COORDINATING A CONUNDRUM: TEXAS COURTS OF APPEALS' STRUGGLE WITH DECIDING WHICH PRECEDENT TO APPLY WHEN CASES ARE TRANSFERRED TO THEM UNDER TEXAS SUPREME COURT AUTHORITY

I. Introduction

The question of whether the courts of appeals should decide cases transferred to them under the transfer power granted to the Supreme Court by Tex. Gov't Code § 73.001 by applying their own precedent or that of the transferring court admits of no clear answer. Certainly no one can quarrel with the principle that state laws should apply uniformly to parties in different territorial districts. Unfortunately, under current Texas practice, conflict is precisely the result of having a system of coordinate courts of appeals that enunciate interpretations of state laws for their own territorial jurisdictions absent a requirement of mandatory acceptance of the precedent of sister courts. Tex. Gov't Code § 22.001(a)(2) gives the Supreme Court jurisdiction to hear cases concerning conflicts of law between the courts of appeals, but the courts of appeals themselves have been engaged in the struggle to determine which precedent to apply when cases are transferred to them. The question then becomes, who decides? Should the courts of appeals themselves determine which precedent to apply, thereby opening the door to conflicting outcomes within territorial districts, or should the question be reserved for § 22.001(a)(2) cases heard by the Supreme Court?

Part II is a brief look at the historical development of the Texas courts of appeals and the power granted to the Texas Supreme Court to transfer cases between the courts of appeals, as well as a recent resolution urging the Texas Supreme Court to adopt a rule or rules of appellate procedure to deal with the issue of conflicting precedent in appellate case transfers. Part III examines two recent decisions, one by the Tenth District and one by the Fourth District, which

highlight the confusion and difficulty that the courts of appeals are struggling with in the area of precedential conflicts between the courts. Part IV looks at two states' attempt at resolving the issues related to transfer of appeals between courts of appeals; New York and California have adopted different rules for the transfer of cases on appeal, and each gives insight into how a rule of appellate procedure could be structured in Texas; Part V analyzes the problem by asking whether resolution of conflicts between the courts of appeals is more correctly left to those courts or to the Supreme Court under its jurisdiction to hear conflicts of law cases arising between the courts of appeals.

II. Historical Development of the Texas Courts of Appeals

Prior to 1876, appellate jurisdiction in Texas was exclusively in the Texas Supreme Court. The Texas Constitution of 1876 created the appellate courts, whose jurisdiction included appellate jurisdiction in all criminal cases from the district courts as well as all appeals, civil and criminal, from the county courts.[1] The Texas Supreme Court retained jurisdiction in all civil appeals from the district courts.[2] By 1890 civil appeals from the district courts had increased to the point that the Supreme Court could not keep-up, and in September, 1891, the Texas Constitution was amended to create the courts of civil appeals to hear all civil appeals from district and county courts.[3] Criminal appeal jurisdiction was vested by this same amendment in

[1]Townes, TEXAS PLEADINGS 2d, 101-02 (1913) (hereinafter *Townes*).

[2]*Id.*

[3]*Id.* at 103-04. Townes indicates it was "a physical impossibility for the Supreme Court to keep-up with the vast and ever increasing number of appeals in civil cases." *Id.*

the courts of criminal appeals.[4]

A. JURISDICTION

The Amendment of September 22, 1891 gave the courts of civil appeals jurisdiction "coextensive with the limits of their respective districts, which shall extend to all civil cases of which the district or county courts have original or appellate jurisdiction."[5] In addition, the courts of civil appeals retained "such other jurisdiction, original and appellate, as may be prescribed by law."[6] Pursuant to this grant of power, the 24th legislature passed "An act to give jurisdiction to the several Courts of Civil Appeals over cases transferred from one of such courts to another under the direction of the Supreme Court, and providing for the transfer of such cases."[7] This act made it the duty of the Supreme Court to equalize the dockets of the various courts of civil appeals once a year by directing transfers from courts with heavier docket loads to those with lighter loads.[8] The courts of civil appeals to which cases were transferred were granted jurisdiction of the transferred cases "without regard to the districts in which such cases were originally tried and returnable on appeal."[9]

Justice Charles W. Barrow, in an article from 1978, discussed the procedures as they then

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[4]*Id.*

[5]Bond v. Carter, 96 Tex. 359 (1903) (citing Article 5, section 6 of the Texas Constitution as amended September 22, 1891).

[6]*Id.*

[7]Act of Apr. 19, 1895, 24th Leg., R.S., ch. 53, 1, 1895 Tex. Gen. Laws 79.

[8]*Id.*

[9]*Id.*

stood for inter-court transfers.[10] Repealed in 1985, Texas Revised Civil Statute article 1738 gave the Supreme Court more latitude in transferring cases between courts of civil appeals.[11] The Court now had authority to transfer cases "at any time" when the Supreme Court determined that good cause existed for such transfer.[12] Article 1738 continued to grant the transferee court jurisdiction over the cases regardless of the district in which they were originally tried.[13] However, oral argument was to be heard in the district from which the case was transferred.[14] Finally, opinions issued in transferred cases were to be "delivered, entered and rendered at the place where the court to which the cases are transferred regularly sits."[15] Thus, it appears plausible that the opinion would become precedent for the transferee court, not necessarily the transferor court.

B. OVERLAPPING DISTRICTS

In 1927, the legislature moved Hunt County from the Fifth District in Dallas to the Sixth District in Texarkana.[16] Then, in 1934, the legislature moved it back to the Fifth District,

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[10]Barrow, Charles W., Transfer of Cases Between Courts of Civil Appeals by the Supreme Court of Texas, 41 Tex. B.J. 335 (1978) (hereinafter *Barrow*).

[11]Tex. Rev. Civ. Stat. art. 1738 (1963).

[12]*Id.*

[13]*Barrow*, *supra* note 10 at 335.

[14]*Id.*

[15]*Id.*

[16]Worthen, James T., *The Organizational & Structural Development of Intermediate Appellate Courts in Texas*, 1892-2003, 46 S. Tex. L. Rev. 33, 64 (2004) (hereinafter *Worthen*).

thereby creating the first county within overlapping appellate court jurisdiction.[17] When the Twelfth Court of Appeals was created in Tyler, eight counties fell within its jurisdiction and the jurisdiction of another court of appeals.[18] Because of the overlaps, civil appellants in these eight counties have the opportunity to elect in which court of appeals district the appeal will be heard.[19] Thus, in *Miles v. Ford Motor Company*[20] the Supreme Court held that, absent inequitable conduct estopping a party from asserting prior active jurisdiction or a lack of intent to prosecute, the first party to perfect an appeal controls venue selection.[21] The Court in *Miles* reiterated a concern regarding overlapping appellate district jurisdiction when it said: "[T]he problems created by overlapping districts are manifest. Both the bench and bar in counties served by multiple courts are subjected to uncertainty from conflicting legal authority."[22]

C. RECENT PROPOSED LEGISLATION

The Texas State Senate has recently introduced a bill, SCR No. 7, which would cause the legislature to urge the Supreme Court to adopt a new rule or rules designed to resolve conflicting precedent in transferred and overlapping jurisdiction cases.[23] The resolution, which has been

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Miles v. Ford Motor Co., 914 S.W.2d 135 (Tex. 1995).

[21] *Id.* at 138-39 (holding that "the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts" and citing to Tex. Gov't Code §73.001, discussed *infra*).

[22] *Id.* at 139.

[23] 79R7358 TLE-F, S.C.R. No. 7 by Duncan.

filed with the Secretary of State by the Senate, asks the Supreme Court "to adopt rules providing for the random assignment of cases" for cases arising in a county located within two or more districts.[24] In addition, and more importantly, the resolution asks the Supreme Court to adopt rules governing the precedent to be applied when an appeal is transferred pursuant to the Supreme Court's constitutional grant of authority to transfer cases.[25] The resolution goes on to indicate that the rule should be specific to situations in which there is a conflict of precedent between the transferring and transferee courts.[26]

III. Current Appellate Court Jurisdiction and Transfer Concerns

The overlapping of Texas courts of appeals continues to be an issue in Texas.[27] The Texas legislature has made some improvements in this regard, the latest in 2003 when the legislature restored Brazos county to the exclusive jurisdiction of the Tenth District.[28] However, eliminating the overlapping appellate court jurisdiction will have no effect on cases transferred pursuant to the Supreme Court's transfer authority.[29] Indeed, as the following cases show, the

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[24]*Id.*

[25]*Id.*

[26]*Id.*

[27]According to a recent Court of Appeals map there are twenty-two counties lying within two or more Courts of Appeals' jurisdictions.

[28]*Worthen*, *supra* note 16 at 65.

[29]Currently the Supreme Court's authority to transfer appeals from one district to another is governed by Tex. Gov't Code §73.001, which states that the Court may order transfer of cases "at any time" the Court finds "good cause" to do so. *See* Tex. Gov't Code § 73.001. The

concerns of the *Miles* court that "[b]oth the bench and bar . . . are subjected to uncertainty from conflicting legal authority" is as active as ever.[30]

A. TENTH CIRCUIT – WACO

In *Jaubert v. Texas*[31] Judge Vance of the Tenth Circuit issued this strong statement of position on the applicable law question: "There are some who argue that we should apply the law of the court from which the case was transferred to cases transferred out of one court of appeals and into another. We disagree."[32] In this criminal case Jaubert failed to preserve his ineffectiveness of counsel claim at his trial.[33] The Fort Worth Court of Appeals would have heard this claim for the first time on appeal, but the case was transferred pursuant to Tex. Gov't

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Supreme Court has previously approved an appellate redistricting plan that would eliminate all county overlaps, consolidate the territorial jurisdiction of some districts, and substantially increase the number of appellate court judges in the busiest districts. By evening-out the disparity in workloads between the courts of appeals, the Supreme Court hopes to the need to transfer cases between the courts of appeals will be eliminated. Notably, the redistricting plan promulgated by the Supreme Court: consolidates the First and Fourteenth Districts into the First; creates a new Fourteenth District in the Rio Grande Valley; increases justices in Houston, Dallas and Beaumont districts; and expands the Eleventh District from twenty-three to fifty-five counties. *See*, email from Osler McCarthy to Lisa Hobbs, "Texas Supreme Court advisory: Appellate redistricting," February 28, 2005 (originally dated December 17, 2002).

[30]*Miles*, 914 S.W.2d at 139.

[31]Jaubert v. Texas, 65 S.W.3d 73 (10th Dist.–Waco 2000).

[32]*Id*. at 75.

Code § 73.001 to the Waco Court of Appeals.[34] In his concurrence, Judge Gray more subtly examined the transfer issue under the light of a choice of law analysis.[35] Like other judges and Justices faced with the question of which district's law to apply, he asked the question: "Should we apply the law as we believe it should be across the State of Texas or should we apply the law in the manner we believe [the transferring court] would apply it?"[36] Because the Waco court determined in a previous case that state law as interpreted by the Waco court would apply in transfer cases, Judge Gray found himself bound by *stare decisis* to concur in the judgment that Jaubert's claim was not preserved and therefore non-reviewable.[37]

B. FOURTH CIRCUIT – SAN ANTONIO

In *American National Insurance Co. v. International Business Machines,*[38] the Fourth Circuit Court of Appeals in San Antonio held that fraudulent inducement to contract is a viable claim separate from a breach of contract claim.[39] This determination conflicted with the precedent in the First District, where the appeal had originally been assigned by the 56th Judicial District Court of Galveston County.[40] Under First and Fourteenth District precedent no claim for

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[33]*Id.*

[34]*Id.*

[35]*Id.* at 76.

[36]*Id.* at 77.

[37]*Id.*

[38]Am. Nat. Ins. Co. v. IBM, 933 S.W.2d 685 (4th Dist.–San Antonio 1996).

[39]*Id.* at 687.

[40]*Id.* at 689-90.

fraudulent inducement could accompany a benefit-of-the-bargain damage action sounding in contract.[41] Thus, the court's determination to apply its own precedent rather than either the First or Fourteenth District's led to a conflict of laws issue.[42] Indeed, the majority's opinion admitted that its holding was in direct conflict with the First and Fourteenth District precedent, but stated that it believed that its role was to interpret Texas state law, not the law of the First or Fourteenth District.[43] The appropriate remedy in such circumstances was appeal to the Texas Supreme Court in accordance with Tex. Gov't Code § 22.001(a)(2).[44]

In her dissent, Judge Duncan addressed the conflict of laws inherent in coordinate court transfer cases. First she recognized that no court has enunciated choice of law rules for resolving conflicts between the coordinate appellate courts.[45] Secondly she pointed out that all too often transferee courts are silent as to the transfer status of the case and that there is a conflict of applicable law between the transferee court and the transferring court.[46] In enunciating her preferred approach that the courts of appeals adopt a choice of law rule requiring transferee courts to apply the law of the transferring court, she looked to traditional conflict of law analysis.[47] Her approach purports to take account of the needs of the intrastate transfer system,

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[41] *Id.* at 690.

[42] *Id.* As Judge Duncan's dissent pointed out, the transcript was filed and briefing made in the First District before transfer to the Fourth District. *Id.*

[43] *Id.* at 688.

[44] *Id.*

[45] *Id.* at 690.

[46] *Id.* at note 3.

[47] *Id.* at 692.

as well as the policies and interests of the transferring and receiving courts.[48] Her analysis is a useful framework for considering whether a rule of appellate procedure should require a transferee court to apply the precedent and state law interpretation of the transferring court.

1. The Needs of the Intrastate Transfer System

Equalization of appellate court dockets has been the primary concern underlying the Supreme Court's power to transfer cases between the courts of appeals.[49] According to Judge Duncan, efficiency, the "laudable goal" of equalization, is properly effected when the transfer system is convenient for the courts, pragmatically workable, and fair to litigants.[50]

a. Convenience

A 1927 amendment required that transferred cases be heard in the place where the transferring court usually sits.[51] This requirement has carried-over for the current courts of appeals by Tex. Gov't Code § 73.003.[52] Thus, argues Judge Duncan, transferee courts are akin to a panel of visiting judges, a role that would require them to apply the law of the transferring

[48]*Id.* at 692-94.

[49]*See Townes*, *supra* note 1 at 103-04 and Act of Apr. 19, 1895, *supra* note 7.

[50]*Am. Nat. Ins. Co.*, 933 S.W.2d at 692-94.

[51]*Id.* at 692 (citing Act of March 10, 1927, 40th Leg., R.S., ch. 76 §§ 1-2, 1927 Tex. Gen. Laws 115, 115-16).

[52]Tex. Gov't Code § 73.003(b), (c), requiring that transfer cases by heard in the place where the transferring court usually sits unless the parties agree otherwise or the court is closer than 35 miles from the transferring court.

court.[53] Notwithstanding that, the convenience factor seems to Judge Duncan to be neutral in conflicts analysis, because the Fourth Circuit could just as easily apply the First or Fourteenth Districts' law as its own.[54]

b. Workability

The issue of workability is essentially law-of-the-case analysis.[55] Judge Duncan argues that a rule allowing a transferee court to apply its own law is unworkable because remanding a case back to the trial court would effectively require the trial court to apply the law of the transferee court.[56] Thus, in this case, the trial court applied the law as enunciated by the Houston courts of appeals, holding that American National did not have a cause of action in fraud, and the parties briefed the appellate court on authority of the First and Fourteenth Districts. However, on remand, the trial court will be bound to recognize the fraud action.[57] Finally, statistically the case on further appeal would be heard by either the First or Fourteenth District Court of Appeal, which likewise would be bound by the Fourth District's precedent.[58] Thus, in Judge Duncan's opinion, because the coordinate courts can only set aside, annul or vacate another court's order under a clearly erroneous standard, to apply the transferee court's interpretation of state law to the transferring district is unworkable.[59]

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[53] *Am. Nat. Ins. Co.*, 933 S.W.2d at 692.

[54] *Id.*

[55] *Id.* at 693.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 694.

c. Fairness

The issue of fairness is simply and succinctly put by Judge Duncan: "[H]ow can it be fair when IBM would win in the transferring court, while in the receiving court it loses - when the sole purpose of the transfer is docket equalization, not the promotion of one court of appeals' view of the substantive law?"[60] By engendering such an unfair result, Judge Duncan worries that the transfer system will not achieve general acceptance, and will violate fundamental principles of justice.[61]

2. Relevant Policies and Interests of the Courts

At the time this opinion issued, the Houston Courts of Appeals had "uniformly and consistent[ly]" held that the "contort" claim was barred.[62] This uniformity and consistency underscores the interests and policy goals which those districts sought to further.[63] In contrast, the Fourth District, according to Judge Duncan, had no interest whatsoever in the outcome.[64] The transaction under which this case arose did not occur in the Fourth District's territorial jurisdiction, the trial did not take place in the district courts of the Fourth District, and in all likelihood the Fourth District Court of Appeals would not hear any further appeal.[65] In addition, The Fourth Circuit had recently enunciated its own position on the "contort" claim and had no further need to define the interests and policies it sought to further within its territorial

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

jurisdiction.[66] Thus, the balance of interests between transferee and transferring court in this case weighed heavily in favor of applying the transferring court's precedent.[67]

IV. Other States's Solutions to the Problem of Appeals Transfers

Two states that have dealt with the issue of appellate case transfers are notable. California and New York have addressed and resolved the issue in different ways, both of which are instructive for our purposes.

A. NEW YORK

New York Civil Practice Law and Rule § 5711 provides that appeals may be transferred from one department to another "in furtherance of justice."[68] The Court of Appeal of New York, the state's highest court, has held in *Doyle v. Amster*[69] that cases transferred between one of the state's four appellate departments should be decided on the law of the transferring court.[70] In *Doyle* an appeal was transferred from the Second Department of the Appellate Division to the

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[66] *Id.*

[67] *Id.*

[68] New York Civ. Prac. L. & R. § 5711 (2004). The Advisory Committee Notes to §5711 indicate that "Furtherance of justice" includes: "(1) lack of a quorum of four justices; (2) Lack of concurrence of three justices; (3) Inability to dispose of business within a reasonable time; (4) Where the order was granted or the case tried before a judge who is now one of the justices of the Appellate Division." *Id.*

[69] Doyle v. Amster, 594 N.E.2d 911 (NY 1992).

[70] *Id.* at 913.

Third Department pursuant to New York Constitution, article VI, §4.[71] The case involved a challenge to the Clarkstown Zoning Board's determination that Doyle be denied his application to subdivide a parcel of land located in New City.[72] Although the law in the Second and Third Divisions was "essentially the same," the Court found that if the law had been different, "the view of the originating intermediate appellate court governs."[73] The conflict of law between the Divisions would persist, said the Court, "until we finally settle the issue."[74]

B. CALIFORNIA

California also allows for inter-court transfers of cases on appeal. California Rules of Court 47.1 vests authority in the Supreme Court to transfer "causes" between the state's courts of appeals.[75] The Advisory Committee Comment to Rule 47.1 states that "only the Supreme Court may transfer causes between Courts of Appeal."[76] However, Rule 62 gives authority to the courts of appeal to order cases transferred to it "if the appellate division certified . . . that transfer is necessary to secure uniformity of decision or to settle an important question of law."[77] Thus, in *Snukal v. Flightways Manufacturing, Inc.*,[78] the California Supreme Court reaffirmed that the courts of appeals have "uncontrolled discretion" to transfer appeals to its jurisdictions under rule

[71] *Id.*

[72] *Id.* at 912.

[73] *Id.* at 913.

[74] *Id.*

[75] Cal R. Court R 47.1.

[76] *Id.*

[77] Cal. R. Court R 62.

[78] Snukal v. Flightways Manufacturing, Inc., 3 P.3d 286 (Cal. 2000).

62.[79] That discretion, however, does not include the discretion to "select and review only an issue or issues not dispositive of the appeal."[80] Instead, according to the Court, the court of appeal must "decide the issues necessary to resolution of the appeal and thereafter to transmit the remittitur to the municipal court (or, in the instance of a limited civil case tried in a unified superior court, to transmit the remittitur to the superior court)."[81]

V. Analysis

We take as a first principle that the law should not be different in different places within the state. This is clearly the rationale behind the legislative grant of power in the Supreme Court to hear cases where there is a conflict between the courts of appeals on issue of state law.[82] In this fundamental respect, the courts of appeals are interpreting the law of the state, not merely the law as it exists in their respective districts. 22.001(a)(2) would be unnecessary if the coordinate courts were interpreting and applying state law only as it applies in their own

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[79] *Id.* at 293.

[80] *Id.*

[81] *Id.* at 291.

[82] *See* Tex. Gov't Code § 22.001(a)(2) (a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case), (6) (any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute).

districts. If state law is allowed to mean different things in different territorial districts, conflicts would pose no significant issue of state jurisprudence.

In another sense, however, the statutory grant of jurisdiction in the Supreme Court to decide on conflicts arising between the courts of appeals militates against the courts themselves deciding conflicts of law. It has been argued that until the Supreme Court inveighs on which court of appeals has correctly interpreted state law, the coordinate courts ought to respect the interpretation of the court from which a case has been transferred. This is precisely Judge Duncan's approach. When a transferring court has already issued its interpretation of state law, with its concomitant interests and policy objectives, unfair surprise and disparate results may follow from a transferee court applying its own precedent. However, Judge Duncan's approach does not work when the transferring court has not decided the state law issue. In that circumstance, it would be appropriate for a coordinate transferee court to apply its own standing precedent. Indeed, it is difficult to see how such a court could do otherwise unless it simply guessed at what the transferring court would decide under the circumstances.

VI. Conclusion

Perhaps the issue ought to be framed as a choice between principle and pragmatism. The courts of appeals see themselves as interpreters of state law and upholders of the postulate that state law does not mean different things in different places. By interpreting and applying state law consistent with their own precedent, transferee courts are faithful to the first principle when they hold fast to their own precedent. In doing so, the transferee court maintains integrity within itself. Pragmatically this steadfastness leads to disparate results that cause confusion and

perhaps unfair disappointment for litigants and their attorneys. Having tried a case in one district, briefed their appeal under that district's precedent, they must steel themselves for the possibility that their appeal will be transferred, and that the transferee court interprets state law in such a way as to turn their winning arguments into losing propositions. A rule that mandates that the courts of appeals apply the precedent of the transferring court would have the benefit of certainty for litigants and the judiciary, though it must acknowledge that, until the Supreme Court decides the issue, state law is indeed different in different territorial districts.