AFFIRM, and Opinion Filed October 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01203-CV

CHARLES BROOKS, Appellant
V.
CALATLANTIC HOMES OF TEXAS, INC., F/K/A STANDARD PACIFIC OF TEXAS, INC. AND STANDARD PACIFIC CORP., Appellees

On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03838

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Lang-Miers

Charles Brooks appeals a summary judgment granted in favor of appellees based on a statute of repose. Under the statute, certain suits against persons who construct an improvement to real property must be brought within ten years after the construction of the improvement. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (West 2002). The issue presented in this appeal is whether the statute of repose bars Brooks's claims as a matter of law. Because we conclude that Brooks did not raise a genuine issue of material fact that appellees engaged in willful misconduct that would preclude the application of the statute of repose, we affirm the trial court's judgment.

BACKGROUND

In 1993, appellees CalAtlantic Homes of Texas, Inc., formerly known as Standard Pacific of Texas, Inc. and Standard Pacific Corp. ("Standard Pacific") built a retaining wall on property in Las Colinas that was purchased in 1998 by appellant Charles Brooks. Alleging that the wall was deteriorating and shifting, Brooks sued Standard Pacific in 2016 seeking damages for deceptive trade practices, breach of warranty, and negligence.

Standard Pacific moved for summary judgment on the ground that Brooks's claims were barred by the ten year statute of repose. Brooks responded that an exception to the statute applied, and submitted the affidavit of Wayne Joseph Switzer, a registered professional engineer. Switzer testified that:

- he performed "a comprehensive inspection and assessment to determine the viability of the retaining wall and the cause for its poor condition";
- in the course of his inspection he examined a copy of the original, stamped professional engineering plans created on August 26, 1993, by James E. Dewey, Jr. of Dewey and Associates, submitted to the Las Colinas Association Architectural Committee for approval on August 27, 1993, and approved by the Committee on or about September 1, 1993 ("Civil Plans"); and
- his investigation revealed "a litany of problems" with the retaining wall, including seven specific instances in which Standard Pacific's construction was not consistent with the Civil Plans.

Switzer concluded that Standard Pacific "severely deviated from" the Civil Plans, and "such deviation compromised the structural integrity and the long-term viability of the retaining wall." He opined that "the failure to adhere to the Civil Plans resulted in Mr. Brooks' retaining wall being significantly smaller and less capable of bearing load than the wall originally anticipated and designed by Dewey and Associates" and "the deterioration of Mr. Brooks' retaining wall was the direct consequence of Standard Pacific deviating from the Civil Plans and instead building a retaining wall that lacked the structural integrity necessary to resist shifting and soil loads." Switzer also determined that the deviations from the Civil Plans were not reviewed or

approved by a registered engineer, and that "the construction of the retaining wall, which required professional engineering design, lacked engineering calculations and created a hazard to public safety, both of which, to the best of [sic] knowledge, are violations of state law." Switzer also opined that "the wall as built was only 50% of the cost that was necessary to build it as required by the Civil Plans."

Brooks also submitted his own affidavit. He testified that (1) he purchased land and improvements in 1998; (2) the improvements were originally built by Standard Pacific; (3) in May 2015, he observed that the retaining wall on his property "seemed somewhat unstable and had noticeably shifted"; (4) in his opinion, the wall "appeared to create an unreasonable safety hazard for passersby"; (5) he hired Switzer to inspect and assess the wall; and (6) he obtained a copy of the original engineering plans for the wall as well as the homeowners' association's approval of them. Brooks also summarized Switzer's conclusions.

The trial court granted Standard Pacific's motion and subsequently denied Brooks's motion for new trial. In three issues, Brooks claims the trial court erred by granting summary judgment because he raised genuine issues of material fact regarding Standard Pacific's willful misconduct.

APPLICABLE LAW AND STANDARD OF REVIEW

A plaintiff alleging deficiencies in the construction or repair of an improvement to real property must bring suit not later than ten years after the defendant substantially completed the improvement. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (West 2002). The purpose of section 16.009 "is to protect someone who constructs or installs an improvement from facing never-ending potential liability based on that work." *Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied). Section 16.009, a statute of repose, differs from a statute of limitations. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290

S.W.3d 863, 866 (Tex. 2009) (discussing differences between statutes of repose and limitations). Statutes of limitations "operate procedurally to bar the enforcement of a right"; a statute of repose "takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Id.* Section 16.009, however, does not bar an action "based on wilful[1] misconduct or fraudulent concealment in connection with the performance of the construction or repair." TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e)(3).

When a defendant moves for summary judgment based on an affirmative defense such as the statute of repose, the defendant as movant bears the burden of proving each essential element of that defense. *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012) (quoting *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam)). To obtain summary judgment, a defendant must first establish that the statute of repose applies and that the plaintiff did not file suit within the ten-year statutory period. *See Ryland Grp., Inc.*, 924 S.W.2d at 121. The plaintiff then bears the burden to raise a genuine issue of material fact whether the affirmative defenses of fraudulent concealment and willful misconduct defeat the defendant's right to summary judgment. *Id.*

We review a summary judgment de novo. *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.). In a traditional summary judgment motion, the movant must establish that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant and resolve any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

[1] Section 16.009 uses the alternative spelling of "willful." When quoting the statute, we will use the alternative spelling.

DISCUSSION

The parties agree that section 16.009 of the civil practice and remedies code applies to Brooks's claims. Brooks does not contend that he brought suit before the expiration of section 16.009's ten-year period. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (plaintiff must bring suit not later than 10 years after substantial completion of improvement). He alleges, however, that Standard Pacific engaged in willful misconduct, so that his suit is not barred. *See id.* § 16.009(e)(3). In his first and second issues, Brooks argues that his summary judgment evidence raises a fact issue on Standard Pacific's willful misconduct. In his third issue, Brooks alleges that Standard Pacific bore the burden of establishing the absence of willful misconduct. We address the third issue first.

A. Summary judgment burdens

Brooks argues that to obtain summary judgment, Standard Pacific bore the burden to prove the absence of willful misconduct as an element of its section 16.009 affirmative defense. He contends that because Standard Pacific did not offer any evidence to disprove willful misconduct, summary judgment was improper. He relies on the well-established principle that a defendant seeking summary judgment on an affirmative defense must conclusively prove each element of the defense. *See, e.g.*, *Deer Creek Ltd. v. N. Am. Mortg. Co.*, 792 S.W.2d 198, 200 (Tex. App.—Dallas 1990, no writ) ("When a defendant moves for summary judgment based on an affirmative defense, the defendant bears the burden of proving each essential element of the affirmative defense.").

The supreme court, however, has explained the summary judgment burdens in a case involving section 16.009's statute of repose:

> Ryland [the defendant] conclusively established that Respondents' [the plaintiffs'] damages occurred outside the statute's ten year limitation period. Respondents do not dispute that the statute of repose applies. Consequently, Ryland met its summary judgment burden to prove as a matter of law that section 16.009 applies

> because Respondents did not file suit within the ten year statutory period. *See Swilley* [*v. Hughes*, 488 S.W.2d 64] at 67 [(Tex. 1972)]. The question is whether Respondents in turn presented enough proof to raise a fact issue on their affirmative defenses–fraudulent concealment and willful misconduct, to defeat Ryland's right to summary judgment. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

Ryland Grp., Inc., 924 S.W.2d at 121.

Under *Ryland Group, Inc.*, once Standard Pacific conclusively established that section 16.009 applied and that Brooks's cause of action arose more than ten years after substantial completion of the wall's construction, Brooks was required to present proof to raise a fact issue on Standard Pacific's willful misconduct. *See Ryland Grp., Inc.*, 924 S.W.2d at 121; *see also Garza v. Williams Bros. Constr. Co., Inc.*, 879 S.W.2d 290, 295 (Tex. App.—Houston [14th Dist.] 1994, no writ) ("[I]f the plaintiff raises an affirmative defense to counter the defendant's affirmative defense, the plaintiff has the burden of raising a fact issue on each element of his own affirmative defense to avoid the granting of summary judgment").

Numerous courts have followed this rule in considering summary judgments under section 16.009. *See, e.g., Bunch v. Woodlands Land Dev. Co., LP*, No. 09-16-00136-CV, 2017 WL 3081095, at *8 (Tex. App.—Beaumont Jul. 20, 2017, pet. filed) (mem. op.) (when movant establishes prima facie elements of § 16.009 limitations defense, burden falls on nonmovant to come forward with proof supporting allegations of fraudulent concealment); *Powitzky v. Tilson Custom Homes*, No. 13-15-00137-CV, 2015 WL 6594730, at *2 (Tex. App.—Corpus Christi Oct. 29, 2015, pet. denied) (mem. op.) (once defendant establishes that statute of repose applies, plaintiff has burden to prove existence of fact issue on one of exceptions under § 16.009(e) to defeat summary judgment); *Brent v. Daneshjou*, No. 03-04-00225-CV, 2005 WL 2978329, at *4 (Tex. App.—Austin Nov. 4, 2005, no pet.) (mem. op.) (under § 16.009, nonmovant seeking to avoid effect of statute of limitations established by summary judgment proof must produce evidence to raise fact question on counter-affirmative defenses of willful misconduct or

fraudulent concealment); *Suburban Homes v. Austin-Nw. Dev. Co.*, 734 S.W.2d 89, 91 (Tex. App.—Houston [1st Dist.] 1987, no writ) (once defendant establishes elements of defense of limitations under § 16.009, burden shifts to plaintiff to show existence of disputed fact related to affirmative defense of fraudulent concealment).

Standard Pacific did not bear the burden to conclusively establish the absence of willful misconduct. We decide Brooks's third issue against him.

B. Evidence of willful misconduct

In his first and second issues, Brooks argues he presented more than a scintilla of summary judgment evidence of the "wilful misconduct" exclusion[2] to the statute of repose by presenting evidence "that Standard Pacific's construction created dangerous hazards and/or was a gross departure from the applicable construction standard." Brooks contends that evidence of Standard Pacific's knowing deviation from the Civil Plans is sufficient to raise a fact issue on Standard Pacific's willful misconduct under section 16.009(e)(3).

"Wilful misconduct" is not defined in section 16.009. But courts discussing the section 16.009(e)(3) exception have described it as including the element of intent or actual knowledge. *See Ryland Group, Inc.*, 924 S.W.2d at 122 (willful misconduct under section 16.009(e)(3) requires proof of actual knowledge of alleged deficiency in construction); *Baskin v. Mortg. & Tr., Inc.*, 837 S.W.2d 743, 746 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (willful misconduct under section 16.009(e)(3) includes element of intent). In other contexts, we have equated "willful" conduct to gross negligence. *See, e.g., Turner v. Franklin*, 325 S.W.3d 771, 780–81 (Tex. App.—Dallas 2010, pet. denied) (interpreting phrase "willful and wanton negligence" as used in § 74.153 of the civil practice and remedies code to mean "gross

[2] On appeal, Brooks does not contend that he raised a fact issue on the "fraudulent concealment" exclusion to section 16.009 as he did in his summary judgment response; we therefore address only the "wilful misconduct" exclusion.

negligence"); *Fath v.CSFB 1999-C1 Rockhaven Place Limited Partnership*, 303 S.W.3d 1, 6 (Tex. App.—Dallas 2009, pet. denied) (concluding that "'willful misconduct' is generally equated with gross negligence," in suit for breach of guaranty agreement).[3] In *Fath*, we explained:

> Two elements comprise gross negligence. First, viewed objectively from the actor's standpoint, the act or omission complained of must depart from the ordinary standard of care to such an extent that it creates an extreme degree of risk of harming others. *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784–86 (Tex. 2001). Second, the actor must have actual, subjective awareness of the risk involved and choose to proceed in conscious indifference to the rights, safety, or welfare of others. *Id.* at 785. "Extreme risk" is not "a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Id.* "Willful misconduct" is generally equated with gross negligence. *IP Petroleum Co., Inc. v. Wevanco Energy, LLC*, 116 S.W.3d 888, 898 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Id.

Relying on *Fath*, Brooks argues that willful misconduct under section 16.009(e)(3) equates to gross negligence. Standard Pacific does not concede this point, but argues that in any event, Brooks's evidence failed to raise a fact issue on the elements of gross negligence. Standard Pacific "particularly" challenges "the element that Standard Pacific had actual, subjective knowledge of an extreme degree of risk relating to construction of the retaining wall but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others."

Standard Pacific relies on several cases applying section 16.009, including the supreme court's opinion in *Ryland Group*, to support its argument that Brooks failed to raise a fact issue on willful misconduct. In *Ryland Group*, plaintiff Theresa Hood and others were injured when the second-story deck at her home collapsed. *Ryland Grp., Inc.*, 924 S.W.2d at 121. Hood sued,

[3] In *Turner*, we noted that "terms such as gross negligence, willful or wanton misconduct, and reckless disregard have been used to convey the idea of aggravated wrongdoing that still falls short of intentional torts," and that these terms have been equated to "recklessness." *Turner*, 325 S.W.3d at 780 n.11 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 2 cmt. a, b (2010)).

alleging that Ryland's use of untreated lumber as the "runner board" in the deck's construction caused the collapse. *Id.* Ryland moved for summary judgment, asserting that section 16.009 barred Hood's claims. *Id.* As here, Hood offered an expert's affidavit to raise a fact issue on the application of section 16.009. *See id.* The expert, James Manning, "stated he was of the opinion that Ryland should have treated the runner board." *Id.* at 122. Manning also testified that to use untreated lumber for a deck support when treated lumber is specified "amounts to intentional or willful misconduct by the builder." *Id.* The court held that summary judgment for Ryland was proper. *Id.* The court explained that there was no evidence that "the parties ever specified or contracted for the use of treated wood." *Id.* Further, there was no evidence that Ryland had actual knowledge of the untreated lumber. *Id.* Therefore, section 16.009 barred Hood's claims. *Id.*

In *Brent v. Daneshjou*, also cited by Standard Pacific, evidence that a builder "cut corners to save money" was insufficient to raise a fact issue on willful misconduct or fraudulent concealment under section 16.009(e)(3). *Brent*, 2005 WL 2978329, at *6. Brent's home was damaged by water leaks and mold. *Id.* at *1. Brent sued Daneshjou, the builder, complaining that the original construction of the house was defective and Daneshjou's later repairs were inadequate. *Id.* In response to Daneshjou's motion for summary judgment, Brent produced evidence that to save construction costs, Daneshjou did not place any foundation under the stairs in the home. *Id.* Wood from the stairs "was touching ground alleged to be repeatedly and extensively wet," in addition to other problems in the home resulting from water penetration. *Id.* Brent argued that this evidence raised a fact issue on willful misconduct or fraudulent concealment, so that summary judgment for Daneshjou under section 16.009 was improper. The court of appeals disagreed, explaining:

> [T]he record in this case does not contain the evidence necessary to show a fact issue regarding willful misconduct or fraudulent concealment of flaws in the original construction. Construing the evidence most favorably to Brent, the record shows that Daneshjou built the house in ways that made it susceptible to

> admitting and retaining water, leading to rot and mold. *But there is no evidence of improper intent. Evidence shows that Daneshjou cut corners to save money, but it does not show that he did so knowing that those measures rendered the house deficient or dangerous or risked doing so.* Nor is there evidence that, in building or repairing the house, he acted with the intent to conceal these wrongs. . . . There is no evidence that Daneshjou committed willful misconduct while building the house, nor is there evidence that he guided construction and repairs intending to conceal any misconstruction or intentionally misled Brent through information or misinformation intending to conceal any misconstruction. In short, there is no evidence of willful misconduct or fraudulent concealment of errors in the original construction . . . creating a fact question regarding tolling. *See Ryland*, 924 S.W.2d at 121. Accordingly, we conclude that the district court did not err by granting Daneshjou's motion for summary judgment that Brent's complaints about the construction of the house were barred by the ten-year statute of repose.

Id. at *6 (emphasis added).

In *Powitzky v. Tilson Home Corp.*, also cited by Standard Pacific, the defendant Tilson agreed by written contract to build Powitzky's home to certain specifications, including a reinforced concrete foundation approximately three and one-half inches thick. *Powitzky*, 2015 WL 6594730, at *1. Thirty years later, when remodeling the home, Powitzky discovered that the foundation was only one and one-half inches thick, and sued Tilson for the alleged construction defect. *Id.* Tilson filed a motion for summary judgment, relying on section 16.009; Powitzky responded by asserting that Tilson engaged in willful misconduct or fraudulent concealment in building the home. *Id.* The trial court granted Tilson's motion, and the court of appeals affirmed. *Id.*

As here, Powitzky offered the affidavit of an expert to support his contention. *Id.* Powitzky's expert testified that Tilson's failure to comply with the plans was willful if Tilson knew the plans called for a slab three and one-half inches thick, and if Tilson knew the slab as poured was not that thick. *Id.* at *3. The court explained that the expert's testimony did not raise a fact issue on willful misconduct or fraudulent concealment. *Id.* There was no evidence that Tilson, "as opposed to a concrete contractor," poured the foundation, and thus no evidence that Tilson knew the foundation did not comply with the plans. *Id.* The expert testified only that "if"

Tilson knew, then its conduct was willful. Neither this testimony nor the expert's statement that Tilson "knew or should have known" of the defect, was sufficient to raise a fact issue on Tilson's actual knowledge. *Id.*[4]

Brooks distinguishes each of these cases. He distinguishes *Ryland Group, Inc.* on the grounds that (1) Standard Pacific had actual knowledge of the plans and specifications prepared by a certifying engineer; (2) Standard Pacific "severely deviated" from those plans, in Switzer's expert opinion; (3) the deviations were of such magnitude that Standard Pacific must have known about them; (4) Standard Pacific was aware that deviating from the plans could create property defects and dangerous conditions; and (5) the defects and dangerous conditions were a direct consequence of Standard Pacific's deviation from the plans. Brooks also distinguishes *Powitsky*, arguing that Standard Pacific actually constructed the wall and therefore had knowledge of the deviations from the Civil Plans. And he argues that the court in *Brent* relied on precedent addressing only fraudulent concealment, not willful misconduct.[5] Brooks also relies on *Fath* for his argument that evidence of deviation from an industry standard is some evidence of gross negligence.[6]

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[4] In *Preston Oaks Crossing Condo. Ass'n, Inc. v. Preston Oaks Crossing Joint Venture*, No. 05-96-00631-CV, 1998 WL 102973, at *5 (Tex. App.—Dallas Mar. 11, 1998, no pet.) (not designated for publication), another case applying section 16.009 cited by Standard Pacific, we concluded the plaintiff failed to raise a fact issue on the defendant's fraudulent concealment of defects in the construction of condominiums. *Id.* at *5. An expert testified that the roof was not constructed in a good and workmanlike manner, and that a contractor of average competence should have recognized that the manner in which the roof was constructed was defective. *Id.* The expert also stated that the facts "appear to indicate that the way the roof was constructed was intentional and not accidental nor the result of mere oversight." *Id.* We concluded that the expert's affidavit "does not raise a fact issue that appellees had actual knowledge the roof was constructed in a defective manner and a fixed purpose to conceal the wrong." *Id.* As Brooks points out, however, the case does not have precedential value. *See* TEX. R. APP. P. 47.7 (opinions designated "do not publish" by courts of appeals prior to 2003 have no precedential value but may be cited with the notation "not designated for publication").

[5] As the passage from *Brent* quoted above reflects, however, the court addressed and rejected both willful misconduct and fraudulent concealment as grounds for precluding summary judgment. *See Brent*, 2005 WL 2978329, at *6.

[6] Brooks also relies on two personal injury suits in which section 16.009 was not applicable or at issue. In *Mitchell v. City of Dallas*, 855 S.W.2d 741, 748–49 (Tex. App.—Dallas 1993), *aff'd*, 870 S.W.2d 21 (Tex. 1994), we concluded that the defendant did not conclusively negate any essential element of the plaintiffs' claim for grossly negligent construction and maintenance of a "gabion wall" to control erosion at a municipal park. 855 S.W.2d at 743, 748–49. As the summary judgment movant in *Mitchell*, the city bore the burden to establish its entitlement to judgment as a matter of law, but failed to present any evidence regarding the original design of the wall. *Id.* Here, as we have discussed, Standard Pacific met its summary judgment burden to establish that section 16.009 applied; it was not required to prove its lack of negligence in constructing the wall. In *University of Texas at Arlington v. Williams*, 455 S.W.3d 640, 645 (Tex. App.—Fort Worth 2013), *aff'd*, 459 S.W.3d 48 (Tex. 2015), the plaintiff fell from stadium stands to the ground five feet below when a gate with a faulty latch swung open. *See Williams*, 455 S.W.3d at 642. There was evidence that the defendant (1) knew the latch was broken; (2) secured the gate with the same chain and padlock system that had failed on other occasions; (3) knew of the five-foot dropoff; and (4) did not post any warning signs. *Id.* at 645–46. The court of appeals agreed with the trial court that the plaintiff raised a fact issue that the defendant "committed an act or omission involving an extreme

We disagree with Brooks's arguments. *Ryland Group, Inc.*, is not authority for the proposition that knowing deviation from construction plans constitutes knowledge of a dangerous condition resulting from the deviation, because the court did not address that question. *See Ryland Grp., Inc.*, 924 S.W.2d at 122 (no actual knowledge of any deviation; therefore no summary judgment evidence that use of untreated lumber was intentional or willful misconduct under § 16.009(e)(3)). Here, there is no evidence of Standard Pacific's awareness that deviating from the Civil Plans could create property defects and dangerous conditions. And neither *Powitsky* nor *Fath* supports Brooks's contention that proof of deviation from construction plans, alone, is evidence of willful misconduct. In *Powitsky*, as we have discussed, the specifications for the slab were a matter of express contract between Powitsky and Tilson, rather than in plans approved by a third party, as here. *See Powitzky*, 2015 WL 6594730, at *1. Powitsky offered proof of deviation from the contract's specifications. *Id.* at *3. Nonetheless, the court held that absent evidence of Tilson's knowing conduct, summary judgment for Tilson was proper. *Id.* Deviation from the specifications was not evidence of willful misconduct. *Id.*

Section 16.009 was not at issue in *Fath*. Fath signed a guaranty agreement in connection with the financing of real property. *Fath*, 303 S.W.3d at 4. The guaranty provided that Fath would be liable for fraud in connection with the loan, and for gross negligence or willful misconduct resulting in physical waste of the property. *Id.* Fath completed some renovations, but eventually abandoned the property, leaving it to decay. *Id.* At the jury trial of Fath's liability on the guaranty, several experts testified that Fath's approach to the renovations, completely vacating the property and demolishing the interior, deviated from industry standards by eliminating all cash flow from the property. *Id.* at 7. Fath testified that his approach was

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degree of risk; . . . had subjective awareness of this extreme degree of risk; and that this awareness indicated a conscious indifference to the rights, safety, or welfare of others." *Id.* at 646. In contrast, there is no similar evidence of Standard Pacific's knowledge of extreme risk when it constructed the wall. We conclude that neither *Mitchell* nor *Williams* presents the same facts or legal issues as those we consider here.

necessary due to crime in the area. *Id.* The evidence showed that it would cost more than $3 million to repair the damage caused by the renovation efforts. *Id.* at 8. The question on appeal was the legal sufficiency of the evidence to support the jury's finding that Fath breached the guaranty. *Id.* at 4. We concluded the evidence was legally sufficient to support a finding of gross negligence resulting in waste of the property, but not fraud in connection with the loan. *Id.* at 5–8. Because we could not determine whether the jury's answer was based on the erroneous submission of fraud, we reversed the trial court's judgment and remanded for a new trial. *Id.* at 9.

In contrast to *Fath*, Standard Pacific completed the construction of the wall rather than abandoning the project to decay and waste. There is nothing in the record to indicate that the wall presented any risk until some twenty-two years after construction was completed, when Brooks first noticed deterioration. Although Switzer testified that the wall as built "severely deviated from and was not in accordance with the Civil Plans . . . , compromis[ing] the structural integrity and the long-term viability of the wall," and that "the wall as built was only 50% of the cost that was necessary to build it as required by the Civil Plans," there is no evidence that Standard Pacific knew of any risk of harm in deviating from the Civil Plans. Switzer's additional opinions that the wall "lacked engineering calculations and created a hazard to public safety, both of which, to the best of [sic] knowledge, are violations of state law," are legal opinions rather than evidence raising an issue of fact. *See Gonzalez v. VATR Constr., LLC*, 418 S.W.3d 777, 786 (Tex. App.—Dallas 2013, no pet.) (expert's opinion about subcontractor's legal duties did not raise fact question precluding summary judgment).

We conclude that Brooks's summary judgment evidence does not raise a genuine issue of material fact as to Standard Pacific's willful misconduct. There is no evidence of Standard Pacific's "actual, subjective awareness of the risk involved" or its choice to "proceed in conscious indifference to the rights, safety, or welfare of others." *See Fath*, 303 S.W.3d at 6.

There is no evidence that Standard Pacific, in 1993, knew of an extreme risk of harm or the likelihood of serious injury to others as a result of its deviation from the Civil Plans. We decide Brooks's first and second issues against him.

CONCLUSION

We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHARLES BROOKS, Appellant

No. 05-16-01203-CV V.

CALATLANTIC HOMES OF TEXAS, INC., F/K/A STANDARD PACIFIC OF TEXAS, INC. AND STANDARD PACIFIC CORP., Appellees

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-03838.
Opinion delivered by Justice Lang-Miers; Justices Brown and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Calatlantic Homes of Texas, Inc., f/k/a Standard Pacific of Texas, Inc. and Standard Pacific Corp. recover their costs of this appeal from appellant Charles Brooks.

Judgment entered this 9th day of October, 2017.