

237 Fed.Appx. 156, 2007 WL 1577954 (C.A.9 (Cal.))  
(Not Selected for publication in the Federal Reporter)  
(Cite as: 237 Fed.Appx. 156, 2007 WL 1577954 (C.A.9 (Cal.)))

**H**

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,  
Ninth Circuit.  
Michael SITRICK and Ryan Kavanaugh, Plaintiffs-Appellants,  
v.  
NORTHWESTERN PACIFIC INDEMNITY COMPANY, Defendant-Appellee.

No. 05-56117.  
Argued and Submitted May 18, 2007.  
Filed May 30, 2007.

**Background:** Two individuals brought civil action against insurer. The United States District Court for the Central District of California, Edward Rafeedie, J., granted judgment for defendant. Plaintiffs appealed.

**Holdings:** The Court of Appeals held that:  
(1) plaintiffs waived their challenge to insured capacity instruction given at trial, and  
(2) motion for new trial based on juror misconduct was properly denied.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚡630.1

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review  
170BVIII(D)2 Objections and Exceptions

170Bk630 Instructions

170Bk630.1 k. In General. Most Cited Cases

In civil action brought against insurer, plaintiffs, who did not object to insured capacity instruction at trial on the basis that the district court failed to adequately instruct the jury as to how to determine insured capacity, and who did not meet the elements of the pointless formality rule, waived their challenge to that instruction for purposes of appeal. Fed.Rules Civ.Proc.Rule 51. 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚡2337

170A Federal Civil Procedure  
170AXVI New Trial  
170AXVI(B) Grounds

170Ak2337 k. Jury; Disqualification; Misconduct of or Affecting. Most Cited Cases

Denial of motion for new trial in civil action brought against insurer based on alleged misconduct of jury foreperson was not an abuse of discretion, where district court analyzed numerous factors to determine whether there had been potential prejudice as a result of the foreperson's observation of one of the plaintiffs.

\*156 Pamela E. Dunn, Dunn Koes LLP, Pasadena, CA, Ronald M. Sitrick, Esq., Sitrick & Sitrick, Chicago, IL, for Plaintiffs-Appellants.

Paul H. Breslin, Esq., Archer Norris, Walnut Creek, CA, Limor Lehavi, Esq., Archer Norris, Newport Beach, CA, for Defendant-Appellee.

Appeal from United States District Court for the Central District of California, Edward Rafeedie, District Judge, Presiding. D.C. No. CV-03-2929ER (VBKx).

Before: FISHER and CLIFTON, Circuit Judges, and MARTINEZ, District Judge.<sup>FN\*</sup>

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FN\* The Honorable Ricardo S. Martinez,  
 District Judge for the Western District of  
 Washington, sitting by designation.

MEMORANDUM FN\*\*

FN\*\* This disposition is not appropriate  
 for publication and is not precedent.

\*\*1 [1] Appellants, Michael Sitrick and Ryan  
 Kavanaugh (collectively "Sitrick"), have waived  
 their argument that the district court failed to ad-  
 equately instruct the jury as to how to determine in-  
 sured capacity because they did not object to the in-  
 struction at trial on that basis and do not meet the  
 elements of the pointless formality\*157 rule set  
 forth in *Gulliford v. Pierce County*, 136 F.3d 1345,  
 1348 (9th Cir.1998). Nothing about Sitrick's pro-  
 posed instruction or his formal exception to the dis-  
 trict court's proposed instruction brought into focus  
 the precise error now alleged on appeal, as required  
 by Rule 51. In any event, the district court's instruc-  
 tion correctly stated the applicable law and Sitrick  
 offers no authority for the proposition that an in-  
 sured capacity instruction must include more de-  
 tailed information to guide the jury's deliberation.

Further, we reject Sitrick's argument that the  
 jury decided a question of law. The jury was asked  
 to determine whether the facts, as they decided  
 them, led to the conclusion that Mr. Kavanaugh was  
 acting in whole or in part in his capacity as a direct-  
 or of PreNet. Ultimately, the jury concluded that he  
 was not. We must uphold that conclusion if it is  
 supported by substantial evidence. *Johnson v.*  
*Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222,  
 1227 (9th Cir.2001); *Gilbrook v. City of Westmin-*  
*ster*, 177 F.3d 839, 856 (9th Cir.1999). We agree,  
 for the reasons set forth by the district court, that  
 substantial evidence supports the jury's verdict.

[2] We also hold that the district court did not  
 err in denying Sitrick's motion for a new trial on the  
 basis of alleged misconduct by the jury foreperson.  
 The district court's denial of a motion for new trial

based on juror misconduct is reviewed for abuse of  
 discretion. *Molski v. M.J. Cable, Inc.*, 481 F.3d  
 724, 728 (9th Cir.2007). Likewise, the district  
 court's decision not to hold an evidentiary hearing  
 is reviewed for abuse of discretion. *Hard v. Burl-*  
*ington N. R.R. Co.*, 870 F.2d 1454, 1461-62 (9th  
 Cir.1989). The district court weighed the submitted  
 written declarations to determine whether a new tri-  
 al was warranted. The court analyzed numerous  
 factors to determine whether there had been poten-  
 tial prejudice to Sitrick as a result of the foreper-  
 son's observation of Mr. Kavanaugh, including  
 whether the interaction concerned the case, the  
 length and nature of the interaction, the identity and  
 role of the parties involved, evidence of actual im-  
 pact on the juror, and the possibility of eliminating  
 prejudice through a limiting instruction. The court  
 also conducted a hearing where both sides made  
 legal arguments, and then issued a thorough, well-  
 reasoned order denying the motion. Accordingly,  
 the district court did not abuse its discretion.

Because the jury decided only the issue of in-  
 sured capacity, Sitrick's remaining arguments are  
 moot.

**AFFIRMED.**

C.A.9 (Cal.),2007.  
 Sitrick v. Northwestern Pacific Indem. Co.  
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