

WHY COURTS REVERSE

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PUBLICATIONS:

"Reasons for Reversal in the Texas Courts of Appeals," 44 S. TEX. L. REV. 431 (2003)
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(August 1997)
"Democratizing HMO Regulation to Enforce the 'Rule of Rescue,'" 30 U. MICH. J. L. REF. 147 (1996)

PRESENTATIONS:

"Why Courts of Appeals Reverse," Advanced In-House Counsel Course, State Bar of Texas
(August 2003)
"Why Courts Reverse in Personal Injury Cases," Advanced Personal Injury Law Course,
State Bar of Texas (June 2003)
"Reasons the Fort Worth and Dallas Courts of Appeals Reverse," Tarrant County Bar Association
Appellate Section (May 2003)
"Reasons the 1st & 14th Courts of Appeals Reverse," Houston Bar Association Appellate Practice
Section (January 2003)
"Why the Courts of Appeals Reverse," Advanced Civil Appellate Practice Course, State Bar of Texas
(September 2002)
"Perfecting the Appeal," LAU Seminar, State Bar of Texas (September 2002)
"Fifth Circuit Update," The University of Texas School of Law, 12th Annual Conference on State and
Federal Appeals (June 2002) (co-author)
"Preserving Error at Trial," Civil Appeals for Trial Lawyers, South Texas College of Law
(December 2001)
"Overview of New Discovery Rules," Houston Paralegal Association (May 2000)
"How to Avoid Waiving Error at Trial," Fear and Loathing on Appeal: Appellate Specialists Share
Their Tips and Strategies with Trial Lawyers, South Texas College of Law (December 1999)
"The New Texas Rules of Appellate Procedure," LAU Seminar, State Bar of Texas
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WHY COURTS REVERSE

I. INTRODUCTION

When advising a client to accept a post-judgment settlement offer or pursue an expensive appeal, and when selecting the arguments to emphasize in the brief, an appellate lawyer must theorize about why courts reverse. This paper provides empirical data, based on an analysis of all appeals decided by the fourteen Texas courts of appeals during an entire court year.

II. SCOPE AND METHODOLOGY

The study on which this paper is based began with an analysis of all appeals decided on the merits by the fourteen Texas courts of appeals during the 2001-02 court year. To present an accurate picture, however, certain types of opinions were excluded before the statistics were calculated. 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. 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. The remaining decisions—1,832 in all—form the basis of the findings presented here.

Each case was categorized according to the court that decided the appeal and the nature of the dispute—for example, a tort case, a contract case, or an employment case.

Next, each case 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, not the subsequent trial of the remaining issues, the appeal was categorized as a summary judgment appeal.

Finally, each case was categorized as an affirmance or reversal. 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 damages or a relatively small award of prejudgment interest, sanctions, or attorney's fees. An appeal was also classified as an affirmance if the court of appeals suggested a relatively small remittitur.

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, deleted a significant award of exemplary damages, reversed with respect to some of the claims or some of the parties, reversed a significant sanctions award, or suggested a substantial remittitur. Finally, each reversal was categorized by the basic reason for the reversal.

III. REVERSALS BY COURT

As shown in Figure 1, the statewide reversal rate in civil cases is approximately one in three. All but one court, the Waco court of appeals, were within seven percentage points of the statewide average.

The 33% statewide reversal rate is somewhat higher than the rate that can be derived from statistics compiled by the Office of Court Administration for the same period. The primary reason for the 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. The Office of Court Administration statistics generally confirm the findings of this study regarding the relative reversal rates of the various courts of appeals. For example, the Office of Court Administration reports that the El Paso court of appeals had the lowest reversal rate in civil cases during the period studied, and the Waco court had the highest. As shown in Figure 1, this study found that the Austin and El Paso courts had the lowest reversal rates and the Waco court had the highest.

IV. REVERSALS BY PROCEDURE

As shown in Figure 2, in appeals from judgments entered on jury verdicts, the reversal rate was 25%. In appeals following bench trials, the reversal rate was 22%. In appeals from summary judgments, the reversal rate was 33%.

On the whole, these results confirm the widely held supposition that courts of appeals reverse summary judgments at a higher rate than judgments entered on jury verdicts. However, the difference between the two reversal rates was less than one might expect, considering that the presumptions and standards of review applicable on appeal generally run in favor of judgments on jury verdicts, and against summary judgments. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 Baylor L. Rev. 1, 81 (2002). In two courts of appeals, San Antonio and the Houston Fourteenth, judgments on jury verdicts were reversed at a higher rate than summary judgments. Statewide, judgments on jury verdicts were reversed at a higher rate than summary judgments in tort and DTPA cases.

A. Judgments on Jury Verdicts

As shown in Figure 3, the courts of appeals are not uniform in their approach to jury verdicts. For example, the Dallas court reversed 11% of judgments entered on jury verdicts, while San Antonio and the Houston Fourteenth reversed 36%.

Some courts are not listed separately in Figure 3 because they did not issue enough opinions in appeals from judgments on jury verdicts to provide a reliable sample. However, the statewide average of 25% includes cases from all 14 courts of appeals.

As shown in Figure 4, when the courts of appeals reversed judgments on jury verdicts, they most often did so on the basis that 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. These reasons accounted for 60% of the reversals. Charge error accounted for 14% of the reversals. Factual insufficiency and “great weight” points accounted for just 4% of the reversals.

B. Directed Verdicts and Judgments Notwithstanding the Verdict

As shown in Figure 5, most directed verdicts were affirmed, and most judgments notwithstanding the verdict were reversed. When the trial court directed a verdict without submitting the case to the jury, the reversal rate was 24%. When the jury returned a verdict, but the trial court entered judgment notwithstanding the verdict, the reversal rate was 58%.

C. Bench Trials

As shown in Figure 6, in appeals following bench trials, there was a dramatic difference between the lowest reversal rate (4% in the Austin court) and the highest (60% in the Eastland court).

Some courts are not listed separately in Figure 6 because they did not issue enough opinions in appeals following bench trials to provide a reliable sample. However, the statewide average of 22% includes cases from all 14 courts of appeals.

As shown in Figure 7, 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 72% of the reversals. An additional 14% 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.

D. Summary Judgments

As shown in Figure 8, the courts of appeals in Dallas, Fort Worth, Austin, and Corpus Christi reversed a higher percentage of summary judgments than the courts in San Antonio, El Paso, and Houston.

Some courts are not listed separately in Figure 8 because they did not issue enough opinions in appeals from summary judgments to provide a reliable sample. However, the statewide average of 33% includes cases from all 14 courts of appeals.

As shown in Figure 9, summary judgments granted in favor of employers and personal injury defendants were reversed at a significantly lower

rate than summary judgments granted in contract cases.

As shown in Figure 10, when summary judgments were reversed, the reason for reversal was most often the existence of a fact issue, or, in the case of no-evidence summary judgments, the existence of some evidence. These grounds accounted for 58% of the reversals. Errors of law accounted for 31% of the reversals. Procedural errors accounted for the remaining 11%.

Pure no-evidence summary judgments were rarely appealed, accounting for less than one-fifth of the summary judgment appeals. When the summary judgment motion was based solely on no-evidence grounds, the reversal rate was 19%. When the motion was based at least partially on traditional grounds, the reversal rate was 35%.

E. Default Judgments

Appeals from no-answer default judgments had one of the highest rates of reversal—79%. For post-answer default judgments, the rate of reversal was 48%. When the trial court granted a default judgment and then denied a motion for new trial, the reversal rate was 66%; when the defendant pursued a restricted appeal, the reversal rate was 74%.

V. REVERSALS BY TYPE OF DISPUTE

A. Tort and DTPA Cases

As shown in Figure 11, plaintiffs in tort and DTPA cases fared poorly on appeal. When the plaintiff prevailed in the trial court and the defendant appealed, the rate of reversal was 51%—more than half. When the defendant prevailed in the trial court and the plaintiff appealed, the reversal rate was 23%. Plaintiffs frequently appealed from judgments entered on defense verdicts in tort and DTPA cases, despite the low reversal rate in these appeals. Appeals by plaintiffs outnumbered appeals by defendants by a margin of more than three to one.

As shown in Figure 12, in tort and DTPA cases, judgments on jury verdicts were reversed at a higher rate than summary judgments.

As shown in Figure 13, when a defendant appealed from a verdict favoring the plaintiff in a tort or DTPA case, the reversal rate was 49%. When a plaintiff appealed from a defense verdict

in a tort or DTPA case, the reversal rate was just 10%.

B. Contract Cases

As shown in Figure 14, the reversal rate in contract cases was 33%. In most courts of appeals, the reversal rate was within four percentage points of the statewide average. At the same time, there was a substantial difference between the reversal rates in the Houston First and Fort Worth courts (20% and 22%, respectively) and the Corpus Christi court (48%).

Some courts are not listed separately in Figure 14 because they did not issue enough opinions in appeals in contract cases to provide a reliable sample. However, the statewide average of 33% includes cases from all 14 courts of appeals.

As shown in Figure 15, summary judgments in contract cases were more likely than other summary judgments to be reversed, but judgments following jury trials and bench trials in contract cases were less likely than other judgments following trials to be reversed.

C. Employment Cases

Because cases between employees and employers are often brought under federal statutes, they are frequently filed in, or removed to, federal court. Only eighty employment appeals were decided by the Texas courts of appeals during the period studied. In these appeals, when the employee prevailed below, the reversal rate was 52%. When the employer prevailed below, the reversal rate was 20%.

VI. CONCLUSION

Evaluating a potential appeal is a difficult task that requires an objective analysis of the strengths and weaknesses of a particular case. This paper provides a starting point by enabling practitioners to assess how frequently a reversal has been obtained in similar appeals.

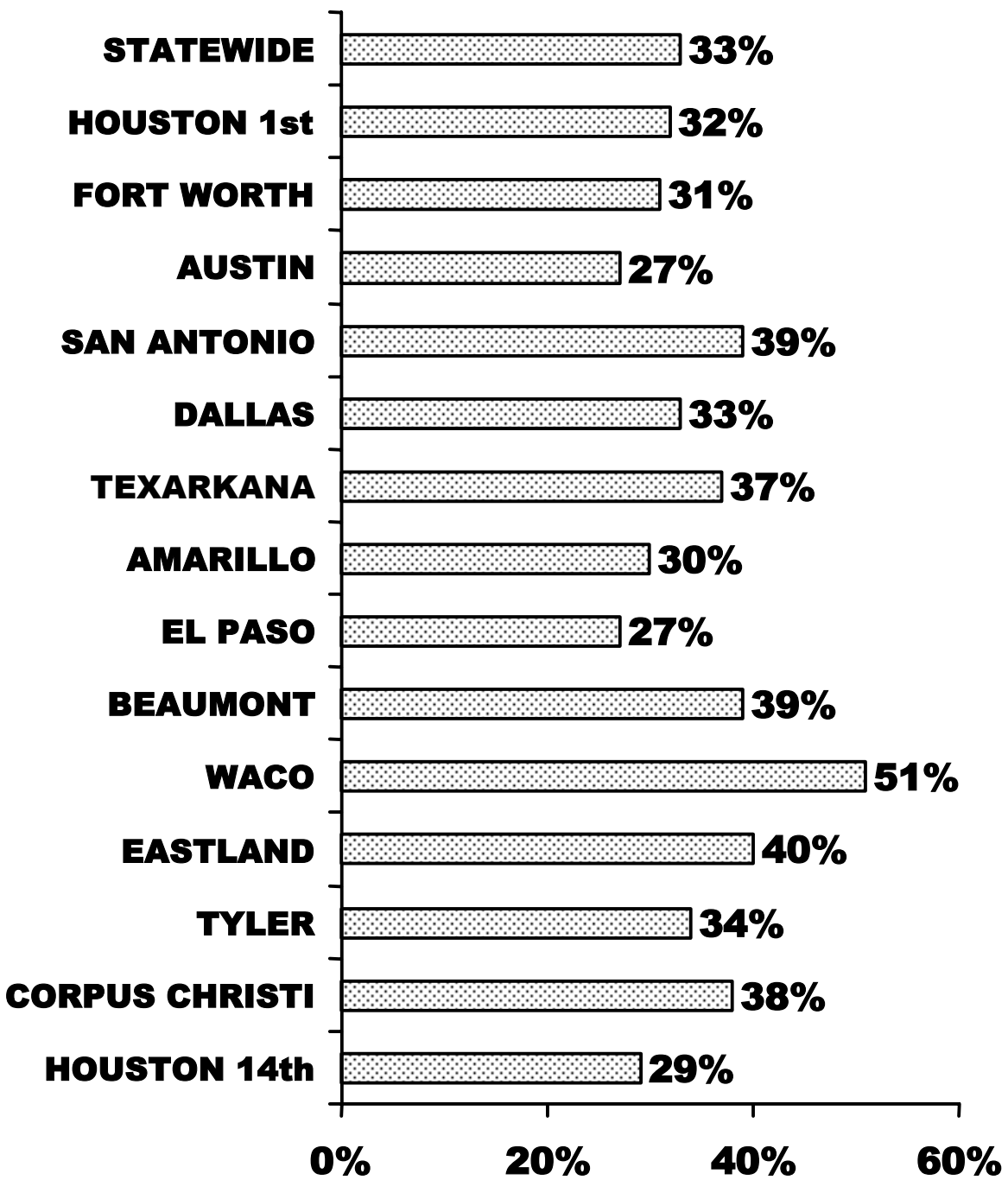


Figure 1: Reversal Rates by Court

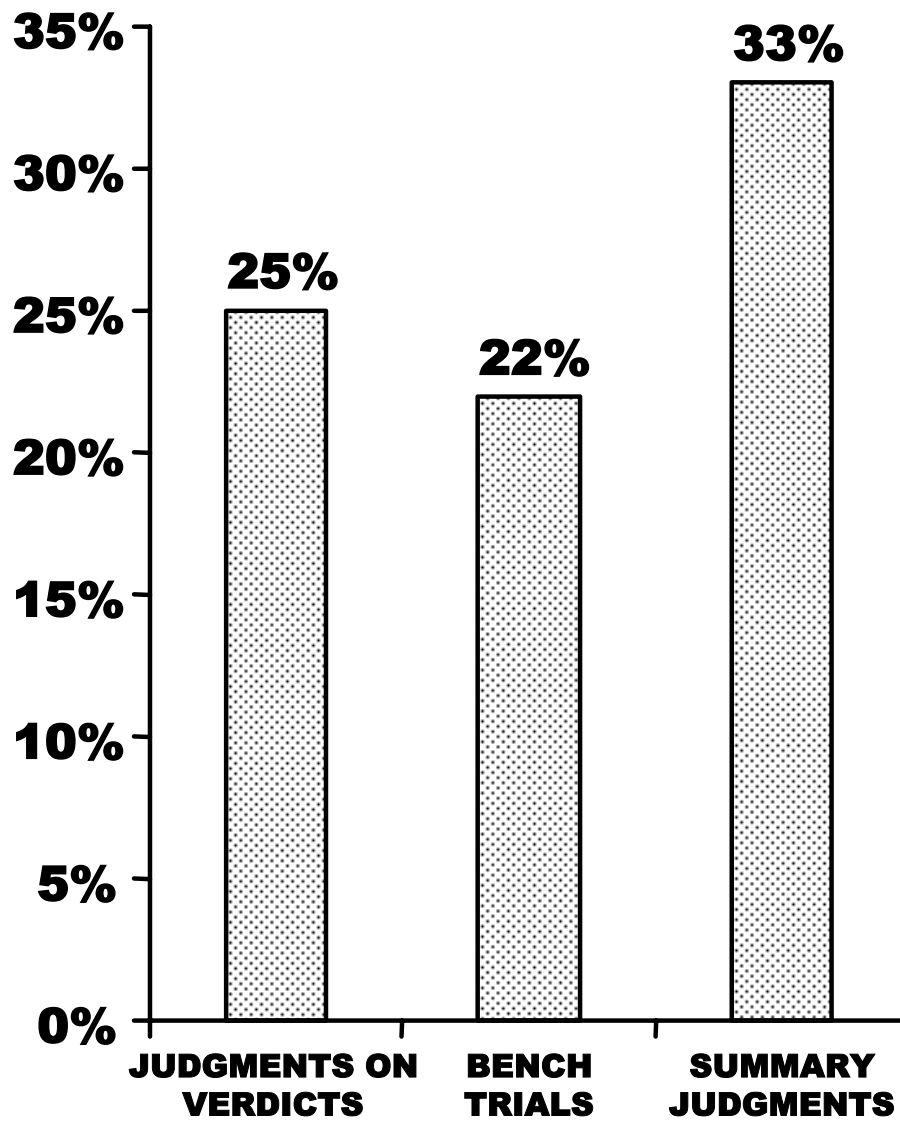


Figure 2: Reversal Rates by Procedure

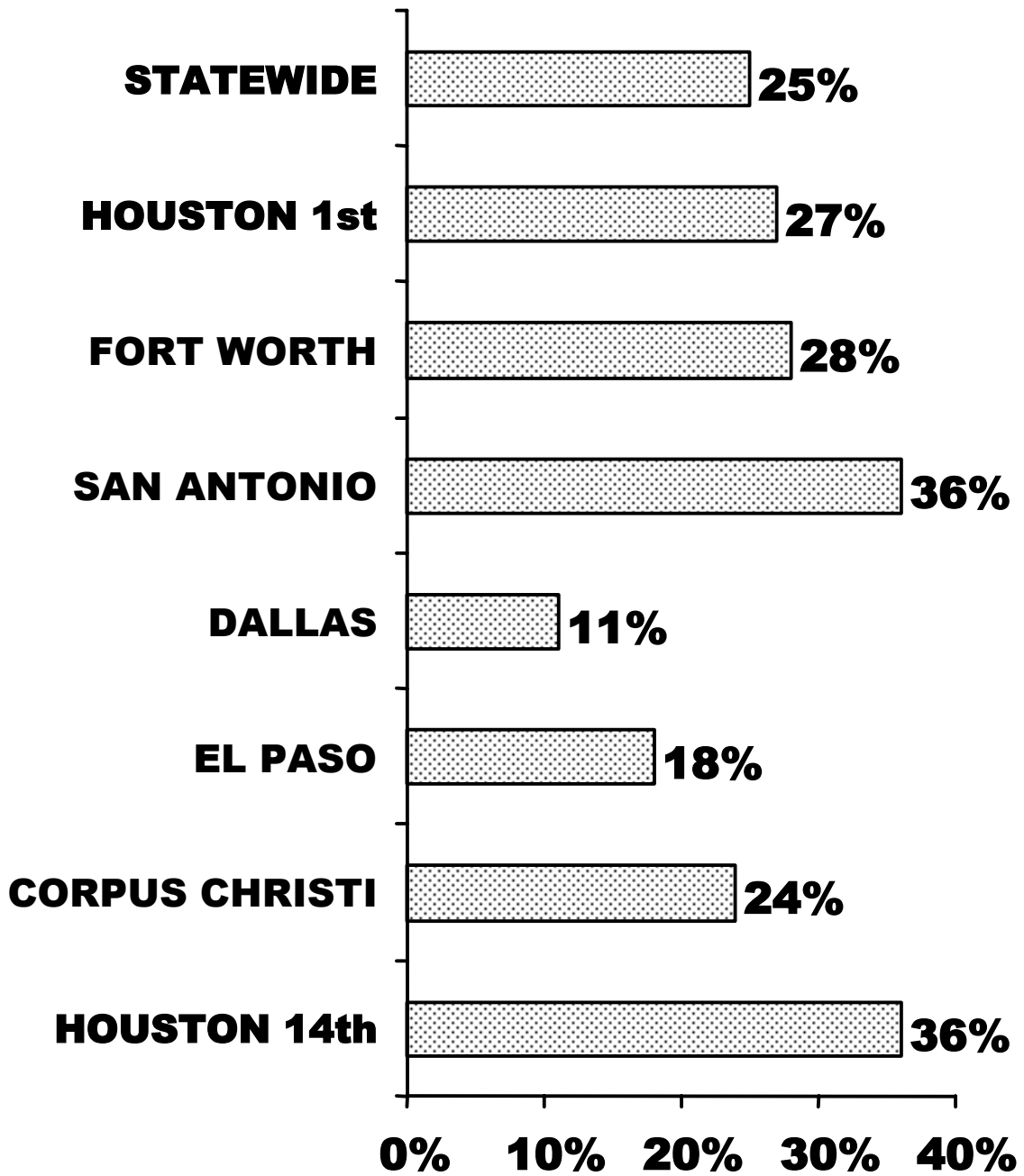


Figure 3: Reversal Rates for Judgments on Jury Verdicts, by Court

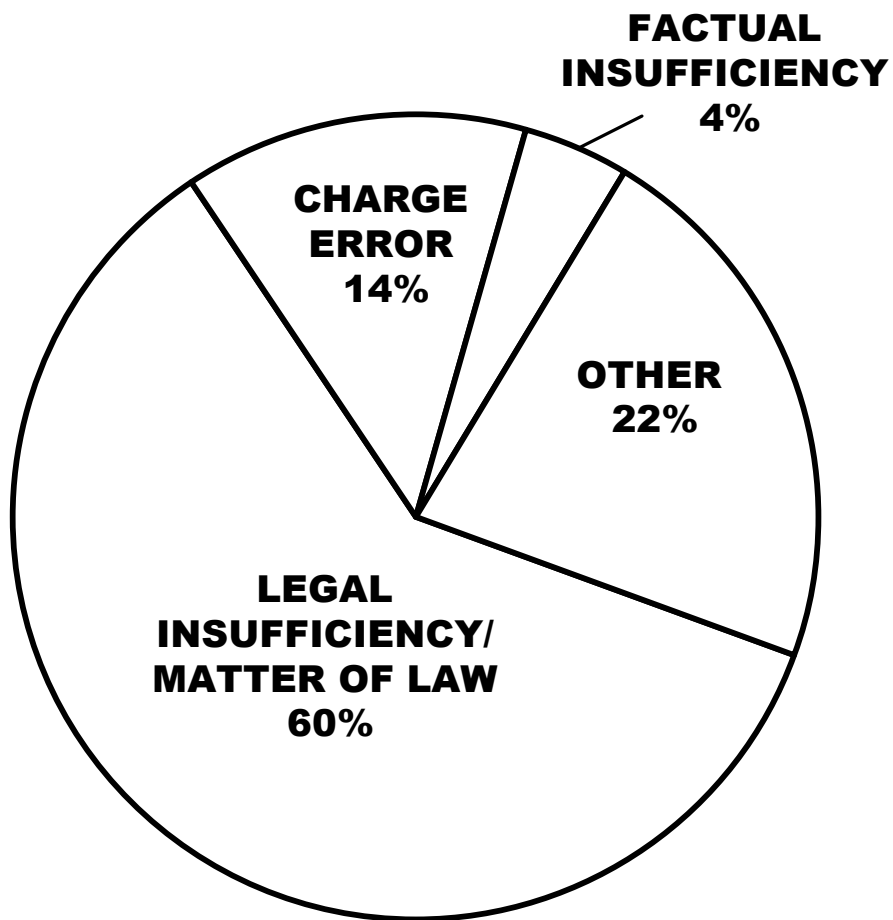


Figure 4: Reasons for Reversal of Judgments on Jury Verdicts

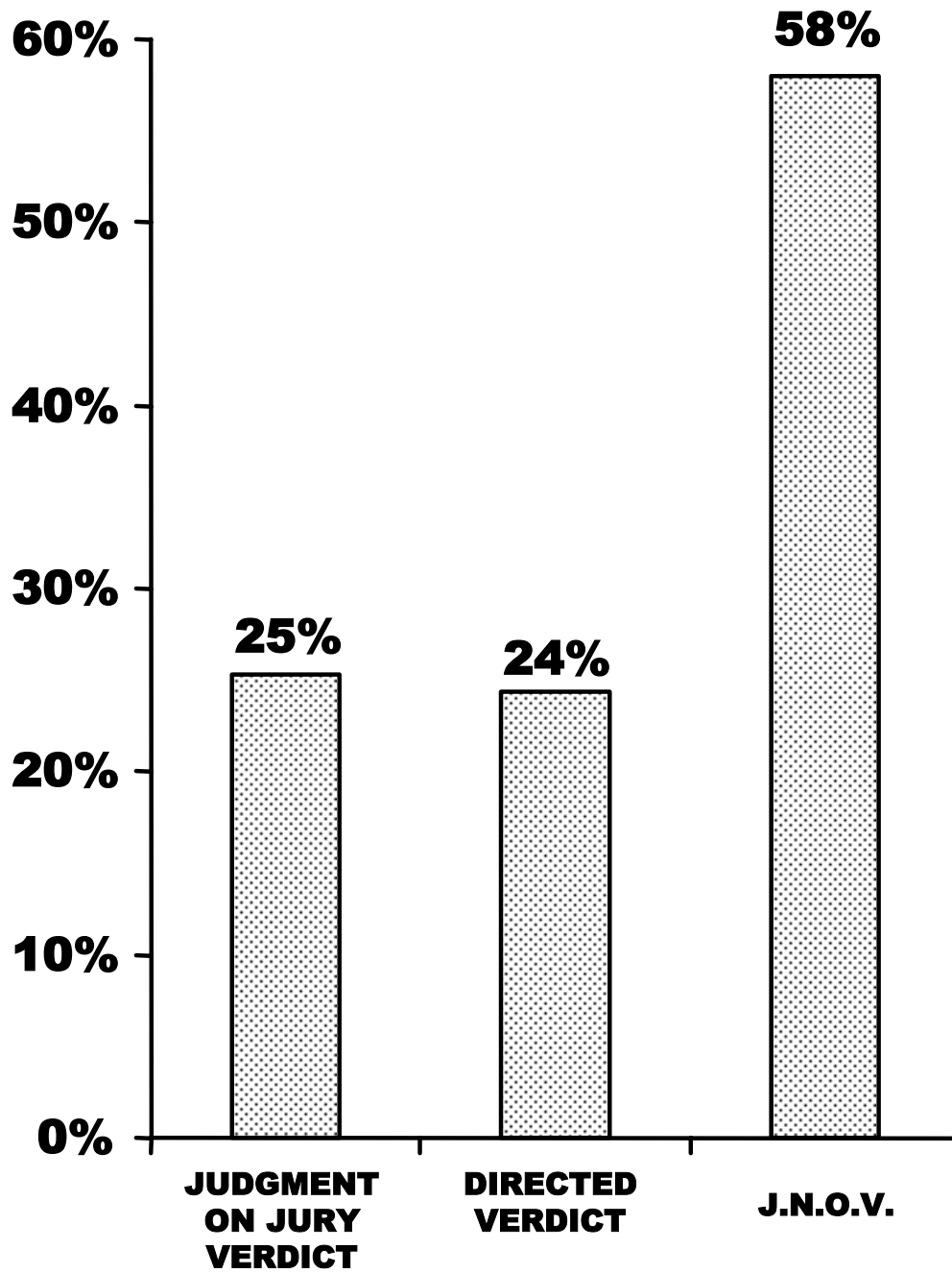


Figure 5: Reversal Rates for Judgments Following Jury Trials

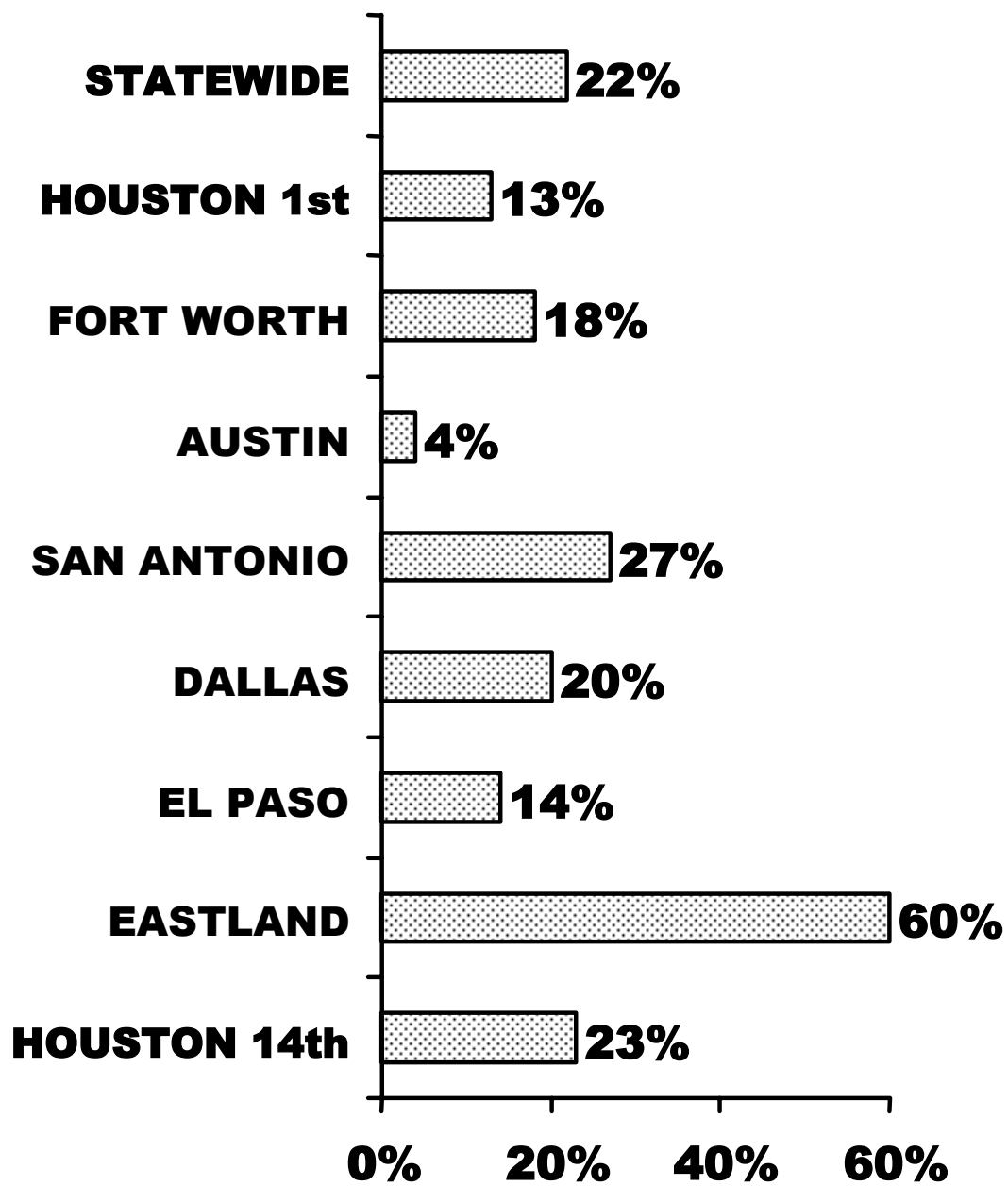


Figure 6: Reversal Rates for Judgments Following Bench Trials, by Court

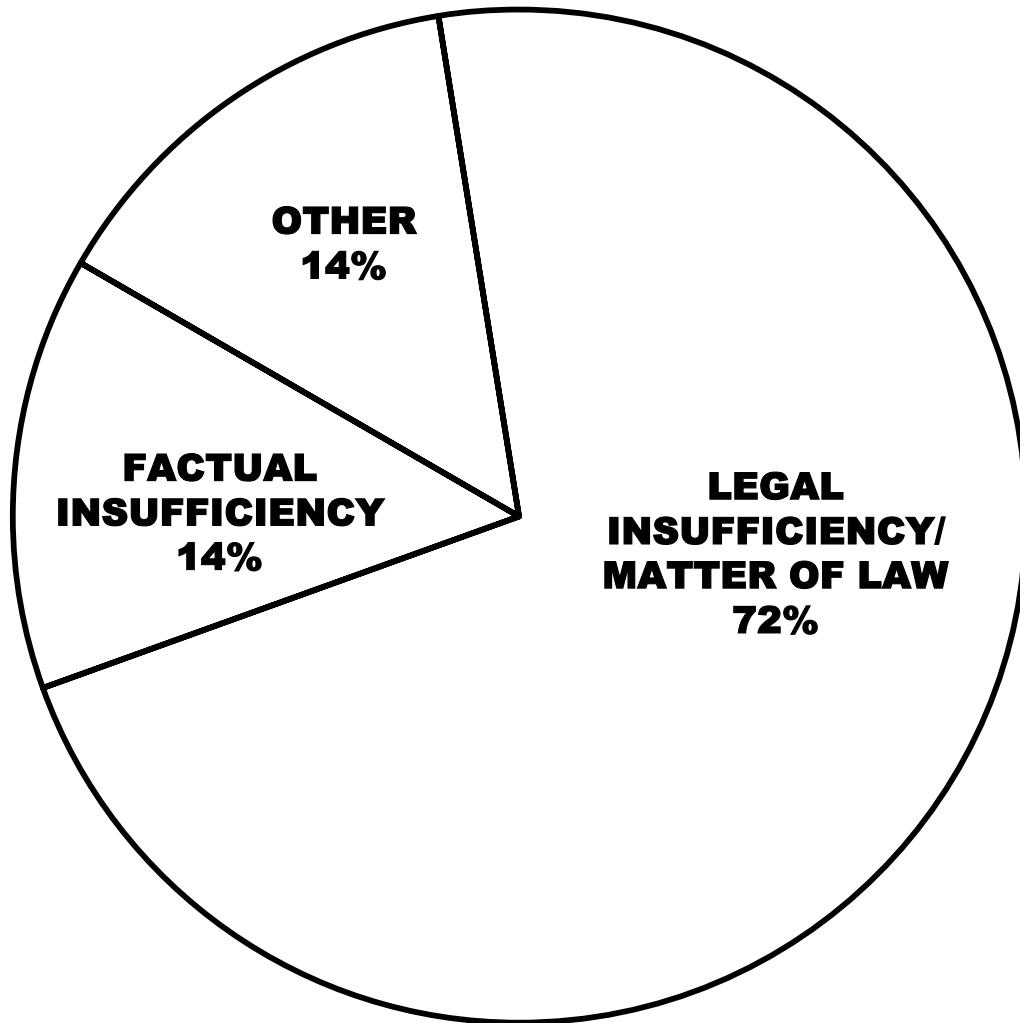


Figure 7: Reasons for Reversal of Judgments following Bench Trials

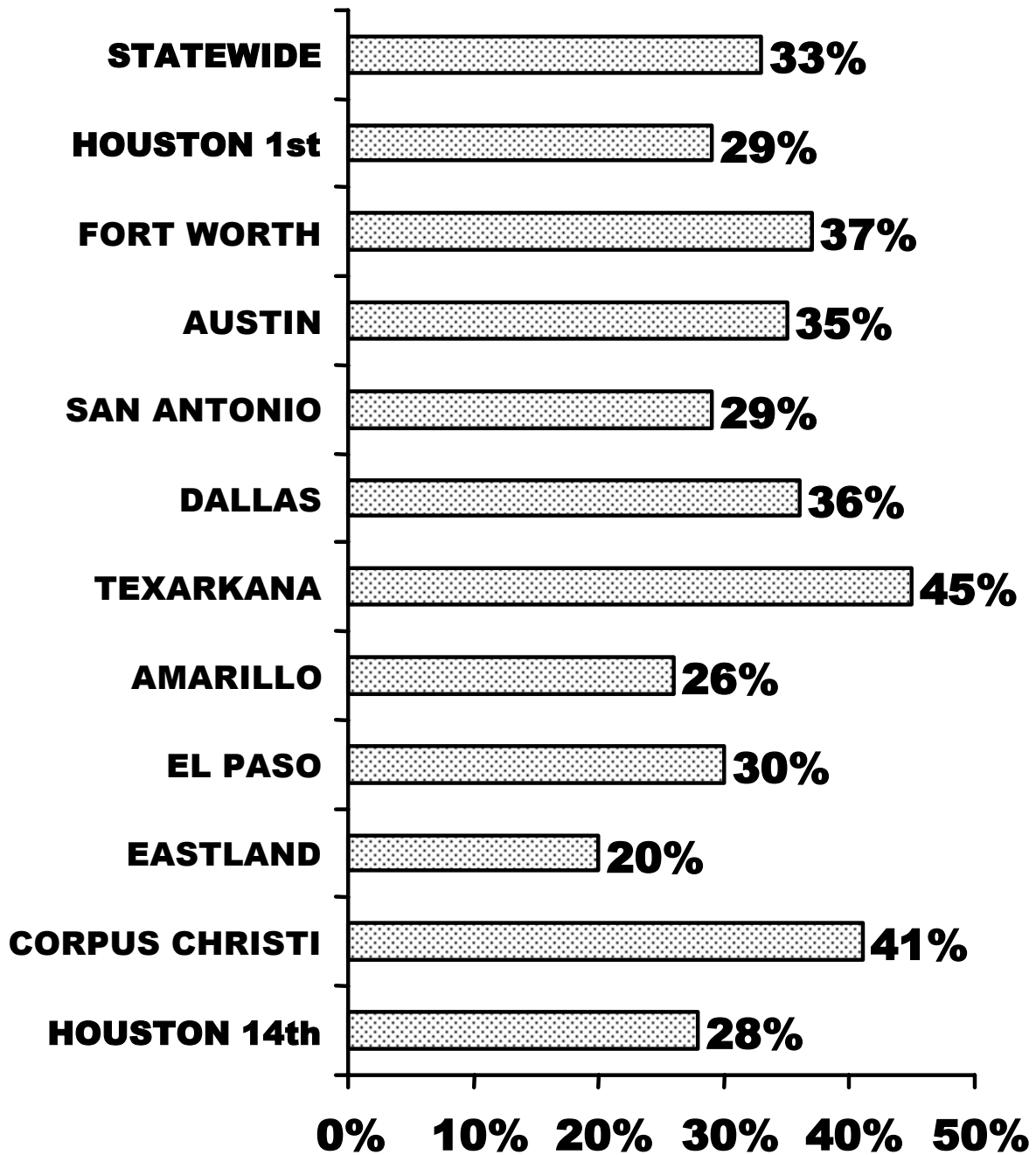


Figure 8: Reversal Rates for Summary Judgments, by Court

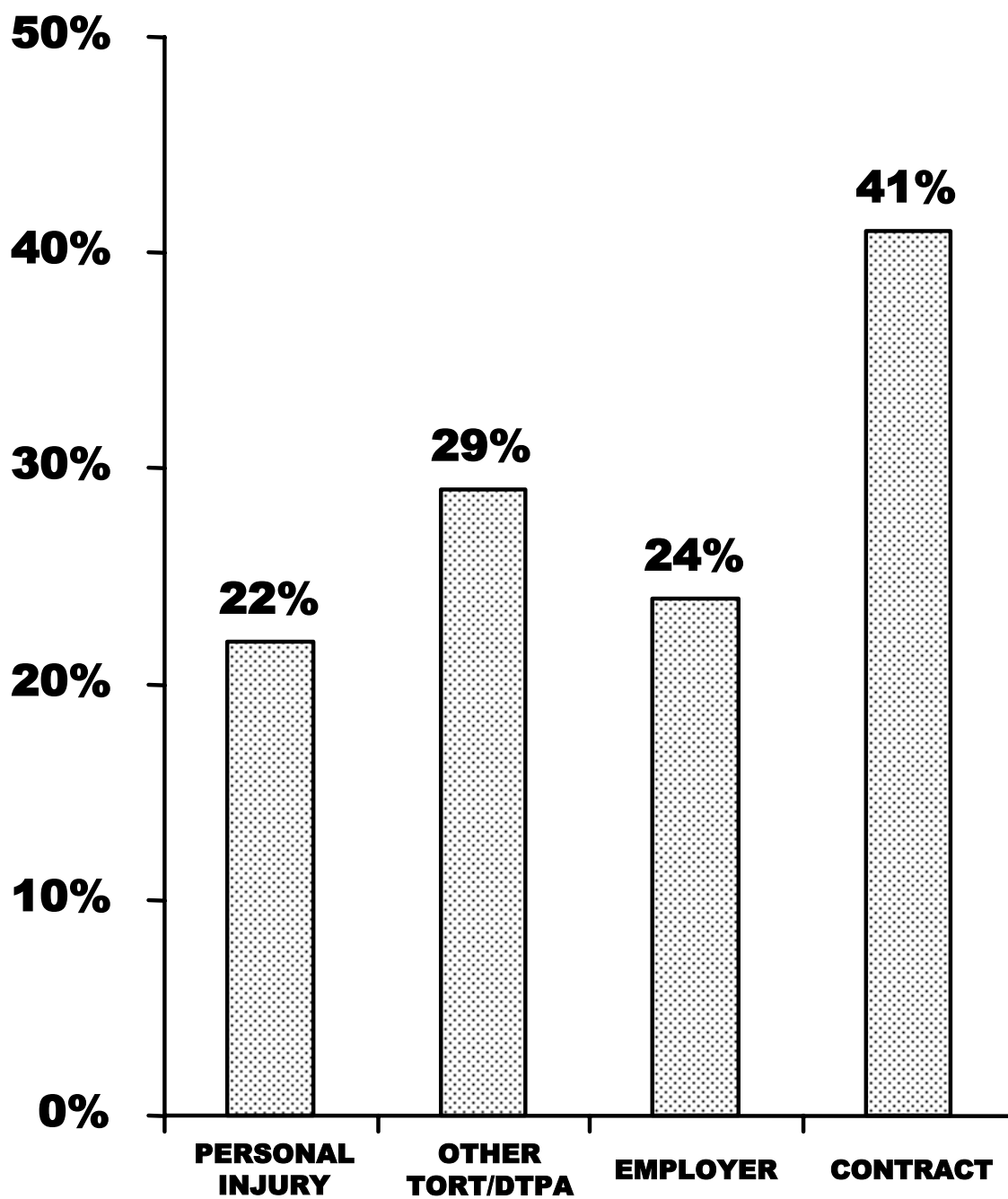


Figure 9: Reversal Rates for Summary Judgments, by Type

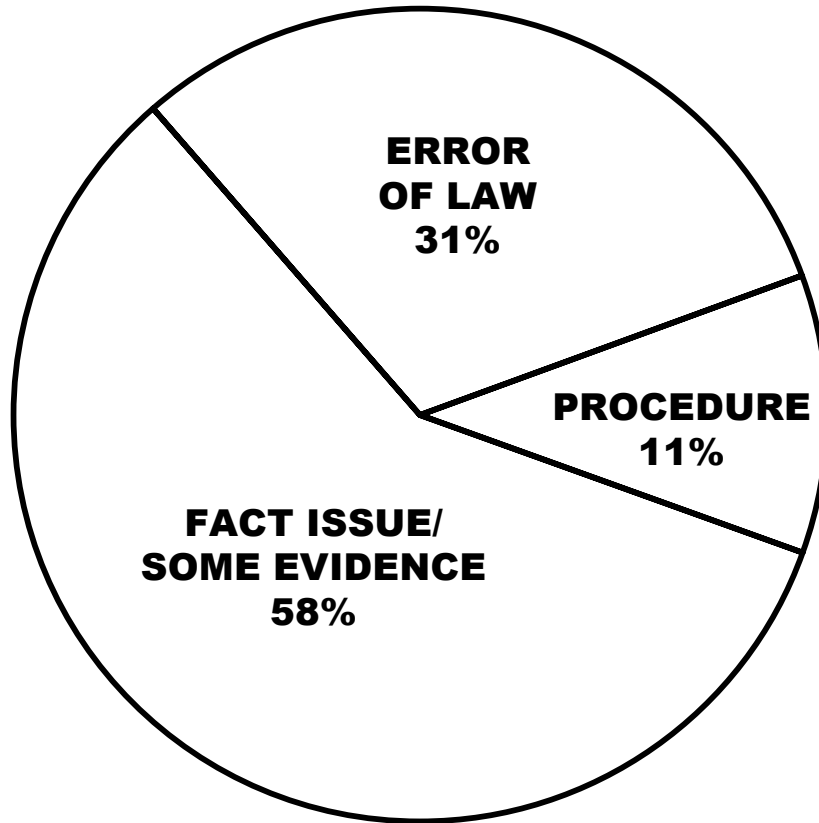


Figure 10: Reasons for Reversal of Summary Judgments

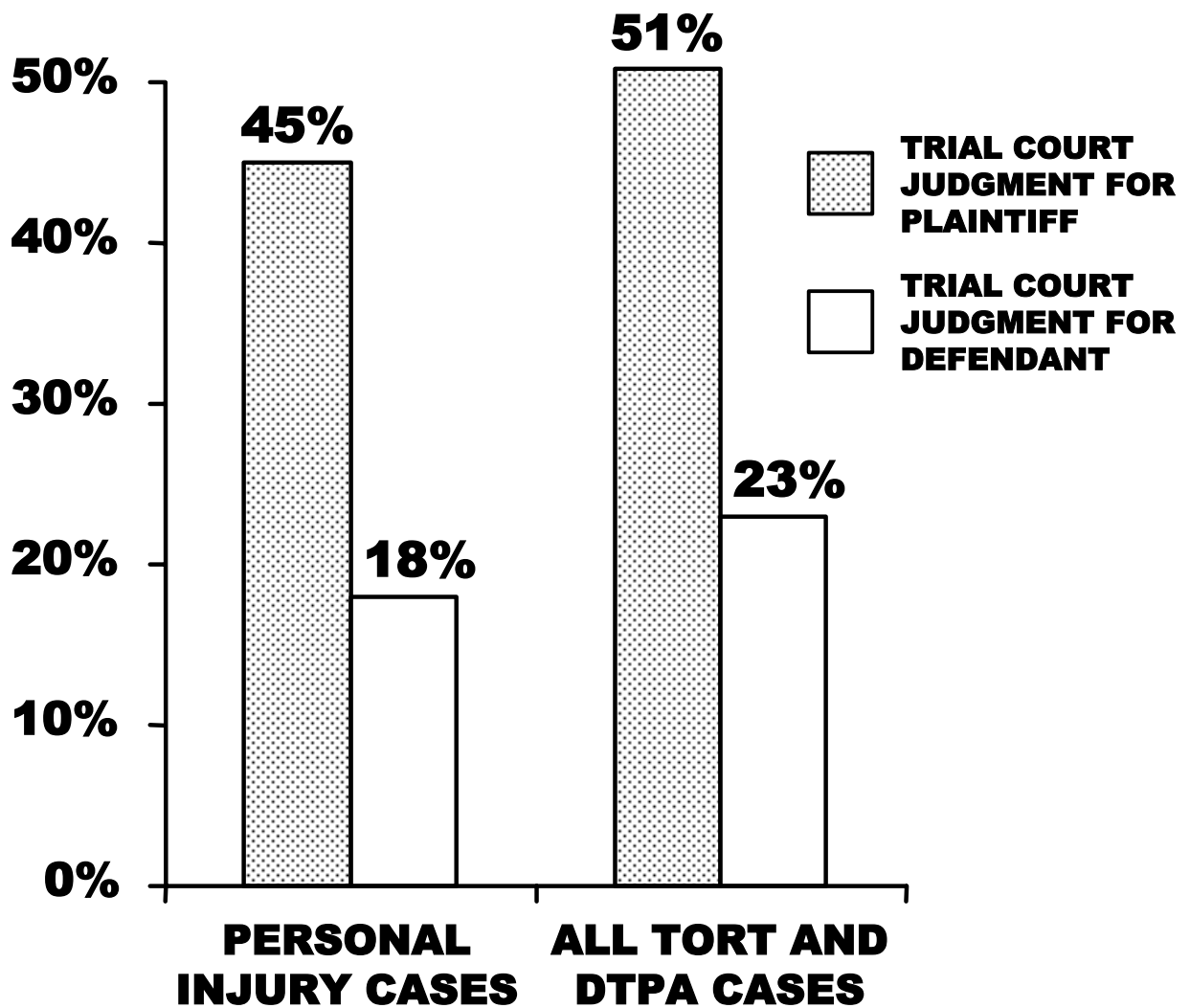


Figure 11: Reversal Rates for Tort and DTPA Judgments

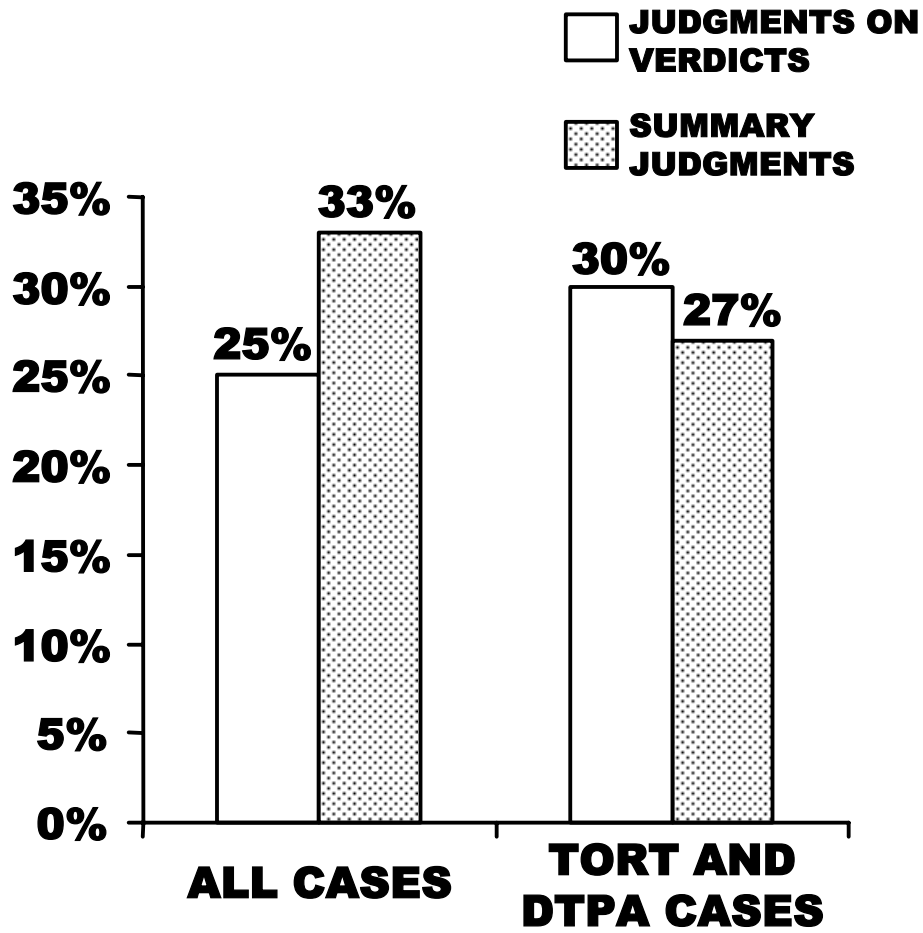


Figure 12: Reversal Rates, by Procedure and Type

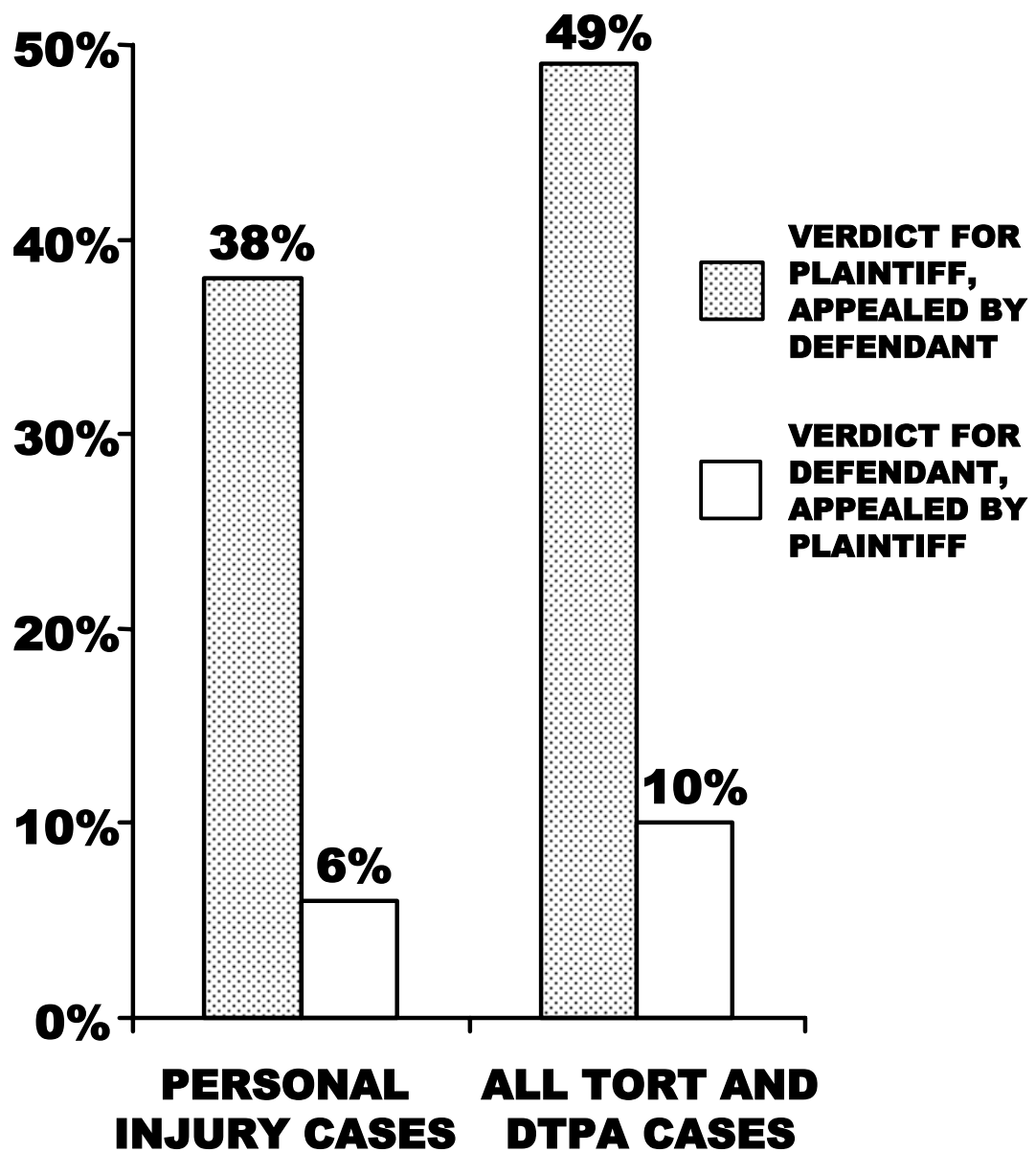


Figure 13: Reversal Rates for Tort and DTPA Judgments on Verdicts

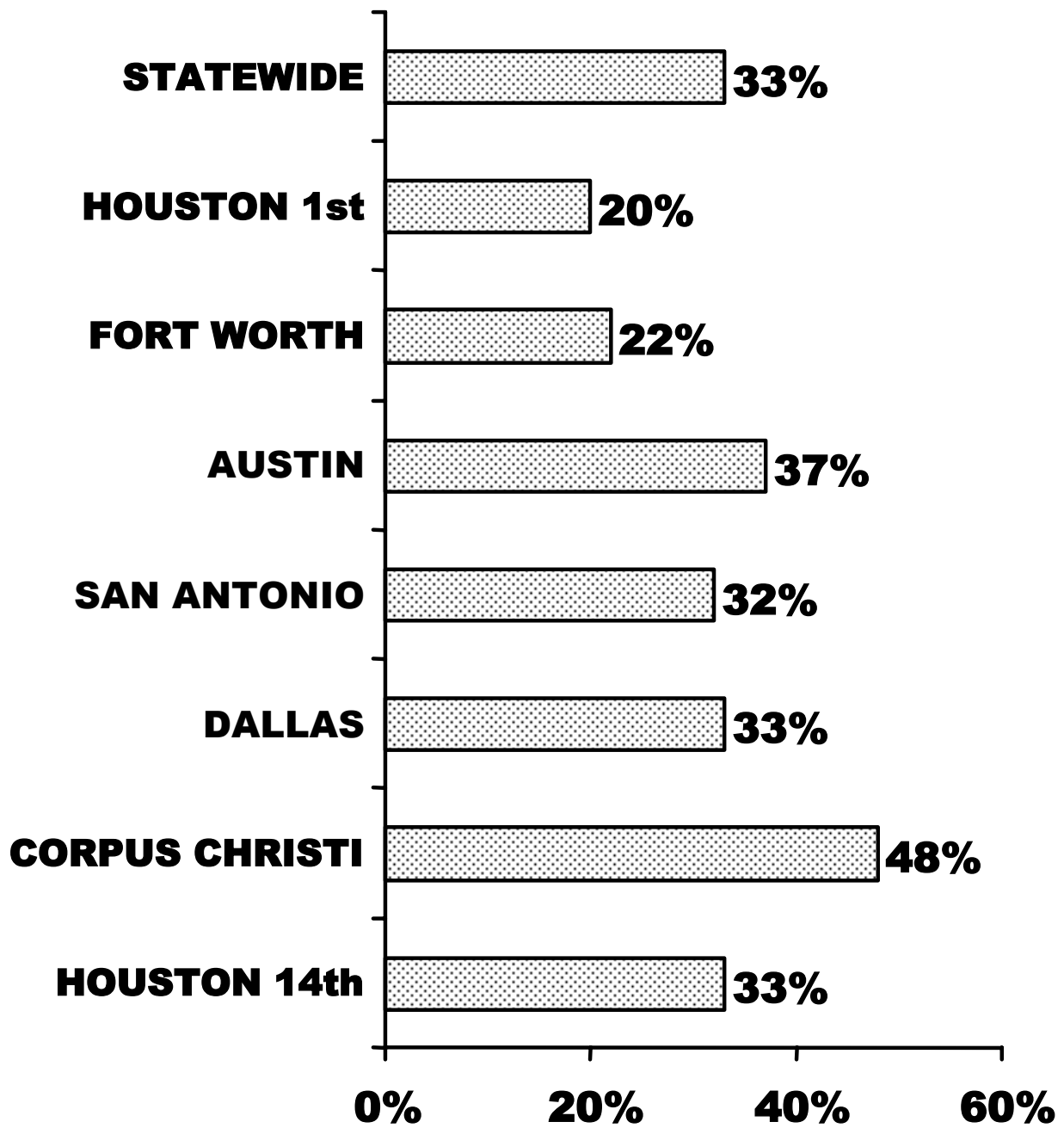


Figure 14: Reversal Rates in Contract Cases, by Court

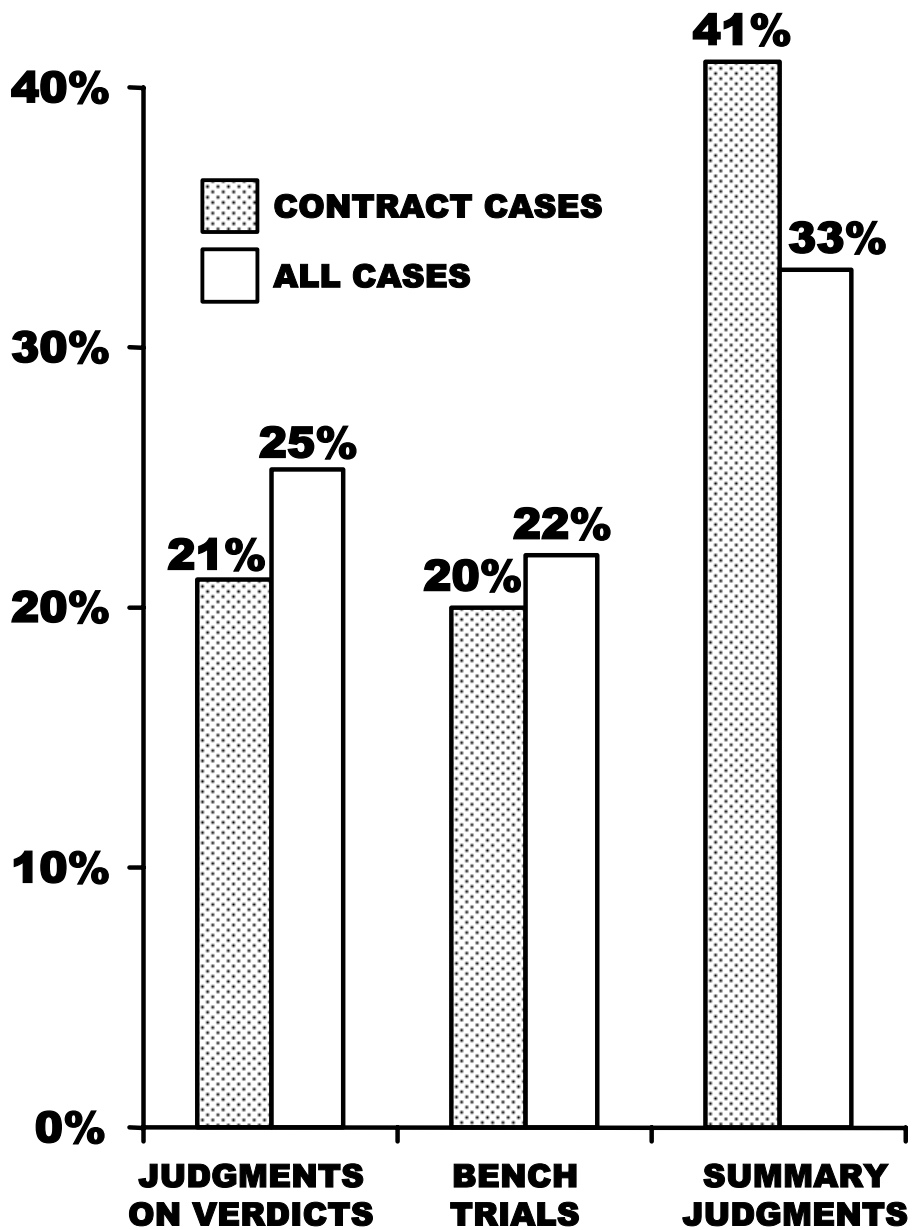


Figure 15: Reversal Rates by Procedure