Mellon's claims in the context of the material facts. Based on that analysis, the District Court properly determined, as a matter of law, which claims were facts and which were opinions. Under Wyoming law, opinions cannot form the basis of claims for negligent misrepresentation or fraud, and the District Court correctly found that Mellon presented only opinions and no other conclusive evidence to support his claims. The District Court further correctly determined that Mellon failed to present any evidence of the standard of care, or a breach of any standard, in the highly specialized fields this matter involves. These and other deficiencies make summary judgment appropriate in this case.

IV. STANDARD OF REVIEW

A district court's decision granting summary judgment reviewed is *de novo*. *Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). In reviewing the decision of the District Court, this Court must do so while "applying the same standards that the district court should have applied." *Cox v. Lockheed Martin Corp.*, 545

Fed.App. 766, 770 (10th Cir. 2013) (citing *Helm*, 656 F.3d at 1284). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

As did the District Court, when reviewing a decision granting summary judgment, this Court must determine whether there is evidence to support the nonmoving party's factual claim, *Jarvis v. Potter*, 500 F.3d 1113, 1120 (10th Cir. 2007), and, in doing so, must view the evidence and draw reasonable inferences therefrom in a light most favorable to the nonmoving party, *E.E.O.C. v. C.R. England*, 644 F.3d 1028, 1037 (10th Cir. 2011). Additionally,

> the court should accept as true all material facts asserted and properly supported in the summary judgment motion. But only if those facts entitle the moving party to judgment as a matter of law should the court grant summary judgment.

Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1195 (10th Cir.2002).

"However, unsupported conclusory allegations do not create genuine issue of fact." *C.R. England*, 644 F.3d at 1037 (internal quotations and citations omitted). Similarly, "mere speculation unsupported by evidence is insufficient to resist summary judgment." *Martinez v. CO2 Serv., Inc.*, 12 Fed.Appx. 689, 695 (10th Cir. 2001) (citations omitted).

The nonmoving party must also establish the existence of the essential elements of their accusations:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact" since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make sufficient showing on an essential element of [his] case with respect to which she has the burden of proof.

Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, the party moving for summary judgment need not negate the nonmoving party's claims in order to obtain summary judgment. Instead, the moving party only bears the initial burden of showing or alerting the court that there is an "absence of evidence to support the nonmoving party's case." *Id.* at 325. By revealing the absence of any evidentiary support of the nonmoving party's claims, the burden shifts to the nonmoving party to go beyond the pleadings and set forth *specific* facts that would be admissible in evidence in the event of a trial from which a rational trier of fact could find for the nonmoving party. *UMLIC-Nine Corp. v. Lipsan Springs Dev. Corp.*, 168 F.3d 1173, 1176 (10th Cir. 1999).

V. ARGUMENT

An overarching deficiency is found in Mellon's arguments – instead of fulfilling the elements of his claims, he provides only subjective opinions and conclusory allegations and statements. Throughout Mellon's argument in support

of his negligent misrepresentation claim, Mellon makes citations to qualified statements of probability or possibility, none of which are supported by actual, conclusive evidence, as well as to communications about the need to conduct further analysis and searches for Earhart wreckage. "Unsupported allegations without significant probative evidence tending to support the [claim] are insufficient…as are conclusory allegations that factual disputes exist." *Shively v. Rock*, No. 09-CV-826, 2011 WL 1060305, *3 (D. Colo. Feb. 18, 2011) (quoting *Southway v. Central Bank of Nigeria*, 149 F. Supp. 2d 1268, 1273 (D. Colo. 2001)) (internal quotations omitted). Conclusory allegations are all that Mellon has to offer, making summary judgment for TIGHAR and Gillespie appropriate in this case.

A. Negligent Misrepresentation

An important point begs comment before beginning the formal legal analysis of negligent misrepresentation. Analysis and decision of this matter require an understanding of the legal distinction between negligent misrepresentation and fraud. The elements of each claim are set out below, but suffice it to say that the distinction between them frequently becomes lost when reviewing the record, Mellon's claims of error, and his brief. TIGHAR and Gillespie believe that maintaining this distinction when reviewing this matter is essential to properly analyze the case.

1. Elements

In Wyoming, negligent misrepresentation requires a claimant to show the following, namely that:

> (1) defendant gave plaintiff false information in a transaction in which defendant had a pecuniary interest; (2) defendant gave the false information to plaintiff for the guidance of plaintiff in plaintiff's business transactions; (3) defendant failed to use reasonable care in obtaining or communicating the information; (4) plaintiff justifiably relied on the false information supplied by defendant; and (5) as a result of plaintiff's reliance, plaintiff suffered economic damages.

Wyo. Sugar Growers, LLC v. Spreckels Sugar Co., 925 F. Supp. 2d 1225, 1228 n. 2 (D. Wyo. 2012) (citing *Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 656 (Wyo. 2003)). Negligent misrepresentation must be proved by a preponderance of the evidence. *Birt*, 75 P.3d at 658. Here, the Appellant failed to produce evidence for at least two of the necessary elements.

2. No False Information Was Communicated

In analyzing the claim for negligent misrepresentation, this Court must first examine what information, exactly, Mellon claims is false. All parties agree that Gillespie communicated to Mellon TIGHAR's *belief* that they had not found the Earhart wreckage and that they were planning a future expedition in 2012 to further their search. Aplt. Br. at 10. The fact that they said this is an uncontested material fact. Additionally, the subject matter of the statement is of future intent and is an opinion, and "negligent misrepresentation does not apply to

misrepresentations of future intent or to statements of opinion." *Birt*, 75 P.3d at 657-58.

Further, Mellon never states that the background materials TIGHAR and Gillespie sent to him contain false information, but affirmatively states they did not spur him to do any due diligence prior to making his gift. Aplt. App. at 206-207. All parties agree that Gillespie's public statements at the Washington, D.C. press conference were that, based on the various images they had analyzed, including the Bevington Object, 2010 footage and other artifacts found on the island, TIGHAR had "*circumstantial but strong*" evidence to support their hypothesis that Ms. Earhart and Mr. Noonan landed on or near Nikumaroro, and that they could not promise success in further expeditions. *Id*. at 127. All parties further agree that neither Mellon's experts, nor the experts for TIGHAR, nor TIGHAR itself nor Gillespie make any *conclusive* factual statements that Earhart wreckage is depicted in the 2010 footage. Aplt. Br. at 20; Aplt. App. at 47.

Apparently, the only information Mellon believes to be false is the reason TIGHAR and Gillespie provided to him regarding their future intent to conduct another expedition in 2012: TIGHAR needed to continue to search for and hopefully find the wreckage. Mellon believes this statement is false because, in his opinion, TIGHAR and Gillespie already found the wreckage and knew or should have known that they did. Aplt. Br. at 13; 19. If this statement is were false, the

negligent misrepresentation claim could only apply to *how* TIGHAR conducted the 2010 search and analysis of the 2010 footage. After all, if TIGHAR and Gillespie knew they had found Earhart wreckage before Mellon made his donation and did not tell him, Mellon would only have a claim for fraud, not negligent misrepresentation. *Birt*, 75 P.3d at 656-58. This patent, irreconcilable conflict that Mellon articulates in this claim is discussed *infra*.

As stated by the Court below, the first deficiency in Mellon's argument was his failure to produce evidence that he was ever given *false information* by TIGHAR or Gillespie. Aplt. App. at 19. Mellon claims that TIGHAR and Gillespie withheld from him the "fact" that they had found Earhart wreckage in 2010. This is the only information provided to Mellon that he claims to be false under his theory of negligent misrepresentation. Aplt. Br. at 23-24.

The insurmountable problem with Mellon's position, of course, is that there is no evidence, other than his own opinion, that Earhart wreckage appears in the 2010 underwater footage.[6] None of the things that Mellon claims to see have been recovered, or even closely examined in place. Rather, Mellon's belief is based completely upon his exhaustively repeated viewings of the 2010 video footage. These countless viewings, or any amount of viewings for that matter, cannot transform his opinion into fact.

[6] As noted by the District Court, the standard for TIGHAR to prove its hypothesis is "you have to have a smoking gun." Aplt. App. at 163 (113:20-21). Gillespie further explains this standard as "Something that's[…] incontrovertibly[…] from Earhart's airplane. *Id*. (114:5-8).

Lacking definitive proof of his claims, Mellon calls upon his experts to review the footage, but not even they can provide any definitive, conclusive statement that the 2010 footage portrays Earhart wreckage,[7] and none reach any factual conclusion. They merely parrot TIGHAR, its volunteers and experts, and Gillespie in concluding that there is a possibility these items *could* be man-made, part of the Earhart wreckage, or proof that Earhart and Noonan landed on the island; or, they might not. Aplt. App. at 47; 62-63; 107-8; 117; 147 (6-8).[8] In contrast to how desperately Mellon wishes to construe the expert opinions as incontrovertible proof of his claims and criticize the District Court for dismissing them out of hand, the District Court correctly concluded that the opinions themselves are inconclusive as to whether the 2010 footage depicts Earhart wreckage; they certainly do not prove that TIGHAR and Gillespie performed the search and analysis improperly or that they knew wreckage was present and lied about it. We are therefore left with unanimity of opinion among the parties about conceivability and potential, but with a complete absence of proof necessary to support Mellon's claims.

[7] Interestingly, Mellon's experts make no statement whatsoever about the other various and sundry items, such as human remains, musical instruments and toilet paper rolls, that Mellon sees in the footage.

[8] As noted in the hearing on motions for summary judgment, there are a myriad of explanations for anything depicted in the 2010 footage: debris from a shipwreck, a WWII-era Coast Guard station, a failed British settlement. Aplee. Sup. App. 38:6-11. Of course, the fact that experts for all parties essentially agree in their findings (i.e., possibility, likelihood, etc.) means that there is no disputed issue of material fact as to the experts' opinions.

As noted by the District Court below, there *is* a dispute about what exactly can be seen in the 2010 footage and what the source of those items might be.[9] However, there is absolutely no conclusive or demonstrable evidence in the record that, in fact, Earhart wreckage is located near the island. Nor is there conclusive evidence that TIGHAR and Gillespie knew or should have known of its location based on the review of the 2010 footage. Again noted by the District Court, to make such an argument flies in the face of Mellon's belief that TIGHAR and Gillespie made any misrepresentation that would amount to negligent misrepresentation: if TIGHAR and Gillespie *should have known* Earhart wreckage was in that location and visible in the 2010 footage, the issue is whether their search and analysis was done negligently, *not* whether they communicated information to Mellon in a certain way. If TIGHAR and Gillespie *knew* Earhart wreckage was visible but told Mellon they had not found Earhart wreckage, no negligence has occurred; instead, such behavior would amount to fraud.

Since there is no conclusive evidence that Earhart wreckage is where Mellon believes it to be or that TIGHAR should have found it in 2010, all that is at issue here is TIGHAR and Gillespie's *opinion* that they should conduct another mission

[9] Mellon readily admits that other people see objects in the footage that he does not see, and that he has changed his mind about exactly what the footage depicts. Aplt. App. at 212-214; 223:15-20. This admission demonstrates the problem with watching any type of imagery repeatedly over extended periods of time – doing so can often result in a psychological phenomenon known as "pareidolia," where the mind attempts to decipher recognizable shapes out of random patterns. Similar examples include seeing a face on the surface of Mars, seeing a religious figure on a piece of toast, or asking a group of people what they see in a particular cloud formation. Each person's opinion may be genuine and deeply held, but none is not a fact.

in 2012 to attempt to find the wreckage, versus Mellon's *opinion* that he can see Earhart wreckage in the 2010 footage. As Mellon does (and must) concede, a claim for negligent misrepresentation cannot be based upon a statement of opinion. Aplt. Br. at 17**.** Negligent misrepresentation only "applies to misrepresentations of facts," but not to future intent or opinions. *Birt*, 75 P.3d at 657-58. Determining "whether the alleged misrepresentation was one of present fact or of opinion…is a question of law" *id*. at 658, and the District Court was correct in determining that TIGHAR and Gillespie's statements were opinions as a matter of law. In the absence of any evidence that, in fact, TIGHAR and Gillespie found Earhart wreckage in 2010, their statements to Mellon and any implication regarding why a 2012 mission was necessary are, as a matter of law, opinions. Summary judgment against Mellon is therefore necessary and appropriate on this basis alone.

3. No Evidence of a Standard of Care

Mellon's attempt to support his claim for negligent misrepresentation also fails in that he makes no effort to establish the appropriate standard of care that TIGHAR and Gillespie allegedly violated in either conducting their search for wreckage or in analyzing the 2010 footage. Such evidence is necessary because in technical and highly specialized areas, such as those in this case, special expertise is required to assist the jury in establishing what the applicable standard of care

might be.[10] As noted by the District Court, Mellon himself agreed to this proposition when he admitted that certain expertise is needed to both properly perform an underwater ROV archeological search and to forensically analyze underwater footage. Aplt. App. at 21, n. 10; 218-19; 223-25. Mellon did not attempt to elicit such information from any witness deposed or listed in this matter, nor did he designate any such expert. Since Mellon admitted that he does not have the necessary expertise, *id.*, he clearly cannot establish the standard for a jury.

It may be true that in some cases, expert testimony is not required to establish the standard of care necessary to determine if negligence occurred. *See, e.g., Garrison v. CC Builders, Inc.*, 179 P.3d 867, 874 (Wyo. 2008); *Logan v. Pacific Intermountain Express Co.*, 400 P.2d 488, 493 (Wyo. 1965) (holding that if certain matters are of "common knowledge," expert testimony is not needed to establish a standard of care); *Vassos v. Roussalis*, 625 P.2d 768, 772-73 (Wyo. 1981) (holding that "[w]hen the circumstances in which the fictitious reasonable person acts are within the common knowledge of the jury, the jury does not need assistance in comprehending the standard fixed by the court"). But other cases require experts to establish the standard of care because a layman cannot be expected to have such expertise.

[10] Mellon attempts to argue that the only standard of care TIGHAR and Gillespie violated is a "reasonable man" standard of proper communication; however, in his deposition, Mellon attributes alleged negligent conduct *only* to the search and video analysis, and alleged fraudulent conduct *only* to the fact that TIGHAR and Gillespie have not "announced the discovery of the Electra." Aplt. App. at 221-222; 224:16-24.

Here, the necessary skill requires the analysis of underwater video footage, in tropical seawater, taken at depths approaching 1,000 feet, in an attempt to identify wreckage from an airplane missing for over 70 years. Mellon admits that he, as a laymen, does not have such expertise and agrees with the question that, without specialized "expertise and equipment," "…someone in Wyoming, landlocked Wyoming, someone off the street can't do this, can they?" Aplt. App. at 218:7-9; 219:1-10. Mellon underscored that need for expertise and his awareness of that need by criticizing TIGHAR's use of Jeff Glickman as a footage analyst, commenting that TIGHAR and Gillespie "had the wrong expert." *Id*. at 220:18-19. In contrast to what he claims in his brief, the individual and cumulative effect of Mellon's statements demonstrates that this matter is not one "where the common sense and experience of a layperson are sufficient to establish the standard of care." *Rino v. Mead*, 55 P.3d 12, 19 (Wyo. 2002) (citing *Meyer v. Mulligan*, 889 P.2d 509, 516 (Wyo. 1995)), that expert testimony was required for Mellon to prove his case, and that he knew it. Consequently, Mellon failed in his duty to establish what should or should not have been done in preparation for the investigation and analysis, during the expedition itself, and in reporting the results; this failure means that he cannot prove negligent misrepresentation as a matter of law.

Mellon attempts to remedy his lack of necessary expert testimony and evidence by again pointing to Gillespie and TIGHAR. Either Gillespie or TIGHAR, Mellon claims, "is the expert," when it comes to Earhart and her fatal trip.[11] Aplt. Br. at 18; Aplt. App. at 153. Yet, it is important to note that Mr. Gillespie does not call himself an expert, nor was he or anyone else from TIGHAR designated as an expert witness. Indeed, in contrast to what Mellon claims on page 18 of his brief, when Gillespie was asked in his deposition "Would you consider yourself an expert in underwater recovery," he answered with a straightforward "No." Aplt. App. at 153 (57:1-3; 21-23). Gillespie certainly has a great deal of experience in searching for Earhart and a great deal of knowledge concerning the circumstances of her 1937 expedition, *id*. at 153 (58-59), but that does not and cannot make him an "expert" for the purposes of establishing a standard of review for negligence in the specialized fields of underwater archeology and forensic video analysis. Fed. R. Ev. 702; *see generally Deasy v. United States*, 99 F.3d 354, 358 (10th Cir. 1996) (stating that experts in one field were not qualified to offer expert opinions on the standard of care for fields outside their specialty) (internal citations omitted). Even if Mellon persisted in his claim that Gillespie was "the expert," Gillespie's testimony was far too general to establish an appropriate

[11] Of course, stating that Mr. Gillespie and TIGHAR are the experts creates another compelling problem for Mr. Mellon. If Mr. Gillespie and TIGHAR are the experts he claims them to be, then who better to view video footage and determine if it depicts Earhart wreckage?

standard of care. *See Garaman, Inc. v. Williams*, 912 P.2d 1121, 1124 (Wyo. 2006).

This lack of evidence of a standard of care is fatal to Mellon's negligent misrepresentation claim. *Id.* (holding that laypeople who do not have sufficient expertise to understand concepts like the interpretation of building codes must present expert testimony regarding the appropriate standard of care, and failure to do so supports a judgment as a matter of law). Just as fatal is the fact that Mellon utterly failed to produce any evidence of what a breach of such an illusory standard would be, or of what action or conduct TIGHAR and Gillespie committed which breached any such standard.

Mellon admitted that this case requires expert analysis and that its specialized facts demand it. Mellon failed to procure or present such evidence. This failure, under Wyoming law, supports the grant of summary judgment. *Id*.

4. Mellon Did Not Justifiably Rely on Appellees' Information

Mellon's argument loses altitude, as he has failed to produce any evidence that he justifiably relied upon the information provided by TIGHAR and Gillespie prior to making his donation: Within the span of 10 days, Mellon contacted TIGHAR, spoke with Gillespie, reviewed materials Gillespie sent, and transferred roughly one million dollars of stock to TIGHAR. Mellon admits that he *did not* do

any independent investigation or due diligence prior to making his donation on April 2, 2012. Aplt. App.at 206-207.

In addition, what is especially damning to justifiable reliance is that the 2010 footage and the Bevington Object photo were publicly available for months prior to his donation. *Id*. at 174, ¶ 12. Additionally, TIGHAR and Gillespie never hid the fact that they believed they had strong, *yet circumstantial*, evidence that the wreckage was off Nikumaroro, or that, based on this evidence, they were planning additional expeditions to the island. Never, in any way, does Mellon provide evidence that TIGHAR and Gillespie misrepresented their upcoming mission or the status of the search for the wreckage – it was their opinion that Earhart wreckage had not been found and that additional searches needed to be conducted. Mellon concedes that this was communicated to him. No evidence, other than Mellon's opinion, contradicts TIGHAR and Gillespie's opinion that they had not yet found Earhart wreckage, and Mellon did not justifiably rely on this opinion. Without any such evidence, Mellon cannot support his claim for negligent misrepresentation.

5. Mellon Presents Irreconcilable Arguments

Making analysis of this matter difficult, Mellon makes two mutually-exclusive arguments to support his claim for negligent misrepresentation in his

brief. Mellon's brief is unclear[12] as to whether he believes the statements of future intent[13] and opinion made by TIGHAR and Gillespie are part of his negligent misrepresentation claim or his fraud claim. Aplt. Br. at 26-29. He loses his bearing when he tries to combine the two, stating that the search and analysis were negligent, so any communication about that search was therefore negligent, too. *Id*.

On the other hand, and in complete conflict with the negligent misrepresentation argument, Mellon maintains that the search and analysis were incorrectly performed, but then argues that TIGHAR and Gillespie knew actual wreckage was in the 2010 footage and that they found it, but somehow purposely miscommunicated that information to Mellon. *Id*. at 19, 23-24.

These arguments are not simply pled in the alternative, but are based on the same alleged behavior. Given the first argument, concerning negligence in the search and analysis, proving the second argument, that TIGHAR and Gillespie knew the wreckage was there and lied about it, is logically impossible; they could not have known and not known at the same time. This is one example of obfuscations in Mellon's brief, as well as the disconnect between the factual record

[12] In contrast to the lack of clarity in the brief, Mellon's deposition is very clear as to which behavior he attributes to each claim. In his deposition, Mellon states that the claim for negligent misrepresentation is *solely* based on the search and analysis and never mentions any statements made to him by TIGHAR or Gillespie; in contrast, the failure of TIGHAR and Gillespie to "[announce] they found the Electra aircraft (in 2010)" or "disclose that the aircraft was shown in the 2010 video" support *only* his claim for fraud. Aplt. App. at 221-222; 224:16-24.

[13] As noted *supra*, negligent misrepresentation does not apply to statements of future intent or opinions. *Birt*, 75 P.3d at 657-58.

and the statements Mellon chose to use in his brief, which requires the reader to carefully review the record and analyze Mellon's argument.

B. Fraud

1. Elements

To prove fraud under Wyoming law, a claimant must show "(1) the defendant made a false claim or false representation intended to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation to be true; and (3) the plaintiff relied on the false representation and suffered damages." *Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 48 (Wyo. 2010) (citing *Birt*, 75 P.3d at 656). "In order to prove intentional misrepresentation, the plaintiff must show that the misrepresentation was made intentionally, with knowledge of its falsity, or that the maker of this misrepresentation was at least aware that he did not have a basis for making the statement" *Id*. at 48-49. Unlike negligent misrepresentation, fraud must be proven by clear, unequivocal and convincing evidence. *Id*. at 49.

2. Mellon Does Not Provide Clear, Unequivocal and Convincing Evidence

Mellon has failed to support, by the burden of clear, unequivocal and convincing evidence that he was the victim of fraud at the hands of TIGHAR and Gillespie. Mellon must show by clear, unequivocal and convincing evidence that TIGHAR and Gillespie had actual knowledge they found the wreckage and

intentionally misrepresented that fact to him. This knowledge is essential, as "one cannot be guilty of fraudulently or intentionally concealing or misrepresenting facts of which he is not aware." *Throckmartin v. Century 21 Top Realty*, 226 P.3d 793, 809 (Wyo. 2010).

Even if this Court accepts Mellon's experts' inconclusive opinion that the objects in the 2010 footage are *not inconsistent with* Earhart's plane, "When a party accused of fraud has presented facts, in support of a motion for summary judgment, that refute the allegations of fraud, the party relying upon the fraud claims then must demonstrate the existence of genuine issues of material fact by clear, unequivocal and convincing evidence." *Phillips v. Toner*, 133 P.3d 987, 996 (Wyo. 2006). Mellon has not done so here. Other than Mellon's own opinions concerning what can be seen in the 2010 footage, he has no evidence, let alone clear, unequivocal and convincing evidence, to support his claim of fraud. As stated above, expressions of opinion or future intent are not representations of fact and cannot form a basis for a fraud claim. *See Birt*, 75 P.3d at 657-58; *Davis v. Schiess*, 417 P.2d 19, 21 (Wyo. 1966) ("a statement which is but an expression of opinion is generally not held to be the representation of a fact" supporting fraud).

There is a complete absence of evidence for anything that would establish fraud. Mellon has provided no discussions, comments, letters, reports, etc. that show any intent to defraud him. What the evidence *does* show is that TIGHAR and

Gillespie believed they were searching in the correct area; that they had strong but circumstantial evidence that the wreckage was off the island; that images in the 2010 footage showed items that were possibly man-made and possibly related to the Earhart wreckage; that they formed an agreement with the Republic of Kiribati so that the Republic would be able to retain any and all artifacts;[14] that more research and archeological work needed to be done; and that they were more than willing to do it. The evidence *does* show that none of the experts have concluded that anything in the 2010 footage is, unequivocally, Earhart wreckage. To equate statements like "possibly," "probably," "maybe," and "might" to an established fact defies logic. To argue that they fulfill the evidentiary standard of a preponderance of the evidence, let alone clear, unequivocal and convincing evidence, borders on incredulity. Summary judgment in favor of TIGHAR and Gillespie on Mellon's claim for fraud is appropriate.

VI. CONCLUSION

From a historical standpoint, this case may be fascinating; it certainly is to the parties. However, the legal analysis of the remaining claims is quite simple.

[14] To support his opinion, Mellon makes much of the facts concerning TIGHAR's agreement with the Republic of Kiribati and its contract with the Discovery Channel. Aplt. Br. at 6-7. Interestingly enough, and not noted by Mellon, this agreement protects the Republic of Kiribati by giving it the explicit rights to and ownership of any and all artifacts that might be found on or around Nikumaroro. The only "benefit" to TIGHAR is that it is allowed to conduct the search with the supervision of a customs officer of the Republic of Kiribati. Given the reality of the purpose and contents of the agreement, Mellon's mention of it is an attempt to stray from the issues properly before this Court. This discussion has nothing to do with the District Court's decision, and indeed this agreement formed no part of its basis for its decision. While this discussion occupies more than ten percent of Appellant's brief, it is only mentioned in two footnotes by the District Court, one of which (footnote 2) is merely informational, and the other (footnote 3), which disposes of the claims by naming them for what they are: a distraction that "does not suggest TIGHAR knew it had indeed found the Earhart wreckage." Aplt. App. 12-13.

TIGHAR and Gillespie represented to Mellon that *it was their opinion* and that *they believed* that they had not found the Earhart wreckage. Mellon then, with no further information or investigation, donated a large sum of money to the 2012 expedition. What TIGHAR and Gillespie communicated to Mellon was not a false representation, an element required in both the claim for negligent misrepresentation and the claim for fraud. While Mellon may be entirely convinced in his opinion that TIGHAR and Gillespie already found Earhart wreckage, or that they should have known they found it, his opinion is insufficient to create a genuine dispute of material fact. *See Rice v. U.S.*, 166 F.3d 1088, 1092 (10th Cir. 1999). Nothing else Mellon has provided, including equivocal expert opinions and statements of possibility, creates a genuine issue of material fact or meets the appropriate burdens of proof. The District Court's decision to grant summary judgment to TIGHAR and Gillespie was correct, and it should be affirmed.

VII. STATEMENT REGARDING ORAL ARGUMENT

Appellees agree with Appellant that oral argument will provide the best opportunity to address any questions that may arise.

Respectfully submitted this 13th day of January, 2015.

THE INTERNATIONAL GROUP FOR HISTORIC AIRCRAFT RECOVERY and RICHARD E. GILLESPIE,
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By: /s/ Alaina M. Stedillie

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X. CERTIFICATE OF COMPLIANCE

Appellees' brief fully complies with Fed. R. App. P. 32 as complying with the requirement for the length and formatting of briefs, as it appears in 14 point Times New Roman print and contains an appropriate word count (7,635). Fed. R. App. P. 28.

VIII. CERTIFICATE OF DIGITAL SUBMISSION

All privacy redactions have been made and, with the exceptions of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Check Point Endpoint Security, Version E80.30 (8.1.302), last updated January 13, 2015, and, according to the program, are free of viruses.

DATED: January 13, 2015.

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IX. CERTIFICATION OF PRIVACY REDACTIONS

Appellees hereby certify that they have made all redactions required by Fed. R. App. P. 25(a)(5).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing **BRIEF OF APPELLEES** was served on the parties herein this 13th day of January, 2015, by placing true and correct copies thereof in the United States mail, first-class postage prepaid and properly addressed as follows:

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