COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00132-CV

RDJRLW, INC. — APPELLANT

V.

BOBBY ELBERT MILLER, JR. D/B/A MILLER CONSTRUCTION AND GUY DANKEL AND JANET DANKEL — APPELLEES

FROM THE 362ND DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 2013-40713-362

MEMORANDUM OPINION[1]

After homeowners Guy and Janet Dankel sued Bobby Elbert Miller, Jr. d/b/a Miller Construction for using defective concrete in constructing a driveway and concrete slab on their property, Miller Construction filed a third-party action

[1]*See* Tex. R. App. P. 47.4.

against the concrete manufacturer, Appellant RDJRLW, Inc. (RDJ), for statutory indemnity under chapter 82 of the civil practice and remedies code. A jury found in the Dankels' favor on some of their claims against Miller Construction and also found that RDJ was required to indemnify Miller Construction. The trial court entered judgment on the jury's verdict. RDJ has appealed, arguing in five issues that the evidence was legally and factually insufficient to support the jury's finding that it was required to indemnify Miller Construction and that the trial court erred by excluding RDJ's expert witness. We affirm.

Background

In early 2013, the Dankels contracted with Miller Construction to build a driveway and to extend an existing concrete slab on their property in Valley View, Texas. Miller Construction bought the concrete from Gateway Concrete, RDJ's predecessor.[2]

After Miller Construction demolished the existing gravel driveway and prepared the site with rebar and wooden framing, RDJ delivered about 210 cubic yards of concrete to the Dankels' property.[3] Under Miller Construction's direction,

[2]Gateway Concrete's owners sold the company's assets and name in September 2013. One of the owners testified at trial that "our attorney said that we needed to set up [RDJ] when we sold." Presumably, RDJ acquired Gateway Concrete's liabilities as the parties do not dispute that RDJ is a proper party to this suit.

[3]RDJ mixed the concrete at its facility before delivery.

RDJ poured the concrete, and the Miller Construction crew spread and smoothed it. The concrete was discolored, and it did not set properly and cracked.

The Dankels sued Miller Construction, which in turn filed a third-party action against RDJ for statutory indemnity under chapter 82. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 82.001–.002 (West 2017). At trial, Bobby Miller and the Dankels' expert both testified that the concrete was defective. Midway through RDJ's expert's testimony, the trial court struck that expert and excluded his testimony and report because RDJ did not produce to the other parties six items listed in its expert's report or the expert's working file. Had he been allowed to testify, RDJ's expert would have opined that the concrete was not defective, that the cracks were caused not by the concrete but by Miller Construction's actions after the concrete was poured, and that the concrete exceeded the design strength Miller Construction had requested.

The jury found in the Dankels' favor on their breach-of-contract and DTPA claims against Miller Construction and awarded them $215,000 in damages on each claim. The jury also found that the Dankels' reasonable and necessary attorney's fees were $36,000 for trial and $42,500 for appeal. The jury further found that RDJ was required to indemnify Miller Construction for its losses and that Miller Construction's reasonable and necessary attorney's fees were $40,000 for trial and $42,500 for appeal. The trial court entered judgment on the verdict, awarding (1) the Dankels judgment against Miller Construction for $215,000, plus $25,210.96 in prejudgment interest and $36,000 in attorney's

fees, and (2) Miller Construction judgment against RDJ for $277,215.96, plus $40,000 in attorney's fees. The trial court also awarded the Dankels and Miller Construction conditional appellate attorney's fees.

The framework of the Texas Products Liability Act

The Texas Products Liability Act requires a manufacturer of an allegedly defective product to indemnify an innocent seller for any loss arising out of a products-liability action unless the seller independently caused the loss:

> A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

Id. § 82.002(a). Section 82.002's purpose is to "protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers." *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 494 (Tex. 2014) (op. on reh'g). A manufacturer's duty to indemnify a seller under section 82.002 is "in addition to any duty to indemnify established by law, contract, or otherwise." Tex. Civ. Prac. & Rem. Code Ann. § 82.002(e)(2).

This duty is triggered by allegations in the injured claimant's pleadings of a defect in the manufacturer's product, regardless of any adjudication of the manufacturer's liability directly to the claimant. *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 36 (Tex. 2016) (citing *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255 (Tex. 2006)). The manufacturer may "escape this duty to indemnify" by proving that the seller's "acts or omissions

independent of any defect in the manufactured product cause[d] injury." *Hudiburg Chevrolet*, 199 S.W.3d at 252, 255; *see* Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a); *see also Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001) ("[I]t is the manufacturer's 'duty to indemnify' that applies regardless of outcome . . . [, b]ut for the Manufacturers to implicate section 82.002(a)'s exception to that duty, it must be established that seller's conduct 'caused' the loss.").

RDJ does not dispute that it is a "manufacturer" under the Act[4] or that it manufactured the concrete at issue here, but it argues that Miller Construction was not a "seller" and that the Dankels failed to plead and prove a "products liability action."

Miller Construction's status as a "seller" under the Act

The scope of a manufacturer's duty to indemnify under the Act is broad but is owed only to sellers. *Centerpoint Builders*, 496 S.W.3d at 36. Miller Construction's "seller" status is thus a prerequisite for it to be indemnified under the Act.[5] *See id.* (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999)). In its first and third issues, RDJ argues that

[4]"'Manufacturer' means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce." Tex. Civ. Prac. & Rem. Code Ann. § 82.001(4).

[5]"Seller" status under the Act is based on the evidence. *See Centerpoint Builders*, 496 S.W.3d at 37, n.3.

because Miller Construction is not a statutory "seller," the evidence is legally and factually insufficient to support the jury's finding that it must indemnify Miller Construction.

The Act defines "seller" as "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof." Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). RDJ posits that a "seller" under the Act does not include a contractor that incorporates a defective product into a construction project when the product is only incidental to the sale of construction services. As a result, RDJ urges, because selling concrete was incidental to Miller Construction's selling its construction services to the Dankels, Miller Construction was not a "seller." *See generally Centerpoint Builders*, 496 S.W.3d at 37–43; *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 898–99 (Tex. 2010). But RDJ did not preserve these issues for our review.

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if those grounds are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a). In a jury trial, no-evidence and matter-of-law issues or points must be preserved through one of the following procedural steps in the trial court:

- a motion for instructed verdict,
- a motion for judgment notwithstanding the verdict,
- an objection to the submission of the question to the jury,

- a motion to disregard the jury's answer to a vital fact question, or
- a motion for new trial.

T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 220–21 (Tex. 1992); *see also* Tex. R. Civ. P. 324(b) (listing appellate complaints that must be preserved by a motion for new trial). A complaint that the evidence is factually insufficient to support a jury answer, or that the answer is against the overwhelming weight of the evidence, must have been raised in a motion for new trial. Tex. R. Civ. P. 324(b)(2)–(3); *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).

At no time in the court below did RDJ challenge Miller Construction's "seller" status. But RDJ asserts now that its three posttrial motions made plain that it was challenging the evidentiary sufficiency to support the jury's implied finding that Miller Construction was a "seller." We disagree.

In its first posttrial motion, RDJ moved to disregard the jury's finding that it was required to indemnify Miller Construction, claiming that Miller Construction's loss did not arise from a products-liability action because (1) the Dankels did not plead a products-liability claim against Miller Construction and (2) the damages awarded against Miller Construction were for breach of contract and DTPA violations, not for "personal injury, death, or property damage arising out of a defective product." Far from implicitly complaining that Miller Construction was not a statutory seller, by raising only these two arguments RDJ's motion can be fairly read as tacitly presupposing "seller" status. RDJ made similar arguments in its contemporaneously filed objections to the Dankels' motion to enter judgment.

Along the same lines, the following month RDJ filed its motion to modify, correct, or reform the judgment or, in the alternative, motion for new trial. As with RDJ's earlier posttrial filings, it is not at all apparent from either the substance or the context of these arguments that RDJ was challenging whether Miller Construction met the definition of "seller" under the Act. *See* Tex. R. App. P. 33.1(a).

In its motion for new trial, RDJ also broadly asserted that the evidence was legally and factually insufficient to support any implied findings in jury question 8 (the indemnification question), arguing that the evidence was insufficient to support any implied finding that the concrete contained a manufacturing defect or that any such defect caused the Dankels' damages or any implied finding that Miller Construction's conduct was not the sole cause of those damages. Question 8 read as follows:

> Do you find that [RDJ] is required to indemnify [Miller Construction]?
>
> You are instructed that [RDJ] shall indemnify and hold harmless [Miller Construction] against loss arising out of this action, unless you find that the loss to [the Dankels] was caused by [Miller Construction's] negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product.
>
> "Negligence" when used with respect to the conduct of [Miller Construction] means failure to use ordinary care, that is, failing to do that which a company of ordinary prudence would have done under the same or similar circumstances or doing that which a company of ordinary prudence would not have done under the same or similar circumstances.

Generally, a sufficiency objection to a single jury issue suffices to preserve error without further detail. *See Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387–88 (Tex. 2008) (basing its holding also on trial court's understanding of nature of objection to multipart damages issue by holding posttrial hearing on sufficiency of evidence to support damages). But the "cardinal rule" is that the objection must be clear enough to give the trial court an opportunity to correct the alleged error. *Id.* at 387. Here, RDJ's general sufficiency complaint in its new-trial motion did not alert the trial judge that RDJ was challenging the sufficiency of the evidence supporting the discrete issue of Miller Construction's "seller" status. *Cf. id.* at 388. ("If a single jury question involves many issues, it is possible that a general objection may not tell the trial court where to start."). Moreover, it is apparent from the hearing on RDJ's motion that the trial court (and the other parties, for that matter) had no inkling that RDJ was also disputing Miller Construction's "seller" status.

Because RDJ's complaints did not alert the trial court to any challenge to Miller Construction's "seller" status, we conclude that RDJ has failed to preserve its first and third issues for our review. We therefore overrule them.

The nature of the Dankels' claims

In its second and fourth issues, RDJ argues that the evidence is legally and factually insufficient to support the jury's finding that it must indemnify Miller Construction because (1) the Dankels neither pleaded nor obtained jury findings supporting a "products liability action" under the Act and (2) the jury's liability

findings against Miller Construction conclusively establish its own liability, and thus section 82.002(a)'s exception to a manufacturer's indemnity obligation applies. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a).

RDJ contends that the Dankels did not plead a "products liability action" because they did not allege a products-liability claim under Texas law and because they alleged only economic damages, which are barred by the economic-loss rule in products-liability cases.[6] The Act broadly defines "product liability action" as

> any action against a manufacturer or seller for recovery of damages arising out of . . . property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

Id. § 82.001(2). A "product liability action" includes not only products-liability claims denominated as such but also "other theories of liability properly joined thereto." *Meritor Auto.*, 44 S.W.3d at 91. We look at the Dankels' pleadings to determine whether they asserted a "products liability action"—that is, whether they alleged an action to recover damages arising out of property damage

[6]The Dankels and Miller Construction assert that RDJ has waived this complaint because RDJ never specially excepted to the Dankels' pleadings. *See* Tex. R. Civ. P. 90, 91. Neither the Dankels nor Miller Construction points us to any authority discussing whether the alleged failure to plead a "products liability action" under chapter 82 is a pleading defect that is waived by not filing special exceptions. We therefore assume without deciding that this issue was preserved for our review.

allegedly caused by a defective product. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.001(2); *Centerpoint Builders*, 496 S.W.3d at 36.

Here, the Dankels alleged that the concrete itself was "defective." They pleaded claims against Miller Construction for breach of contract, DTPA violations (unconscionability and breach of implied warranty), negligence, and negligent misrepresentation—all based on Miller Construction's pouring "defective concrete," which they alleged caused them such damages as the "[c]ost to remove and replace the defective concrete."

Once poured and thus affixed to the Dankels' land, the defective concrete became a part of their real property. *See San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000) (stating that real property is land and generally whatever is erected upon or affixed to land). Based on this principle, we conclude that the Dankel's removal and replacement costs were in fact damages arising out of property damage allegedly caused by the defective concrete. Accordingly, the Dankels pleaded a "products liability action" under the Act, thereby triggering RDJ's duty to indemnify Miller Construction.

RDJ also contends that the Dankels were required to obtain jury findings supporting a "products liability action." But because it is simply the allegations in an injured claimant's petition that trigger a manufacturer's indemnification duty, the Dankels did not have to obtain jury findings supporting a "products liability action." *See, e.g.*, *Centerpoint Builders*, 496 S.W.3d at 36 ("[T]he duty to indemnify is triggered by allegations in the injured claimant's pleadings of a

defect in the manufacturer's product, regardless of any adjudication of the manufacturer's liability to the claimant."); *Petroleum Sols.*, 454 S.W.3d at 492 ("[T]he duty is triggered by allegations of a defect in the manufacturer-indemnitor's product and is not dependent on an adjudication of the indemnitor's liability."); *Toyota Indus. Equip. Mfg., Inc. v. Carruth-Doggett, Inc.*, 325 S.W.3d 683, 690 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("The supreme court has reaffirmed that the manufacturer's duty to indemnify is triggered by the pleadings and not by proof of defect.").

RDJ next asserts that the jury's liability findings against Miller Construction for breach of contract and DTPA violations conclusively establish Miller Construction's liability and that section 82.002(a)'s exception therefore applies. That exception to a manufacturer's duty to indemnify applies only upon a finding that the seller was independently liable for the loss. *Meritor Auto.*, 44 S.W.3d at 91; *see* Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a). Here we have no such finding; in fact, the jury impliedly found the opposite. Question 8 instructed the jury that RDJ must indemnify Miller Construction unless the jury found that the Dankels' loss was caused by Miller Construction's "negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product." In finding that RDJ was indeed required to indemnify Miller Construction, the jury implicitly found that Miller Construction did *not* cause the Dankels' loss, and so RDJ did not establish section 82.002(a)'s exception to its indemnification duty.

Because the Dankels' pleadings activated RDJ's duty to indemnify Miller Construction and because RDJ did not establish that Miller Construction's conduct independently caused the loss, we overrule RDJ's second and fourth issues.

RDJ's excluded expert

In its fifth issue, RDJ argues that the trial court erred by striking its expert's testimony for failing to disclose six documents listed in the expert's report and several documents in the expert's file because the documents either (1) were produced or (2) were listed in the expert's report, which was provided to the Dankels and to Miller Construction over a year before trial, without those parties' ever attempting to depose RDJ's expert and without their objecting to any missing documents until trial.

RDJ identified its retained expert in response to the Dankels' and Miller Construction's requests for disclosure, listing his name, address, and telephone number; the subject matter on which he was to testify; and the general substance of his mental impressions and opinions. *See* Tex. R. Civ. P. 194.2(f)(1)–(3). RDJ also attached the expert's curriculum vitae and his report. *See* Tex. R. Civ. P. 194.2(f)(4)(B). In the report, RDJ's expert listed 16 documents that he had reviewed as part of his engineering analysis. Before the expert began testifying during the second day of trial, the Dankels and Miller Construction objected and moved to exclude him because RDJ had not produced six of the 16 documents the expert had reviewed:

- American Concrete Institute—ACI 306-10,
- American Concrete Institute—ACI 302.1R-96,
- American Concrete Institute—ACI 224.3R,
- an April 1998 publication entitled, "Concrete Technology Today,"
- a publication entitled "Placing Joints in Concrete Flatwork: Why, How and When," and
- a presentation entitled, "Cold Weather Concreting, The New ACI 306 Report."

See Tex. R. Civ. P. 194.2(f)(4)(A). RDJ's attorney admitted that RDJ had not produced these documents but argued that he would have made them available upon request and that, in any event, they were publicly available on the Internet.[7] The Dankels' and Miller Construction's attorneys stated that they had tried to access some of the documents online but could not find them. At that point in the trial, the court denied the motion to exclude but ordered RDJ to produce the six documents. After the expert finished testifying for the day, the trial court also granted Miller Construction's attorney's request to review documents in the expert's working file after it appeared that the expert was testifying from a file whose entire contents might not have been provided to the opposing parties.

When the parties returned the next morning, neither the Dankels' nor Miller Construction's attorney had received the six documents, even though RDJ's attorney had assured them the day before that he would email the documents to them. The trial judge then asked RDJ to forward the email directly to him.[8] The

[7]In his report, the expert provided hyperlinks for two of the documents.

[8]It appears from the email forwarded to the trial judge that RDJ had attempted to send it to the Dankels' and Miller Construction's attorneys the afternoon before, but the two attorneys maintained they did not get it.

forwarded email listed each of the six documents with a hyperlink for each through which the trial court accessed:

- a website to purchase a book,
- a 67-page document,
- a 44-page document,
- an eight-page document,
- a website, and
- a 61-page document.[9]

Upon the trial court's questioning, the expert admitted that he had never given copies of these documents to RDJ. The expert testified that he had an electronic copy of the book at his office and that anyone could purchase a copy. He further testified that he could have printed out the pages he had relied on if he had access to the book, but he had not done so the evening before because his office was over two hours away.

The Dankels and Miller Construction further complained that the expert's working file contained photographs and documents that had not earlier been produced. After examining that file, the trial court determined that over 50 photographs, as well as many pages of notes, documents, and drawings, in the expert's file had not been produced. This omission was no small thing: the expert testified that he had used his working file in formulating his opinions and his report.

[9]The book, documents, and website are not in the record. The trial judge described each item as he accessed them through the hyperlinks.

Based on RDJ's failure to produce all contents of the expert's file and the six documents from the expert's report, the trial court then struck the expert and his report and instructed the jury to disregard his testimony. RDJ claims this was error.

We review the trial court's admission or exclusion of evidence for an abuse of discretion. *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001). A trial court abuses its discretion if the court acts without reference to any guiding rules or principles—that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low*, 221 S.W.3d at 620.

Regarding testifying experts, rule 194.2(f) permits a party to request disclosure of "the subject matter on which the expert will testify" and "the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them." Tex. R. Civ. P. 194.2(f)(2), (3). And when, as in this case, the expert is employed by the responding party, a party can also request disclosure of "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony." Tex. R. Civ. P. 194.2(f)(4)(A). The responding party must serve a written response on the requesting party.

Tex. R. Civ. P. 194.3. Copies of documents and other tangible items must be served with the response, but if the responsive documents are voluminous, the response must state a reasonable time and place for their production. Tex. R. Civ. P. 194.4.

A response to a disclosure request regarding testifying experts is governed by rule 195, which provides, in part, that a party must timely designate experts by "furnish[ing] information requested under [r]ule 194.2(f)." Tex. R. Civ. P. 195.2, *see* Tex. R. Civ. P. 194.3(b). When a party responds to a written discovery request, that party must "make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made." Tex. R. Civ. P. 193.1. A party has an ongoing duty to amend and supplement written discovery regarding its testifying experts. *See* Tex. R. Civ. P. 193.5, 195.6. Any amended or supplemental responses must be made "reasonably promptly after the party discovers the necessity for such a response," and it is presumed that an amended or supplemental response made fewer than 30 days before trial is not reasonably prompt. Tex. R. Civ. P. 193.5(b). A party failing to timely make, amend, or supplement a discovery response may not introduce into evidence the undisclosed material or information, nor may that party offer the testimony of a nonparty witness who was not timely identified, unless good cause exists for the failure or unless the failure to disclose will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a).

Failure to respond fully to a request for an expert's mental impressions and opinions and the documents, tangible things, reports, models, or data compilations provided to, reviewed by, or prepared by or for the expert in anticipation of his testimony is considered a complete failure to respond, triggering rule 193.6's automatic exclusion. *VingCard, A.S. v. Merrimac Hosp. Sys., Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied) (op. on reh'g). In other words, such failure is not just an incomplete answer, *see id.*, a situation that the Texas Supreme Court has held requires a pretrial objection or a pretrial motion to compel or for sanctions, *State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616, 619–20 (Tex. 1998).

Here, RDJ provided the general substance of its expert's mental impressions and opinions, but—even though both the Dankels and Miller Construction served disclosure requests—RDJ did not produce all documents provided to, reviewed by, or prepared by or for its expert in anticipation of its expert's testimony or state a reasonable time and place for production because the documents were voluminous. *See* Tex. R. Civ. P. 194.2(f)(4)(A); 194.4. RDJ was affirmatively obliged to provide the requested information, whether in original, amended, or supplemental responses. *See* Tex. R. Civ. P. 193.5, 194.3, 195.2, 195.6; *see also Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671–72 (Tex. 1990) (stating that a party has no duty to remind another party to abide by procedural rules).

Regarding the items in its expert's working file, RDJ argues that, as its offer of proof revealed,[10] its expert's testimony was "confined to only the documents referred to in his Report" and that because the report contained the expert's opinions and the bases for those opinions, the Dankels and Miller Construction had sufficient information to prepare for cross-examination. *See $28,877 Current Money of U.S. v. State*, 331 S.W.3d 110, 120–21 (Tex. App.—Fort Worth 2010, pet. denied) (concluding that trial court did not abuse its discretion in refusing to exclude expert when the State's disclosures sufficiently informed defendant of the expert's opinions so that defendant could prepare to cross-examine the expert). RDJ additionally argues that nothing in its expert's working file unfairly surprised or unfairly prejudiced the Dankels and Miller Construction because "a majority" of the information was "either duplicative of information disclosed in his Report, was incorporated into the findings and conclusions of his Report, was irrelevant to any opinions or findings he made and/or was already in the other parties' possession." Finally, RDJ asserts that the trial court should have exercised its discretion under rule 193.6(c) to continue the trial. *See* Tex. R. Civ. P. 193.6(c).

[10]We note that the trial court permitted RDJ to continue its offer of proof while the jury deliberated even through rule 103(c) requires that offers of proof be made before the trial court reads the charge to the jury. *See* Tex. R. Evid. 103(c) ("The court must allow a party to make an offer of proof outside the jury's presence as soon as practicable—and before the court reads its charge to the jury.").

But these arguments ignore the expert's testimony that he used his working file—the existence of which was not revealed until trial and which contained 50 photographs and many pages of notes, documents, and drawings that had not been produced—in formulating his opinion and his report. The rule requires disclosure of all documents "provided to, reviewed by, or prepared by or for the expert," not just those the expert refers to in his report. Tex. R. Civ. P. 194.2(f)(4)(A). Further, RDJ never explained or showed the trial court either that good cause existed for its production failure or that the Dankels and Miller Construction were not unfairly surprised or unfairly prejudiced. *See* Tex. R. Civ. P. 193.6(a)(2). As for RDJ's argument that the trial court should have continued the trial, the record does not show that RDJ ever asked for a continuance.

We conclude that the trial court was within its discretion to exclude RDJ's expert based solely on RDJ's failure to produce or make available the expert's working file, and so we need not address RDJ's remaining arguments regarding production issues surrounding the six documents listed in its expert's report.[11]

We overrule RDJ's fifth issue.

[11]RDJ also generally discusses the *TransAmerican* two-part test for determining whether discovery sanctions were "just." *See TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding); *see also* Tex. R. Civ. P. 215.2(b). Because RDJ did not raise the applicability of the *TransAmerican* test in the trial court, we do not address it. *See* Tex. R. App. P. 33.1(a).

Conclusion

Having overruled each of RDJ's five issues, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

DELIVERED: June 15, 2017