

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

Courtney Taylor Carlson
Jackson Walker L.L.P.
1401 McKinney
Houston, Texas 77010
(713) 752-4200
ccarlson@jw.com

27th Annual Conference on State & Federal Appeals
University of Texas CLE
June 1-2, 2017

*These materials are largely excerpted from McDonald & Carlson,
Texas Civil Practice
(2016 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).

Courtney Taylor Carlson
Jackson Walker L.L.P.
1401 McKinney St., Suite 1900
Houston, Texas 77010
(713) 752-4200
ccarlson@jw.com
<https://www.jw.com/courtney-carlson/>

Courtney Taylor Carlson was born in Houston, Texas, in 1983. She received her Bachelor of Business Administration from the University of Texas at Austin in 2005 and her Doctor of Jurisprudence from South Texas College of Law in 2008. She currently is a partner in the litigation section of Jackson Walker in the Houston office. Ms. Carlson's practice focuses on civil litigation and appellate issues. She has served on the adjunct faculty of South Texas College of Law teaching Texas Procedure as well as Appellate Advocacy.

Ms. Carlson was a Briefing Attorney to Justice David M. Medina of the Supreme Court of Texas from 2008-2009. While at South Texas College of Law, Ms. Carlson was a Staff Member on the Texas Journal of Business Law and a Member of Phi Delta Phi Legal International Fraternity. She received an American Jurisprudence Award in 2005 for obtaining the highest grade in her Legal Research and Writing course.

Ms. Carlson was a member of three varsity appellate advocacy teams, including the William B. Spong, Jr. National Moot Court Competition where her team won first place and received the Best Brief award, the Burton D. Wechsler First Amendment Moot Court Competition where her team received the Best Brief award and she was named the Third Best Speaker, and the American Bar Association National Appellate Advocacy Competition where her team won at the regional level. As a result of Ms. Carlson's active involvement in South Texas College of Law's Advocacy Program, she was honored with the Dean's Student Advocacy Service Award for Most Outstanding Female Varsity Moot Court Advocate.

Ms. Carlson is a member of the American Bar Association, the State Bar of Texas (Litigation and Appellate sections), the Houston Bar Association (Litigation and Appellate sections), and the Houston Young Lawyers Association. Ms. Carlson is also a Texas Bar Foundation Fellow and serves on the Nominating Committee. She is also a Founding Member of both the South Texas College of Law Young Alumni Council and the Central Houston, Inc. Millennial Enterprise, or CHIME, for short. She is a current member of the State Bar of Texas Standing Committee on Women in the Profession. Ms. Carlson has co-authored several CLE papers for the State Bar of Texas as well as the University of Texas School of Law. Ms. Carlson was awarded the 2012 Young Alumni of the Year award from South Texas College of Law and currently serves on the Alumni Board of Directors.

TEXAS CIVIL PROCEDURE UPDATE	1
Arbitration	1
Attorneys	10
Courts	15
Subject Matter Jurisdiction.....	16
Personal Jurisdiction.....	25
Dominant Jurisdiction	32
Forum Non Conveniens.....	34
Venue.....	36
Declaratory Judgments	38
Class Actions	39
Multidistrict Litigation	40
Notice of Constitutional Challenges to Texas Attorney General.....	41
Pleadings.....	42
Pleading Amount In Controversy Range.....	42
Affirmative Defenses.....	42
Verified Denials	43
Amended Pleadings	44
Waiver of Pleading Defects.....	45
Parties	45
Compulsory Counterclaims	49
Severance.....	49
Immunity	50
In General	50
Immunity: Texas Tort Claims Act.....	55
Local Government Immunity	57
Default Judgments.....	59
Attacks on Defective Service	63
Early Dismissal On The Pleadings Under New Rule 91a.....	64
Dismissal Anti-SLAPP.....	72
Discovery.....	74
Scope of Discovery.....	74
Electronic Discovery	76

Depositions	78
Request For Admissions	82
The Duty to Supplement and Amend Discovery Responses.....	85
Discovery of Expert and Expert Reports	85
Discovery Privileges.....	86
Attorney Client Privilege.....	86
Medical Records	86
Fifth Amendment Privilege	87
Litigation Immunity.....	88
Trade Secrets	886
Court Ordered Shared Discovery	91
Discovery From Jurors	91
Post Judgment Discovery	92
Sealing Court Records.....	92
Res Judicata	93
Summary Judgments	94
Choice of Law	103
Law of the Case.....	103
Limitations & Repose.....	104
Daubert-Sufficiency of Expert Opinions.....	112
Injunctive Relief	114
Right to Jury	116
Jury Selection	116
In General	116
Batson Challenges to Peremptory Jury Strike.....	118
Right To Twelve Person Jury	121
Contractual Waiver of Right to Jury Trial.....	122
Jury Charge.....	122
Closing Argument to the Jury	128
Jury Misconduct	129
Nonjury Trial	129
Settlement	130
In General	130
Under Offer of Settlement Rule	130
Structured Settlements	132

Dismissal	133
For Want of Prosecution.....	133
Dismissal Due to Forum Selection Clause	135
Dismissal Due to Failure To Comply With Statutory Prerequisites to Bringing Suit.....	137
Contempt, Sanctions & Spoliation	139
Contempt.....	139
Sanctions.....	140
Spoliation.....	143
Non Suit.....	145
Judgments	146
In General	146
Rendition.....	148
Agreed Judgment.....	149
One Satisfaction Rule	149
The Economic Loss Rule.....	150
Reducing Damages Due To Settlement Credit.....	151
Reducing Judgment Due To Proportionate Responsibility	151
Reducing Judgment Due To Statutory Caps	152
Reducing Damages to Those Actually Paid or Incurred	152
Reducing Damages in Rule 169 Expedited Trials	153
Reducing Punitive Award Damages That are Excessive	153
Pre-judgment Interest	155
Post Judgment Interest.....	155
Costs	157
Attorney's Fees.....	158
In General.....	158
Segregation of Attorney Fees	168
Attorney's Fees-Breach of Express Warranty.....	168
Appellate Attorney's Fees	169
Attorney Fees for Legal Assistant's Work.....	169
Guardian Ad Litem Fees.....	170
Remittitur.....	170
Election of Remedies.....	171
Judgment Finality	171
Funds In The Registry of the Court.....	172
Motion For New Trial	172
Other Post-Judgment Motions.....	176
Supersedeas	176

Enforcement of Domestic Judgment	180
In General	180
Turnover Orders.....	181
Fraudulent Transfer	182
Enforcement of Foreign Judgments	183
Bill of Review.....	184
Restricted Appeal	186
Appellate Court Jurisdiction.....	186
Certified Question	194
Permissive Interlocutory Appeals	196
Appellate Record	198
Challenging the Sufficiency of the Evidence	199
Preservation of Error	203
Summary Judgment Appeals.....	211
Raising Appellate Complaints.....	214
Alternate Grounds to Affirm Judgment.....	214
Cross Points To Support Judgment JNOV	215
Complaint Raised In Body of Brief But Not In Points.....	215
Appellate Court Obligation to Rule on Appellate Complaints	215
Challenging The Sufficiency of the Evidence	217
Remand vs Rendition	219
Frivolous Appeals.....	220
Mandamus	221
In General	221
Mandamus Review of Trial Court’s Grant of Motion for New Trial...	228
Mandamus Review of Trial Court Denial of a Motion for New Trial .	237
Writ of Prohibition	238
Habeas Corpus.....	239
2016 Rule Amendments	240
Indigent Litigants.....	240
Evidence Rules 509 and 510	241
Three Judge Trial Courts	241

TEXAS CIVIL PROCEDURE UPDATE

Arbitration

Hoskins v. Hoskins, 497 S.W.3d 490, 496 (Tex. 2016) (The Texas Supreme Court addressed, as a matter of first impression, whether the Texas General Arbitration Act (hereafter “TAA”) permits vacatur of an arbitration award on common-law grounds not enumerated in the statute. Resolving the split in the lower courts of appeals, the Court concludes that section 171.088 of the Texas Civil Practice and Remedies Code provides the *exclusive* grounds for vacatur of an arbitration award. Accordingly, manifest disregard and all other common-law vacatur doctrines are not viable grounds for vacating an arbitration award under the TAA. The Court notes:

In sum, the TAA mandates that, *unless* a statutory vacatur ground is offered, the court *shall* confirm the award. TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (West 2011). Thus, a party may avoid confirmation only by demonstrating a ground expressly listed in section 171.088. Leonard complains that “the TAA contains gaps that need [common-law] supplementation” in order to foreclose arbitration awards that are “unquestionably” improper. But we may not rewrite or supplement a statute to overcome its perceived deficiencies. The parties signed an agreement to arbitrate under the TAA, and that agreement contained no limitations on the arbitrator’s authority beyond those enumerated in the statute. Because manifest disregard is not an enumerated vacatur ground under section 171.088, the court of appeals correctly declined to consider it in affirming the trial court’s confirmation order.

The concurrence highlights the advantages in establishing the exclusivity of the TAA’s vacatur grounds. Not only does the Court’s decision provide lower courts with clear instruction, it also eradicates the ambiguity surrounding vacatur grounds that is still present in the Federal Arbitration Act. (at *6)

The American Arbitration Association adopted rules allowing parties to agree to submit commercial arbitration decisions to appellate review before an appellate arbitral panel. www.adr.org/ If the parties have not appointed an appeal tribunal nor not provided for any other method of appointment, the appeal tribunal will be appointed by the AAA. A notice of appeal must be filed with the AAA within thirty days of the arbitration agreement. The rules call for the filing of briefs and permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

See also: <http://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf>.

Good Times Stores, Inc. v. Macias, 355 S.W.3d 240, 244 (Tex. App.--El Paso 2011, pet. denied) (The grounds to vacate an arbitration award under the Federal Arbitration Act are exclusive under the U.S. Supreme Court decision of *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404, 170 L.Ed.2d 254 (2008) and forecloses any common law grounds for vacatur. The FAA applies to maritime transactions and actions involving interstate commerce.).

Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97 (Tex. 2011) (The Texas Arbitration Act presents no impediment to an agreement that limits the arbitrator's authority and allows for judicial review of an arbitration award for reversible error. When an arbitration agreement is covered by both state and federal law, state law is preempted to the extent that it actually conflicts with federal law. While acknowledging judicial review of an arbitration award is not allowed under the Federal Arbitration Act, Texas law does not conflict with that law).

Forest Oil Corp. v. El Rucio Land, 446 S.W. 3d 58, 73-74, 81-87 (Tex. App.—Houston [1st Dist.] 2014, pet. abated) (The judicially created primary jurisdiction doctrine operates to allocate power between courts and agencies when both have authority to make initial determinations in a dispute. The Railroad Commission does not have primary jurisdiction over a landowner's non-regulatory based claims for injuries caused to the landowner's property by environmental contamination incident to oil and gas production. Simply because the Railroad Commission might have jurisdiction to determine some facts related to a controversy does not oust a court or the arbitrators of jurisdiction to make the underlying factual determinations.

The parties' arbitration agreement provided: "The arbitrators will have the authority to award punitive damages where allowed by Texas substantive law". This does not support the argument the parties agreed to expanded judicial review of the sufficiency of the evidence to support the arbitrator's award of exemplary damages. The supreme court's decision in *Nafta Traders* is distinguished:

There, the supreme court determined that parties, by contract, may agree to allow for judicial review of an arbitration award for reversible error. *See Nafta Traders*, 339 S.W.3d at 101. In that case, the arbitration agreement stated, "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." *Id.* at 88. The supreme court concluded this language meant that the arbitrator

Also available as part of the eCourse

[2017 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
27th Annual Conference on State and Federal Appeals session

"Texas Civil Procedure Update: A Look at Recent Decisions and Legislative Mandates"