

ARTICLE

REASONS FOR REVERSAL IN THE TEXAS COURTS OF APPEALS*

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TABLE OF CONTENTS

I. INTRODUCTION.....	994
II. OVERVIEW.....	997
III. REVERSALS BY COURT.....	999
IV. REVERSALS BY PROCEDURE.....	1002
A. <i>Jury Trials</i>	1002
1. <i>Judgments Entered on Verdicts</i>	1002
2. <i>Directed Verdicts and Judgments Notwithstanding the Verdict</i>	1006
B. <i>Bench Trials</i>	1007
C. <i>Summary Judgments</i>	1009
D. <i>Default Judgments</i>	1012
E. <i>Temporary Injunctions</i>	1014
F. <i>Special Appearances</i>	1015
G. <i>Immunity Defenses and Pleas to the Jurisdiction</i>	1016
V. REVERSALS BY TYPE OF DISPUTE.....	1017
A. <i>Tort and DTPA Cases</i>	1017

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<i>B. Contract Cases</i>	1020
<i>C. Insurance Coverage Cases</i>	1021
<i>D. Family Cases</i>	1021
<i>E. Probate Cases</i>	1022
VI. CONCLUSION.....	1022
APPENDIX A: METHODOLOGY.....	1023
APPENDIX B: FIGURES.....	1026

I. INTRODUCTION

“It is a capital mistake to theorize before one has data.”¹

—*Sherlock Holmes*

As Sherlock Holmes reminds us, it is a mistake to theorize before one has data. Detectives know this. Scientists know this. Lawyers know this too, but even in the absence of data, they frequently are called upon to theorize about reasons for reversal in the Texas courts of appeals. A trial lawyer must theorize about reasons for reversal when advising a client whether to accept a post-judgment settlement offer or pursue an expensive appeal. An appellate lawyer must theorize about reasons for reversal when narrowing the focus of an appeal and selecting the arguments to emphasize in the brief. And it is not only lawyers,² but also their clients and the public as a whole,³ who theorize about reasons for reversal in the Texas courts of appeals.

How often do the courts of appeals reverse judgments entered on jury verdicts for plaintiffs in personal injury cases? Are these judgments reversed most often because of procedural errors occurring at trial, or because the evidence is legally or factually insufficient? Do different courts of appeals reverse different types of cases for different reasons? These questions cannot be answered solely from personal experience, war stories, observations by judges at continuing legal education programs, or

1. 1 ARTHUR CONAN DOYLE, *Adventures of Sherlock Holmes*, in THE COMPLETE SHERLOCK HOLMES § 3, ch. 1, at 5 (Doubleday, Doran & Co. 1930) (1892).

2. See generally Timothy Patton, State Bar of Tex., *To Appeal or Not to Appeal, That Is the Question*, in 20 ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE ch. 6 (2006) (offering professional guidance regarding the viability of different kinds of appeals).

3. See Editorial, *Publish or Perish*, HOUS. CHRON., Dec. 9, 2001, at 2C (editorializing against the former practice of issuing unpublished opinions on the ground that “citizens are less able to know what their elected justices are up to when so many of the decisions they make are not made public”).

lore passed down through generations of lawyers. Answering these questions requires data.

Nine years ago, the Authors of this Article conducted a study to find the data.⁴ Now, the study has been repeated to determine what has changed, and what has remained the same, about why courts reverse.

As before, the study began with a preliminary review of all opinions, including memorandum opinions,⁵ issued in civil appeals⁶ by the fourteen Texas courts of appeals⁷ during an entire court year, the twelve-month period beginning September 1, 2010, and ending August 31, 2011.⁸ To present an accurate picture, certain types of opinions were then excluded from the analysis as described in Appendix A.⁹ For example, appeals in juvenile cases, although categorized by the Texas courts as civil cases, were excluded because in reality they are quasi-criminal in nature.¹⁰ Also excluded were appeals that were not decided on the merits, such as appeals that were dismissed for want of prosecution and appeals in which an affirmance or reversal was entered at the request of the parties pursuant to settlement.¹¹ The remaining decisions—1,832 in all—form the basis of the findings presented here.¹²

This Article first identifies the statewide reversal rate in civil cases and a rate for each of the fourteen courts of

4. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431 (2003).

5. See TEX. R. APP. P. 47.4 (explaining when courts of appeals should issue memorandum opinions).

6. The analysis is limited to appeals and excludes original proceedings.

7. The intermediate courts of appeals in Texas are the First Court of Appeals (Houston), Second (Fort Worth), Third (Austin), Fourth (San Antonio), Fifth (Dallas), Sixth (Texarkana), Seventh (Amarillo), Eighth (El Paso), Ninth (Beaumont), Tenth (Waco), Eleventh (Eastland), Twelfth (Tyler), Thirteenth (Corpus Christi), and Fourteenth (Houston). TEX. GOV'T CODE ANN. §§ 22.202–.215 (West 2004).

8. This period coincides with the courts' reporting periods, which end on August 31 of each year. See Office of Court Admin. & Tex. Judicial Council, *2011 Annual Report*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/pubs/AR2011/toc.htm> (scroll to "Courts of Appeals"; then download "Activity Detail") (last visited Jan. 28, 2012) [hereinafter *OCA 2011 Annual Report*] (reporting activity for the fiscal year ending on August 31, 2011). The 2011 Summary Report for the Texas Judiciary was not published prior to this Article's printing, but the report will be available at <http://www.courts.state.tx.us/pubs/AR2010/toc.htm> on or around February 2012.

9. See *infra* Appendix A.

10. See Ed Kinkeade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 18 (1999) (citing *E.T.J. v. State*, 766 S.W.2d 871, 873 (Tex. App.—Dallas 1989, no writ) (Kinkeade, J., dissenting)) (arguing that the juvenile proceeding at hand was not entirely civil in nature).

11. See *infra* Appendix A.

12. See *infra* Appendix A.

appeals.¹³ It then examines reversal rates and reasons for reversal in various procedural contexts,¹⁴ including reversals following jury trials,¹⁵ bench trials,¹⁶ summary judgments,¹⁷ and default judgments,¹⁸ as well as reversals of orders granting or denying temporary injunctions,¹⁹ special appearances,²⁰ and pleas to the jurisdiction.²¹ After considering reversals from a procedural standpoint, the Article switches to a substantive perspective,²² examining reversal rates and reasons for reversal in tort and Deceptive Trade Practices Act (DTPA) cases,²³ contract cases,²⁴ insurance coverage cases,²⁵ family cases,²⁶ and probate cases.²⁷

When the first version of this study was published nine years ago, it “caus[ed] a stir in legal circles.”²⁸ The data revealed that certain types of appeals fared better in some courts than others.²⁹ The data also revealed that defendants fared better than plaintiffs in tort and DTPA appeals.³⁰

The current study confirms that the courts of appeals are not interchangeable and that some types of appeals succeed more than others. As before, however, the aim of the study is not to imply that any court of appeals reverses any type of judgment on any particular ground too frequently, or not frequently enough.³¹ No attempt was made to evaluate whether the opinions were persuasive or applied the law correctly. Nor was there any

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part IV.A.

16. See *infra* Part IV.B.

17. See *infra* Part IV.C.

18. See *infra* Part IV.D.

19. See *infra* Part IV.E.

20. See *infra* Part IV.F.

21. See *infra* Part IV.G.

22. See *infra* Part V.

23. See *infra* Part V.A.

24. See *infra* Part V.B.

25. See *infra* Part V.C.

26. See *infra* Part V.D.

27. See *infra* Part V.E.

28. Janet Elliott, *Defendants Fare Better on Appeal, Study Finds*, HOUS. CHRON., Nov. 6, 2003, at 27A.

29. Liberato & Rutter, *supra* note 4, at 444 (showing that for bench trials, “there was a dramatic difference between the lowest reversal rate, 4% in the Third Court of Appeals, and the highest, 60% in the Eleventh Court of Appeals”).

30. *Id.* at 454–56.

31. See Elliott, *supra* note 28 (quoting a Texans for Lawsuit Reform spokesman who observed that “[n]o such analysis can be credible without examining the merits of each and every case and drawing conclusions as to whether the courts ruled according to the law and precedent and the facts of the case”).

analysis of the briefs, the records on appeal, or any further action in or by the Supreme Court of Texas.

Thus, instead of presenting an argument about which types of judgments the courts of appeals ought to reverse, this Article presents the facts about which types of judgments they actually do reverse. While there is no substitute for the good judgment of a lawyer in assessing a potential appeal, this Article provides a tool to better inform the lawyer's and client's decision.

II. OVERVIEW

Some of the results of the study confirm conventional expectations about appeals. Other results are surprising. Some of the key findings are as follows:

A. The statewide reversal rate in civil cases is 36%. Among the fourteen courts of appeals, the reversal rates ranged from 32% (in the Beaumont court of appeals) to 46% (in the Corpus Christi court of appeals).³²

B. In appeals from judgments entered on jury verdicts, the reversal rate was 34%. In appeals following bench trials, the reversal rate was 28%. In appeals from summary judgments, the reversal rate was 31%.³³

C. There has been a shift toward reversing judgments entered on jury verdicts and a shift away from reversing summary judgments. In the 2001–2002 court year, the reversal rate for summary judgments was higher than the reversal rate for judgments entered on jury verdicts.³⁴ In the 2010–2011 court year, the opposite was true.³⁵

D. The reversal rate for judgments entered on jury verdicts varies significantly from court to court. For example, the Fourteenth Court in Houston reversed 29% of the judgments entered on jury verdicts, while the San Antonio court of appeals reversed 50%.³⁶

E. When the courts of appeals reversed judgments entered on jury verdicts, they most often did so because the evidence was legally insufficient to support the verdict or because one of the parties was otherwise entitled to judgment as a matter of law.³⁷

32. See *infra* Appendix B, Figure 1.

33. See *infra* Appendix B, Figure 2.

34. Liberato & Rutter, *supra* note 4, at 439.

35. See *infra* Appendix B, Figure 2.

36. See *infra* Part IV.A.1 and Appendix B, Figure 3.

37. See *infra* Appendix B, Figure 4.

These reasons accounted for 77% of the reversals.³⁸ Charge error accounted for 9% of the reversals.³⁹ Complaints about factual insufficiency or the “great weight” of the evidence accounted for just 5% of the reversals, compared to 4% in the 2001–2002 court year.⁴⁰ Despite concerns that the Texas Supreme Court’s 2005 decision in *City of Keller v. Wilson*⁴¹ would bring an end to factual sufficiency review, in practice the decision had no such effect on appellate review of judgments entered on jury verdicts.⁴² Reversals on factual sufficiency grounds were rare before *City of Keller* and remain rare today.⁴³

F. When the courts of appeals reversed judgments following bench trials, they most often did so because the evidence was legally insufficient or because there was some other reason the judgment was incorrect as a matter of law.⁴⁴ These reasons accounted for 81% of the reversals.⁴⁵ Complaints about factual insufficiency or the “great weight” of the evidence accounted for only 5% of the reversals—a sharp drop since the 2001–2002 court year, when these complaints accounted for 14% of the reversals.⁴⁶ In appeals following bench trials—in contrast to appeals following jury trials—it appears that *City of Keller v. Wilson* did curtail factual sufficiency review.⁴⁷

G. When the courts of appeals reversed summary judgments, they most often did so because there was a fact issue.⁴⁸ Fact issues accounted for 47% of the reversals.⁴⁹ Errors of law accounted for 35% of the reversals.⁵⁰ Procedural errors accounted for the remaining 18%—a significant increase since the 2001–2002 court year, when procedural errors accounted for only 11% of the reversals.⁵¹

H. Pure no-evidence summary judgments were rarely appealed, accounting for approximately one-tenth of the

38. See *infra* Appendix B, Figure 4.

39. See *infra* Appendix B, Figure 4.

40. See *infra* Appendix B, Figure 4; see also Liberato & Rutter, *supra* note 4, at 442.

41. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).

42. See *infra* text accompanying notes 103–06.

43. See *infra* Appendix B, Figure 4.

44. See *infra* Appendix B, Figure 9.

45. See *infra* Appendix B, Figure 9.

46. See *infra* Appendix B, Figure 9; see also Liberato & Rutter, *supra* note 4, at 445.

47. See *infra* Part IV.A–B.

48. See *infra* Appendix B, Figure 13.

49. See *infra* Appendix B, Figure 13.

50. See *infra* Appendix B, Figure 13.

51. See *infra* Appendix B, Figure 13; Liberato & Rutter, *supra* note 4, at 447.

summary judgment appeals.⁵² When pure no-evidence summary judgments were appealed, they were rarely reversed. In appeals from summary judgments granted solely on no-evidence grounds, the reversal rate was 19%.⁵³ In appeals from traditional or hybrid summary judgments, the reversal rate was 32%.⁵⁴

I. No-answer default judgments had a very high rate of reversal—77%.⁵⁵ For post-answer default judgments, the rate of reversal was 54%.⁵⁶

J. Plaintiffs in tort and DTPA cases fared poorly on appeal. When the plaintiff prevailed in the trial court and the defendant appealed, the reversal rate was 49%.⁵⁷ In comparison, when the defendant prevailed in the trial court and the plaintiff appealed, the reversal rate was 25%.⁵⁸ These reversal rates are comparable to the rates from the 2001–2002 court year.⁵⁹ However, the reversal rates do not tell the entire story about the impact of tort reform. Over the past nine years, tort plaintiffs have responded to an increasingly hostile litigation climate by filing fewer cases, taking fewer cases to judgment, and appealing fewer cases to the courts of appeals.⁶⁰ But even though tort and DTPA plaintiffs have been “picking their battles” more carefully, they have not experienced any greater success on appeal.

III. REVERSALS BY COURT

As shown in Figure 1,⁶¹ the statewide reversal rate in civil cases was 36%. Among the courts of appeals, reversal rates ranged from 32% (in the Beaumont court of appeals) to 46% (in the Corpus Christi court of appeals).⁶²

The 36% statewide reversal rate is somewhat higher than the reversal rate that can be derived from statistics compiled by the Office of Court Administration.⁶³ The primary reason for the

52. See *infra* text accompanying note 149.

53. See *infra* text accompanying note 156.

54. See *infra* text accompanying note 156.

55. See *infra* Appendix B, Figure 14.

56. See *infra* Appendix B, Figure 14.

57. See *infra* Appendix B, Figure 15.

58. See *infra* Appendix B, Figure 15.

59. See *infra* Appendix B, Figure 15; see also Liberato & Rutter, *supra* note 4, at 454.

60. See *infra* Part V.A.

61. All figures referenced in this Article can be found in Appendix B.

62. See *infra* Appendix B, Figure 1.

63. The Office of Court Administration categorizes cases according to whether the judgment or order was affirmed, reversed, “modified and/or reformed” or “affirmed in part and in part reversed.” If half of the judgments and orders that were “modified and/or

difference is that reversals are relatively uncommon in certain types of cases that were excluded from this study, but are included in the Office of Court Administration figures, such as appeals brought by inmates and appeals in juvenile delinquency cases.⁶⁴

In general, it is no surprise that affirmances outnumber reversals. Indeed, low reversal rates suggest that the courts of appeals are mindful of the constraints on their power to reverse. For example, a court of appeals may not reverse, no matter how egregious the error, unless the complaining party made a request, objection, or motion in the court below that was proper, timely, and specific, and either obtained a ruling or objected to the trial court's failure to rule.⁶⁵ The steps taken to preserve error must appear in the appellate record⁶⁶ because a court of appeals cannot find error in matters outside the record.⁶⁷ Nor may a court of appeals reverse without taking into account the deference owed the trial court's ruling under the applicable standard of review because standards of review "define the parameters of a reviewing court's authority in determining whether a trial court erred."⁶⁸ Finally, under the doctrine of harmless error, a court of appeals may not reverse unless the error below "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals."⁶⁹

On the other hand, higher reversal rates can result when appellate judges invest the time and effort required to complete the hard task of reversing cases. Appellate dockets are crowded,⁷⁰

reformed" or "affirmed in part and in part reversed" are counted as affirmances, and the other half are counted as reversals, the Office of Court Administration's reversal rate for the 2010–2011 court year is 29%.

64. See *infra* Appendix A (explaining the methodology of the study).

65. TEX. R. APP. P. 33.1. An exception is made in rare cases of "fundamental" error. See *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006) ("Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties."); *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) ("Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.").

66. TEX. R. APP. P. 33.1.

67. See, e.g., *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657–58 (Tex. 2009) (declining to reach the question of recovery for attorney's fees due to the record's silence on the matter).

68. W. Wendell Hall et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 244 (2010).

69. TEX. R. APP. P. 44.1.

70. See *OCA 2011 Annual Report*, *supra* note 8 (scroll to "Courts of Appeals"; then download "Activity Detail") (reporting that during the 2011 fiscal year, the fourteen courts of appeals disposed of 11,936 cases).

and appellate judges are busy.⁷¹ If the appellant fails to show preservation and harm, there is no need for the court of appeals to reach the merits; it may quickly affirm and move on.⁷² Even if the court of appeals does reach the merits, affirming is still often easier than reversing. For example, when a court of appeals overrules a complaint regarding the factual insufficiency of the evidence, its opinion need not contain anything beyond a short description of the evidence supporting the verdict, followed by a statement that the evidence is factually sufficient.⁷³ In contrast, when a court reverses on factual sufficiency grounds, it must describe all of the evidence and “state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.”⁷⁴ Similarly, when a court of appeals overrules a complaint that the trial court abused its discretion, its opinion is often succinct.⁷⁵ When reversing, the court of appeals must explain how the trial court’s ruling exceeded the bounds of its discretion.⁷⁶

The reversal rates set forth above provide some basis for comparing the fourteen courts of appeals, but they are only a starting point. Certain types of cases are reversed frequently, even in the courts with the lowest reversal rates; other types of cases are reversed rarely, even in the courts with the highest reversal rates. The remainder of this Article identifies the types of cases that are most often reversed and the most common reasons for reversal.

71. See Sarah B. Duncan, Essay, *Pursuing Quality: Writing a Helpful Brief*, 30 ST. MARY’S L.J. 1093, 1098–1100 (1999) (comparing the high volume of an appellate judge’s workload with the low level of available resources). Justice Duncan noted as follows: “As an appellate judge, I work substantially more than the forty hours a week I averaged after I became of counsel. The reason? Volume . . .” *Id.* at 1098.

72. See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 480 (1998) (“Appellate judges can (and do) avoid complicated issues by deciding on simpler grounds.”); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 10–11 (1993) (observing the economic incentives in the “judiciary’s nonprofit structure”).

73. See *Ellis Cnty. State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994) (refusing to require that courts of appeals detail all the supporting evidence when upholding a trial court’s judgment). There is one exception: a court of appeals *must* provide a full analysis of all the evidence when overruling a complaint regarding the factual sufficiency of the evidence supporting an award of punitive damages. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994).

74. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

75. See, e.g., *Christian Care Ctrs., Found., Inc. v. Gooch*, No. 05-10-00933-CV, 2011 WL 1534511 (Tex. App.—Dallas Apr. 25, 2011, pet. filed) (mem. op.) (explaining in four paragraphs why the trial court did not abuse its discretion when it denied a motion to dismiss).

76. See *Hall et al.*, *supra* note 68, at 17 (“To find an abuse of discretion, the reviewing court ‘must determine that the facts and circumstances presented extinguish any discretion [or choice] in the matter.’” (alteration in original) (quoting *Kaiser Found. Health Plan of Tex. v. Bridewell*, 946 S.W.2d 642, 646 (Tex. App.—Waco 1997, orig. proceeding [leave denied]) (internal quotation marks omitted)).

IV. REVERSALS BY PROCEDURE

Each of the cases studied was categorized according to the procedure by which it was decided in the trial court—for example, by jury trial, bench trial, or summary judgment. When different aspects of the case were decided by different procedures, the case was categorized according to the procedure that was the focus of the appeal. Thus, if the focus of the appeal was a partial summary judgment granted on some issues, rather than the subsequent jury trial on the remaining issues, the case was categorized as a summary judgment.⁷⁷

As shown in Figure 2, in appeals from judgments entered on jury verdicts, the reversal rate was 34%. In appeals following bench trials, the reversal rate was 28%.⁷⁸ In appeals from summary judgments, the reversal rate was 31%.⁷⁹ In other types of appeals, as discussed below, the reversal rates generally were higher.

These findings refute the widely held supposition that courts of appeals reverse summary judgments at a higher rate than judgments entered on jury verdicts. The conventional wisdom was correct at one time: during the 2001–2002 court year, the reversal rate for summary judgments was 33%, while the reversal rate for judgments entered on jury verdicts was 25%.⁸⁰ But during the 2010–2011 court year, the courts of appeals reversed judgments entered on jury verdicts at a higher rate than summary judgments—even though the presumptions and standards of review applicable on appeal generally run in favor of judgments entered on jury verdicts and against summary judgments.⁸¹

A. *Jury Trials*

1. *Judgments Entered on Verdicts.* As shown in Figure 3, in appeals from judgments entered on jury verdicts,⁸² the statewide reversal rate was 34%. Figure 3 provides the reversal rates for

77. *E.g.*, *Zurita v. Lombana*, 322 S.W.3d 463, 469–70 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (reviewing a partial summary judgment, as well as the jury’s verdict on the remaining claims).

78. *See infra* Appendix B, Figure 2.

79. *See infra* Appendix B, Figure 2.

80. *Liberato & Rutter, supra* note 4, at 439.

81. *See infra* Appendix B, Figure 2; *see also* David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1480 (2010) (“In an appeal from a trial on the merits, the standard of review and presumptions run in favor of the judgment.” (citing *Tex. Dep’t of Pub. Safety v. Martin*, 882 S.W.2d 476, 482–83 (Tex. App.—Beaumont 1994, no writ)).

82. These figures include only judgments entered on verdicts, not directed verdicts or judgments notwithstanding the verdict.

the courts that reviewed the most judgments entered on jury verdicts.⁸³ Among these courts, the San Antonio court had the highest reversal rate, at 50%.⁸⁴

An appellant's chances of success depended in large part on the nature of the grounds for the appeal. As shown in Figure 4, when the trial court entered judgment on a jury verdict, the most common reason for reversal was that the evidence was legally insufficient to support the verdict or that one of the parties was otherwise entitled to judgment as a matter of law. This category, which accounted for 77% of the reversals, encompasses issues that are reviewed on appeal under a *de novo* standard.⁸⁵ For example, this category includes judgments reversed because there was no evidence, or legally insufficient evidence, to support essential findings regarding causation,⁸⁶ damages,⁸⁷ or another element of the cause of action.⁸⁸ In some cases, there was no evidence to support the verdict because the expert testimony was unreliable and therefore inadmissible.⁸⁹ In other cases, the jury failed to find a fact that had been established conclusively, as a matter of law.⁹⁰ Other issues of law

83. Only the courts that decided at least twenty appeals from judgments on jury verdicts are listed separately in Figure 3. However, the statewide average is based on appeals from all fourteen courts of appeals.

84. *See infra* Appendix B, Figure 3.

85. *See infra* Appendix B, Figure 4.

86. *E.g.*, *Williams v. Dardenne*, 345 S.W.3d 118, 128–29 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Majeed v. Hussain*, No. 03-08-00679-CV, 2010 WL 4137472, at *1–2 (Tex. App.—Austin Oct. 22, 2010, no pet.) (mem. op.).

87. *E.g.*, *Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 178 (Tex. App.—Dallas 2011, pet. denied); *U.S. Renal Care, Inc. v. Jaafar*, 345 S.W.3d 600, 603 (Tex. App.—San Antonio 2011, pet. denied); *Tex. Dep't of Transp. v. Banda*, No. 03-09-00724-CV, 2010 WL 5463857, at *6 (Tex. App.—Austin Dec. 22, 2010, pet. denied) (mem. op.); *Trend Gathering & Treating, LP v. Moore*, No. 10-10-00136-CV, 2010 WL 4983488, at *4 (Tex. App.—Waco Dec. 1, 2010, no pet.) (mem. op.).

88. *E.g.*, *Ford Motor Co. v. Wiles*, 353 S.W.3d 198, 203 (Tex. App.—Dallas 2011, pet. filed) (concluding there was no evidence of a “safer alternative design,” as required in a design defect case); *Gregan v. Kelly*, No. 01-09-00685-CV, 2011 WL 1938249, at *6 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.) (stating that there was no evidence of a fiduciary relationship, as required in a breach of fiduciary duty case); *Clouse v. Levin*, 339 S.W.3d 766, 770 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (determining that there was no evidence the defendant was a party to the contract, as required in a contract case).

89. *E.g.*, *U.S. Renal Care*, 345 S.W.3d at 616.

90. *E.g.*, *Popcap Games, Inc. v. Mumbojumbo, LLC*, 350 S.W.3d 699, 712 (Tex. App.—Dallas 2011, pet. filed) (holding that the evidence conclusively established the amount of contract damages); *Duncan v. Dominion Estates Homeowners Ass'n*, No. 01-09-01086-CV, 2011 WL 3505298, at *1, *10 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (mem. op.) (holding that the evidence conclusively established that homeowners association failed to comply with association's declaration of covenants, conditions, and restrictions); *Davis v. Insurtek, Inc.*, No. 05-09-01029-CV, 2010 WL 5395668, at *4–5 (Tex. App.—Dallas Dec. 30, 2010, no pet.) (mem. op.) (holding that the evidence conclusively established the “full performance” exception to the statute of frauds).

included the plaintiff's lack of standing⁹¹ and the trial court's failure to apply the correct statute of limitations.⁹²

The second most common reason for reversal was charge error, which accounted for 9% of the reversals.⁹³ The significance of the charge on appeal is not surprising. While the decision to submit a particular instruction or definition generally is committed to the trial court's broad discretion,⁹⁴ other charge issues raise questions of law that are subject to de novo review.⁹⁵ Most reversals based on charge error turned on questions of law. For example, the courts of appeals reversed because the trial court erroneously refused to submit questions on the plaintiff's contributory negligence,⁹⁶ because the charge contained an incorrect producing cause definition,⁹⁷ and because the charge improperly combined issues pertaining to compensability and the extent of injuries into a single question.⁹⁸

Challenges to the factual sufficiency of the evidence and contentions that the verdict was against the great weight and

91. *E.g.*, *Tex. Farm Bureau Mut. Ins. Co. v. Rogers*, 351 S.W.3d 103, 107 (Tex. App.—San Antonio 2011, pet. filed).

92. *E.g.*, *Prestige Ford Garland Ltd. P'ship v. Morales*, 336 S.W.3d 833, 839 (Tex. App.—Dallas 2011, no pet.) (determining that plaintiff's promissory estoppel claim was barred by the statute of limitations); *Sw. Olshan Found. Repair Co. v. Gonzales*, 345 S.W.3d 431, 437 (Tex. App.—San Antonio 2011, pet. filed) (concluding that a two-year statute of limitations barred plaintiff's fraud claim).

93. *E.g.*, *Old HH, Ltd. v. Henderson*, No. 03-10-00129-CV, 2011 WL 3250593, at *7 (Tex. App.—Austin July 27, 2011, no pet.) (mem. op.) (reversing because the trial court erroneously refused to submit a question on the breach of the implied warranty of habitability); *Benham v. Lynch*, No. 04-09-00606-CV, 2011 WL 381665, at *8 (Tex. App.—San Antonio Feb. 2, 2011, no pet.) (mem. op.) (reversing because the trial court erroneously refused to submit an instruction on the "sudden emergency" defense); *Martinez v. State Office of Risk Mgmt.*, No. 04-10-00046-CV, 2011 WL 193468, at *4 (Tex. App.—San Antonio Jan. 19, 2011, no pet.) (mem. op.) (reversing because the charge improperly combined issues pertaining to compensability and the extent of injuries into a single question); *see infra* Appendix B, Figure 4.

94. *See* *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009) ("Determining necessary and proper jury instructions is a matter within the trial court's discretion, and appellate review is for abuse of that discretion."); *Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez*, 995 S.W.2d 661, 664 (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."); *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995) ("The trial court has wide discretion to determine sufficiency of definitions and instructions.")

95. *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.")

96. *GSF Energy, LLC v. Padron*, No. 01-09-00622-CV, 2011 WL 2184368, at *6-7 (Tex. App.—Houston [1st Dist.] Jun. 2, 2011, pet. filed).

97. *Cont'l Cas. Co. v. Baker*, No. 01-09-00881-CV, 2011 WL 3918155, at *11 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.).

98. *Martinez*, 2011 WL 193468, at *4.

preponderance of the evidence rarely met with success on appeal, accounting for only 5% of the reversals.⁹⁹ “Factual sufficiency’ and ‘great weight’ points require an evaluation of the evidence.”¹⁰⁰ Although the courts of appeals are authorized to make such evaluations,¹⁰¹ they are reluctant to do so because of the fine line they must tread to avoid substituting their views for those of juries.¹⁰²

In the wake of *City of Keller v. Wilson*, there is some question as to the continued vitality of factual sufficiency review in Texas.¹⁰³ In that decision, the Texas Supreme Court held that “[t]he final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.”¹⁰⁴ One respected commentator has written that it remains unclear whether “*City of Keller*’s ‘reasonable and fair-minded person’ standard [for legal sufficiency] will, little by little, subsume factual sufficiency in practice, even if not in doctrine.”¹⁰⁵ In practice, however, factual sufficiency reversals were a rarity even before *City of Keller*. During the 2001–2002 court year, challenges to the factual sufficiency of the evidence accounted for only 4% of the reversals of judgments entered on jury verdicts.¹⁰⁶ Thus, there was little room for *City of Keller* to further curtail factual sufficiency review.

Finally, few reversals of judgments on verdicts were based on the manner in which the trial was conducted. For example, the courts of appeals almost never reversed based on the erroneous admission or exclusion of evidence,¹⁰⁷ or on the basis of any other

99. *E.g.*, *Salinas v. Allen*, No. 07-09-0260-CV, 2010 WL 4828412, at *1–2 (Tex. App.—Amarillo Nov. 29, 2010, no pet.) (mem. op.); *Hoppenstein Props., Inc. v. Schober*, 329 S.W.3d 846, 853 (Tex. App.—Fort Worth 2010, no pet.); *Am. Hat Co. v. Wise Electric Coop., Inc.*, No. 02-09-00368-CV, 2010 WL 4028098, at *8 (Tex. App.—Fort Worth Oct. 14, 2010, pet. denied) (mem. op.); *see infra* Appendix B, Figure 4.

100. *Liberato & Rutter*, *supra* note 4, at 442 (citing *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989)).

101. *See* TEX. CONST. art. 5, § 6 (“[T]he decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.”); TEX. GOV’T CODE ANN. § 22.225(a) (West 2004) (“A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.”).

102. *Jackson v. Williams Bros. Constr. Co.*, No. 01-09-00920-CV, 2011 WL 3612280, at *7 (Tex. App.—Houston [1st Dist.] Aug. 18, 2011, pet. denied).

103. *Hall et al.*, *supra* note 68, at 59.

104. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

105. *Hall et al.*, *supra* note 68, at 44.

106. *Liberato & Rutter*, *supra* note 4, at 442.

107. Examples of reversals based on the erroneous admission or exclusion of evidence include: *E-Z Mart Stores, Inc. v. Ronald Holland’s A-Plus Transmission & Auto., Inc.*, No. 04-10-00192-CV, 2011 WL 3328705, at *8 (Tex. App.—San Antonio Aug. 3, 2011, pet. filed), reversing because the trial court excluded evidence that a third party caused the leaks from an underground petroleum storage system; *Tornado Trucking, Inc. v.*

complaint concerning the manner in which the trial was conducted.¹⁰⁸ All of these complaints, taken together, accounted for just 9% of the reversals.¹⁰⁹ In the eyes of the courts of appeals, few trials are so seriously flawed that reversal is required. There are two basic reasons for this. First, most such rulings are committed to the broad discretion of the trial court, and courts of appeals are reluctant to find an abuse of discretion.¹¹⁰ Second, reversal requires not only an abuse of discretion, but also harm.¹¹¹ Although lawyers frequently complain on appeal about the manner in which the trial court conducted the trial, the courts of appeals almost as frequently conclude that the alleged errors were harmless.¹¹²

2. *Directed Verdicts and Judgments Notwithstanding the Verdict.* As shown in Figure 5, when the trial court directed a verdict or signed a judgment notwithstanding the verdict, the reversal rate was 52%. In comparison, when the trial court entered judgment on the verdict, the reversal rate was 34%.¹¹³

This disparity in reversal rates reflects the applicable presumptions and standards of review on appeal, which generally run in favor of judgments on jury verdicts and against directed verdicts and judgments notwithstanding the verdict.¹¹⁴ At the

Dodd, No. 10-10-00062-CV, 2011 WL 2641272, at *6–7 (Tex. App.—Waco July 6, 2011, pet. denied) (mem. op.), reversing because the trial court admitted evidence of drug test results; and *Caffe Ribs, Inc. v. State*, 328 S.W.3d 919, 933 (Tex. App.—Houston [14th Dist.] 2010, no pet.), reversing because the trial court excluded evidence relating to an indemnity obligation addressing potential environmental liability.

108. Examples of reversals based on the manner in which trials were conducted include: *In re H.S.J.*, No. 03-10-00007-CV, 2010 WL 4670564, at *1 (Tex. App.—Austin Nov. 16, 2010, no pet.) (mem. op.), reversing because the trial court denied a request to stay the proceedings pursuant to the Servicemembers Civil Relief Act; and *Duff v. Spearman*, 322 S.W.3d 869, 880, 887 (Tex. App.—Beaumont 2010, pet. denied), reversing because the trial court refused a request to withdraw a deemed admission.

109. See *infra* Appendix B, Figure 4.

110. Hall et al., *supra* note 68, at 16–18.

111. See TEX. R. APP. P. 44.1(a) (establishing that the standard of reversible error is met if the appellate court concludes the error “probably caused the rendition of an improper judgment” or “probably prevented the appellant from properly presenting the case to the court of appeals”).

112. See, e.g., *Lopez-Juarez v. Kelly*, 348 S.W.3d 10, 26 (Tex. App.—Texarkana 2011, pet. filed) (concluding that the admission of evidence, though error, was harmless); *Hancock v. Variyam*, 345 S.W.3d 157, 175 (Tex. App.—Amarillo 2011, pet. filed.) (concluding that the admission of evidence, if error, was harmless); *MacGillivray v. MacGillivray*, No. 04-10-00109-CV, 2011 WL 2150352, at *9 (Tex. App.—San Antonio June 1, 2011, pet. denied) (mem. op.) (concluding that the admission of evidence, if error, was harmless); *Niche Oilfield Servs., LLC v. Carter*, 331 S.W.3d 563, 574–76 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (concluding that the admission of evidence, if error, was harmless).

113. See *infra* Appendix B, Figure 5.

114. See *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) (applying the legal sufficiency standard of review to directed verdicts, judgments notwithstanding the verdict, and summary judgments); *Hittner & Liberato*, *supra* note 81, at 1480–81 (citing

same time, the disparity in reversal rates casts doubt on the conventional wisdom that trial judges grant directed verdicts and judgments notwithstanding the verdict only in the most clear-cut cases, where reasonable minds could not possibly differ.¹¹⁵

It is curious that over the last nine years, the reversal rate for judgments entered on jury verdicts has risen (from 25% to 34%), while the reversal rate for directed verdicts and judgments notwithstanding the verdict has also risen (from 39% to 52%).¹¹⁶ If the reversal rate had risen only for judgments entered on jury verdicts, that statistic might signal that trial courts were deferring to juries too often. On the other hand, if the reversal rate had risen only for directed verdicts and judgments notwithstanding the verdict, that statistic might signal that trial courts were not deferring to juries often enough. Given that both reversal rates have risen, neither conclusion is warranted. Taken together, these rising reversal rates signal only that no matter what decision a trial judge reaches with respect to a jury verdict, the court of appeals is increasingly likely to disagree.

B. Bench Trials

As shown in Figure 6, in appeals following bench trials, the statewide reversal rate was 28%. Figure 6 provides the reversal rates for the courts that reviewed the most judgments following bench trials. Among these courts, the reversal rate ranged from 10% in the Beaumont court of appeals to 37% in the Fort Worth court of appeals.¹¹⁷

For purposes of this study, a case was categorized as a bench trial if significant fact issues were tried to the bench. If the issues tried to the bench were incidental to issues decided on summary judgment or tried to the jury, such as when attorney's fees were tried to the bench following a jury trial¹¹⁸ or summary judgment¹¹⁹ on liability, the case was not categorized as a bench trial.

Tex. Dep't of Pub. Safety v. Martin, 882 S.W.2d 476, 482–83 (Tex. App.—Beaumont 1994, no writ) (contrasting appellate review of jury verdicts and appellate review of summary judgments).

115. See Drahozal, *supra* note 72, at 495–97 (discussing the reasoning employed by trial courts when granting directed verdicts and judgments notwithstanding the verdict).

116. See *infra* Appendix B, Figure 5.

117. Only the courts that decided at least twenty appeals from judgments following bench trials are listed separately in Figure 6. However, the statewide average is based on appeals from all fourteen courts of appeals.

118. *E.g.*, Commerce & Indus. Ins. Co. v. Ferguson-Stewart, 339 S.W.3d 744, 745 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

119. *E.g.*, Am. Int'l Indus., Inc. v. Scott, No. 01-09-00816-CV, 2011 WL 1631764, at *8 (Tex. App.—Houston [1st Dist.] Apr. 28, 2011, no pet.).

As shown in Figure 7, the reversal rate for appeals following bench trials rose from 22% during the 2001–2002 court year to 28% in the 2010–2011 court year. Tort and DTPA cases were largely responsible for the change. As shown in Figure 8, tort and DTPA cases accounted for only 9% of the appeals following bench trials. However, as shown in Figure 7, the reversal rate in appeals following tort and DTPA bench trials surged from 21% in the 2001–2002 court year to 37% in the 2010–2011 court year. By a margin of four to one, these were cases in which the trial court entered judgment for the plaintiff and the defendant appealed.

As shown in Figure 9, the most common reason for reversal following bench trials was that the evidence was legally insufficient to support the judgment, or one of the parties was otherwise entitled to judgment as a matter of law. These grounds accounted for 81% of the reversals.¹²⁰ Examples include judgments that were reversed because the claims were barred by limitations,¹²¹ because the contract claims were barred by the statute of frauds,¹²² because the trial court misconstrued an unambiguous lease,¹²³ or because the statute sued upon provided the plaintiff only a lien, not a cause of action.¹²⁴

As Figure 9 also shows, only 5% of the reversals following bench trials were based on determinations that the trial court's findings were supported by factually insufficient evidence, or were against the great weight and preponderance of the evidence.¹²⁵ Not long ago, reversals on these grounds were several times more prevalent: during the 2001–2002 court year, 14% of the reversals following bench trials were based on these grounds.¹²⁶ In appeals following bench trials—in contrast to appeals following jury trials¹²⁷—it appears that *City of Keller v. Wilson*¹²⁸ has significantly curtailed factual sufficiency review.

120. See *infra* Appendix B, Figure 9.

121. *E.g.*, Gaffar v. Kamal, No. 05-10-00560-CV, 2011 WL 3209218, at *3 (Tex. App.—Dallas July 27, 2011, no pet.) (mem. op.); Daybreak Express, Inc. v. Lexington Ins. Co., 342 S.W.3d 795, 806 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

122. *E.g.*, Carpenter v. Phelps, No. 01-09-00203-CV, 2011 WL 1233312, at *1 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, no pet.).

123. *E.g.*, Cunningham v. Anglin, No. 05-10-01023-CV, 2011 WL 3557951, at *4–5 (Tex. App.—Dallas Aug. 12, 2011, no pet.) (mem. op.).

124. *E.g.*, Green Tree Servicing, LLC v. 1997 Circle N. Ranch Ltd., 325 S.W.3d 869, 874–76 (Tex. App.—Austin 2010, no pet.).

125. *E.g.*, Nguyen v. Nguyen, No. 01-09-00421-CV, 2011 WL 1496746, at *10 (Tex. App.—Houston [1st Dist.] Feb. 24, 2011, pet. denied); *In re K.R.B.*, No. 02-10-00021-CV, 2010 WL 3928727, at *12–13 (Tex. App.—Fort Worth Oct. 7, 2010, no pet.) (mem. op.).

126. Liberato & Rutter, *supra* note 4, at 445.

127. See *supra* Part IV.A.1.

128. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).

C. Summary Judgments

Summary judgments¹²⁹ are frequently appealed. During the period studied, there were more appeals from summary judgments than from any other type of judgment.

As shown in Figure 10, in appeals from summary judgments, the statewide reversal rate was 31%. Figure 10 provides the reversal rates for the courts that reviewed the most summary judgments. Among these courts, the reversal rate ranged from 13% in the El Paso court of appeals to 48% in the Corpus Christi court of appeals.¹³⁰

Most summary judgments are granted in favor of defendants, who may obtain a summary judgment by proving as a matter of law all elements of an affirmative defense,¹³¹ by disproving as a matter of law an essential element of the plaintiff's claim,¹³² or by alleging that the plaintiff lacks evidence to support an essential element of its claim.¹³³ While it is possible for a plaintiff to obtain a summary judgment on any element of its claim other than damages,¹³⁴ even without negating the defendant's affirmative defenses,¹³⁵ summary judgments for plaintiffs are relatively rare. As shown in Figure 11, 43% of the summary judgments that were appealed were granted for personal injury defendants,¹³⁶ defendants in other tort and DTPA

129. The discussion here excludes cases in which summary judgment motions were denied, except when the denial of one summary judgment motion was incidental to the granting of an opposing summary judgment motion. *See* Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009) (affirming a motion for summary judgment). Appeals from orders denying summary judgment motions based on immunity grounds are addressed in Part IV.G. Appeals also may be taken from orders denying summary judgment motions based on First Amendment grounds in media cases, but during the period studied, these orders were not appealed in sufficient numbers to support a reliable analysis. *See, e.g.,* Main v. Royall, 348 S.W.3d 381, 400 (Tex. App.—Dallas 2011, no pet.) (reversing the denial of a media defendant's summary judgment motion); Post-Newsweek Stations, Hous., Inc. v. Dugi, No. 13-10-00366-CV, 2011 WL 2463057, at *7, *14 (Tex. App.—Corpus Christi June 16, 2011, pet. filed) (mem. op.) (affirming the denial of a media defendant's summary judgment motion); ZYZY Corp. v. Hernandez, 345 S.W.3d 452, 462 (Tex. App.—San Antonio 2011, no pet.) (affirming the denial of a media defendant's summary judgment motion).

130. *See infra* Appendix B, Figure 10. Only the courts that decided at least twenty appeals from summary judgments are listed separately in Figure 10. However, the statewide average is based on appeals from all fourteen courts of appeals.

131. TEX. R. CIV. P. 166a(b); *D. Hous., Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002).

132. TEX. R. CIV. P. 166a(b); *Love*, 92 S.W.3d at 454.

133. TEX. R. CIV. P. 166a(i).

134. TEX. R. CIV. P. 166a(a).

135. *Woodside v. Woodside*, 154 S.W.3d 688, 691 (Tex. App.—El Paso 2004, no pet.); *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210, 216 (Tex. App.—Beaumont 2001, pet. *refd.*)

136. *E.g., Forester v. El Paso Electric Co.*, 329 S.W.3d 832, 838 (Tex. App.—El Paso 2010, no pet.).

cases,¹³⁷ defendants in employment cases,¹³⁸ or defendants in insurance coverage cases;¹³⁹ an additional 28% were granted in contract cases.¹⁴⁰ As shown in Figure 12, summary judgments granted in favor of insurers in coverage cases and employers in employment cases were reversed at a significantly lower rate than summary judgments granted in other cases.

As shown in Figure 13, reversals of summary judgments were most often attributed to the existence of fact issues¹⁴¹ (including, in appeals from no-evidence summary judgments, the existence of some evidence raising fact issues).¹⁴² The existence of fact issues accounted for 47% of the summary judgment reversals.¹⁴³ Thirty-five percent of the reversals were attributed to errors of law—for example, an incorrect determination regarding which limitations period applied¹⁴⁴ or whether the economic loss rule barred a negligence claim.¹⁴⁵

Eighteen percent of the reversals were based on procedural errors, such as granting summary judgment on claims that were not the subject of the summary judgment motion¹⁴⁶ or providing inadequate notice of the summary judgment hearing.¹⁴⁷ In

137. *E.g.*, *Kemp v. Jensen*, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied).

138. *E.g.*, *Miles v. Lee Anderson Co.*, 339 S.W.3d 738, 740 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

139. *E.g.*, *Hand v. Old Republic Nat'l Title Ins. Co.*, No. 02-10-00347-CV, 2011 WL 1103725, at *1, *3 (Tex. App.—Fort Worth Mar. 24, 2011, no pet.) (mem. op.).

140. *E.g.*, *Rockwall Commons Assocs., Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 503–04, 514 (Tex. App.—El Paso 2010, no pet.).

141. *E.g.*, *Clark v. Cotten Schmidt, L.L.P.*, 327 S.W.3d 765, 771 (Tex. App.—Fort Worth 2010, no pet.).

142. *E.g.*, *S & I Mgmt., Inc. v. Sungju Choi*, 331 S.W.3d 849, 856 (Tex. App.—Dallas 2011, no pet.).

143. *See infra* Appendix B, Figure 13.

144. *E.g.*, *Stephanie M. v. Coptic Orthodox Patriarchate Diocese of S. U.S.*, No. 14-10-00004-CV, 2011 WL 1761353, at *1 (Tex. App.—Houston [14th Dist.] Mar. 17, 2011, pet. denied) (reversing a summary judgment for defendants because the plaintiff's claim arose out of an intentional sexual assault allegedly committed by a priest, and was therefore governed by a five-year statute of limitations, rather than a two-year statute).

145. *E.g.*, *Wolf Hollow I, L.P. v. El Paso Mktg., L.P.*, 329 S.W.3d 628, 643–45 (Tex. App.—Houston [14th Dist.] 2010, pet. granted).

146. *E.g.*, *Narnia Invs., Ltd. v. Harvestons Sec., Inc.*, No. 14-10-00244-CV, 2011 WL 3447611, at *6 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, no pet.) (mem. op.); *Walker v. Campuzano Enters., Ltd.*, No. 02-10-00061-CV, 2011 WL 945167, at *1 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.) (mem. op.); *Home Loan Corp. v. SKH, L.L.P.*, No. 01-09-01088-CV, 2011 WL 61165, at *3 (Tex. App.—Houston [1st Dist.] Jan. 6, 2011, no pet.) (mem. op.); *Willy v. Winkler*, No. 01-10-00115-CV, 2010 WL 5187719, at *3 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.); *see infra* Appendix B, Figure 13.

147. *E.g.*, *Hummel v. Hummel*, No. 04-10-00554, 2011 WL 3849477, at *3 (Tex. App.—San Antonio Aug. 31, 2011, no pet.) (mem. op.); *Valdez v. Robertson*, 352 S.W.3d 832, 835 (Tex. App.—San Antonio 2011, no pet.).

comparison, during the 2001–2002 court year, only 11% of the reversals resulted from procedural errors.¹⁴⁸ In the eyes of the courts of appeals, Texas lawyers and judges are becoming less proficient or less careful when requesting and granting motions for summary judgment.

Few of the summary judgment appeals were from pure no-evidence summary judgments. During the period studied, pure no-evidence motions accounted for approximately one in ten summary judgment appeals. Pure no-evidence summary judgments accounted for 21% of the summary judgment appeals in personal injury cases¹⁴⁹ and 14% of the summary judgment appeals in other tort cases and DTPA cases.¹⁵⁰ They accounted for an even smaller proportion of summary judgment appeals in insurance coverage cases (7%),¹⁵¹ other contract cases (5%),¹⁵² and employment cases (5%).¹⁵³

When pure no-evidence summary judgments were appealed, they were rarely reversed. When the summary judgment motion was based solely on no-evidence grounds, the reversal rate was 19%, and when the motion was based at least partially on traditional grounds, the reversal rate was 32%. Pure no-evidence summary judgments may be reversed less frequently because they are utilized primarily as a low-cost method to dispose of weak cases—the purpose for which the no-evidence summary judgment was designed.¹⁵⁴ Another factor may be that a no-evidence motion for summary judgment, unlike a traditional motion for summary judgment, must be granted if it complies with Rule 166a(i) and no response is filed.¹⁵⁵ Therefore, a nonmovant generally cannot obtain a reversal of a no-evidence summary judgment if he failed to file a response in the court below.

148. Liberato & Rutter, *supra* note 4, at 447.

149. *E.g.*, Webb v. Maldonado, 331 S.W.3d 879, 881 (Tex. App.—Dallas 2011, pet. denied).

150. *E.g.*, Elizondo v. Krist, 338 S.W.3d 17, 19–20 (Tex. App.—Houston [14th Dist.] 2010, pet. filed).

151. *E.g.*, Cont'l Cas. Ins. Co. v. Lavender, No. 02-10-00399-CV, 2011 WL 2306832, at *1 (Tex. App.—Fort Worth June 9, 2011, pet. denied) (mem. op.).

152. *E.g.*, Dexter v. Strickland, No. 04-09-00459-CV, 2010 WL 3582380, at *1 (Tex. App.—San Antonio Sept. 15, 2010, no pet.) (mem. op.).

153. *E.g.*, Hernandez v. Grey Wolf Drilling, L.P., 350 S.W.3d 281, 282 (Tex. App.—San Antonio 2011, no pet.).

154. Lattrell v. Chrysler Corp., 79 S.W.3d 141, 149 (Tex. App.—Texarkana 2002, pet. denied); *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding [mand. denied]).

155. TEX. R. CIV. P. 166a(i); Hittner & Liberato, *supra* note 81, at 1468 (describing no-evidence summary judgments).

D. Default Judgments

As shown in Figure 14, appeals from no-answer default judgments had one of the highest rates of reversal—77%. No-answer default judgments are entered when a defendant, having been served, fails to appear in the case.¹⁵⁶ As also shown in Figure 14, the reversal rate for post-answer default judgments was lower at 54%. Post-answer default judgments are entered when a defendant, having appeared in the case, fails to appear for trial.¹⁵⁷ When no-answer default judgments were reversed, the most common reason was a defect in service, meaning that the trial court never obtained personal jurisdiction over the defendant and the defendant never had notice of the suit.¹⁵⁸ Post-answer default judgments generally cannot be reversed on this ground because a defendant waives any objections to personal jurisdiction by generally appearing in the lawsuit.¹⁵⁹

As Figure 14 also shows, the reversal rate depended not only on the type of default judgment, but also the method used to challenge the default judgment.¹⁶⁰ When the trial court granted a default judgment and then denied a motion for new trial, the

156. *E.g.*, Quijano v. Quijano, 347 S.W.3d 345, 347 (Tex. App.—Houston [14th Dist.] 2011, no pet.); Hufco-Beaumont, LLC v. Johnson, No. 14-10-01011-CV, 2011 WL 2462195, at *1 (Tex. App.—Houston [14th Dist.] June 21, 2011, no pet.) (mem. op.); Catalyst Partners, Inc. v. BASF Corp., No. 02-10-00377-CV, 2011 WL 2306836, at *1 (Tex. App.—Fort Worth June 9, 2011, no pet.) (mem. op.); Needham v. CMC Cityscape II, Ltd., No. 12-11-00007-CV, 2011 WL 2112773, at *1 (Tex. App.—Tyler May 25, 2011, pet. filed) (mem. op.); Mortg. Elec. Registration Sys., Inc., No. 14-10-00090-CV, 2011 WL 1364070, at *1 (Tex. App.—Houston [14th Dist.] Apr. 12, 2011, pet. denied) (mem. op.).

157. *E.g.*, Ayala v. Ayala, No. 01-09-00785-CV, 2011 WL 2930311, at *1 (Tex. App.—Houston [1st Dist.] July 21, 2011, no pet.); Boatman v. Bradley M. Griffin, Inc., No. 02-10-00417-CV, 2011 WL 2989925, at *1–2 (Tex. App.—Fort Worth July 21, 2011, no pet.) (mem. op.); Henderson v. Henderson, No. 03-10-00531-CV, 2011 WL 2768549, at *1 (Tex. App.—Austin July 13, 2011, pet. struck) (mem. op.).

158. *E.g.*, Kostechko v. Mazaheri, No. 05-10-00793-CV, 2011 WL 2654276, at *1 (Tex. App.—Dallas July 8, 2011, pet. filed) (mem. op.); Chupp v. Chupp, No. 01-10-00197-CV, 2011 WL 2623996, at *3–4 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.); Orgoo, Inc. v. Rackspace US, Inc., 341 S.W.3d 34, 36 (Tex. App.—San Antonio 2011, no pet.); Bus. Staffing, Inc. v. Gonzalez, 331 S.W.3d 791, 793 (Tex. App.—Eastland 2010, no pet.); Inv. Ideas, Inc. v. Ellekay, LLC, No. 13-10-208-CV, 2010 WL 4657953, at *1, *3 (Tex. App.—Corpus Christi Nov. 18, 2010, no pet.) (mem. op.); Bank of Am., N.A. v. Estate of Hill, No. 06-10-00053-CV, 2010 WL 4324436, at *1 (Tex. App.—Texarkana Nov. 3, 2010, no pet.) (mem. op.).

159. TEX. R. CIV. P. 120a(1); Hilburn v. Jennings, 698 S.W.2d 99, 100 (Tex. 1985).

160. Reversals in bill of review proceedings are not addressed here. An order granting a bill of review is interlocutory because it sets aside the prior judgment without disposing of the case on the merits. Kiefer v. Touris, 197 S.W.3d 300, 302 (Tex. 2006) (per curiam) (citing Tesoro Petrol. v. Smith, 796 S.W.2d 705, 705 (Tex. 1990) (per curiam)). An appeal may be brought from a judgment for the bill of review defendant, but during the period studied, these judgments were not appealed in sufficient numbers to support a reliable analysis.

reversal rate was 71%.¹⁶¹ When a motion for new trial was not filed and the default judgment went unchallenged until the defendant perfected a restricted appeal, the reversal rate was 62%.¹⁶² Because these two reversal rates are not far apart, it might appear that default judgments are so vulnerable to reversal that it makes little difference whether the defendant discovers the default in time to file a motion for new trial, or discovers the default too late to file a motion for new trial and therefore files a restricted appeal. However, a closer examination leads to a different conclusion.

Typically, an appeal from the denial of a motion for new trial will raise an argument that a new trial was warranted under *Craddock v. Sunshine Bus Lines, Inc.*¹⁶³ *Craddock* holds that a default judgment should be set aside and a new trial granted when the defendant establishes that (1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake; (2) the motion for new trial set up a meritorious defense; and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff.¹⁶⁴ A trial court's application of the *Craddock* test is reviewed for an abuse of discretion.¹⁶⁵ Because appellate courts will differ on the delicate question of whether trial courts have abused their discretion¹⁶⁶ in almost every case an appeal offers at least some hope of reversal, and defendants often are inclined to try. Given the frequency with which *Craddock* denials are appealed, the reversal rate of 71% is striking.

In contrast, the appellant in a restricted appeal cannot raise a *Craddock* argument and must instead show an error that is apparent on the face of the record,¹⁶⁷ such as improper service.¹⁶⁸ Most of these issues are subject to de novo review. Moreover, because the law governing default judgments is relatively well settled, defendants can often predict whether a default judgment will be set aside and appeal only if reversal is likely. Thus, the

161. *E.g.*, *Bus. Staffing*, 331 S.W.3d at 792; *see infra* Appendix B, Figure 14.

162. *E.g.*, *Gonzalez v. Gonzalez*, 331 S.W.3d 864, 865–66 (Tex. App.—Dallas 2011, no pet.); *see infra* Appendix B, Figure 14.

163. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

164. *Id.* at 126; *see* *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002) (discussing *Craddock*).

165. *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

166. *Craddock*, 133 S.W.2d at 126.

167. *Norman Commc'ns. v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam).

168. *See* Hall et al., *supra* note 68, at 89–90 (explaining why a motion for a new trial after a defective default judgment is not required to satisfy *Craddock*).

reversal rate of 61% may indicate that defendants are selective in pursuing restricted appeals, not that most default judgments are susceptible to reversal in restricted appeals.

E. Temporary Injunctions

In appeals from orders granting temporary injunctions,¹⁶⁹ the reversal rate was 56%.¹⁷⁰ “To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.”¹⁷¹ An order granting a temporary injunction must set forth the reasons, specifically describe the terms and describe in detail the acts to be restrained, set the case for trial on the merits, and fix the amount of the bond.¹⁷² In prior years, most reversals of temporary injunctions were attributed to the movant’s failure to establish a probable, imminent, and irreparable injury.¹⁷³ During the 2010–2011 court year, however, most reversals were attributed to procedural errors, such as a failure to set the case for trial.¹⁷⁴

The reversal rate for temporary injunctions was higher than the rate for most other rulings, even though temporary injunctions are reviewed under a lenient abuse of discretion standard.¹⁷⁵ The reason for the high reversal rate may be that lawyers generally appeal from temporary injunctions only when the grounds for reversal are compelling because in most

169. An order denying a temporary injunction, like an order granting a temporary injunction, is subject to an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (West 2008). During the period studied, however, orders denying temporary injunctions were not appealed in sufficient numbers to support a reliable analysis.

170. The reversal rate for temporary injunctions has remained remarkably constant. Between 1975 and 1985, the courts of appeals affirmed 101 orders granting temporary injunctions, modified 21, and reversed 107. Bob E. Shannon, Charles F. Herring, Jr. & J. Matthew Dow, *Temporary Restraining Orders and Temporary Injunctions in Texas—A Ten Year Survey, 1975–1985*, 17 ST. MARY’S L.J. 689, 750–55, 761–72 (1986). Thus, the rate of reversal or modification was 56% between 1975 and 1985, compared to the 59% rate of reversal during the 2001–2002 court year and the 56% rate of reversal during the 2010–2011 court year. See Liberato & Rutter, *supra* note 4, at 451 (noting the reversal rate for temporary injunctions in 2001–2002).

171. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

172. TEX. R. CIV. P. 683–684.

173. *E.g.*, Liberato & Rutter, *supra* note 4, at 451; Shannon, Herring & Dow, *supra* note 170, at 693.

174. *E.g.*, *City of McAllen v. McAllen Police Officers Union*, No. 13-11-00356-CV, 2011 WL 2976819, at *1 (Tex. App.—Corpus Christi July 21, 2011, no pet.) (mem. op.) (per curiam); *McCurry v. Smith*, No. 14-10-00722-CV, 2011 WL 824882, at *1 (Tex. App.—Houston [14th Dist.] Mar. 10, 2011, no pet.) (mem. op.) (per curiam).

175. *Butnaru*, 84 S.W.3d at 204.

cases there is little to be gained from an appeal. Appeals from temporary injunctions, unlike other interlocutory appeals, do not stay the commencement of a trial on the merits.¹⁷⁶ Thus, an appeal often serves only to intensify the litigation, in effect expanding the battle to two fronts. Indeed, even though appeals from temporary injunction orders are accelerated,¹⁷⁷ in some venues the trial on the merits may occur before the appeal can be decided.¹⁷⁸ Even if the trial will be delayed until the parties have conducted significant discovery, an appeal may be inadvisable because the enjoined party will find it difficult, in the early stages of a complex case, to persuade the court of appeals that the trial court abused its discretion by preserving the status quo until the facts could be discovered and the issues tried. Finally, even if the appeal is decided before the case is tried, the appeal will not obviate the need for a trial unless the court of appeals bases its decision on pivotal legal grounds that become the law of the case.¹⁷⁹ Confronted with all of these reasons not to appeal, temporarily enjoined parties may limit appeals to exceptional cases in which the temporary injunction is highly disruptive and plainly unjustified.

F. *Special Appearances*

An interlocutory appeal may be taken from an order denying a special appearance and assuming jurisdiction over the defendant's person and property.¹⁸⁰ In these appeals, the reversal rate was 46%.¹⁸¹ This relatively high reversal rate reflects that personal jurisdiction is an issue of law.¹⁸² Thus, in appeals from

176. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (West 2008).

177. TEX. R. APP. P. 28.1.

178. *E.g.*, Richards v. Mena, 820 S.W.2d 372, 372 (Tex. 1991); Isuani v. Manske-Sheffield Radiology Grp., P.A., 802 S.W.2d 235, 235–36 (Tex. 1991) (per curiam).

179. See Robert W. Higgason, *Appeals from Temporary Injunctions in State and Federal Courts*, HOUS. LAW., July–Aug. 1997, at 23, 48–49 (explaining how an appellate court ruling can impact later lower court proceedings even if the court of appeals does not address the merits of the case).

180. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008); see TEX. R. CIV. P. 120a(1) (permitting a party to make a special appearance). An exception is made for orders denying special appearances in suits brought under the Family Code. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008).

181. An order granting a special appearance may also be appealed, even if it is interlocutory, except that an interlocutory appeal may not be taken from an order granting a special appearance in a suit brought under the Family Code. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008). However, appeals from orders granting special appearances are not analyzed here because, during the period studied, these orders were not appealed in sufficient numbers to provide a reliable sample.

182. Retamco Operating, Inc. v. Republic Drilling Co., 278 S.W.3d 333, 337 (Tex. 2009).

denials of special appearances, the ultimate issue is reviewed under a de novo standard.¹⁸³ This is true even though the trial court typically must resolve issues of fact before reaching that issue, and fact findings are reviewed for legal and factual sufficiency.¹⁸⁴

G. Immunity Defenses and Pleas to the Jurisdiction

When a government entity or government official successfully asserted an immunity defense in the trial court, the reversal rate was 27%. Most of these appeals (95%) were from orders granting pleas to the jurisdiction.¹⁸⁵ The remaining appeals (5%) were from summary judgments.¹⁸⁶

When an immunity defense was rejected, the reversal rate was considerably higher—68%. Most of these appeals (84%) were from orders denying pleas to the jurisdiction.¹⁸⁷ The remaining appeals (16%) were from orders denying motions for summary judgment.¹⁸⁸ In either context, the rejection of an immunity defense is subject to an interlocutory appeal.¹⁸⁹

When the trial court granted a plea to the jurisdiction on grounds other than immunity, the reversal rate was 42%. Common issues included whether the plaintiff lacked standing¹⁹⁰ or failed to

183. *Id.*

184. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

185. *E.g.*, *Como v. City of Beaumont*, 345 S.W.3d 786, 789 (Tex. App.—Beaumont 2011, pet. filed); *Edwards v. City of Tomball*, 343 S.W.3d 213, 219 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Cernosek Enters., Inc. v. City of Mont Belvieu*, 338 S.W.3d 655, 663 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

186. *E.g.*, *Battista v. City of Alpine*, 345 S.W.3d 769, 771, 779 (Tex. App.—El Paso 2011, no pet.); *Brice v. Hanna*, No. 03-09-00454-CV, 2010 WL 5019468, at *1–2 (Tex. App.—Austin Dec. 10, 2010, no pet.) (mem. op.); *DeRouen v. Falls Cnty. Sheriff Dep't*, No. 10-09-00291-CV, 2010 WL 3434220, at *2 (Tex. App.—Waco Sept. 1, 2010, pet. denied) (mem. op.).

187. *E.g.*, *City of Hous. v. Rodriguez*, No. 14-11-00136-CV, 2011 WL 5244366, at *1, *4 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, pet. filed); *City of San Antonio v. Caruso*, 350 S.W.3d 247, 249 (Tex. App.—San Antonio 2011, pet. filed); *City of N. Richland Hills v. Friend*, 337 S.W.3d 387, 390 (Tex. App.—Fort Worth 2011, pet. filed).

188. *E.g.*, *Fontenot v. Stinson*, No. 14-10-01212-CV, 2011 WL 6098259, at *1 (Tex. App.—Houston [14th Dist.] Dec. 8, 2011, pet. filed); *Klein v. Hernandez ex rel. N.H.*, 333 S.W.3d 689, 690 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

189. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5), (a)(8) (West 2008).

190. *E.g.*, *Holleman v. Daugherty Homes, Inc.*, No. 02-10-00214-CV, 2011 WL 2518912, at *1 (Tex. App.—Fort Worth June 23, 2011, no pet.) (mem. op.); *Grocers Supply Co. v. Harris Cnty. Appraisal Dist.*, No. 14-10-00243-CV, 2011 WL 665073, at *1 (Tex. App.—Houston [14th Dist.] Feb. 24, 2011, no pet.) (mem. op.); *Round Rock Life Connection Church, Inc. v. City of Round Rock*, No. 03-09-00523-CV, 2011 WL 589832, at *1 (Tex. App.—Austin Feb. 18, 2011, pet. denied) (mem. op.); *Braniff CB Ltd. v. Harris Cnty. Appraisal Dist.*, No. 14-10-00089-CV, 2010 WL 4684704, at *1 (Tex. App.—Houston [14th Dist.] Nov. 8, 2010, no pet.) (mem. op.).

exhaust administrative remedies.¹⁹¹ When the trial court denied a plea to the jurisdiction asserting grounds other than immunity, the reversal rate was 73%. Again, common issues were standing¹⁹² and the exhaustion of administrative remedies.¹⁹³

V. REVERSALS BY TYPE OF DISPUTE

Dispositions on appeal were affected not only by the procedural posture of the case, but also by the nature of the dispute. Accordingly, the appeals analyzed in this study were categorized by substance as well as procedure. Appeals in which the merits were not actually litigated below, such as appeals from default judgments, temporary injunctions, and orders granting special appearances, were excluded from this portion of the analysis.

A. Tort and DTPA Cases

Plaintiffs in tort and DTPA¹⁹⁴ cases did not fare well on appeal. As shown in Figure 15, when the plaintiff prevailed in the trial court and the defendant appealed, the rate of reversal was almost half—49%. When the defendant prevailed in the trial court and the plaintiff appealed, the reversal rate was significantly lower—25%.¹⁹⁵ The reversal rates in personal injury cases, including wrongful death and medical malpractice cases, were lower than the reversal rates in other tort cases and DTPA cases. In personal injury cases, when the plaintiff prevailed in the trial court and the defendant appealed, the reversal rate was 48%. When the defendant prevailed in the trial court and the plaintiff appealed, the reversal rate was 20%.

191. *E.g.*, *Covenant Health Sys. v. Dean Foods Co.*, No. 07-09-0348-CV, 2011 WL 3717056, at *2 (Tex. App.—Amarillo Aug. 24, 2011, pet. filed) (mem. op.); *Plano Miller Club, Inc. v. Steen*, No. 03-08-00661-CV, 2011 WL 115879, at *1 (Tex. App.—Austin Jan. 14, 2011, no pet.) (mem. op.).

192. *E.g.*, *Gattis v. Duty*, 349 S.W.3d 193, 197 (Tex. App.—Austin 2011, no pet.); *City of Beaumont v. Fowler*, No. 09-11-00068, 2011 WL 3556931, at *1 (Tex. App.—Beaumont Aug. 11, 2011, no pet.) (mem. op.); *City of Laredo v. Rio Grande H2O Guardian*, No. 04-10-00872-CV, 2011 WL 3122205, at *2 (Tex. App.—San Antonio July 27, 2011, no pet.) (mem. op.); *Dallas Cnty., Tex. v. Cedar Springs Invs., L.L.C.*, No. 05-10-00443-CV, 2011 WL 94732, at *1 (Tex. App.—Dallas Jan. 12, 2011, no pet.) (mem. op.).

193. *E.g.*, *Tex. S. Univ. v. Rodriguez*, No. 14-10-01079-CV, 2011 WL 2150238, at *1 (Tex. App.—Houston [14th Dist.] June 2, 2011, no pet.) (mem. op.); *Hous. Indep. Sch. Dist. v. Morris*, No. 01-10-00043-CV, 2011 WL 1936005, at *1 (Tex. App.—Houston [1st Dist.] May 19, 2011, pet. filed); *City of El Paso v. Granados*, 334 S.W.3d 407, 408 (Tex. App.—El Paso 2011, no pet.).

194. DTPA cases are brought under the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE ANN. §§ 17.41–.62 (West 2011). DTPA claims were placed in the same category as torts that did not involve bodily injury or death, because DTPA claims were often asserted in conjunction with fraud and other tort claims.

195. *See infra* Appendix B, Figure 15.

These reversal rates are comparable to the rates nine years ago. During the 2001–2002 court year, judgments favoring tort plaintiffs had a reversal rate of 51%, while judgments favoring tort defendants had a reversal rate of 23%.¹⁹⁶ In personal injury cases, judgments favoring plaintiffs had a reversal rate of 45%, while judgments favoring defendants had a reversal rate of 18%.¹⁹⁷

Tort reform measures enacted by the legislature, as well as Texas Supreme Court decisions favoring tort defendants, have discouraged some tort and DTPA plaintiffs from filing suit at all. According to the Office of Court Administration, between 2002 and 2010, the number of “injury or damage” cases filed in the trial courts fell by 12%.¹⁹⁸ Many Texas attorneys, having built their careers representing personal injury plaintiffs, have focused their attention elsewhere. The founder of one prominent plaintiffs’ firm explained: “If today we were relying on personal-injury cases in Texas, we would be bankrupt.”¹⁹⁹

When lawyers do file personal injury cases, they are often hesitant to turn down a settlement offer and pursue the case to judgment.²⁰⁰ According to the Office of Court Administration, between 2002 and 2010, the number of “injury or damage” cases decided by summary judgment, jury trial, or bench trial fell by 25%.²⁰¹

When tort and DTPA cases do reach final judgment, plaintiffs are often hesitant to appeal an adverse result.²⁰² The number of appeals from final judgments taken by tort and DTPA plaintiffs has plunged by 39% since the 2001–2002 court year,

196. Liberato & Rutter, *supra* note 4, at 454.

197. *Id.* at 454–55.

198. The Office of Court Administration reports that 33,306 “injury or damage” cases were filed during the 2001–2002 court year, compared to 29,437 during the 2009–2010 court year. See Office of Court Admin. & Tex. Judicial Council, *2010 Annual Report*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/pubs/AR2010/toc.htm> [hereinafter *OCA 2010 Annual Report*] (scroll to “District Courts”; then download “Summary of Activity by Case Type”) (last visited Jan. 26, 2012). At the time this Article was published, some district courts had not furnished data for the 2010–2011 court year to the Office of Court Administration.

199. Michael Orey, *How Business Trounced the Trial Lawyers*, BUS. WK., Jan. 8, 2007, at 44, 45 (quoting Nelson J. Roach, Partner, Nix Patterson & Roach).

200. *Id.* at 49 (quoting David Berg, Partner, Berg & Androphy).

201. The Office of Court Administration reports that 4,702 “injury or damage” cases were decided by summary judgment, jury trial, or bench trial during the 2001–2002 court year, compared to 3,541 during the 2009–2010 court year. Compare Office of Court Admin. & Tex. Judicial Council, *Statewide Summary of Reported Activity for the Year Ended August 2002*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/pubs/AR2002/toc.htm> (scroll to “District Courts”; then download “Statewide Summary of Reported Activity—Civil, Juvenile, and Other Proceedings”) (last visited Jan. 26, 2012) (providing district court data for 2001–2002), with *OCA 2010 Annual Report*, *supra* note 198 (providing district court data for 2009–2010).

202. Orey, *supra* note 199, at 49 (stating that “awards are vulnerable on appeal” in personal injury cases in Texas).

while the number of appeals from final judgments taken by tort and DTPA defendants has fallen by 6%. Tort plaintiffs are filing only the strongest cases in the trial court, and they are pursuing appeals only when the perceived error appears to be relatively clear. Given that tort plaintiffs are “picking their battles” more carefully, one might expect that they would enjoy greater success in the appeals they do bring, all else being equal. But all else is not equal. Tort reform measures are the likely reason that reversal rates have held steady, even as tort plaintiffs file fewer cases and take fewer appeals.

As shown in Figure 16, the courts that decided the most appeals brought by tort and DTPA plaintiffs were the First Court in Houston (with a reversal rate of 34%), the San Antonio court of appeals (with a reversal rate of 26%), the Dallas court of appeals (with a reversal rate of 14%), and the Fourteenth Court in Houston (with a reversal rate of 23%).²⁰³

Thirteen percent of the appeals brought by personal injury plaintiffs arose from orders granting a defendant’s motion to dismiss a healthcare liability case because of the plaintiff’s failure to file and serve an adequate expert report.²⁰⁴ In these appeals, the reversal rate was 11%. In 2003, the Texas Legislature determined that an order denying such a motion would be appealable as well.²⁰⁵ In these interlocutory appeals by healthcare liability defendants, the reversal rate was 46%. These appeals have become commonplace. As shown in Figure 17, interlocutory appeals in healthcare liability cases now constitute a majority of the appeals filed by personal injury defendants.

The reversal rate for judgments entered on verdicts in tort and DTPA cases was 38%, which is slightly higher than the 34% reversal rate for judgments on verdicts generally.²⁰⁶ As shown in Figure 18, when the defendant appealed a judgment entered on a verdict for the plaintiff in a tort or DTPA case, the reversal rate was 50%. When the plaintiff prevailed from a judgment entered on a defense verdict, the reversal rate was just 11%.²⁰⁷ Focusing

203. Only the courts that decided at least twenty appeals from judgments for defendants in personal injury cases are listed separately in Figure 16. However, the statewide average is based on appeals from all fourteen courts of appeals.

204. See TEX. CIV. PRAC. & REM. CODE § 74.351 (West 2011) (mandating plaintiffs to file expert reports when bringing healthcare liability claims and requiring dismissal of the claims if the expert reports are not timely filed).

205. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03(a)(9)–(10), 2003 Tex. Gen. Laws 847, 849 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9)–(10) (West 2008)).

206. See *infra* Appendix B, Figure 20 (providing the comprehensive reversal rate of judgments on the verdict).

207. See *infra* Appendix B, Figure 18.

specifically on personal injury cases, when the defendant appealed from a judgment entered on an adverse verdict, the reversal rate was 44%.²⁰⁸ When the plaintiff appealed from a judgment entered on a verdict favoring the defendant, the reversal rate was a scant 7%.²⁰⁹

The greatest factor favoring defendants in appeals following jury trials may be the burden of proof. Defendants faced with adverse jury verdicts frequently obtained reversals on legal insufficiency or “matter of law” grounds,²¹⁰ which are subject to de novo review on appeal. A plaintiff, however, typically cannot obtain reversal of a defense verdict on legal insufficiency or “matter of law” grounds, because the plaintiff has the burden of proof. For the most part, judgments entered on defense verdicts were overturned only where an award of no damages or minimal damages was against the great weight and preponderance of the evidence.²¹¹

B. Contract Cases

As shown in Figure 19, the statewide reversal rate in contract cases was 32%. Figure 19 provides the reversal rates for the courts that decided the most appeals in contract cases.²¹² The reversal rates in these courts did not vary widely.

As shown in Figure 20, judgments on jury verdicts and summary judgments in contract cases were slightly more likely than other judgments on verdicts and summary judgments to be reversed, but judgments following bench trials in contract cases were slightly less likely than other judgments on bench trials to be reversed.

The reasons for reversal of summary judgments in contract cases mirrored the reasons for reversal of summary judgments in

208. See *infra* Appendix B, Figure 18.

209. See *infra* Appendix B, Figure 18.

210. As shown in Figure 4, most reversals of judgments on jury verdicts fall into this category.

211. See, e.g., *Salinas v. Allen*, No. 07-09-0260-CV, 2010 WL 4828412, at *1 (Tex. App.—Amarillo Nov. 29, 2010, no pet.) (mem. op.) (reversing a judgment on a jury verdict in a personal injury case because the findings assessing zero damages for pain, disfigurement, and mental anguish were against the great weight and preponderance of the evidence); *Am. Hat Co. v. Wise Electric Coop., Inc.*, No. 02-09-00368-CV, 2010 WL 4028098, at *1 (Tex. App.—Fort Worth Oct. 14, 2010, pet. denied) (mem. op.) (reversing a judgment on a jury verdict in a negligence case because the jury’s finding as to the difference in market value following a fire was against the great weight and preponderance of the evidence).

212. Only the courts that decided at least twenty appeals from judgments in contract cases are included in Figure 19. However, the statewide average is based on appeals from all fourteen courts of appeals.

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 49% of the summary judgment reversals in contract cases, compared to 47% of the summary judgment reversals overall. Errors of law accounted for 35% of the summary judgment reversals in contract cases and 35% overall. Errors of summary judgment procedure accounted for 16% of the summary judgment reversals in contract cases, compared to 18% overall.²¹³

C. Insurance Coverage Cases

In coverage disputes between insurance carriers and their policyholders, when the policyholder prevailed in the trial court and the carrier appealed, the reversal rate was 48%. When the carrier prevailed in the trial court and the policyholder appealed, the reversal rate was 10%.²¹⁴

Over the last nine years, reversal rates have shifted in favor of insurance carriers. During the 2001–2002 court year, when the policyholder prevailed in the trial court, the reversal rate was 38%. When the carrier prevailed in the trial court, the reversal rate was 45%.²¹⁵

Judgments on jury verdicts accounted for 32% of the appeals in insurance cases and 60% of the reversals. Summary judgments accounted for 55% of the appeals in insurance cases but only 20% of the reversals.

D. Family Cases

As shown in Figure 22, the reversal rate in family cases²¹⁶ was 27%. In divorce cases, including actions to enforce or modify existing decrees, the reversal rate was 20%. In suits to modify the parent–child relationship, the reversal rate was 31%. In child support cases, including actions to collect child support or modify a child support obligation, the reversal rate was 35%.²¹⁷

The high reversal rate may be connected to the low number of appeals in family cases. Family cases form the

213. See *infra* Appendix B, Figure 13 (comparing the reasons for reversal of summary judgments in all cases).

214. See *infra* Appendix B, Figure 21.

215. Liberato & Rutter, *supra* note 4, at 457.

216. Parental-termination proceedings were excluded from the study. See *infra* Appendix A (explaining the methodological basis for the exclusion of parental-termination proceedings from the study).

217. See *infra* Appendix B, Figure 22.

largest group of civil cases filed,²¹⁸ but few of them are tried.²¹⁹ Even fewer are appealed.²²⁰ 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.

E. Probate Cases

Appeals in probate cases were divided between jury trials (32%), bench trials (38%), and summary judgments (30%). The reversal rate was 31%.

VI. CONCLUSION

By providing and analyzing data about the appellate process, this study aims to help lawyers understand the types of cases that are most often reversed and the most common reasons for reversal. For practitioners formulating a post-judgment strategy, this study is meant to provide a starting point toward a reasoned, accurate evaluation of the potential appeal and a tool to use in selecting the points deserving of the greatest emphasis on appeal.

218. OFFICE OF COURT ADMIN., ANNUAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2010, at 37 (Dec. 2010), available at <http://www.courts.state.tx.us/pubs/AR2010/AR10.pdf>.

219. See *id.* at 42 (comparing the number of cases tried to the number of total dispositions).

220. See *id.* at 33, 42 (providing activity comparisons between district courts and the courts of appeals through 2009).

APPENDIX A: METHODOLOGY

The goal in categorizing cases for this study, and in excluding certain types of civil cases from the study, was to provide practitioners with an accurate tool to use when evaluating potential appeals.²²¹ Providing an accurate assessment of why courts reverse involves as much art as science. It is not as simple as counting the affirmances and reversals in all civil appeals. For example, juvenile cases are categorized by the Texas courts as civil cases, but they were excluded from this study because in reality they are quasi-criminal in nature.²²² Also excluded, for similar reasons, were appeals brought by inmates, appeals in bond forfeiture cases, appeals in proceedings to expunge criminal records, and appeals of driver's license revocations. Appeals challenging terminations of parental rights were likewise excluded. Indigent parents are entitled to state-appointed counsel in parental termination proceedings,²²³ including an appeal.²²⁴ As a result, these appeals form a substantial portion of the docket in some of the courts of appeals, outnumbering many other types of appeals following jury trials and bench trials. Because most of these appeals result in affirmance, inclusion of these cases would have significantly skewed the reversal rates for jury trials and bench trials in some courts. Finally, the study disregarded appeals disposed of without reference to the merits, including appeals dismissed for want of prosecution or because the appellant failed to pay the filing fee, and appeals in which affirmance or reversal was entered at the request of the parties pursuant to settlement. The remaining decisions form the basis of the findings presented here. The total number of opinions included in the study was 1,832.

Each of these 1,832 appeals was categorized in several ways. First, each appeal was categorized according to the procedure by which the case was decided in the trial court. These categories included appeals from judgments entered on jury verdicts, directed verdicts, judgments notwithstanding the verdict, judgments following bench trials, no-evidence summary judgments, traditional

221. The analysis was limited to appeals and excludes original proceedings.

222. See Kinkeade, *supra* note 10, at 18, 45.

223. TEX. FAM. CODE ANN. § 170.013(a)(1) (West 2008).

224. See *In re T.V.*, 8 S.W.3d 448, 449 (Tex. App.—Waco 1999, no pet.) (“The statute regarding appointment of counsel for indigent parents does not expressly provide for representation on appeal. However, we believe the rights would not be adequately protected if an indigent parent, whose parental rights were in jeopardy of being terminated, was required to pursue an appeal without an attorney.” (citation omitted)).

or “hybrid” summary judgments, orders denying summary judgment motions asserting immunity, no-answer default judgments, post-answer default judgments, and orders granting or denying temporary injunctions, special appearances, pleas to the jurisdiction based on immunity grounds, and other pleas to the jurisdiction.

Next, each appeal was categorized according to the substantive nature of the dispute. These categories included personal injury cases, other tort cases and DTPA cases, contract cases, insurance coverage cases, family cases (including divorces, child support cases, and suits to modify the parent–child relationship), probate cases, and employment cases. When a case presented more than one claim, the case was categorized according to the aspect that was the primary focus on appeal. For example, if the trial court disposed of the plaintiff’s fraud claims on summary judgment and conducted a bench trial on the contract claims, the case was categorized as a contract case if the contract recovery was the focus of the appeal.

Tort and DTPA cases, insurance coverage cases, and employment cases were further categorized according to whether the plaintiff or defendant prevailed below. For purposes of this study, when neither party secured a complete victory in the trial court, the party with the greatest stake in an affirmance of the issues at the center of the appeal was designated as the prevailing party below.

Finally, each appeal was categorized as either an affirmance or a reversal. For purposes of this Article, an appeal was classified as an affirmance even if the judgment was modified or reversed in part, if the modification or reversal affected only a small portion of the judgment. For example, an appeal in a suit for damages was classified as an affirmance if the court of appeals left most of the damages undisturbed and reversed or modified only a relatively small component of the actual damages²²⁵ or a relatively small award of prejudgment interest,²²⁶ sanctions,²²⁷ attorney’s fees,²²⁸ or

225. *E.g.*, *Hebert Acquisitions, LLC v. Tremur Consulting Contractors, Inc.*, No. 03-09-00385-CV, 2011 WL 350466, at *2, *12 (Tex. App.—Austin Feb. 4, 2011, no pet.) (mem. op.); *In re L.L. & T.L.*, 341 S.W.3d 22, 23 (Tex. App.—San Antonio 2010, no pet.).

226. *E.g.*, *Collier v. Robert Edward Hall Trust*, No. 07-09-00387-CV, 2011 WL 691201, at *1, *5 (Tex. App.—Amarillo Feb. 28, 2011, no pet.) (mem. op.).

227. *E.g.*, *Barham v. McGraw*, 342 S.W.3d 716, 720 (Tex. App.—Amarillo 2011, pet. denied).

228. *E.g.*, *Affordable Motor Co. v. LNA, LLC*, 351 S.W.3d 515, 519, 522–23 (Tex. App.—Dallas 2011, pet. filed); *Harton v. First Victoria Nat’l Bank*, No. 13-10-00371-CV, 2011 WL 1935605, at *8 (Tex. App.—Corpus Christi May 19, 2011, pet. denied) (mem.

costs.²²⁹ Conversely, an appeal was classified as a reversal if the court of appeals reversed a significant portion of the judgment. For example, an appeal was classified as a reversal if the court of appeals reversed a significant component of the actual damages,²³⁰ deleted a significant award of exemplary damages,²³¹ reversed with respect to some of the claims²³² or some of the parties,²³³ reversed a significant sanctions award,²³⁴ or suggested a substantial remittitur.²³⁵

op.); Windsor Vill., LTD v. Stewart Title Ins. Co., No. 14-09-00721-CV, 2011 WL 61848, at *6 (Tex. App.—Houston [14th Dist.] Jan. 6, 2011, no pet.) (mem. op.).

229. *E.g.*, Diaz v. Diaz, 350 S.W.3d 251, 257 (Tex. App.—San Antonio 2011, pet. denied).

230. *E.g.*, Drury Sw., Inc. v. Louie Ledeaux #1, Inc., 350 S.W.3d 287, 292–94 (Tex. App.—San Antonio 2011, no pet.); Bluelinx Corp. v. Tex. Constr. Sys., Inc., No. 14-09-00237-CV, 2011 WL 1049545, at *6 (Tex. App.—Houston [14th Dist.] Mar. 11, 2011, no pet.).

231. *E.g.*, Hertz Equip. Rental Corp. v. Barousse, No. 01-10-00949-CV, 2011 WL 3207793, at *1, *11 (Tex. App.—Houston [1st Dist.] July 28, 2011, pet. denied); Bennett v. Reynolds, No. 03-05-00034-CV, 2010 WL 4670270, at *1 (Tex. App.—Austin Nov. 18, 2010, no pet.) (mem. op.), *supplemented by* 2011 WL 182876 (Tex. App.—Austin Jan. 19, 2011, no pet.).

232. *E.g.*, Sw. Bell Tel., L.P. v. Edwards, No. 05-09-00606-CV, 2011 WL 3672288, at *13 (Tex. App.—Dallas Aug. 23, 2011, no pet.) (mem. op.).

233. *E.g.*, Holland v. Lovelace, 352 S.W.3d 777, 781, 795 (Tex. App.—Dallas 2011, pet. filed); Salinas v. Allen, No. 07-09-0260-CV, 2010 WL 4828412, at *1 (Tex. App.—Amarillo Nov. 29, 2010, no pet.) (mem. op.).

234. *E.g.*, Yuen v. Gerson, 342 S.W.3d 824, 826 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

235. *E.g.*, Hernandez v. Sovereign Cherokee Nation Tejas, 343 S.W.3d 162, 178–79 (Tex. App.—Dallas 2011, pet. denied); Trend Gathering & Treating, LP v. Moore, No. 10-10-00136-CV, 2010 WL 4983488, at *4 (Tex. App.—Waco Dec. 1, 2010, no pet.) (mem. op.).

APPENDIX B: FIGURES

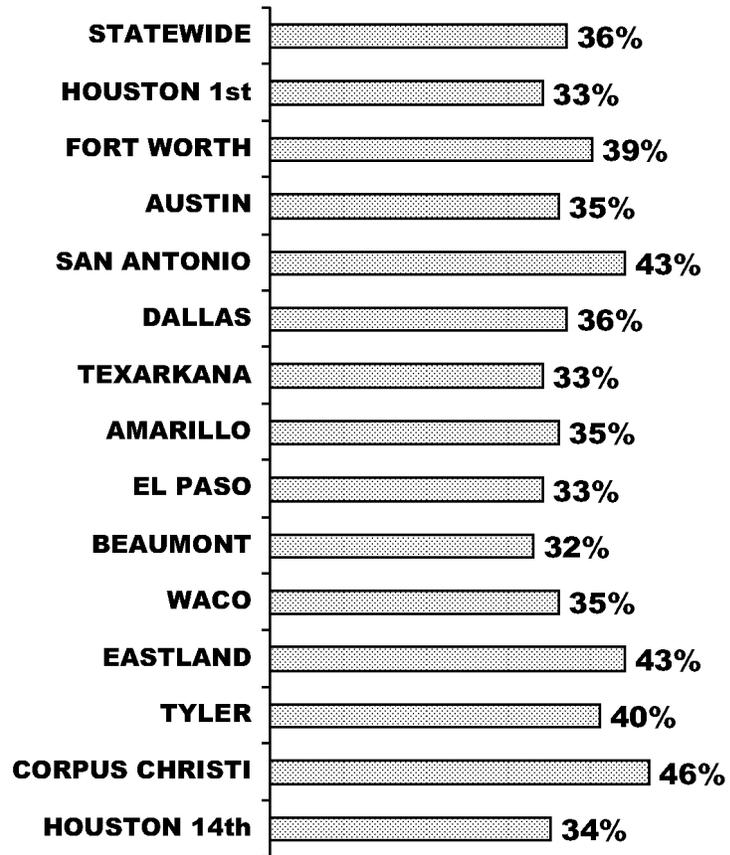


Figure 1: Reversal Rates by Court

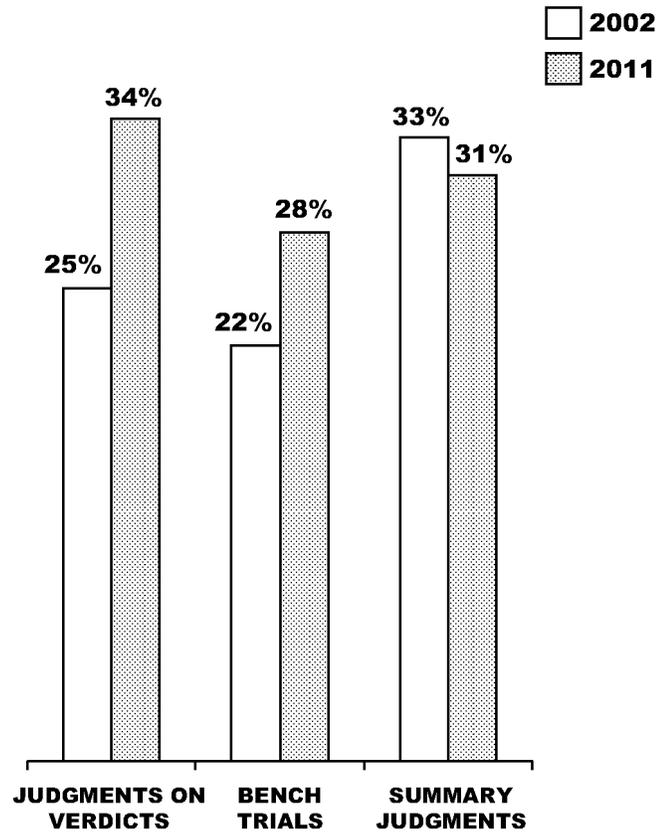
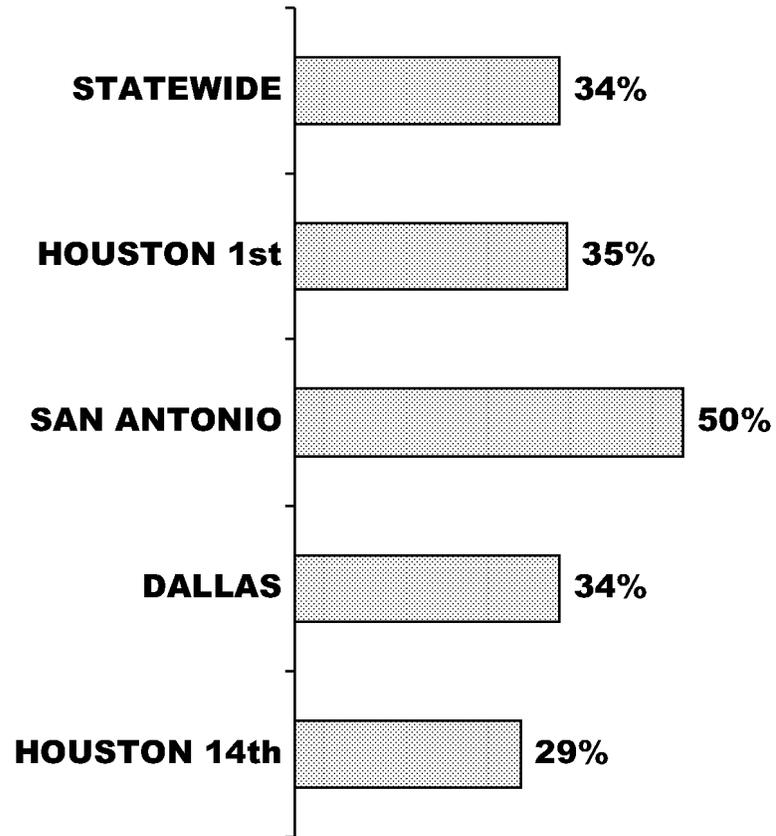


Figure 2: Reversal Rates by Procedure



***Figure 3: Reversal Rates for
Judgments on Jury Verdicts, by Court***

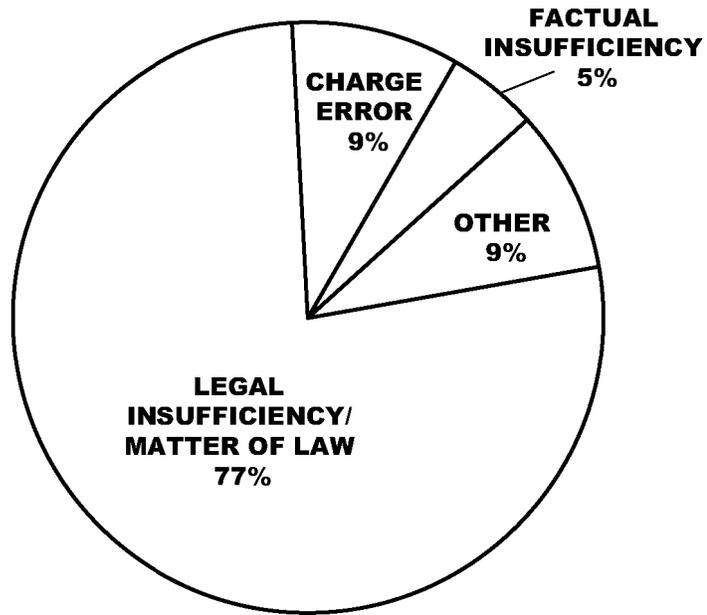


Figure 4: Reasons for Reversal of Judgments on Jury Verdicts

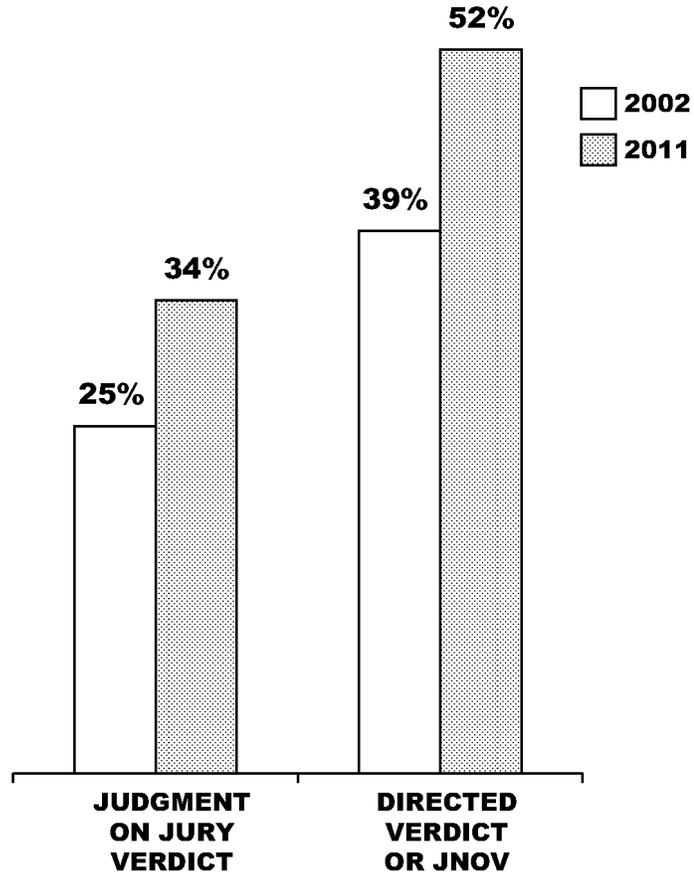


Figure 5: Reversal Rates for Judgments Following Jury Trials

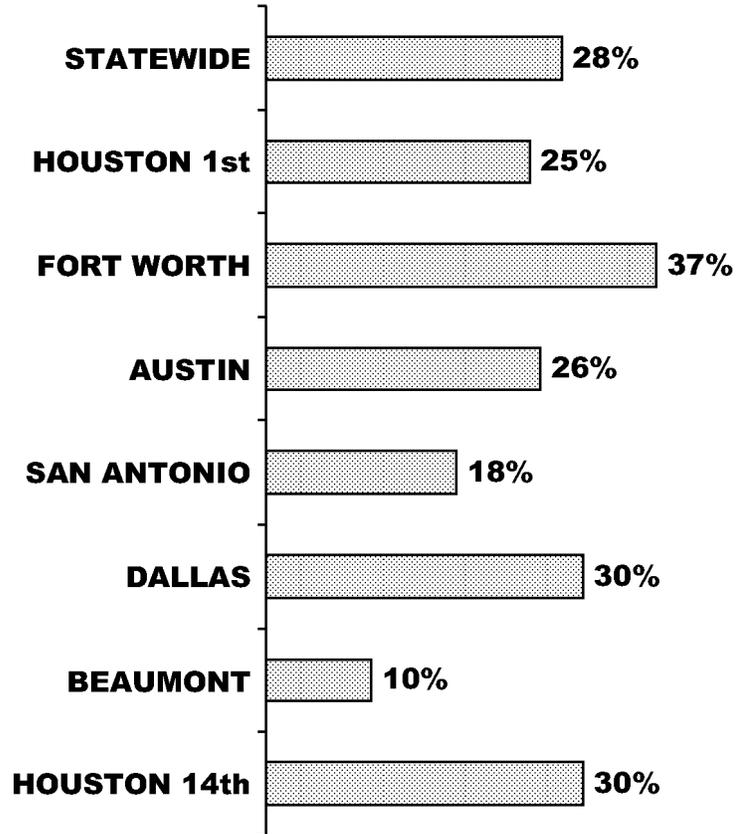


Figure 6: Reversal Rates for Judgments Following Bench Trials, by Court

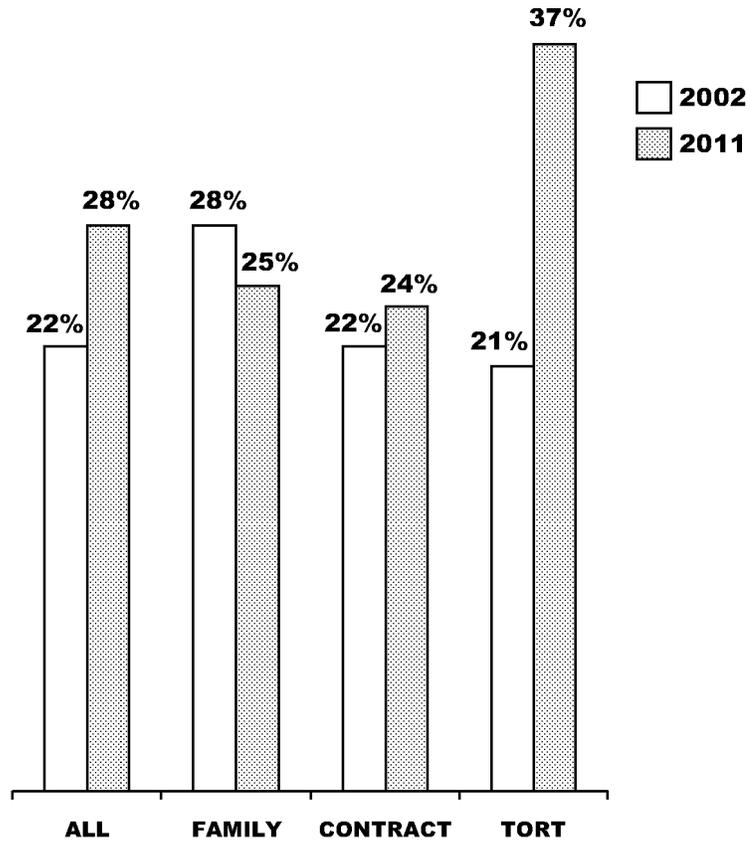


Figure 7: Reversal Rates for Judgments Following Bench Trials, by Type

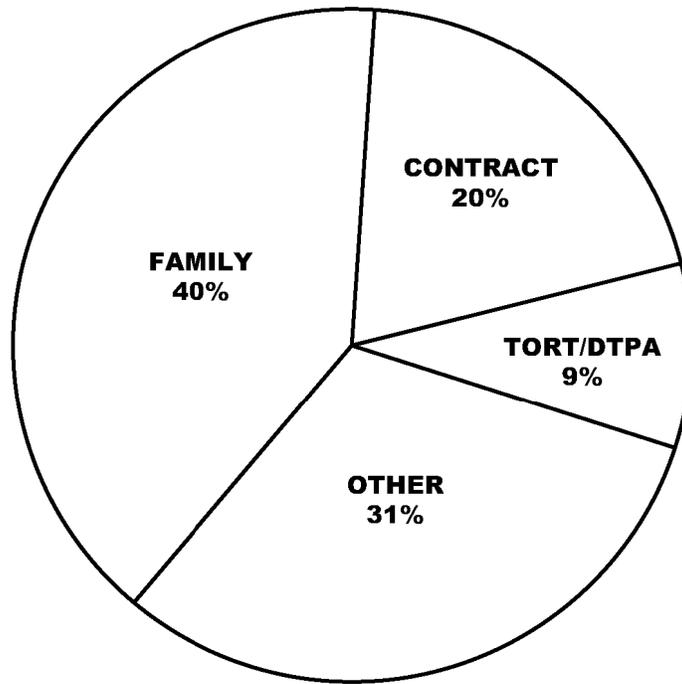


Figure 8: Bench Trials, by Type

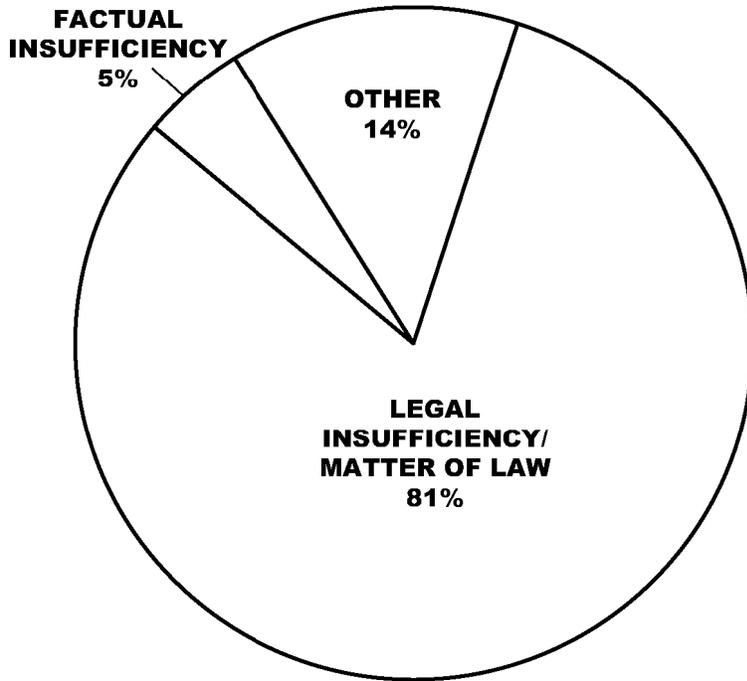


Figure 9: Reasons for Reversal of Judgments following Bench Trials

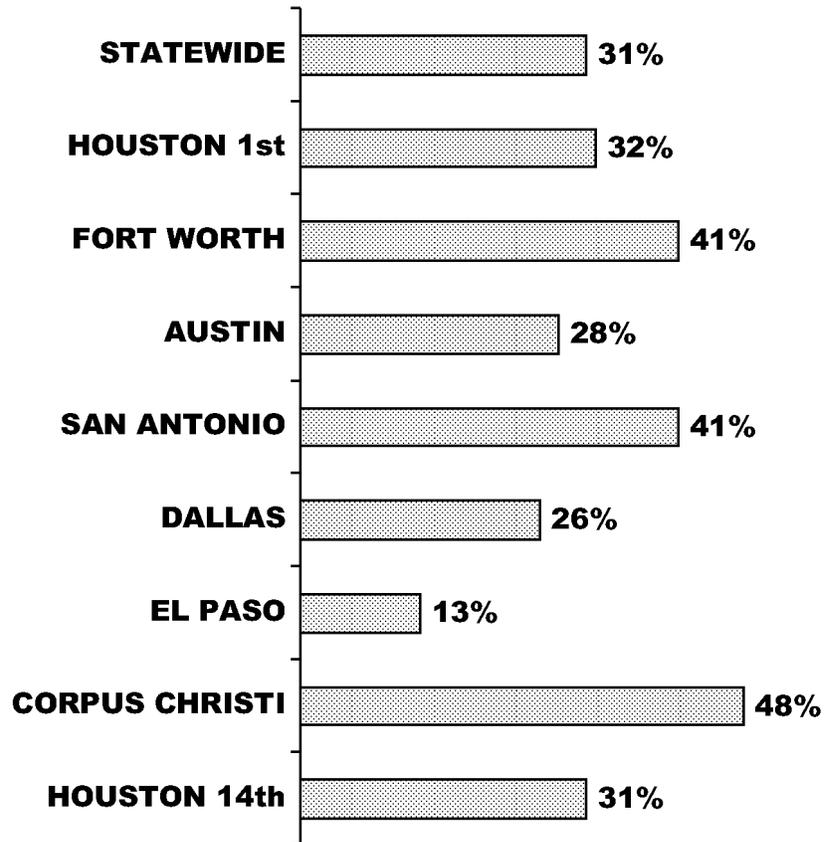


Figure 10: Reversal Rates for Summary Judgments, by Court

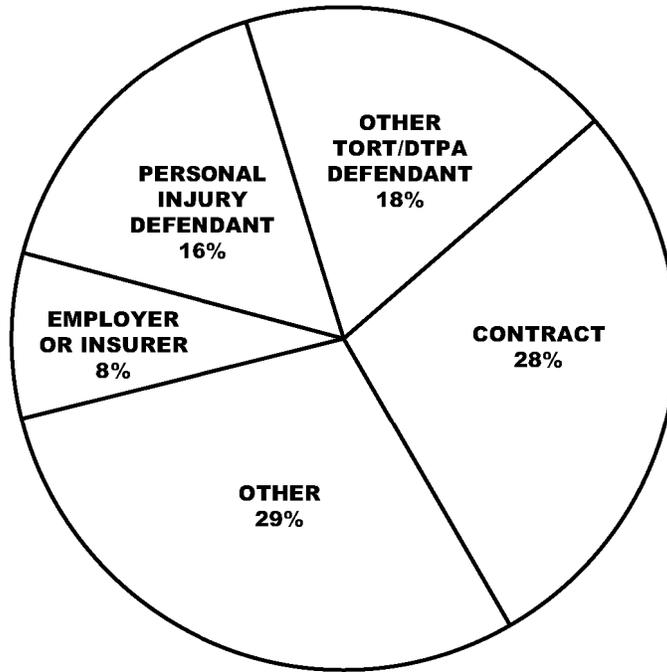


Figure 11: Summary Judgments, by Type

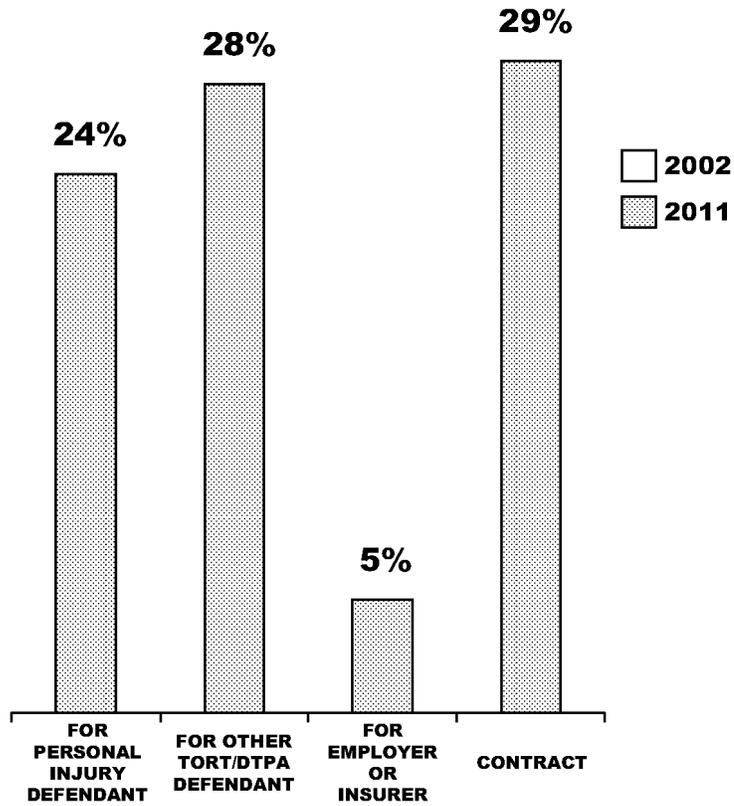


Figure 12: Reversal Rates for Summary Judgments, by Type



Figure 13: Reasons for Reversal of Summary Judgments

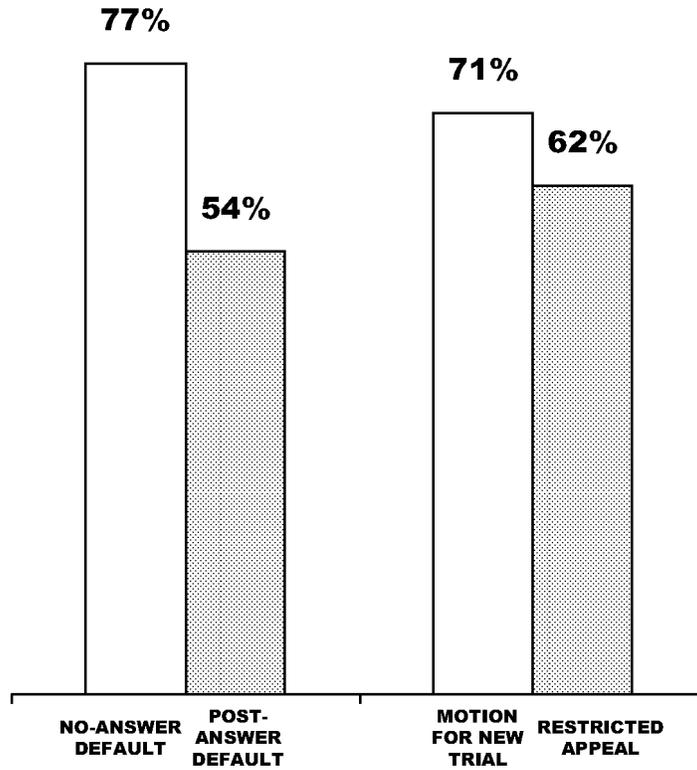


Figure 14: Reversal Rates for Default Judgments

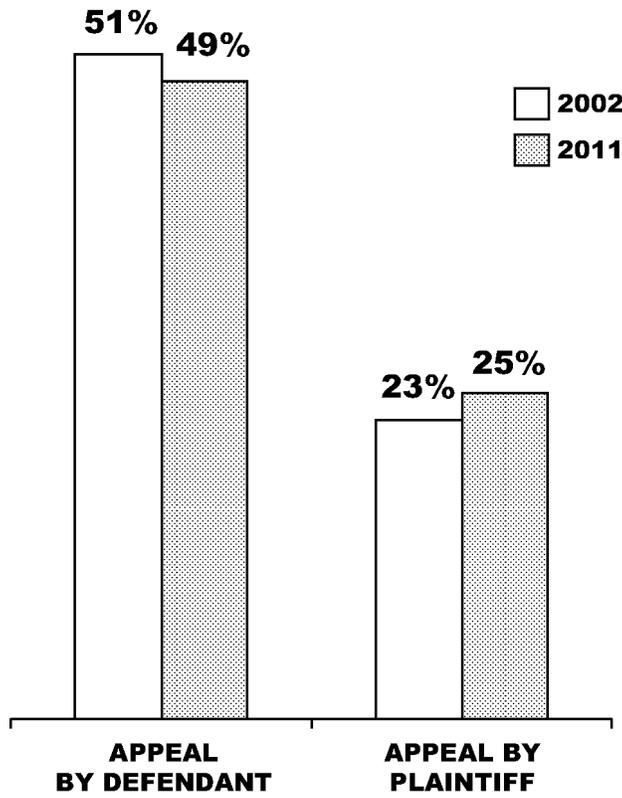


Figure 15: Reversal Rates for Tort and DTPA Judgments

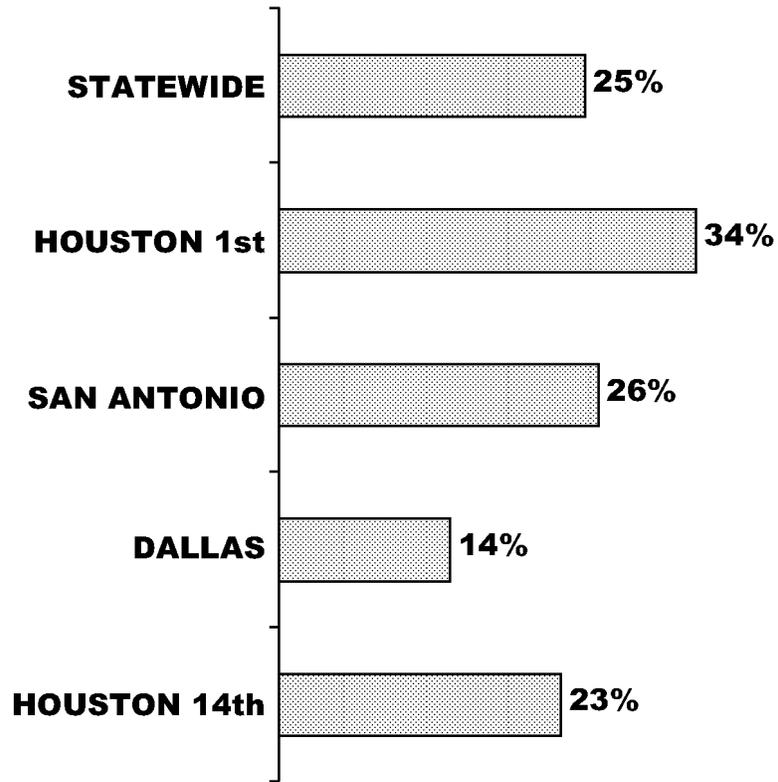


Figure 16: Reversal Rates in Appeals by Tort and DTPA Plaintiffs, by Court

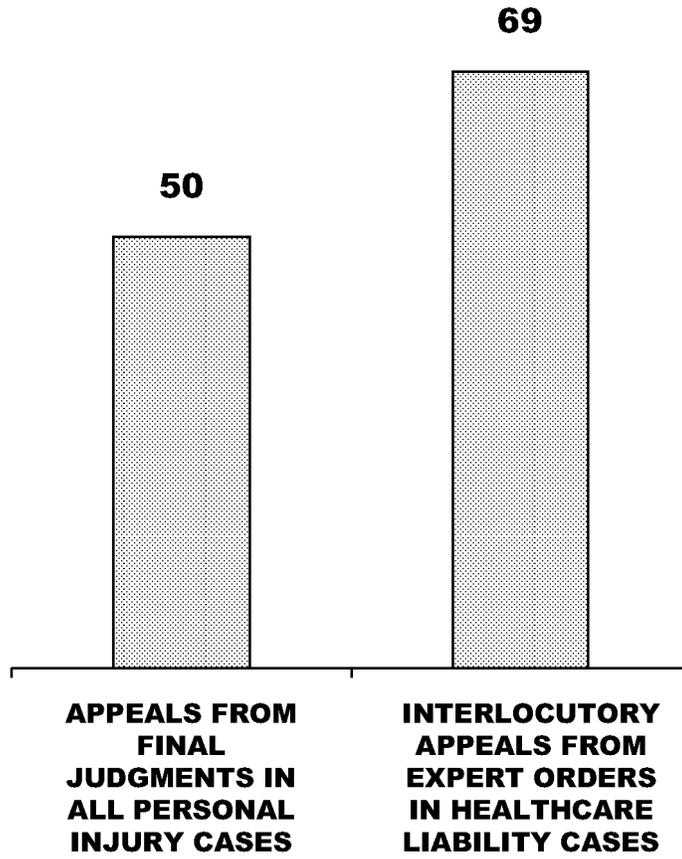


Figure 17: Number of Appeals by Defendants

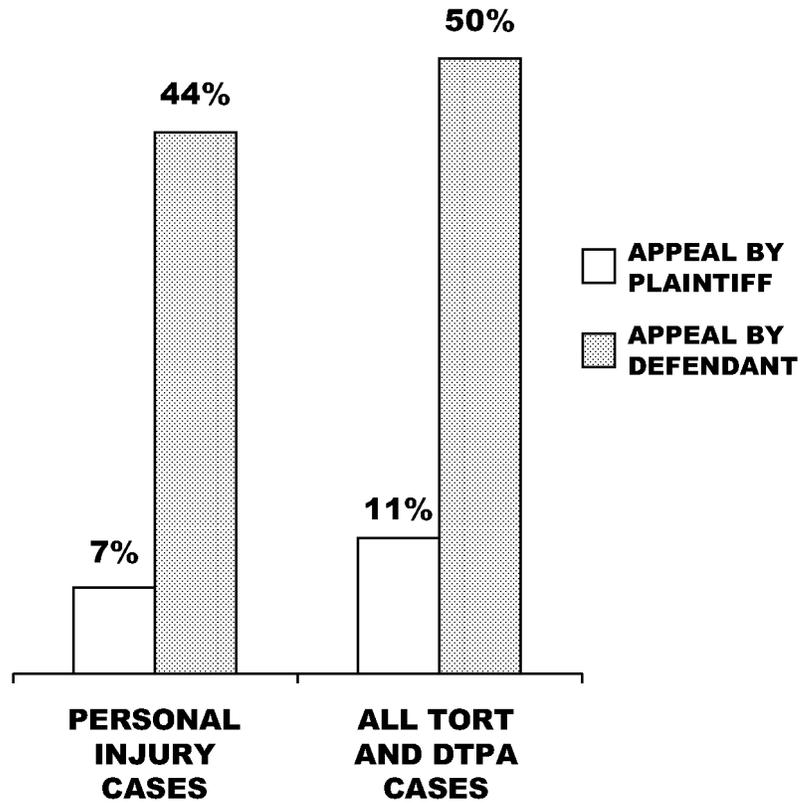


Figure 18: Reversal Rates for Tort and DTPA Judgments on Verdicts

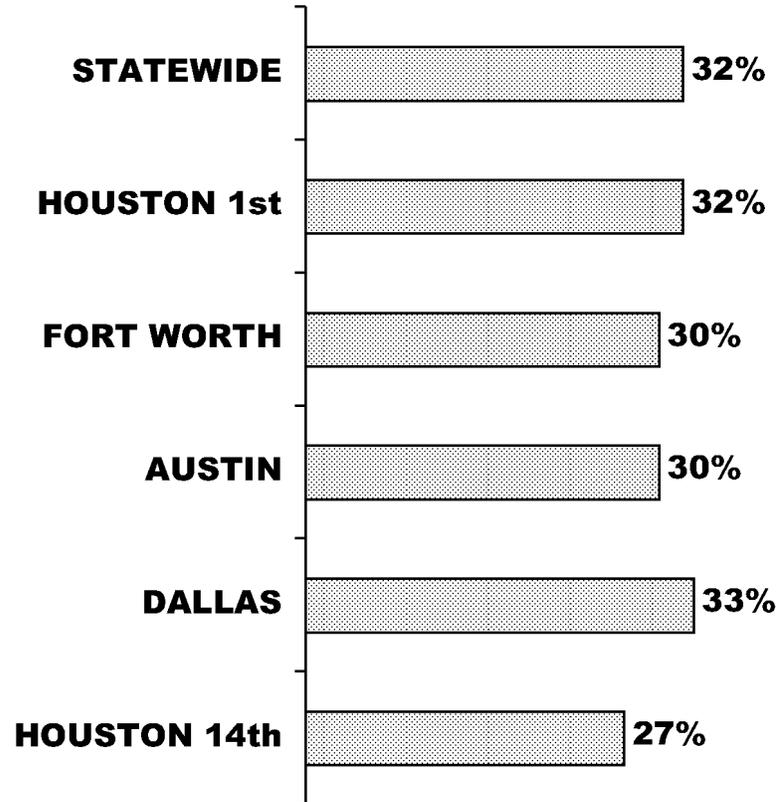


Figure 19: Reversal Rates in Contract Cases, by Court

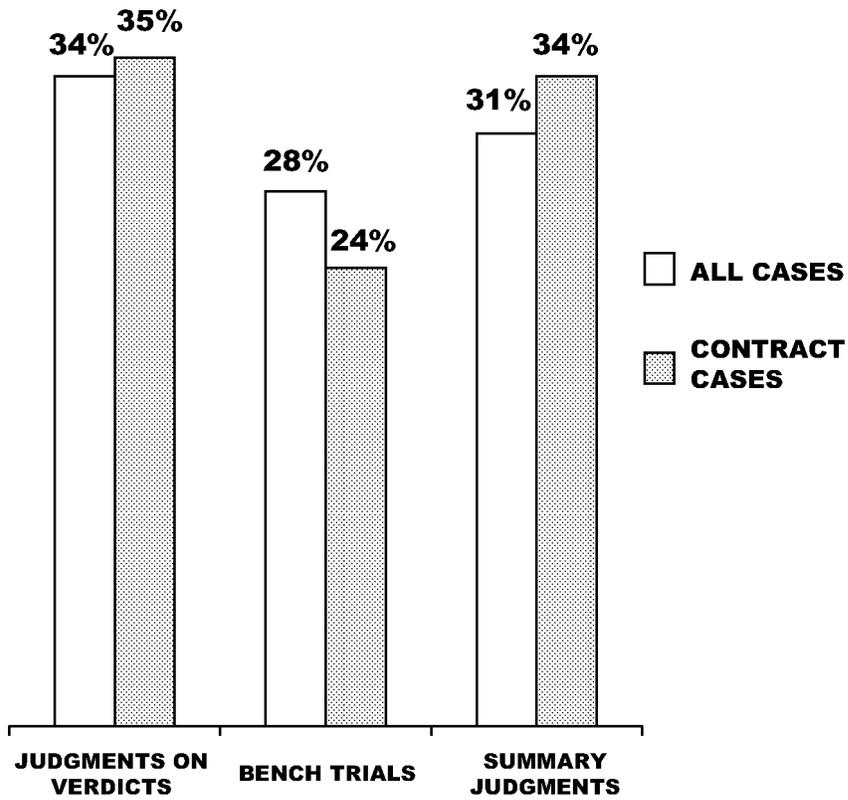


Figure 20: Reversal Rates by Procedure

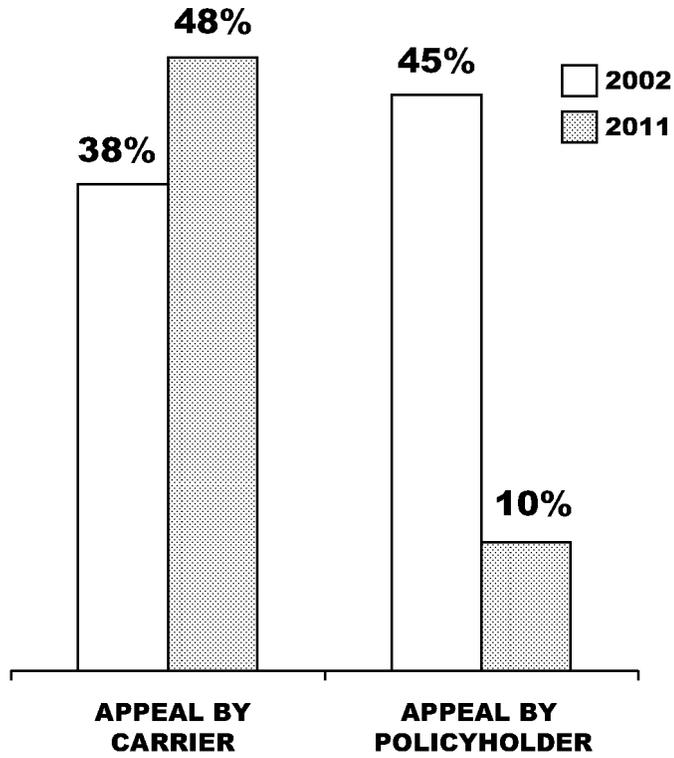


Figure 21: Reversal Rates in Insurance Coverage Appeals

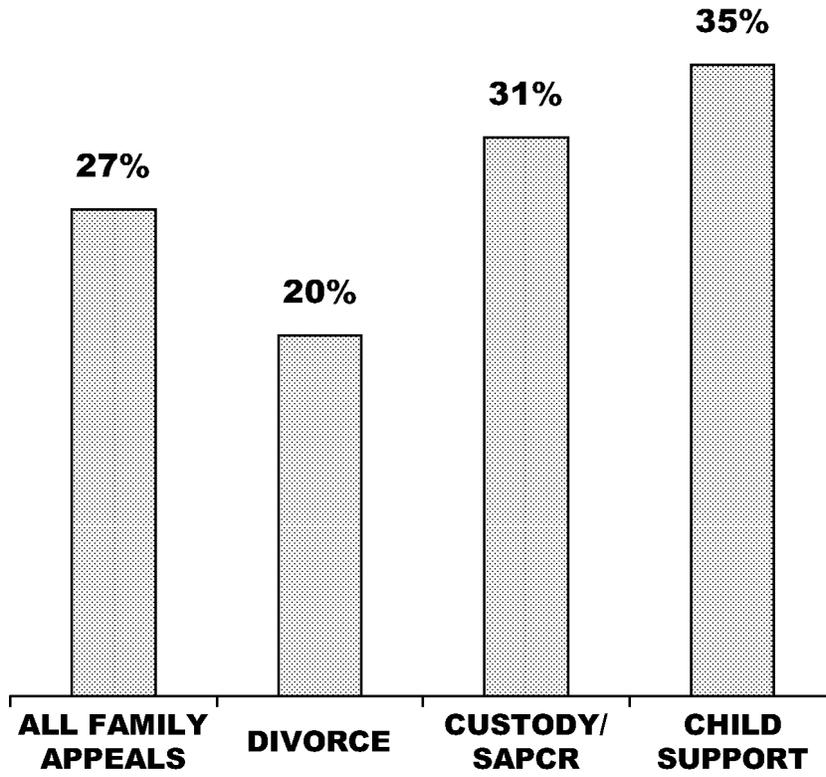


Figure 22: Reversal Rates in Family Cases