NO. 12-25-00030-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

STEVEN ANDERSON, APPELLANT	***§***	***APPEAL FROM THE 218TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
ALISHA BENTZ SEIDERS ANDERSON, APPELLEE	***§***	***WILSON COUNTY, TEXAS***

MEMORANDUM OPINION

Steven Anderson challenges the trial court's final decree of divorce. In three issues, he asserts that the trial court erroneously granted Alisha Bentz Seiders Anderson's motion for trial amendment, as well as her motion to modify, correct, and reform the judgment. We affirm.[1]

BACKGROUND

Steven and Alisha were married in 2019. Prior to their marriage, in November of 2017, they purchased a property located in Floresville, Texas (the Property). Each party's name appears on the warranty deed as "Grantee." On August 24, 2023, Alisha filed for divorce. Trial commenced on June 28, 2024, and continued on July 26.

At trial, Alisha testified that the money for the purchase of the Property derived from a USAA checking account belonging to both parties. She agreed that at the time of the purchase, the joint account contained the proceeds from Steven's sale of a property located in Granite

[1] This case was transferred to this Court from the Fourth Court of Appeals in San Antonio, Texas, pursuant to a docket equalization order. *See* TEX. GOV'T CODE ANN. § 73.001(a) (West 2023).

Shoals, Texas. However, she disagreed that those proceeds were the only source of funds used to purchase the Property, claiming the account also contained "money that had been contributed into that account prior by both of us." She did not testify as to the amount of her own contributions to the account.

Conversely, Steven testified that all funds used to purchase the Property were proceeds from his sale of the Granite Shoals property. He stated that he was medically incapacitated in 2017, and during that time, Alisha set up the joint account and transferred $210,000.00 from a USAA account solely in Steven's name to the joint account. He did not know why Alisha opened the joint account but noted that it was closed very shortly after the parties purchased the Property. Steven averred that he had no intent to gift the money to Alisha at the time of the transfer. He claimed he added Alisha to the deed for the Property only so she could "take care of everything" if "something bad" happened to him, which he believed was likely because of his medical issues.

At the conclusion of trial, the following dialogue occurred:

> Steven's Counsel: …Your Honor, I would just say I think the Court should award, you know, confirm the house to Mr. Anderson. The Court doesn't believe that he didn't transfer on that basis, I understand splitting now, but it is separate property. At best if these parties can agree, and that's where the pressure point will be to mediate and settle it, if this is where it's going to come to an end is somebody else needs to sell the house because they'll never agree…. That's what we've asked the Court to do[.]
>
> …
>
> Court: All right. And let me ask both of the attorneys, if I do find it—the house is separate property that they own together, do I have the—have you all tried this as a partition suit by consent? Or do I have the ability to order a divider or just the ability to say you all own it together[?]
>
> Alisha's Counsel: Yes. I think we absolutely tried it by consent. I thought about that thoroughly and so I think you have authority to order it sold and to award it, absolutely.
>
> Steven's Counsel: …We didn't try that by consent because we've taken the position it's his separate property tracked back to him. We just needed the records to show that…. [T]he pressure is they either find some way to do this or the Court—if they agree to sell, then the Court can let some third party do it.
>
> …
>
> Court: Okay. But do I have the power to order that or not?
>
> Alisha's Counsel: Yes.
>
> Steven's Counsel: Is it your separate property or not?

> Steven: It's my separate property.
>
> Steven's Counsel: That's the question, Judge. I don't think you do.
>
> …
>
> Steven's Counsel: That's a good question, Your Honor. We're happy to brief it for you.
>
> Alisha's Counsel: There's no need to brief when it's a straightforward issue. You've spent two days with us talking about the character and nature of this house. If that's not trying it by consent, then there is no trying it by consent. So at this point—I mean, we can simply do a trial amendment if that cleans up the record. But to act like we have not tried this case to determine what's going to happen to it—the other thing is, they both already agreed it's going to be sold so there's not a dispute about that. It's a matter of determining how the proceeds will be divided.
>
> …
>
> Court: All right. I plan to look at this next Tuesday or Wednesday so people have time to file a trial amendment. I'm still taking it into consideration….
>
> …
>
> Alisha's Counsel: [I]n terms of the partition, I would move for a trial amendment now, which I think you have the authority to grant. But, again, the scope of this, Judge, is only the terms of the sale and the division of proceeds, that's it. We've been trying to get the house sold for a year or so; and so I think you certainly have the authority to do that….
>
> Court: All right. And the response in [sic] the motion for trial amendment?
>
> Steven's Counsel: Your Honor, we did not try this as a partition case. You know, we fought it as a separate property versus her claim for community property. And we think that would put the pressure—at least work together or come to a resolution that it needs to be handled by a third party because otherwise it will be fought over for the next—unless there is pressure on one side, there never has been over there because they've taken the position it's community, until we got it all together and we're able to pull it together, and Mr. Anderson's position has been, you know, that's all I want. I want my house. The rest of it will go.
>
> Court: My recollection is that there have been long involved discussions about how the house was going to be sold in the past, so I will grant the trial amendment. I'll find I have jurisdiction to hear this matter…. I will withhold a ruling on the division and marital property of the estate and a determination of what that estate consists of, and I will pronounce the divorce in open court.

Prior to this exchange, there was no express mention of partition at trial.

On October 25, the trial court issued its final decree of divorce, in which it confirmed that the Property was Steven's sole and separate property. Thereafter, Alisha moved to modify, correct, and reform the judgment to reflect that she and Steven each owned an undivided one-half interest in the Property. She alleged that, given the "plain language of the deed," the court was prohibited from awarding the Property solely to Steven because he failed to assert (1) a verified plea that the real estate deed was executed without consideration or that the

consideration failed in whole or in part, and (2) the affirmative defense of failure of consideration.

On December 19, the trial court issued an order granting Alisha's motion and requiring Steven to transfer to her a portion of the proceeds from the sale of the Property (which occurred following the issuance of the final decree). This appeal followed.

TRIAL AMENDMENT

In his first issue, Steven claims that the trial court erred in granting the trial amendment regarding partition of the Property. Specifically, he asserts that the issue was not tried by consent, and the amendment was therefore not mandatory.

Standard of Review and Applicable Law

Trial amendments are governed by Rule 66 of the Texas Rules of Civil Procedure, which provides in relevant part:

> [I]f during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits.

TEX. R. CIV. P. 66.

A trial amendment is mandatory if it is merely procedural in nature, such as when conforming the pleadings to evidence presented at trial. ***Tanglewood Homes Ass'n, Inc. v. Feldman***, 436 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Conversely, substantive amendments or those that change the nature of the trial are discretionary. ***Id.*** Therefore, appellate courts first review the trial court's ruling to determine whether allowing the amendment was mandatory. ***Dallas City Limits Prop. Co., L.P. v. Austin Jockey Club, Ltd.***, 376 S.W.3d 792, 797 (Tex. App.—Dallas 2012, pet. denied). If the trial amendment was not mandatory, the decision to allow or deny the amendment is within the sound discretion of the trial court and may be reversed only upon the showing of a clear abuse of said discretion. ***Geis v. Colina Del Rio, LP***, 362 S.W.3d 100, 115 (Tex. App.—San Antonio 2011, pet. denied).

Unpleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they had been raised by the pleadings. ***Fontenot v. Fontenot***, 667 S.W.3d 894, 906 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (citing ***Roark v. Stallworth Oil & Gas,***

Inc., 813 S.W.2d 492, 495 (Tex. 1991)); *see* TEX. R. CIV. P. 67. If an unpleaded issue is tried by consent, the granting of a trial amendment to conform the pleadings to the evidence is mandatory. ***Geis***, 362 S.W.3d at 115. "The doctrine of trial by consent only applies when the issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make the appropriate complaint." ***Maswoswe v. Nelson***, 327 S.W.3d 889, 895 (Tex. App.—Beaumont 2010, no pet.); *see* ***Ingram v. Deere***, 288 S.W.3d 886, 893 (Tex. 2009) ("When both parties present evidence on an issue and the issue is developed during trial without objection, any defects in the pleadings are cured at trial, and the defects are waived."). Although the trial court's discretion is to be "exercised liberally in favor of justice," trial by consent is "the exception, not the rule, and should not be inferred in doubtful cases." ***Garcia v. Nunez***, No. 05-17-00631-CV, 2018 WL 6065254, at *9 (Tex. App. Nov. 20, 2018) (mem. op.); *see also* ***Gamboa v. Gamboa***, 383 S.W.3d 263, 271 (Tex. App.—San Antonio 2012, no pet.).

Trial by consent "can cure lack of pleading, but an issue is not tried by consent merely because evidence regarding it is admitted." ***Bos v. Smith***, 556 S.W.3d 293, 306–07 (Tex. 2018). To determine whether an issue was tried by consent, the court must examine the record not for evidence of the issue, but rather for evidence of trial of the issue. ***Id.*** at 307. An issue is not tried by consent if the evidence presented on that issue is also relevant to other issues raised by the pleadings, because the evidence would not be calculated to draw an objection. ***Fontenot***, 667 S.W.3d at 906; ***Garcia***, 2018 WL 6065254 at *9.

Analysis

Steven alleges in his first issue that the issue of partition was not tried by consent, and the trial court therefore erred in granting a trial amendment thereon. The first express mention of partition at trial came from the court, in questioning the parties' attorneys as to whether they "tried this as a partition suit by consent[.]" Steven and Alisha agree that prior to trial, neither party expressly pleaded for the trial court to partition the Property. Instead, Steven maintained that the Property was entirely his separate property, while Alisha contended that the Property was community and part of the marital estate.

Assuming without deciding that the issue of partition was *not* tried by consent (meaning that the trial amendment was not mandatory), from our review of the record, we still cannot conclude that the trial court abused its discretion by granting the amendment. Generally, a trial

court lacks discretion to refuse a trial amendment unless: (1) the opposing party presents evidence of surprise or prejudice, or (2) the proposed amendment asserts a new cause of action or defense and the opposing party objects to it. ***Tanglewood Homes***, 436 S.W.3d at 64. In this case, Steven did not present evidence of surprise or prejudice associated with the amendment before the trial court. *See* ***Dallas City Limits Prop. Co.***, 376 S.W.3d at 798 (citing ***State Bar of Tex. v. Kilpatrick***, 874 S.W.2d 656, 658 (Tex. 1994)) (burden of showing surprise or prejudice rests on party resisting trial amendment). Therefore, we examine whether the trial amendment was prejudicial on its face. *See* ***Bravo v. Bravo***, No. 05-24-00419-CV, 2025 WL 2053579, at *5 (Tex. App.—Dallas July 22, 2025, pet. filed) (mem. op.).

A proposed trial amendment that asserts a new cause of action is not prejudicial to the opposing party as a matter of law. ***Tanglewood Homes***, 436 S.W.3d at 64. An amendment is prejudicial on its face when: (1) it asserts a new substantive matter that reshapes the nature of the trial itself; (2) the opposing party could not have anticipated the new substantive matter given the development of the case up to the time the amendment was requested; and (3) the amendment would detrimentally affect the opposing party's presentation of its case. ***Dallas City Limits Prop. Co.***, 376 S.W.3d at 797; ***Tanglewood Homes***, 436 S.W.3d at 65. Under this test, a discretionary trial amendment should not be rejected simply because it alleges a new cause of action; instead, we must evaluate the three factors listed above in the context of the entire case. ***Kilpatrick***, 874 S.W.2d at 658; ***Stephenson v. Leboeuf***, 16 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Steven does not present any argument or analysis as to these factors before this Court (arguing only that the amendment was erroneous because there was no trial by consent). *See* ***Halmos v. Bombardier Aerospace Corp.***, 314 S.W.3d 606, 623 (Tex. App.—Dallas 2010, no pet.) (on appeal, party complaining of court's ruling on trial amendment bears burden of demonstrating the court erred). However, in examining the first factor, we note that the partition issue shares some common elements with pleaded matters, specifically Steven's claim that the Property was solely his separate property. *See* ***Hampden Corp. v. Remark, Inc.***, 331 S.W.3d 489, 498–99 (Tex. App.—Dallas 2010, pet. denied) (additional cause of action may not be new substantive matter if it has common elements with pleaded matters and evidentiary proof required to support it is the same for an already pleaded cause of action). Because the Property was conveyed to Steven and Alisha together, to have the Property awarded to him alone, Steven

was required to rebut the presumption that he and Alisha owned equal shares. *See* ***Hance, Scarborough, Wright, Ginsberg & Brusilow, L.L.P. v. Kincaid***, 70 S.W.3d 907, 915 n.8 (Tex. App.—Amarillo 2002, pet. denied). And Steven attempted to do so at trial by presenting evidence that Alisha "contributed an unequal amount" toward the Property's acquisition. ***Id.*** Regarding the second factor, "[t]he question is not whether the opposing party actually anticipated the new issue, but whether, based on the record, it could have been anticipated." *See* ***Hampden Corp.***, 331 S.W.3d at 499. At the start of the second day of trial, the parties disputed the admissibility of summaries of bank statements prepared by a lay witness (as part of Steven's effort to prove that he provided all funds used to purchase the Property), during which the trial court asked:

> Court: …Do we need to [trace the funds used to purchase the Property] if it was purchased before the marriage? Or do we just have an argument about whether there was a presumption of gift or was Ms. Anderson to be putting money into the account also?
>
> Alisha's Counsel: Right. Right. So I get your point, which is are we tracing out a separate property claim? We all know it was purchased before the marriage. We've entered the deed. We know the deed doesn't recite percentage, so we all know the undivided one-half interest rule. That's what we're dealing with.

Steven's counsel made no direct response to this statement but thereafter continued his argument about the exhibit at issue. The trial court could reasonably conclude that Steven could have anticipated the partition issue, given the development of the case up to the time Alisha requested the amendment.

Finally, the trial court could reasonably conclude that the partition claim would not detrimentally affect Steven's presentation of his case. In her sworn inventory produced on or about February 8, 2023, Alisha designated the Property as part of the community estate, and she maintained this position throughout the first half of trial (including in her own testimony). At the beginning of the second day of trial, as discussed above, Alisha changed her position to allege that she and Steven (as co-grantees) each owned an undivided one-half share of the Property. However, Steven's claim as to the nature and proper disposition of the Property remained constant; in his own sworn inventory, he designated the Property as entirely part of his separate estate. At trial, the parties agreed that the Property was purchased pre-marriage, and Steven testified to Alisha's lack of financial contribution to the purchase thereof. Steven also presented tracing evidence regarding the movement of the purchase money through both his own personal

accounts and accounts shared with Alisha. If believed by the trier of fact, this evidence could rebut the presumption that he and Alisha owned the Property in equal shares. *See* ***Kincaid***, 70 S.W.3d at 915 n.8. Despite the claim of Steven's trial counsel that he "did not try this as a partition case," nothing in the record suggests that Steven would have presented additional or different evidence (or that the amendment would "reshape the nature of the trial") if Alisha changed her position earlier. *See* ***Dallas City Limits Prop. Co.***, 376 S.W.3d at 797.

We conclude that Steven cannot establish that the trial court clearly abused its discretion in granting Alisha's requested trial amendment regarding partition of the Property. Consequently, we overrule his first issue.[2]

MOTION TO MODIFY, CORRECT, AND REFORM JUDGMENT

In his second and third issues, Steven asserts that the trial court erroneously granted Alisha's motion to modify the judgment to confirm that the parties each own an undivided one-half interest in the Property.

Steven alleges that, because Alisha did not object at trial that he failed to file either (1) an amended verified pleading alleging failure of consideration or (2) an amended pleading asserting the affirmative defense of lack of consideration, these issues were tried by consent. Additionally, Steven contends that Alisha did not timely except to his failure to file an amended verified pleading and therefore waived this complaint. Ostensibly, Steven claims that these occurrences barred the trial court from modifying the judgment.

Standard of Review and Applicable Law

A trial court's ruling on a motion to modify the judgment is reviewed for an abuse of discretion. ***Kontoh v. Safo***, No. 05-17-00448-CV, 2018 WL 3215881, at *2 (Tex. App.—Dallas July 2, 2018, no pet.) (mem. op.). A trial court abuses its discretion when it acts without reference to any guiding rules or principles, or when it acts arbitrarily or unreasonably. ***In re J.J.R.S.***, 627 S.W.3d 211, 218 (Tex. 2021).

There exists a clear distinction between lack of consideration and failure of consideration. A *lack* of consideration occurs when a contract, at its inception, does not impose obligations on

[2] Steven does not focus his appellate argument on the evidence of each party's respective monetary contribution to the purchase of the Property. However, even if he did, the evidence does not conclusively show that Alisha made no financial contribution, so the trial court did not err by applying the 50/50 ownership presumption.

both parties. *See* ***Burges v. Mosley***, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.). Lack of consideration for a contract is an affirmative defense to its enforcement. ***McLernon v. Dynegy, Inc.***, 347 S.W.3d 315, 335 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In contrast, a *failure* of consideration constitutes a defense to an action for breach of contract and occurs when, because of some supervening cause arising after the contract is formed, a party does not receive the promised performance thereunder. ***Burges***, 304 S.W.3d at 628. A total failure of consideration is grounds for cancellation or rescission of a contract, while a partial failure of consideration may entitle the injured party to damages. ***Fortitude Energy, LLC v. Sooner Pipe LLC***, 564 S.W.3d 167, 181 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

The Texas Rules of Civil Procedure require that a pleading shall be verified by affidavit if it alleges "[t]hat a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part." TEX. R. CIV. P. 93. Texas Rule of Civil Procedure 94 requires that affirmative defenses be pleaded and provides several examples of matters, including failure of consideration, which constitute an affirmative defense. ***Id.*** at 94.

Analysis

We first note that Steven fails to provide any citations to the record for both his second and third issues. Appellate Rule 38.1 mandates that an appellant's brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and the record. TEX. R. APP. P. 38.1(i). Even though we must construe briefing requirements reasonably and liberally, an appellant still must put forth specific argument and analysis showing that the record and law support its contentions. ***San Saba Energy, L.P. v. Crawford***, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). And the failure to brief, or to adequately brief, an issue by an appellant effects a waiver of that issue on appeal. ***RSL Funding, LLC v. Newsome***, 569 S.W.3d 116, 126 (Tex. 2018).

Even construing Steven's brief liberally, we find it difficult to discern why the defenses of lack of consideration and failure of consideration would be applicable to this matter. Steven did not assert, either in his pleadings or at trial, that the warranty deed for the Property is unenforceable because it did not impose obligations on both the grantors and grantees at its inception. ***Burges***, 304 S.W.3d at 628. Nor did he claim any entitlement to cancellation, rescission, or damages from the grantors on the basis that he and Alisha, as the grantees, did not

receive the performance from the grantors promised in the warranty deed. ***Id.*** Instead, Steven argued before the trial court that he was the Property's sole owner despite Alisha's presence on the deed as a co-grantee, because Steven furnished all the funds for the purchase thereof. As aforementioned, where a deed names more than one grantee and "the interest of each grantee is not stated, a rebuttable presumption arises that each has an equal undivided interest in the property." ***Estate Land Co. v. Wiese***, No. 14-13-00524-CV, 2015 WL 1061553, at *6 (Tex. App—Houston [14th Dist.] Mar. 10, 2015, pet. denied) (mem. op.). However, this presumption can be rebutted by showing that the grantees did not *furnish* consideration in equal shares. ***In re Marriage of Murray***, 15 S.W.3d 202, 205 (Tex. App.—Texarkana 2000, no pet.); ***Zephyr v. Zephyr***, 679 S.W.2d 553, 556 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). It appears that the parties conflated the showing needed to rebut the presumption that Steven and Alisha each own an undivided one-half share of the Property with the consideration-related defenses discussed above. Because it does not appear from Steven's pleadings or the record as a whole that Steven attempted to raise either lack of consideration or failure of consideration in relation to the warranty deed (and these defenses otherwise have no relevance to this matter), the parties cannot have tried either issue by consent, because it is apparent from the record that those issues were not present in the case at all. *See* ***Maswoswe***, 327 S.W.3d at 895.

Pertaining to Steven's third issue, he is correct that a party may waive its complaint regarding a defect in an opposing party's pleadings, including the absence of a verified denial, by failing to object thereto. TEX. R. CIV. P. 90; *see* ***Fee Prop. Co., LLC v. Venegas***, No. 05-24-00713-CV, 2025 WL 1909394, at *1 (Tex. App.—Dallas July 9, 2025, pet. filed) (mem. op.) (citing ***In re Clear Diamond, Inc.***, No. 13-21-00068-CV, 2021 WL 3889424, at *5 n.5 (Tex. App.—Corpus Christi-Edinburg, Aug. 31, 2021, orig. proceeding) (mem. op.)). However, having concluded that Steven alleged neither lack of consideration nor failure of consideration, those pleading requirements do not apply here. Alisha's failure to object to the absence of a verified pleading on those issues is therefore of no significance.

In summary, the arguments Steven presents on appeal do not support the conclusion that the trial court abused its discretion in granting Alisha's motion to modify. We attempted to liberally construe Steven's brief to give effect to his arguments, but we are prohibited from researching the law and fashioning a coherent legal argument for an appellant who fails to do so. ***Zhang v. Capital Plastic & Bags, Inc.***, 587 S.W.3d 82, 90 (Tex. App.—Houston [14th Dist.]

2019, pet. denied); *see also* ***Roberts for Roberts v. City of Texas City***, No. 01-21-00064-CV, 2021 WL 5702464, at *2 (Tex. App.—Houston [1st Dist.] Dec. 2, 2021, no pet.) (mem. op.) (appellate court may not abandon its role as judge and assume the role of advocate for a party). We overrule Steven's second and third issues.

DISPOSITION

Having overruled each of Steven's three issues, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion October 31, 2025.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J., not sitting.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

OCTOBER 31, 2025

NO. 12-25-00030-CV

STEPHEN ANDERSON,
Appellant
V.
ALISHA BENTZ SEIDERS ANDERSON,
Appellee

Appeal from the 218th District Court
of Wilson County, Texas (Tr.Ct.No. CVW2300470)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED, and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, Steven Anderson, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J., not sitting.