

## Improper Jury Argument: Texas Courts' Recent Focus on Unsubstantiated Anchoring

Update

September 12, 2024 | 2 minute read

Texas courts have recently provided guidance on what constitutes improper jury argument, focusing specifically on unsubstantiated anchoring. Trial counsel routinely use strategies to enhance the persuasiveness of their presentations and arguments in jury trials, and “anchoring” is a technique designed to influence jurors’ evaluation of a plaintiff’s noneconomic damages. It involves mentioning a number or value that the jury can use as a reference point when determining the actual amount of a plaintiff’s damages.

Attempts to set anchors at trial may begin as early as voir dire and are most commonly used during closing argument. Plaintiffs’ counsel ordinarily seek to establish high anchors, while defense counsel may choose to set anchors of their own with low numbers. But there are limits. Texas Rule of Civil Procedure 269(e) provides that “[c]ounsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel,” and “unsubstantiated anchoring” occurs when trial counsel references values or things that have no rational connection to the case.

The Texas Supreme Court discussed unsubstantiated anchoring and the sufficiency of evidence supporting noneconomic damages in *Gregory v. Chohan*.<sup>[1]</sup> *Chohan* involves a wrongful death action in which plaintiffs’ counsel suggested during closing argument that the amount of noneconomic damages was analogous to a \$71 million Boeing F-18 fighter jet and a \$186 million painting by Mark Rothko.<sup>[2]</sup> The court held that “[u]nsubstantiated anchors like those employed here have nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded.”<sup>[3]</sup> Since “the only arguments provided to justify an amount of damages were impermissible appeals to irrelevant considerations, such as fighter jets,” the court reversed and remanded the case, concluding that there

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was no evidence to support the amount of noneconomic damages awarded by the jury.<sup>[4]</sup>

A pair of recent appellate decisions have cited *Chohan* when discussing how far is too far with the use of anchoring.

In *Alonzo v. John*, trial counsel compared the value of the plaintiff's damages to "a van Gogh painting worth \$90 million, multimillion-dollar athlete and CEO salaries, and the value of [the defendant's] trucking fleet and warehouses."<sup>[5]</sup> While not reaching the issue of unsubstantiated anchoring in its opinion, the Texas Supreme Court mentioned in a footnote that counsel's reference to the painting, salaries, fleet, and warehouse as anchors "are of the same ilk" as the unsubstantiated anchors disapproved in *Chohan*.<sup>[6]</sup>

In *Team Industrial Services v. Most*, trial counsel argued that a "painting sells for \$350 million" and "I don't think there is a person that would say that a painting is more valuable than a human life."<sup>[7]</sup> The First Court of Appeals described those comments as "improper argument" and held that the trial court erred in entering judgment on the jury's damages findings because "the damages were not supported by the evidence."<sup>[8]</sup>

Texas litigators should heed the warning delivered in these recent decisions scrutinizing unsubstantiated anchoring. Damages arguments made in furtherance of persuasive, creative, zealous advocacy need to relate in some way to the evidence in the case, and using anchors that have no rational connection to the evidence may very well result in reversible error.

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<sup>[1]</sup> *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023).

<sup>[2]</sup> *Id.* at 557.

<sup>[3]</sup> *Id.* at 558.

<sup>[4]</sup> *Id.* at 564.

<sup>[5]</sup> *Alonzo v. John*, 689 S.W.3d 911, 915 n. 1 (Tex. 2024).

<sup>[6]</sup> *Id.*

<sup>[7]</sup> See *Team Indus. Services, Inc. v. Most*, No. 01-22-00313-CV, 2024 WL 2194508 at \*18 (Tex. App.—Houston [1st Dist.] May 16, 2024, no pet. h.)

<sup>[8]</sup> *Id.* at \*18-19.