

# Evaluating Appeals *By the Numbers*

By Lynne Liberato and Kent Rutter

Is there anything more difficult for a lawyer than predicting the outcome of a civil case? That chore seems somewhat easier when predicting the outcome of an appeal, where the momentum and standard of review are stacked against the appeal, and lawyers feel confident explaining that the odds favor the appellee. However, it is not always true that the appellant is likely to lose. For example, in appeals decided during the 2001-2002 court year: 58 percent of judgments notwithstanding the verdict were reversed; 59 percent of orders granting temporary injunc-

tions were reversed; and 79 percent of no-answer default judgments were reversed. In restricted appeals, the reversal rate was 74 percent; in tort and DTPA cases, when the plaintiff prevailed in the trial court and the defendant appealed, the reversal rate was 51 percent; in the Waco Court of Appeals, the overall reversal rate in civil appeals was 51 percent; and in the Eastland Court of Appeals, the reversal rate in appeals following bench trials was 60 percent.

These numbers demonstrate that evaluating an appeal requires more than predicting a loss for the appellant.

They also call into question the accuracy of appellate case evaluations based on personal experience, impressions gleaned from advance sheets, war stories, observations at continuing legal education programs, or lore passed down through generations of lawyers. Answering questions about why courts reverse requires data.

This article offers suggestions for evaluating the most common types of appeals and formulating an effective appellate strategy, using data from a recent comprehensive study of reversals by Texas courts of appeals.<sup>1</sup>

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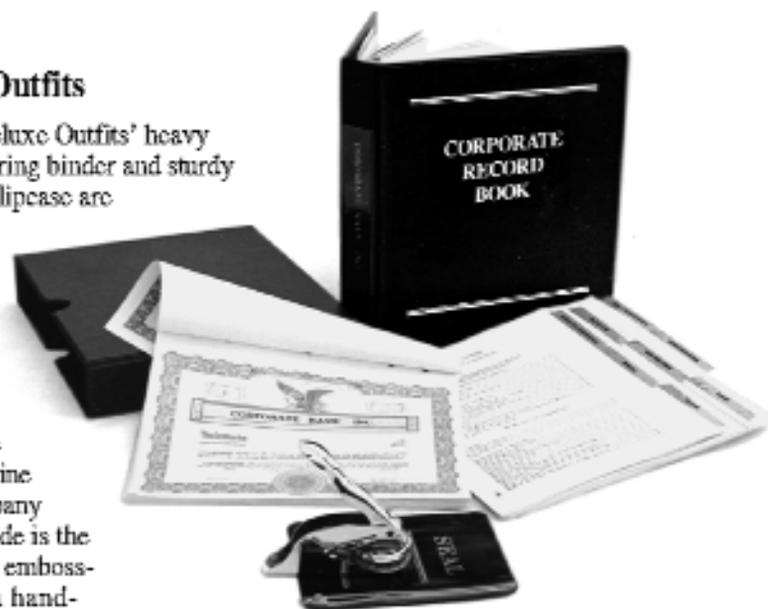
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# Evaluating Appeals *By the Numbers*

## Overview

Evaluating an appeal requires more than numbers. There is no substitute for the good judgment of a lawyer who takes into consideration the myriad factors necessary to make a fair evaluation of an appeal. Nonetheless, numbers provide additional tools to inform the decisions of lawyers and clients.

The overall numbers are as follows: In the Texas courts of appeals, during the period studied, approximately one in three civil appeals resulted in a reversal. Broken down by procedure, the reversal rate for judgments on jury verdicts was 25 percent, the reversal rate following bench trials was 22 percent, and the reversal rate for summary judgments was 33 percent. Broken down by substance, when the defendant appealed in a tort or DTPA case, the reversal rate was 51 percent, and when the plaintiff appealed, the reversal rate was 23 percent. In contract cases, the

reversal rate was 33 percent. In family cases, the reversal rate was 32 percent.

## Specific Application of the Numbers

At an average of one-third, the overall reversal rate is fairly high. As the overall rate suggests, the appellate courts are willing to reverse most types of cases. Although the courts tend to reverse summary judgments more readily than jury trials, the difference between the two reversal rates is less than one might expect, considering that the presumptions and standards of review applicable on appeal generally run in favor of judgments on jury verdicts, and against summary judgments.<sup>2</sup> One in four judgments on jury verdicts was reversed, compared to one in three summary judgments. In two courts of appeals, San Antonio and the Houston 14th, judgments on jury verdicts were reversed at a higher rate than summary judgments. These figures may reflect an increasing lack of deference to juries by more conservative justices.

That conservatism was also reflected in the substance of the cases reversed. In tort and DTPA appeals brought by plaintiffs, the courts of appeals reversed at a rate of 23 percent, while defendants were successful 51 percent of the time.

The following sections of this article discuss specific types of appeals, divided first by procedure and then by substance.

## Jury Trials

In appeals following jury trials, the most valid generalization is that issues of law succeed, and issues of fact and challenges to trial procedure do not. An appeal is strongest when the alleged errors are errors of law, and it is generally good strategy to emphasize those issues in the brief.

Fully 60 percent of all reversals of judgments on jury verdicts were based on the grounds that there was no evidence to support the verdict, or one of the parties was otherwise entitled to judgment as a matter of law. Questions of law take many forms. Examples include arguments that there is no evi-

dence to support the verdict because the expert testimony was unreliable and therefore inadmissible,<sup>3</sup> that the jury failed to find a fact that had been established conclusively as a matter of law,<sup>4</sup> that the plaintiff lacked standing,<sup>5</sup> or that the trial court applied the wrong statute of limitations.<sup>6</sup>

Another place to look for errors of law is the jury charge. Charge error was the second most common reason for reversal of judgments on jury verdicts, accounting for 14 percent of the reversals.<sup>7</sup> While the decision to submit a particular instruction or definition is committed to the trial court's broad discretion,<sup>8</sup> other charge issues raise questions of law that are subject to de novo review.<sup>9</sup> For example, courts have reversed because there was no sufficient predicate for an award of exemplary damages,<sup>10</sup> because a jury question allocated the burden of proof incorrectly,<sup>11</sup> and because a jury question incorporated both correct and incorrect bases of DTPA liability.<sup>12</sup>

In contrast, courts of appeals rarely sustained challenges to the sufficiency of the evidence, or evidentiary challenges. Challenges to the factual sufficiency of the evidence and contentions that a verdict was against the great weight and preponderance of the evidence accounted for four percent of all reversals of judgments on jury verdicts. Unlike legal determinations, "factual sufficiency" and "great weight" points require an evaluation of the evidence. Courts of appeals are reluctant to sustain these points because they must tread a fine line to avoid substituting their views for those of juries.

Although trial lawyers focus on evidentiary rulings, these rulings accounted for a scant one percent of the reversals of judgments on jury verdicts. While admission or exclusion of evidence is a critical part of the trial, it is not critical for appeal.

The ineffectiveness of challenges to evidentiary rulings reflects an overall reluctance of the courts to reverse based on the conduct of the trial. Courts of appeals defer to trial judges to run their courtrooms. The standard

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of review, abuse of discretion, supports this reluctance,<sup>13</sup> as does the requirement that harm be shown.<sup>14</sup> Although lawyers frequently complain on appeal about the manner in which the trial court conducted the trial, these rulings seldom provide a basis for reversal.<sup>15</sup>

## Bench Trials

Most — but not all — considerations relevant to evaluations of appeals following jury trials are also relevant when evaluating appeals following bench trials. The most successful arguments in appeals following bench trials, accounting for 72 percent of the reversals, were arguments that the appellant was entitled to judgment as a matter of law.

There is a difference between jury trials and bench trials when the appellant challenges the sufficiency of the evidence. These points were somewhat more successful following bench trials than following jury trials. “Factual sufficiency” and “great weight” points accounted for 14 percent of reversals following bench trials, compared to just four percent following jury trials. The courts of appeals are reluctant to “substitute [their] judgment for that of the jury” on fact issues,<sup>16</sup> but they may be somewhat less reluctant to substitute their judgment for that of the trial judge.

In general, judgments following bench trials are not as hard to reverse as one might suspect. Fully 22 percent were reversed. However, the reversal rate varied dramatically by court. The Austin court of appeals reversed only four percent, while the Eastland court reversed 60 percent. Most courts were clustered around the statewide average of 22 percent.

Not surprisingly, family law cases comprised the largest number of bench trials on appeal. Surprisingly, they were reversed at the highest rate, 28 percent.

## Summary Judgments

Summary judgments are proper when there is no genuine issue of material fact.<sup>17</sup> Demonstrating the existence of a fact issue provides the most successful route to the reversal of a summary judgment. Of all summary judgment

reversals, 58 percent were attributed to the existence of fact issues. Errors of law also led to a significant number of reversals, accounting for 31 percent of all summary judgments reversed. Examples included incorrect determinations regarding whether a statute was unconstitutional<sup>18</sup> and which limitations period applied.<sup>19</sup>

At the trial court level, summary judgment practice remains highly technical. On appeal, failure to comply with

the technicalities will result in reversal. Eleven percent of reversals of summary judgments occurred not because summary judgment could not have been granted in the case, but because of a procedural error. For example, summary judgments were reversed when they were granted on claims not made in the summary judgment motion,<sup>20</sup> when the appellant provided inadequate notice of the summary judgment hearing,<sup>21</sup> or when there was not an adequate time

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for discovery.<sup>22</sup> Summary judgment practice deserves its reputation for being complex and technical.

Surprisingly, there were few appeals from pure no-evidence summary judgments. During the study period, there were only 84 appeals from pure no-evidence summary judgments, compared to 582 appeals from summary judgments granted in whole or in part on traditional grounds. Thus, pure no-evidence motions accounted for less than 13 percent of the summary judgment appeals.

There were also disproportionately few reversals of no-evidence summary judgments. When the summary judgment motion was based solely on no-evidence grounds, the reversal rate was 19 percent, a rate significantly lower than the reversal rate of 35 percent when the motion was based at least partially on traditional grounds. Pure no-evidence summary judgments may be reversed less frequently because they, in fact, dispose of weak cases — the purpose for which the no-evidence summary judgment was designed.<sup>23</sup> Also, a no-evidence summary judgment, unlike a traditional summary judgment, must be affirmed if the non-movant failed to file a response in the trial court.<sup>24</sup> Another factor may be that the costs of the appeal — and, if the appeal is successful, a possible trial — are prohibitive in many cases that are otherwise viable. It may also be that relatively few no-evidence summary judgments are granted.

**Tort & DTPA Cases**

The substantive nature of the dispute offers an additional yardstick by which appeals can be measured.

In tort and DTPA cases, when the plaintiff prevailed in the trial court and the defendant appealed, the reversal rate was 51 percent — more than half. When the defendant prevailed in the trial court and the plaintiff appealed, the reversal rate was significantly lower — 23 percent.

Another significant factor in evaluating a tort or DTPA case is the court that will consider the appeal. The disparity between courts is reflected most

dramatically in Houston, where the First Court of Appeals reversed in 26 percent of the appeals brought by plaintiffs, while the 14th Court of Appeals reversed in just four percent. In Houston, assignment between the First and 14th courts is random. Once a lawyer knows which Houston court will decide the personal injury/DTPA appeal, his or her evaluation of the case may change.

**Contract Cases**

About one in three contract cases was reversed. This rate parallels the overall reversal rate in civil cases. Most contract cases that were appealed were resolved by summary judgment. The most common reasons for reversal of summary judgments in contract cases were the same as the most common reasons for reversal of summary judgments in other cases. The existence of a fact issue (including, in appeals from no-evidence summary judgments, the existence of some evidence raising fact issues) accounted for 56 percent of the summary judgment reversals in contract cases, compared to 58 percent of the summary judgment reversals overall. Errors of law accounted for 31 percent of the summary judgment reversals in contract cases, and 31 percent overall. Errors of summary judgment procedure accounted for 13 percent of the summary judgment reversals in contract cases, compared to 11 percent overall.

**Family Cases**

Family law appeals meet with more success than one might suspect. The overall reversal rate for family cases, 32 percent, parallels the overall reversal rate for civil appeals. This figure is somewhat surprising in light of the great deference given to trial judges, whose decisions are appealed more often than jury verdicts in family cases.

Broken down by type, the figures show that in divorce cases, including actions to enforce or modify existing decrees, the reversal rate was 24 percent. In suits to modify the parent-child relationship, the reversal rate was 34 percent. In child support cases,

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including actions to collect child support or modify a child support obligation, the reversal rate was 42 percent.

The high reversal rate may be connected to the low number of appeals in family cases. Family cases form the largest group of civil cases filed,<sup>25</sup> but few of them are tried.<sup>26</sup> Even fewer are appealed.<sup>27</sup> In family cases, individuals, not companies, are paying the costs. As a result, there is careful self-selection of the cases that are appealed, and appeals often may be pursued only when there are strong grounds for reversal.

## Conclusion

The evaluation of an appeal requires much more than an analysis of the numbers. But the numbers provide a starting point for accurate case evaluation and for use in selecting the issues to argue on appeal.

## Notes

1. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. L. Rev. 431 (2003). The study is based on a review of all opinions, both published and unpublished, issued in civil appeals by the 14 Texas courts of appeals during the 2001-02 court year. The South Texas Law Review article covers procedural areas (default judgments, special appearances, judgments not withstanding verdict, directed verdicts, default judgments, and special appearances) and substantive areas (insurance coverage, probate, employment) not addressed here.
2. See Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 Baylor L. Rev. 1, 81 (2002) (citing *Texas Dep't of Public Safety v. Martin*, 882 S.W.2d 476, 482-83 (Tex. App. — Beaumont 1994, no writ)).
3. *E.g.*, *Mo. Pac. R.R. Co. v. Navarro*, 90 S.W.3d 747, 760 (Tex. App. — San Antonio 2002, no pet.); *Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 132 (Tex. App. — Eastland 2001, pet. filed).
4. *E.g.*, *Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 370-71 (Tex. App. — Houston [14th Dist.] 2002, pet. denied) (reversing judgment on verdict because warning of wet floor given to the plaintiff was adequate as a matter of law).
5. *E.g.*, *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 28 (Tex. App. — Tyler 2002, pet. denied).
6. *E.g.*, *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322, 333 (Tex. App. — Houston [First Dist.] 2002, no pet. h.).
7. *E.g.*, *R & R Contractors v. Torres*, 88 S.W.3d 685, 705-06 (Tex. App. — Corpus Christi 2002, no pet.) (reversing award of exemplary damages because charge lacked a sufficient predicate); *Custom Residential Paint Contracting, Inc. v. Klein*, No. 05-98-01858-CV, 2001 WL 1318420, \*3 (Tex. App. — Dallas Oct. 29, 2001) (not designated for publication) (reversing because a proper theory of liability and an

improper theory of liability were combined in one question) vacated on remittitur, 2002 WL 660200, (Tex. App. — Dallas Apr. 23, 2002) (not designated for publication).

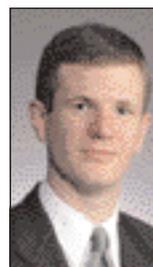
8. See *Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez*, 995 S.W.2d 661, 665 (Tex. 1999) (“The goal of the charge is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely. Toward that end, the trial judge is accorded broad discretion so long as the charge is legally correct”).
9. See *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2002) (“Whether a definition used in the charge misstated the law is a legal question. Thus, the court of appeals properly reviewed the issue de novo, as do we”).
10. *Halliburton Energy Servs., Inc. v. Stewart*, 02-99-00354-CV (Tex. App. — Fort Worth 2001, pet. denied) (not designated for publication).
11. *R & R Contractors v. Torres*, 88 S.W.3d 685 (Tex. App. — Corpus Christi 2002, no pet.).
12. *Custom Residential Paint Contracting, Inc. v. Klein*, No. 05-98-01858-CV, 2001 WL 1318420 (Tex. App. — Dallas Oct. 29, 2001), vacated on remittitur, 2002 WL 660200 (Tex. App. — Dallas Apr. 23, 2002, pet. denied).
13. *W. Wendell Hall, Standards of Review in Texas*, 34 St. Mary's L. J. 8, 1001-01 (2002).
14. *Id.*
15. See *e.g.*, *Texas A&M Univ. v. Bishop*, No. 14-97-00153-CV, 2002 WL 1962958, at \*4 (Tex. App. — Houston [14th Dist.] Aug. 22, 2002, no pet.) (not designated for publication) (holding that the admission of evidence was harmless); *In re C.Y.*, No. 08-01-00338-CV, 2002 WL 1874855, at \*10 (Tex. App. — El Paso Aug. 15, 2002, no pet.) (holding that the improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial); *Harris v. WHMC, Inc.*, No. 01-00-01134-CV, 2002 WL 1821989, at \*3 (Tex. App. — Houston [First Dist.] Aug. 8, 2002, no pet.) (holding that the exclusion of evidence was harmless).
16. *Amerman v. Martin*, 83 S.W.3d 858, 862 (Tex. App. — Texarkana 2002, pet. granted); *accord Laparade v. Rivera*, No. 01-99-00723-CV, 2002 WL 992562, at \*3 (Tex. App. — Houston [First Dist.] May 16, 2002, no pet.) (not designated for publication); *In re V.J.C.*, No. 08-01-00071-CV, 2002 WL 971801, at \*4 (Tex. App. — El Paso May 9, 2002, no pet.) (not designated for publication); *James v. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 94 (Tex. App. — San Antonio 2002, pet. denied).
17. *Tex. R. Civ. P. 166a*.
18. *E.g.*, *Jeter v. McGraw*, 79 S.W.3d 211, 215 (Tex. App. — Beaumont 2002, pet. denied) (reversing summary judgment because statute relied upon below was unconstitutional).
19. *E.g. Rubio v. Diversicare General Partner*, 82 S.W.3d 778 (Tex. App. — Corpus Christi 2002, pet. granted) (reversing summary judgment because plaintiffs claims were not within purview of the Texas Medical Liability Insurance Act, and therefore were not barred by the limitations provision of that statute).
20. *E.g.*, *Howell v. Hilton Hotels Corp.*, 84 S.W.3d 708, 716 (Tex. App. — Houston [First Dist.] 2002, pet. denied) (reversing because claims were not addressed in the motion for summary judgment; therefore, summary judgment could

not be sustained on that cause of action).

21. *E.g.*, *Forrester v. Oil Con. Tech, Inc.*, No. 06-0100055-CV, 2001 WL 1356319, at \*1 (Tex. App. — Texarkana Nov. 6, 2001, no pet.) (not designated for publication) (reversing summary judgment because there was no evidence in the record that the opposing party was aware of the motion).
22. *E.g.*, *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 791 (Tex. App. — Dallas 2002, pet. denied) (reversing summary judgment because more than a scintilla of evidence existed and would exist had discovery not been limited).
23. *Lattrell v. Chrysler Corp.*, 79 S.W.3d 141, 149 (Tex. App. — Texarkana 2002, pet. denied).
24. *Tex. R. Civ. P. 166a(i)*; see *Hittner & Liberato, supra* n. 8, at 70-71.
25. See note 7, Annual Report, Office of Court Administration and the Texas Judicial Council, Texas Judicial System Annual Report, Fiscal Year 2002, Activity for the Year Ended Aug. 31, 2002, [http://www.courts.state.tx.us/publicinfo/AR2002/coa/Activity\\_Detail.pdf](http://www.courts.state.tx.us/publicinfo/AR2002/coa/Activity_Detail.pdf) (last visited Aug. 18, 2003).
26. *See Id.*
27. *See Id.*



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