

TEXAS CIVIL PROCEDURE UPDATE

Professor Elaine Grafton Carlson

Stanley J. Krist Distinguished Professor of Law
South Texas College of Law
1303 San Jacinto, Suite 755
Houston, Texas 77002
(713) 646-1870
ecarlson@stcl.edu

2021 Annual Page Keeton Civil Litigation Conference

University of Texas CLE

April 2021

*These materials are largely excerpted from McDonald & Carlson,
Texas Civil Practice Treatise
(2020 Supplement), West Publishing. Westlaw Database: "txcp"

Professor Elaine A. Carlson
Stanley J. Krist Distinguished Professor of Law
South Texas College of Law, Houston, Texas
ecarlson@stcl.edu

Biographical Information

Professional Appointments:

Member, American Law Institute. Appointee: Supreme Court of Texas Advisory Committee on Rules of Practice and Procedure 1986-present; Texas Supreme Court Task Force on Ancillary Proceedings, Chair 2009-2012; Texas Supreme Court Task Force: Code of Judicial Conduct Member 2003-2004; State Bar of Texas Appellate Council 2005-2008, Texas Supreme Court Task Force: Judicial Speech Advisory Committee 2002; Texas Supreme Court Task Force on Civil Reform 2002-2003; Past member of Appellate Practice Specialist Exam Commission; Civil Trial Law Specialist Exam Commission; Personal Injury Trial Law Specialist Exam Commission.

Law Related Publications, Academic Appointments and Honors, Education and Bar Admissions:

Stanley J. Krist Distinguished Professor of Law, Professor at South Texas College of Law. Faculty 1982-Present, Faculty, Houston Bench Bar Conference on Appellate Practice 2000, 1998; Faculty, Texas Judicial Conference 1993-1994, Faculty, Texas Briefing Attorney Seminar 1998.

Author, McDonald and Carlson, Texas Civil Practice, West Publishing (six volume treatise): Co-author with Professors William Dorsaneo, David Crump, and Elizabeth Thornburg: Texas Pretrial and Trial & Appellate Practice texts, Lexis Publishing Co.; Author of numerous articles focusing upon civil procedure and related topics, including publications with Baylor Law Review, Texas Tech Law Review, St. Mary's Law Review, South Texas Law Review; Texas Bar Journal, and others. State Bar of Texas, Litigation Section, Contributing Author on Civil Procedure Update for Section Quarterly Publication "The Advocate" 1987-1999.

Honors: Texas Extraordinary Women in Texas Law, Texas Lawyer Award 2008; Distinguished Alumna, South Texas College of Law 2008; State Bar of Texas Bar Foundation Outstanding Law Review Article of the Year, 1995; Vinson & Elkins Faculty Excellence Award; South Texas College of Law Outstanding Professor Award.

Visiting Professor and CLE Lecturer, University of Texas School of Law; Continuing Legal Education Author and Frequent Lecturer, State Bar of Texas, Southern Methodist University School of Law, South Texas College of Law, Houston Bar Association, Travis County Bar Association; Internal Seminars: First and Fourteenth Court of Appeals, Texas Association of Defense Counsel, Texas College of Trial Advocacy, Texas Judicial Conference. Advisor to Texas Legislature, Joint Special Committee on Security for Judgment, Texas Legislation 1987, as well as Commission on Federal Courts 1990.

Briefing Attorney (First Court of Appeals), Honorable James P. Wallace 1978-1980.

Admitted to Bar 1979. Admitted to practice before all Texas Courts, the U.S. Supreme Court; U.S. Court of Appeals, Fifth and Eleventh Circuits; U.S. District Court, Southern District of Texas.

Preparatory education, Southern Illinois University (B.A. 1974); McMaster University (Master of Arts 1976); Legal education, South Texas College of Law (J.D. Summa Cum Laude 1979).

TEXAS CIVIL PROCEDURE UPDATE	1
Arbitration	1
Electronic Signatures.....	15
Attorneys	16
Courts	23
Subject Matter Jurisdiction.....	25
Personal Jurisdiction.....	40
Dominant Jurisdiction	55
Forum Non Conveniens.....	57
Parties	63
Venue.....	64
Declaratory Judgments.....	68
Class Actions.....	70
Multidistrict Litigation	71
Pleadings.....	73
In General	73
Pleading Amount In Controversy Range.....	74
Affirmative Defenses.....	74
Verified Denials.....	75
Amended Pleadings	77
Waiver of Pleading Defects.....	78
Parties	79
Compulsory Counterclaims.....	84
Severance.....	85
Immunity	87
In General	87
Immunity: Texas Tort Claims Act.....	94
Local Government Immunity	97
Default Judgments.....	100
Attacks on Defective Service	105
Early Dismissal On The Pleadings Under Rule 91a	106
Dismissal Anti-SLAPP.....	116
Dismissal: Administrative Appeal For Failure To Timely Serve Petition	127
Discovery.....	128
Scope of Discovery	128

Electronic Discovery	134
Depositions	138
Rule 202 Depositions	138
Apex Depositions	143
Request For Admissions.....	145
Court Order Physical Examination.....	146
Discovery of Expert and Expert Reports.....	147
Discovery Privileges.....	148
Work Product Privilege.....	148
Attorney Client Privilege	150
Medical Records.....	151
Fifth Amendment Privilege.....	153
Litigation Immunity	153
Trade Secrets	154
Court Ordered Shared Discovery	156
Discovery From Jurors	157
Post Judgment Discovery	157
Sealing Court Records.....	157
Res Judicata & Collateral Estoppel.....	159
Summary Judgments	160
Choice of Law	181
Law of the Case	182
Limitations & Repose.....	184
Daubert-Sufficiency of Expert Opinions.....	196
Injunctive Relief	199
Continuance	201
Expedited Trials.....	202
Right to Jury	203
Jury Selection	204
In General	204
Batson Challenges to Peremptory Jury Strike.....	206
Right To Twelve Person Jury	209
Contractual Waiver of Right to Jury Trial.....	210
Motion for Directed Verdict.....	211
Jury Charge.....	212
Closing Argument to the Jury	221

Jury Misconduct	222
Nonjury Trial	222
Settlement	224
In General	224
Under Offer of Settlement Rule	224
Structured Settlements	227
Dismissal	227
For Want of Prosecution.....	227
Dismissal Due to Forum Selection Clause	231
Dismissal Due to Failure To Comply With Statutory Prerequisites to Bringing Suit.....	233
Contempt, Sanctions & Spoliation	243
Contempt.....	243
Sanctions.....	244
Spoliation.....	250
Non Suit.....	253
Judgments	255
In General	255
Rendition.....	257
Agreed Judgment.....	258
One Satisfaction Rule	259
The Economic Loss Rule.....	261
Reducing Damages Due To Settlement Credit.....	262
Reducing Judgment Due To Proportionate Responsibility	263
Reducing Judgment Due To Statutory Caps	264
Reducing Damages to Those Actually Paid or Incurred	265
Reducing Damages in Rule 169 Expedited Trials.....	265
Reducing Punitive Award Damages That are Excessive	266
Pre-judgment Interest	269
Post Judgment Interest.....	270
Costs	272
Attorney's Fees.....	273
In General	273
Segregation of Attorney Fees.....	288
Attorney Fees-Breach of Express Warranty	289
Appellate Attorney Fees.....	290
Attorney Fees for Legal Assistant's Work.....	290
Guardian Ad Litem Fees.....	291
Remittitur	292
Election of Remedies.....	292

Judgment Finality	293
Funds In The Registry of the Court.....	295
Motion For New Trial	295
Other Post-Judgment Motions.....	301
Supersedeas	302
Enforcement of Domestic Judgment	307
In General	307
Turnover Orders.....	309
Fraudulent Transfer	312
Enforcement of Foreign Judgments	313
Bill of Review.....	315
Restricted Appeal	317
Appellate Court Jurisdiction.....	318
Certified Question	331
Permissive Interlocutory Appeals	332
Appellate Record.....	335
Challenging the Sufficiency of the Evidence.....	337
Preservation of Error	348
Adequacy of Appellate Briefs	355
Summary Judgment Appeals.....	361
Juvenile Appeals.....	368
Raising Appellate Complaints.....	369
Alternate Grounds to Affirm Judgment.....	369
Cross Points To Support Judgment JNOV	370
Complaint Raised In Body of Brief But Not In Points.....	370
Appellate Court Obligation to Rule on Appellate Complaints	370
Appellate Authority.....	371
Harmless Error.....	372
Remand vs Rendition	373
Frivolous Appeals.....	375
Mandamus	378
In General	378
Mandamus Review of Trial Court’s Grant of Motion for New Trial...	393
Mandamus Review of Trial Court Denial of a Motion for New Trial .	407
Writ of Prohibition	407
Habeas Corpus.....	409

Texas Supreme Court Original Jurisdiction.....	410
APPENDIX.....	411

TEXAS CIVIL PROCEDURE UPDATE

Arbitration

Bonsmara Natural Beef Co., LLC v. Hart of Texas Cattle Feeders, LLC, 603 S.W.3d 385, 393 (Tex. 2020) (The mere availability of a discretionary interlocutory appeal of a ruling denying a motion to compel arbitration does not preclude review of an order as part of a final judgment in the case.)

Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407,1414-15 (2019) (An agreement to arbitrate disputes arising out a contract does not infer an agreement under the Federal Arbitration Act to arbitrate those disputes in a class action, absent an affirmative contractual basis to do so. Nor will an ambiguous arbitration agreement provide the necessary contractual basis for compelling class certification.).

Robinson v. Home Owners Mgmt. Enters., Inc., 590 S.W.3d 518, 528-35 (Tex. 2019) (Overruling its decision in *In re Wood*, 140 S.W.3d 367 (Tex. 2004) (per curium), the Texas Supreme Court holds that determining whether the parties have agreed to arbitrate class action disputes is a threshold question of arbitrability presumptively for the courts to decide, rather than a procedural question for the arbitrator. The Court further held that while parties are free to alter these presumptions by agreement, the limited warranty and addendum in this case were silent as to arbitrating arbitrability issues and, therefore, the question whether the parties agreed to arbitrate class claims was a question for the court to answer. Because the arbitration provisions did not reference class claims at all and Respondents' objected to the arbitration of the class claims, the parties did not agree to class arbitration. Further, there was no clear intent by Respondents to arbitrate class claims. Accordingly, the lower courts correctly determined that Respondent was not bound to arbitrate Petitioners' putative class claims, and the court of appeals' judgment was affirmed.).

RSL Funding, LLC v. Newsome, 569 S.W.3d 116, 122-23 (Tex. 2018) (“While the [Structured Settlements Protection Act] requires a court to approve a settlement-payment transfer, it is silent as to who should decide disputes that arise after such approval, including disputes that require application of the court order itself. . . Here, the courts below have not questioned the validity of parties' arbitration clause. We thus have no choice but to send this dispute to arbitration for the arbitrator to at least decide arbitrability.”Because the parties agreed to have the arbitrator decide issues of arbitrability, the lower court erred in denying the motion to compel arbitration.).

San Antonio River Auth. v. Austin Bridge & Road, L.P., 601 S.W.3d 616, 621-31 (Tex. 2020) (The Texas Supreme Court held that Local Government Code Chapter 271 provides the authority for local governments to agree to arbitrate claims brought under the chapter. Thus, even though the Construction Industry Arbitration Rules permit an arbitrator to decide the validity and scope of an arbitration agreement, the arbitrator has the “power to rule on his or her own jurisdiction.” However, whether there is sovereign immunity implicates subject matter jurisdiction and it is for the court to decide because it is the non-delegable role of the judiciary to determine whether governmental immunity exists, whether the immunity has been waived, and to what extent. A court lacks jurisdiction to compel or stay arbitration, or to enforce a later arbitration award, if a governmental entity is immune from any suit or liability. The parties cannot contractually agree to define a court’s subject matter jurisdiction.).

Jefferson County v. Jefferson County Constables Assoc., 546 S.W.3d 661, 674 (Tex. 2018) (Common-law grounds for vacating an arbitration award are exceedingly narrow and do not include an arbitrator's mere error in applying the law in ruling on a matter within the scope of the arbitration agreement.).

Jody James Farms, JV v. Altman Group, Inc., 547 S.W.3d 624, 633 (Tex. 2018) (When relying on a contract to compel arbitration, the moving party must first establish the existence of a valid and enforceable arbitration agreement. Second, the claims at issue must fall within the arbitration agreement's scope. Whether a non-signatory may enforce an arbitration agreement's terms is a question within the first element. The Supreme Court determined that a valid arbitration agreement exists for disagreements between Insured and Agency, but the insurance policy can not be reasonably read to encompass disagreements between the signatories and other parties.).

Tex. Windstorm Ins. Ass'n v. Jones, 512 S.W.3d 434, 441, 444 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (The standard of review of a trial court's decision to confirm or vacate an arbitration award is de novo. The arbitration agreement in this case provided the arbitrator with the authority to resolve "all disputes concerning the proper interpretation and application of this Agreement." Appellees successfully moved for summary judgment on the ground the arbitrator exceeded its authority by deciding the issue incorrectly, not that the arbitrator lacked the authority to interpret the agreement. The appellate court reverses, explaining that in determining whether the arbitrator exceeded its authority, courts need not decide whether the arbitrator made a correct decision under the law and facts of the case. The court’s review focuses on the integrity of the process, not the propriety of the

Also available as part of the eCourse

[2021 Page Keeton Civil Litigation eConference](#)

First appeared as part of the conference materials for the
44th Annual Page Keeton Civil Litigation Conference session
"Texas Civil Procedure Update"