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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Gabriel Martinez and Donal Childers as
conservator for Cruz Baca Soto,

No. CV-11-0961-PHX-DGC

10 Plaintiffs,

ORDER

11 v.

12 UPS Ground Freight Incorporated, et al.,

13 Defendants.
14

15 Donald Childers, as conservator for Cruz Baca Soto, has filed a motion for a new
16 trial. Doc. 157. The motion is fully briefed. Docs, 161, 163. The Court will deny the
17 motion.¹

18 Defendants admitted liability, and the jury awarded Gabriel Martinez \$400,000
19 and Cruz Baca Soto \$25,000 for the accidental death of their mother. The motion argues
20 that a new trial should be granted under Rule 59 of the Federal Rules of Civil Procedure
21 because Mr. Soto's damages were insufficient.

22 The Court may grant a new trial only if the jury's verdict is against the clear
23 weight of the evidence. *Tortu v. Las Vegas Metropolitan Police Dept.*, 556 F.3d 1075,
24 1083 (9th Cir. 2009). In addressing this issue, the Court cannot substitute its evaluation
25 of the evidence for that of the jury. *Id.* at 1084.

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28 ¹ The request for oral argument is denied because the Court heard all of the
evidence at trial, the standards under Rule 59 are clear, the parties have fully briefed the
issues, and oral argument will not aid the Court's decision. Fed. R. Civ. P. 78(b).

1 The verdict for Mr. Soto was not against the clear weight of the evidence. Mr.
2 Soto did not appear or testify at trial, and Mr. Childers, his conservator, attended only
3 parts of the trial and did not testify. Mr. Martinez, by contrast, attended the entire trial,
4 sat at counsel table, and, most importantly, testified personally about the loss of his
5 mother.

6 Witnesses who testified for Plaintiffs also provided less evidence about Mr. Soto
7 and his relationship with his mother than about Mr. Martinez. Ms. Parker, the CPS
8 witness, testified that she met Mr. Soto only briefly on one occasion. Mr. Vasquez Baca,
9 who took in the decedent's children after her death and testified about the effect of her
10 death on the children, could not recall Mr. Soto's name. Other evidence concerning Mr.
11 Martinez's relationship with family members, his sorrow at being away from his mother,
12 and the efforts he made to improve his life after his mother's death all spoke to his close
13 relationship with her, but there was little comparable evidence regarding Mr. Soto.
14 Moreover, the fact that the jurors awarded Mr. Martinez \$400,000 and Mr. Soto \$25,000
15 shows that they distinguished between the two Plaintiffs and the evidence presented in
16 their behalf and were not influenced by passion or prejudice.

17 The motion also asserts that defense counsel engaged in misconduct when he
18 asserted during closing argument that the jury should award Mr. Soto nothing because
19 Mr. Soto did not appear and testify at trial. Defense counsel argued that the jury had no
20 credible basis upon which to award damages to Mr. Soto because he did not testify at
21 trial, the evidence did not show how long he lived in the house with his deceased mother,
22 and one of the persons who took the children in after their mother's death, Mr. Vasquez
23 Baca, could not even remember Mr. Soto's name. Plaintiff's counsel did not object to
24 this line of argument, but instead suggested in rebuttal that Defendants' suggestion of no
25 damages for Mr. Soto showed that Defendants were not really admitting liability in this
26 case as they claimed, and that the big corporation in Virginia (Defendant UPS) viewed
27 Arizona as a "third world country" in which it could dictate the jury award. In other
28 words, Plaintiffs' counsel sought to take advantage of the defense closing argument

1 rather than objecting and asking the Court to correct it. Plaintiff’s counsel made these
2 points at the outset of his rebuttal argument, seeking to capitalize on defense counsel’s
3 argument.

4 As the Ninth Circuit has noted, “federal courts erect a ‘high threshold’ to claims of
5 improper closing arguments in civil cases raised for the first time after trial.” *Hemmings*
6 *v. Tidyman’s Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002). This is because raising an
7 objection before the jury begins deliberations permits the judge to examine the alleged
8 prejudice and issue a curative instruction if warranted, and because permitting a party to
9 wait until after a negative verdict before raising an error simply encourages that party to
10 sit silently in the face of error. *Id.*

11 Plaintiff has not met this high threshold. The Court cannot conclude that defense
12 counsel’s argument was prejudicial or fundamentally unfair. *Id.* Defense counsel argued
13 the paucity of evidence in support of Mr. Soto’s damages claim, a legitimate point to
14 make in closing argument. Although Mr. Soto was represented by a conservator during
15 trial because he is in state custody and recently was found not competent to stand trial in
16 a state criminal case, the Court informed the jury only that he was represented at trial by
17 his conservator. The Court does not view it as unfair that defense counsel later
18 commented in closing argument on the lack of evidence to support Mr. Soto’s damages,
19 including the fact that Mr. Soto did not testify. To the extent defense counsel was
20 implying that Mr. Soto was absent because he did not care about his mother, the Court’s
21 instruction that he was represented by a conservator countered such an implication. More
22 importantly, Plaintiffs’ counsel could have objected, but chose not to. Plaintiffs’ counsel
23 instead chose to turn Defendants’ argument against them by asserting that the distant “big
24 corporation” could not dictate to the “good people of Arizona” what damages to award
25 for the loss of a mother.

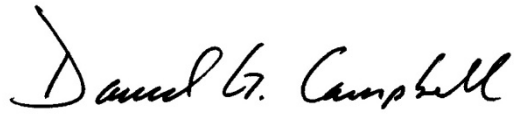
26 In sum, the Court cannot conclude that defense counsel’s argument so permeated
27 the trial as to result in a jury verdict that was “influenced by passion and prejudice.” *Id.*
28 at 1192. A new trial is not warranted on the basis of Defendants’ closing argument.

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Finally, the motion argues that Mr. Soto's damages award is inconsistent with damages awards in other Arizona cases. The relevant inquiry, however, is not how the award compares to awards in cases with different evidence, but whether the award was against the clear weight of the evidence in this case. The Court concludes that it was not.

IT IS ORDERED that the motion for new trial (Doc. 157) is **denied**.

Dated this 18th day of March, 2013.



David G. Campbell
United States District Judge