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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Statement of Prior or Related Appeals

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

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) as the parties are of diverse citizenship and the amount in controversy exceeds the jurisdiction minimum. Venue was proper before the district court pursuant to 28 U.S.C § 1391 because the claims forming the basis of the underlying *Complaint*, or a significant portion thereof, arose in that geographical area which is contained within the federal judicial district known as the District of Wyoming. The Appellant timely filed this Appeal on August 22, 2014 following the entry of a Final Judgment of the United States District Court for the District of Wyoming entered in this case on July 25, 2014. This court has jurisdiction over this Appeal pursuant to 28 U.S.C. §1291 as this appeal is from a final order or judgment that disposes of all parties' claims.

III. STATEMENT OF ISSUES

A. Whether the District Court erred in determining that the statements made to Appellant were statements of opinion and therefore not false statements.

B. Whether the District Court erred in applying rules for professional malpractice actions in concluding that Appellant required expert testimony to prove negligent misrepresentation.

IV. STATEMENT OF FACTS

A. Introduction

This is a dispute that arose in pursuit of one of the world's greatest unsolved mysteries: the whereabouts of Amelia Earhart's airplane. The International Group for Historic Aircraft Recovery (hereinafter "TIGHAR") is a corporation that specializes in archeological or historical investigations and has been involved in searching for Earhart's remains for almost twenty years. Aplt. App. at 161. Because these types of expeditions are exceptionally costly, organizations like TIGHAR rely on financial support through parties like the Appellant, Timothy Mellon. Despite the fact that TIGHAR had within its possession critical evidence plainly showing that it had likely located the Earhart's wreckage site, it nonetheless represented to the Appellant that the wreckage remained to be found so that it could secure sizable funding to continue the site investigation. It is from this fraudulent conduct, as set forth in more detail below, that Appellant brought his *Complaint*.

1. TIGHAR

TIGHAR was formed in 1985 by Appellee Richard Gillespie and his wife Patricia Thrasher. Aplt. App. at 149. The purpose of the organization is to conduct archeological and historic investigations of historic aircraft. *Id.* at 29. Among its primary and most visible projects is an effort to unlock the mysteries of Amelia

Earhart's disappearance. Since its inception, Gillespie has served as the organization's executive director and his wife has served as its president. *Id.* at 149. TIGHAR is governed by a board of directors who are hand-selected by Gillespie. *Id.* at 158. Gillespie has wide authority over the operations of TIGHAR. He has led most of its expeditions. *Id.* at 149. He writes the group's promotional materials. *Id* at 149-150. He is **the** fundraiser for TIGHAR. *Id.* at 149.

2. The First Expedition-The 2010 Niku VI Expedition.

TIGHAR'S primary and most visible project is the effort to solve the mystery of Amelia Earhart's disappearance. To further that mission, TIGHAR has made a total of eleven (11) trips to the Island of Nikumaroro in the Republic of Kiribati. *Id.* at 160. It launched its first expedition there in 1989. *Id.* at 161. In 2010, TIGHAR decided to launch a new expedition to Nikumaroro seeking to find evidence of the Earhart aircraft. *Id.* at 164. TIGHAR organized the expedition around two components. First, TIGHAR reached an agreement with Seabotix to provide a Remote Operated Vehicle (ROV) in order to search the waters off Nikumaroro. *Id.* TIGHAR also planned to conduct an archeological search on the island itself. *Id.*

From May 18, 2010 through June 14, 2010, TIGHAR launched what it called the NIKU VI Expedition. *Id.* at 32-33. During the expedition, TIGHAR utilized the ROV to conduct an underwater search of the area to the Northwest of

the island. *Id.* at 39. The focus of the search was a 300 meter by 300 meter area just off the reef surrounding Nikumaroro. *Id.* at 39; 142.

The ROV was equipped with lighting and two cameras, one utilizing high definition film and one using standard definition film. *Id.* at 170. The search area concentrated on an area near the sighting of what has become known as the "Bevington Object".[1] The "Bevington Object" was an object identified in a photo taken in 1937 after the Earhart disappearance and appeared to show an item resting on the reef. *Id.* 174. TIGHAR operated on a hypothesis that the "Bevington Object" was a portion of the Earhart airplane and that the wreckage of the plane might be located off the edge of the reef where the object had been photographed. *Id.* at 174.

While operating the ROV during the NIKU VI expedition, the ROV happened upon one confirmed man-made object. *Id.* at 165. Near where the Bevington Object had been photographed, the ROV filmed what was identified as a piece of rope and what TIGHAR suspected was wire. *Id.* In reality, the ROV filmed several pieces of debris that belong to the Earhart plane in the area of the rope and the wire. *Id.* at 47. However, TIGHAR only identified those two items during the trip. *Id.* at 165. Given the finding of man-made items in the area where the Bevington Object had been photographed, TIGHAR directed that the ROV

[1] The "Bevington Object" refers to English Colonial Service Cadet Officer, Eric Bevington, who was surveying islands in the area of Nikumaroro during the time in which the Earhart aircraft disappeared. Aplt. App. at ¶ 11.

return to examine the area the day after the discovery. *Id.* at 144. Due to technical problems with the ROV, the area could not be relocated. *Id*.

Following the Niku VI expedition, TIGHAR apparently engaged in only rudimentary analysis of the footage obtained by the ROV. Finally, in April of 2011, TIGHAR once again began to focus on the footage, particularly the "rope and wire" footage. *Id.* at 58-59. TIGHAR forwarded the footage to select members including Jeff Glickman, a man who makes his living conducting forensic analysis of images. *Id.* at 58. Gillespie sent e-mails noting that Glickman had found "suspicious objects" and noted that in Gillespie's own review of the footage "I've already had a couple 'WTF was that?' moments. We really need to look closely at all of this stuff." *Id.* at 132. Other TIGHAR members who had accompanied the 2010 expedition eagerly requested the opportunity to look at the images that Glickman was finding. *Id.* at 134. Glickman's review confirmed man-made objects consistent with wreckage of the Earhart aircraft at the exact location that TIGHAR suspected the wreckage to be. *Id.* at 42-43. Specifically, Glickman identified segments of rope and items that he believed to be rods or taught cables. *Id.*

While Glickman avoided documentation of his follow-up analysis, the discussions with Glickman caused a flurry of excitement at TIGHAR causing one member to note "[the video] is something that would warrant the full brunt of

TIGHAR curiosity. It's not just the rope. It's the rope in the same vicinity as the rods just offshore [of] the Nessie [Bevington Object] location." *Id.* at 62. What TIGHAR discovered was indeed a debris field that demonstrates the presence of the Earhart wreckage. *Id.* at 47.

Gillespie communicated with Jeff Glickman and warned him that he should keep his findings secret. *Id.* at 66. As Gillespie put it "news like this is so good that it could prompt some hotshot millionaire glory hunter to decide to beat us to the 'treasure'." *Id.* One important motivation for the decision to conceal their discovery was the fact that TIGHAR did not have an exclusive agreement with the Republic of Kiribati that would protect TIGHAR's rights to discovered artifacts. *Id.* at 169. Although they had been visiting the island of Nikumaroro for over twenty years, TIGHAR had not acquired and apparently had not requested an exclusive agreement with Kiribati. *Id.* All of that changed within days of the discovery of debris in the 2010 footage. *Id.*

Prior to approaching Kiribati in 2011, TIGHAR only had a hand-written, non-notarized agreement covering certain artifacts collected from Nikumaroro in 1989. *Id.* at 69-77. TIGHAR certainly couldn't publicize that they had found the Earhart wreckage when they had no agreement for exclusivity that would allow them to protect and capitalize on their find.

Within two days of acknowledging that Jeff Glickman had found "suspicious objects" in the 2010 film, Ric Gillespie e-mailed an official with the Republic of Kiribati. *Id.* at 79-80. In that e-mail Gillespie asked "to work out an agreement that will protect the interests of all the parties if and when the wreckage of the plane is discovered." *Id.* at 80. Then Gillespie went on to describe the very real danger TIGHAR now faced after having discovered the debris field:

> There is a popular perception in the U.S. and elsewhere that the recovered wreckage of the Earhart airplane would have great monetary value. The stronger the evidence becomes that the wreckage of the plane is in the waters adjacent to Nikumaroro, the greater the danger of an unauthorized attempt to find and recover it.

Id. at 81. Notably, Gillespie did not disclose their recent find to the government of Kiribati. The discovery of the wreckage adjacent to the Island created a critical need for an agreement between TIGHAR and Kiribati. Time was of the essence. At 12:45 a.m. on April 26, 2011 Glickman forwarded Gillespie some of the specifics regarding his findings. *Id.* at 42. By 7 a.m. the following morning, Gillespie was forwarding additional inquiries to officials in Kiribati. *Id.* at 79. Within one month of confirming evidence of the Earhart wreckage, TIGHAR obtained an agreement with Kiribati which was hastily negotiated by Gillespie and board member Bill Carter. *Id.* at 171.

As problematic for TIGHAR as the lack of an agreement with Kiribati, were the limitations placed on them by an agreement with Discovery Communications.

In 2009, TIGHAR began discussions with Discovery Communications about funding and publicizing TIGHAR expeditions. *Id.* at 167. As part of its efforts, TIGHAR entered into an Exclusive Expedition Agreement with Discovery that covered both the 2010 and 2012 expeditions. *Id.* at 85. That agreement gave Discovery significant exclusive rights to publicize findings of the expeditions. *Id.* at 92, ¶ F. Appellees expressly promised that they could not make a disclosure of any conclusive discoveries and instead the right and the benefits associated with that right belonged only to Discovery Communication. *Id.* at 129. TIGHAR could not undertake its own efforts to publicize its findings and could not sell its media rights to any other party because of the terms of the Discovery agreement. Instead, when wreckage was found in 2010, Discovery was given the sole right to announce and publicize that fact. Those restrictions, of course, could not be enforced if TIGHAR were to conceal that information from them.

3. The Mellon Donation.

In the spring of 2012 TIGHAR began seeking assistance from the U.S. Government in reviewing photos of the Bevington Object. *Id.* at 163. The U.S. State Department, under the direction of Secretary of State Hillary Clinton, reviewed the photos and lent its support to TIGHAR'S efforts. *Id.* There is no indication that TIGHAR informed the U.S. Government of its findings from the 2010 expedition or disclosed the proximity of the underwater debris to the

Bevington object. Instead, the U.S. Government's support was based upon review of historic photographs with no disclosure of the under-water debris.

After requesting that the U.S. Department of State confirm its findings regarding the Bevington photo, TIGHAR began to receive pressure from the U.S. Government to undertake a new expedition to Nikumaroro. *Id.* at 161, 163. Although TIGHAR wanted more time to prepare and raise money for an expedition the State Department offered significant publicity if they were able to mount an expedition in the summer of 2012. *Id.*

On March 20, 2012 TIGHAR, Secretary Clinton and U.S. Transportation Secretary Ray LaHood, held a press conference extolling TIGHAR'S efforts and promoting its next trip to Nikumaroro. *Id.* at 162. During that press conference Gillespie spoke at length about what TIGHAR had found, but steadfastly stuck to the position that they had found none of the wreckage. Instead, he noted that finding the airplane was the key goal of the 2012 expedition. (http://www.youtube.com/watch?v=WGbYeZAvTYk, 22:00-24:00). In fact, Gillespie expressly noted in his address to the public that "it is the searching that is important." (*Id.* 28:25-28:35). Gillespie made those statements specifically intending for potential donors to rely upon them. Aplt. App. at 168.

TIGHAR misled the public, including Appellant by contending it had not yet found wreckage consistent with the Earhart Electra. In fact, TIGHAR's

representations announced that the purpose of the expedition was to locate wreckage of the Earhart Airplane specifically representing that the wreckage had still not been found. Based upon Gillespie's statements, The Casper Star Tribune printed a story discussing the search which was read by Appellant Timothy Mellon. *Id.* at 127.

After seeing the comments made in TIGHAR's press event of March 20, 2012, Tim Mellon contacted Richard Gillespie to express his interest in supporting the trip. *Id.* at 99. Within days they spoke by phone about the expedition and about the financial requirements of the expedition. Again, Gillespie failed to disclose that the wreckage had already been located. Instead, he expressed that he needed $2 million to search for the plane and test out his hypothesis that the plane wreckage was located near Nikumaroro. *Id.* at 139; 162. Gillespie and Mellon spoke by phone two or three times prior to Mellon's gift. *Id.* at 140. Gillespie also forwarded a number of materials about TIGHAR's quest to find the airplane. *Id.* at 101. Based upon his review of those materials and the representation made, Mellon donated approximately $1,000,000.00 worth of stock in order to support the coming expedition. *Id.* at 103.

4. The 2012 Niku VII Expedition.

TIGHAR undertook its most recent expedition, the Niku VII expedition, in July, 2012. The expedition's largest sponsor was Timothy Mellon who also

accompanied TIGHAR to Nikumaroro. Once again, TIGHAR utilized an ROV in the course of its expedition.

The contrast between TIGHAR'S use and review of the underwater film obtained during the 2012 expedition and its review of the 2010 footage is striking. Although TIGHAR waited approximately nine months to engage in a thorough review of the 2010 footage, TIGHAR forwarded its 2012 footage to its volunteer expert within days. *Id.* at 105.

While Gillespie told TIGHAR's board that they must keep any discoveries quiet after the 2010 expedition, he immediately publicized tantalizing findings after the 2012 expedition. Following the expedition, TIGHAR immediately sent the film to Jeff Glickman. *Id.* Gillespie told Glickman "[t]he Discovery show will air Sunday, August 19 at 10pm PT. It would be more than nice if we could come up with something interesting before then." *Id.* As if on cue, Glickman found a host of debris in the same area that the rope and wire footage was collected. *Id.* at 107-111. Gillespie immediately contacted Discovery and told them "We have what appears to be a debris field just offshore where the 'landing gear' object appears in the 1937 Bevington Photo." *Id*. at 107-108. Significantly, this same disclosure could have been made after the discoveries in April, 2011, but it was not.

Appellant filed his original *Complaint* in the United States District Court for the District of Wyoming on June 3, 2013. In his *Complaint*, Appellant asserted claims of fraud, negligent misrepresentation, negligence and claims based upon the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) against both Appellees, TIGHAR and Gillespie. Appellees responded with a Motion to Dismiss. Ultimately the District Court issued an *Order Granting in Part and Denying in Part the Motion to Dismiss Complaint*. In that *Order* the Court dismissed Appellant's negligence and RICO claims, but denied the motion with respect to the Fraud and Negligent Misrepresentation claims.

The Appellees filed what they captioned as separate motions for summary judgment on the remaining claims and additionally argued that Gillespie could not be held liable for the remaining claims. Appellant responded and the Court held oral arguments on Appellees' Motions.

At the hearing the Court denied Appellees' motion with respect to the claims that Gillespie could not be held individually liable, but the Court issued a written decision granting summary judgment on all claims on July 25, 2014. A judgment followed and the notice of appeal was timely filed on August 22, 2014 within 30 days of entry of the judgment.

V. SUMMARY OF THE ARGUMENT

A. The District Court mistakenly determined that representations regarding the current status of TIGHARS' exploratory efforts were opinion rather than statements regarding current existing facts. The District Court further erred by ignoring key material facts and circumstances showing that Appellees knew of the presence of the Earhart aircraft when it solicited a contribution from Appellant under the auspices of continuing the "search" for the aircraft.

B. The District Court erroneously imposed a professional malpractice standard upon Appellant when it required Appellant to provide expert testimony establishing that Appellees failed to exercise reasonable care in obtaining and communicating information to the Appellant.

VI. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure directs the entry of summary judgment in favor of a party who "shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A principle purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, (1986). The court's inquiry is to determine "whether there is the need for a trial, whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact

because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact by informing the court of the basis for its motion. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1313 (10th Cir. 1993) quoting *Celotex*, 477 U.S. at 323. Once the moving party properly supports its motion, the non-moving party "may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In applying the summary judgment standard, the court construes the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

Given the factually intensive nature of negligence claims, findings of summary judgment on negligent claims are widely disfavored. *Solorio ex rel. Solorio v. U.S.*, 228 F.Supp.2d 1280, 1284 (D. Utah 2002). The court in *Rino v. Mead*, 2002 WY 144, ¶ 13, 55 P.3d 13 (Wyo. 2002) stated,

> Over the years, this Court has repeatedly stated that summary judgments are not favored, especially in negligence actions. . . . The mixed questions of law and fact usually involved in a negligence action concerning the existence of a duty, the standard of care and proximate cause " 'are ordinarily not susceptible to summary adjudication.' " . . . Whether a particular defendant's actions have

> violated the required duty is generally a question for the jury. . . . One consequence of the fact that summary judgments are not favored in negligence actions is that, once granted, they are subject to "more exacting scrutiny" on appeal.

Id. "Ordinarily, the issue of breach of a legal duty is a factual question for the jury." *Kitchen v. Cal Gas Company, Inc.*, 821 P.2d 458, 461 (Utah Ct.App.1991). Therefore, "summary judgment is generally improper ... and only in clear-cut cases, with the exercise of great caution, should a court take the issue of negligence from the province of the jury." *Solorio*, *Id.*

VII. ARGUMENT

A. Questions of Fact Exist Regarding The Truth or Falsity of Factual Representations Made To Mellon by Defendants.

In its ruling the District Court hinged its entire decision on the basis that there was a lack of evidence showing the falsity of the Appellees' representations. Aplt. App. at 23. Such a blanket finding overlooks the fact that the evidence of the veracity of the discovery of the Earhart wreckage site was sharply disputed between the parties. This material fact in itself is more than a mere allegation and clearly presents a question for the jury. As the District Court itself noted "[t]o be sure, there is dispute about what can be seen in the 2010 expedition footage and the source of any man-made objects identified." *Id.* at 20.

The communication of a false statement is, of course, a principle element of both Appellant's claims of fraud and negligent misrepresentation. The elements of

fraud require proof that: (1) the Defendant made a 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. Incl. v. HKM Engineering, Inc.*, 2010 WY 34,¶ 33, 228 P.3d 40, 48-49 (Wyo. 2010). The Plaintiff must prove that the Defendant knew the representation was false or that the maker of the misrepresentation was at least aware that he did not have a basis for making the statement. *Id.*

In proving fraud it is usually necessary to consider surrounding circumstances. "Since it is most difficult to prove intent by direct evidence, circumstantial evidence is necessary." *Butcher v. Butcher (Matter of Estate of Reed)*, 566 P.2d 587, 590-91 (Wyo. 1977).

Negligent misrepresentation is a cousin to a fraud action, again requiring the communication of a false statement. A claim for relief for negligent misrepresentation requires a showing that:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Hulse v. First American Title Company of Crook County, 2001 WY 95 ¶ 52, 33 P.3d 122, 138 (Wyo. 2001) (internal quotes and citations omitted). A fundamental

difference between fraud and negligent misrepresentation is, "a plaintiff need only prove negligent misrepresentation by a preponderance of the evidence, not unlike any other plaintiff in any other action sounding in negligence. . . ." *Dewey v. Wentland*, 2002 WY 2, ¶ 10, 38 P.3d 402, 410 (Wyo. 2002).

1. *Representations To Appellant Were Statements of Fact Not of Opinion.*

The District Court hung much of its decision on its finding that the representation made by Appellees was one of opinion, not of fact. While Wyoming law supports the holding that a statement of opinion is not actionable in fraud, it does not support the broad finding that this is such a case because the Appellant was not relying on an *opinion* to support his claim for fraud. Rather, Mr. Mellon relied on the statement that TIGHAR had not yet found the wreckage which induced him to make a sizable contribution. The District Court correctly noted that neither a claim of negligent misrepresentation or fraud can lie when the statement made is a statement of opinion. *Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 657-58, 2003 WY 102, ¶ 47 (Wyo. 2003); *Davis v. Schiess*, 417, P.2d 21 (Wyo. 1966). The Court's error however, lies in its summary conclusion that TIGHAR'S statements were opinion and not fact.

Although the decision of whether a statement is one of fact or of opinion is an issue of law, the determination depends on the circumstances of a case. *Birt*, 75 P.3d at 658, ¶ 47; *White v. Ogburn*, 528 P.2d 1167, 1169 (Wyo. 1974); *Constance*

v. B.B.C. Development Co., 25 S.W. 3d 571 (Mo.Ct.App 2000). Among the various factors to be considered are the speaker's knowledge, the comparative levels of the speaker's and hearer's knowledge, and whether the statement relates to the present or future. *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tx. 1995).

The Restatement (Second) of Torts § 538A (1977) provides useful guidance regarding the difference between statements of opinion and statements of fact. The comments note that "[t]he difference is one between 'This is true,' and 'I think this is true, but I am not sure.'" *Id.* at cmt. b. A statement that involves then-existing facts is more likely to be a matter of fact than of opinion if the maker is understood to have special knowledge of facts unknown to the recipient. Restatement (Second) of Torts § 539 (1977). In this case, of course, TIGHAR represented itself as **the** expert regarding the search for the Earhart Aircraft. Gillespie testified that he was an expert on the disappearance of Earhart and an expert on the aircraft itself. Aplt. App. at 153.

The generally recognized distinction between statements of fact and opinion is that whatever is susceptible of exact knowledge is a matter of fact, while that not susceptible is generally regarded as an expression of opinion." *Constance,* 25 S.W.3d at 587. Similarly, courts acknowledge the line between fact and opinion is razor thin. "[A] statement that in form is one of opinion may constitute

a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it." *McEneaney v. Chestnut Hill Realty Corp.*, 650 N.E.2d 93, 96 (1995)(holding statement of fact existed, rather that statement of opinion, sufficient to allege claim for fraudulent misrepresentation).

The fact that wreckage consistent with the aircraft had been found is a matter of fact not of opinion. The items laying on the ocean floor had either been identified by TIGHAR or they had not. Unlike case law that scrutinizes evidence as to the value of an asset, the facts demonstrated that the video footage shows wreckage on the floor of the ocean that has no other explanation other than being a part of the Earhart Aircraft. TIGHARS' representation was that they had yet to find wreckage of the Earhart Aircraft. The discovery and the evidence of wreckage on the ocean floor is a factual issue not a mere fact of opinion.

The District Court was overly dismissive of the Appellant's evidence in this case. The Court disregarded Mr. Mellon's testimony noting the presence of wreckage despite the fact that testimony is corroborated by TIGHAR's own review prior to the filing of this lawsuit. The District Court also went on to ignore the opinions of Dr. John Jarrell and Dr. Graham Forrester who analyzed the video footage and the man-made objects depicted in that footage. The District Court, noting the careful language that the items depicted in the video were "consistent"

with portions of the Earhart Aircraft completely disregarded the conclusion offered those experts. That conclusion was that given the location of the island and the unique nature of the parts found in the video the experts concluded that "in the absence of an alternative explanation for the source of those objects, we conclude that they are likely to have originated from Earhart's Electra." Apl. App. at 47. The evidence offered is certainly sufficient to allow a jury to determine the truth or falsity of the statements made by Appellees.

A commonly stated test of the actionability of a fraudulent statement, is that "A person is liable for fraud if he makes a false representation of a past or existing material fact susceptible of knowledge, knowing it to be false . . . ." *Swanson v. Domnig*, 86 N.W.2d 716, 720 (Minn. 1957). If TIGHAR represented that it had yet to discovery evidence of the wreckage of the Earhart aircraft knowing they had found such evidence, that representation is fraud not opinion.

2. Questions of Fact Surround Whether Appellees Knew Their Statements Were False.

The District Court's decision also reveals that it yielded to the temptation to weigh evidence. Where conflicting interpretation of material facts existed, the District Court selected Appellees' argument. In particular, the court found that there was no proof that TIGHAR knew the statements it made regarding the status of its search were false. This is territory more suitably confined to the province of a jury. Yet, it made this ruling in the face of clearly conflicting evidence.

When looking at fraud and whether a party knowingly misrepresented a fact it is worth remembering the challenges of analyzing intent. The court in *Butcher v. Butcher (Matter of Estate of Reed),* 566 P.2d 587, 590–91 (Wyo.1977)(citations omitted) outlined the necessary requirements for determining fraud as follows:

> Since it is impractical to look into a person's mind to ascertain his intention, it is necessary to consider surrounding circumstances. Since it is most difficult to prove intent by direct evidence, circumstantial evidence is necessary. The issue of actual fraud is commonly determined by recognized indicia, demonstrated badges of fraud, which are circumstances so frequently attending fraud; a concurrence of several will make out a strong case and be the circumstantial evidence sufficient to sustain a court's finding.

In this case there are a number of "badges of fraud" that the District Court chose to disregard. For example, the Court weighed the evidence related to TIGHAR'S decision to negotiate an agreement with the Republic of Kiribati and concluded that it did not constitute evidence of fraud. Yet the Court, in weighing this evidence, failed to acknowledge the questionable timing of the negotiations. Rather than address the sudden urgency with which TIGHAR entered into negotiations with Kiribati (after finding compelling evidence of the wreckage), the court merely noted in a footnote, "the desire to have an agreement and plan in place for protection of any artifacts, in anticipation of finding proof of the Earhart wreckage, does not suggest TIGHAR knew it had indeed found the Earhart wreckage." Aplt. App. at 13.

TIGHAR had been making trips to Nikumaroro for over twenty (20) years and had repeatedly publicized their belief that the Earhart wreckage was located on or near Nikumaroro. In fact, on repeated occasions TIGHAR had publicized evidence that it believed proved the connection between Nikumaroro and the Earhart disappearance. Yet in that 20-year span of exploration TIGHAR had failed to take any measures to protect their discoveries or the exclusivity of their rights to explore. *Id.* at 169. The evidence shows that TIGHAR finally looked closely at the 2010 footage in April 2011. When they looked at the footage containing the Earhart wreckage TIGHAR evidenced a sudden urgency in reaching an agreement with the Republic of Kirabati. The juxtaposition of their review of the detailed review of the video and their sudden reaction seeking to protect their rights to exploration after 20 years, provides powerful evidence that TIGHAR knew more than it was saying and recognized the significance of the footage of the wreckage. "Where different inferences of fact may reasonably be drawn, a question of fact is presented for the trier of the fact to determine." *John B. Roden, Jr., Inc. v. Davis*, 460 P.2d 209, 213 (Wyo. 1969). This is evidence that the District Court weighed and decided to disregard, but evidence that a jury should have had the opportunity to hear.

The District Court also ignored the fact that actions by TIGHAR provided a powerful signal that the 2010 footage evidenced the Earhart aircraft. For example,

TIGHAR adopted a radically different approach to the analysis of the 2010 footage and 2012 footage. TIGHAR waited approximately nine months to conduct a review of the 2010 footage and then engaged in a concerted effort to keep their discovery quiet in order to keep "some hotshot millionaire glory hunter" from beating TIGHAR to the "treasure." *Id.* at 66.

By contrast, after the 2012 expedition, TIGHAR immediately forwarded selected clips, including those containing the Earhart wreckage to its volunteer expert. *Id.* at 105. Instead of keeping the information quiet, TIGHAR, with its agreement with Kirabati in hand now began to trumpet the discovery of a debris field. "Just in time" for their Discovery Channel TV special Gillespie was able to announce "a debris field just offshore". *Id.* at 108. When it was beneficial for TIGHAR to represent that they had found nothing, they did so. When it was beneficial to admit their discovery, they did so. The contradictions and inconsistencies paint a vivid portrait of an atmosphere where there was no truth. Instead, facts became a matter of convenience.

The District Court's decision that there was no evidence of a false representation is based upon an erroneous view of the law and a limited view of the facts. Not only is the existence of the Earhart wreckage a matter of fact, it is a material fact. A fact that is capable of being known. A fact that the evidence proves TIGHAR did know despite making a representation to the contrary in order

to advance its bottom line. Those factual judgments are properly the realm of a jury and should be presented to a jury.

B. The District Court erred in concluding that expert witness testimony was needed to prove that Appellees failed to exercise reasonable care in obtaining and communicating information to Appellant.

A party is responsible for negligent misrepresentation where it fails to exercise reasonable care or competence in obtaining or communicating information. *Hulse,* 33 P.3d at 138, ¶ 52. "The issue in a negligence action is always one of reasonableness. The reasonableness or unreasonableness of anything is ordinarily a mixed question of law and fact which should be determined by a jury." *Western States Mechanical Contractors, Inc. v. Sandia Corp.*, 798 P.2d 1062, 1067 (N.M.App.,1990) *citing C & H Const. & Paving Co. v. Citizens Bank*, 93 N.M. 150 (Ct.App.1979). Despite this straightforward standard, the District Court concluded that the Appellant failed to present questions of material fact related to Appellees' exercise of reasonable care even though reasonable care is typically a question for the jury.

The portion of the District Court's decision dismissing the negligent misrepresentation claim is premised on its conclusion that Appellant required an expert opinion in order to establish whether reasonable care is required or not. In its reasoning, the Court fails to distinguish between professional negligence actions and the failure to exercise reasonable care in communicating information, which is

the standard in this case. In doing so, it imposed a requirement on Appellant that is not supported by law.

The general tenor of the District Court's analysis shows that the court applied a standard which is more appropriate in a professional negligence case. *Robinson v. Intermountain Health Care, Inc.*, 740 P.2d 262, 266 (Utah Ct.App.1987)(finding summary judgment proper on issue of negligence where plaintiff did not present expert testimony in medical malpractice case). The District Court relied upon the Wyoming Supreme Court case of *Garman, Inc. v. Williams,* 912 P.2d 1121 (Wyo. 1996) for the proposition that expert testimony was required in this matter. *Garman* was not a negligent misrepresentation case. *Garman* was a professional negligence case. The rule articulated in *Garman* indicating the general requirement for expert witness testimony was expressly limited to "[w]hen professional negligence is asserted." *Id.* at 1123.

This is not a professional negligence case. The District Court also favorably cited to another professional malpractice case, *Rino v. Mead,* 55 P.3d 13, 2002 WY 144 (Wyo. 2002), which actually undermines the lower court's decision here. In *Rino*, the Wyoming Supreme Court notes that the general requirement for expert testimony applies to professional negligence actions. *Id.* at 18, ¶ 14. The court noted that where "common sense and experience of a layperson are sufficient to establish the standard of care" no expert testimony is required, even in a

professional negligence case. *Id.* at 19, ¶ 17. The court also found that in summary judgment actions:

> The nonmoving Appellant has no obligation to present expert testimony at the pretrial stage, unless the movant establishes that no material questions of fact exist with respect to the allegations in the complaint.

Id. citing *Metzhger v. Kalke,* 709 P.2d 414, 422 (Wyo. 1985). Here the evidence of the appropriate standard of care was established by the Appellees themselves and is entirely uncontroverted. This is not a matter of great complexity: under Wyoming law, the standard is whether information was obtained and communicated in a reasonable manner.

By converting Appellant's negligent misrepresentation claim into one for professional malpractice, the District Court essentially required Appellants demonstrate that TIGHAR failed to exercise reasonable care in conducting the search. However, the relevant inquiry was whether the Appellees were reasonable in communicating information to Mr. Mellon. *See Western States,* 798 P.2d at 1067 ("Sandia may have had grounds on which to believe its representations were true, but whether those grounds were reasonable depends on what a reasonable person would believe under all the surrounding circumstances.")

Mr. Mellon can demonstrate that the Appellees' failed to act with reasonable care in a number of ways. First, the consideration of scale and how it relates to identifying items of wreckage. In criticizing the analysis Appellant's experts

made of the 2010 video, Gillespie makes much of the fact that there were no scale marker's used during the 2010 expedition. However, previously Gillespie asserts that scale is critical to identifying any items when using an ROV. Aplt. App. at 148 ("Scale is very important. Of course, it is.") At the same time he admits that TIGHAR did nothing during its work in 2010 to allow it to determine scale. *Id.*

Jesse Rodocker, a representative of Seabotix, the company that leased the ROV to TIGHAR and operated it on their behalf during 2010, noted in his testimony that Seabotix had tools readily available to determine scale. *Id.* at 143. Gillespie was familiar with methods that could be easily used to determine scale. *Id.* at 148. Despite that fact and despite the fact that TIGHAR acknowledged scale was critical, TIGHAR did not request to use the laser site that could determine scale. *Id.* at 143. (Rodocker: "I don't recall them asking for that, no."). While Appellant's experts have been able to utilize rigorous analytics to determine scale, TIGHAR's own reviewers indicated that there was no way for them to determine scale from the footage alone. Aplt. App. at 120.

Next, TIGHAR's experts argue that the only way to identify the wreckage is "to turn over and reposition an object several times to be certain that a postulated identity survives multiple perspectives." *Id.* at 120. This is described as a "minimum". *Id.* Despite Gillespie's self-professed status as an expert on searching for the Earhart wreckage, it is undisputed that when TIGHAR found

what it knew to be man-made objects, exactly where TIGHAR expected the wreckage to be, they did nothing to reposition, recover or turn over the items and had no arm on the ROV at that time that could manipulate the items. *Id.* at 145.

Finally, TIGHAR chose to represent that they had yet to find the Earhart Aircraft when in fact they had obtained underwater video of the Aircraft. TIGHAR states that it could not properly identify what was truly in the video because there was no measure of scale even though they knew they needed scale in order to properly determine what they had found. No matter what TIGHAR *thought* or *alleged* it knew, it nonetheless had a duty to Mr. Mellon to reasonably communicate the status of its exploration, questions and all.

By failing to take reasonable steps to properly identify the objects, and by further communicating that erroneous information to Mr. Mellon with a clear understanding that he would rely on that information, TIGHAR breached its duty to Mr. Mellon by failing to exercise reasonable care or competence in communication that information. "Once it is determined that a duty exists as a matter of law, then any claimed breach of that duty presents a question of fact to be resolved by the trier of fact." *Lee v. LPP Mortgage Ltd.*, 2003 WY 92, ¶ 20, 74 P.3d 152, 160 (Wyo. 2003). That is because the details of the standard of care are dependent on the facts in each particular case. *John Q. Hammons, Inc v. Poletis,*

954 P.2d 1353, 1356 (Wyo. 1998). "Under our system of procedure, this question is to be determined in all doubtful cases by the jury". *Id.*

The District Court interpreted Appellant's case as one asserting that all underwater searches must utilize methods to determine scale. That is far beyond the issue in this case nor is it a requirement for a negligent misrepresentation claim. In this case, the question is whether the TIGHAR, in light of its knowledge that scale was required to effectively communicate accurate information about the status of its exploration, acted negligently when communicating false information because it did not exercise the care that Gillespie himself recognized was reasonably required. Because the court applied standards wholly inapplicable to Appellant's claim and because the jury was consequently deprived of the right to make determinations within its domain, the District Court erred and should be reversed.

VIII. CONCLUSION

The District Court's errors deprived Appellant of the opportunity to present its case to a jury, a case that includes substantial evidence that TIGHAR misrepresented key facts in soliciting the sizable donation from Mr. Mellon. Appellant requests that this Court reverse the District Court's decision on Summary Judgment and remand the case for further proceedings.

Respectfully submitted this November 14, 2014.

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IX. REASONS FOR REQUESTING ORAL ARGUMENT

Oral argument is requested in this case because Appellant believes that the issues are complex enough that questions may arise that are best addressed through the process of oral argument. Fed.R.App.R.34(a)(1).

X. CERTIFICATE OF COMPLIANCE

Appellant's opening brief fully complies with Fed. R. App. R. 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 line count (846) and word count (8,029). Fed.R.App.R. 28.

XI. CERTIFICATION OF DIGITAL SUBMISSION

All required privacy redactions have been made and, with the exception 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, Kasperski Endpoint Security 10, Version 10.2.1.23 updated November 16, 2014 and, according to the program, are free of viruses.

XII. CERTIFICATION OF PRIVACY REDACTIONS

Appellant hereby certifies that it has made all redactions required by Fed. R. App. P. 25(a)(5).

XIII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing **Brief of Appellant** was served on the parties herein this 19 day of November, 2014 by placing true and correct copies thereof in the United States mail, postage prepaid and properly addressed as follows:

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