

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KEVIN JOHNSON,

Plaintiff and Appellant,

v.

GLAXOSMITHKLINE, INC.,

Defendant and Respondent.

B199453

(Los Angeles County
Super. Ct. No. BC288536)

ORDER MODIFYING OPINION
AND DENYING REHEARING
(NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on September 19, 2008 be modified as follows:

1. At the end of the first full paragraph on page 16, after the sentence ending “precluded from relitigation -- is missing.” add as footnote 9 the following, which will require renumbering of all subsequent footnotes:

“9. In its petition for rehearing, which we have denied, GSK correctly notes the court may refer to the entire record, as well as other extrinsic evidence, not simply the first court’s written decision, to determine what issues were actually and necessarily decided in the earlier case. (See generally 7 Witkin, California Procedure (5th ed. 2008) Judgment, § 417(1), p. 1062 [entire record in the first action may be admitted for the purpose of determining what issue was decided by the judgment].) However, when, as here, the first court expressly defines the issue it is deciding, we are not permitted to examine the record of the earlier proceeding and preclude litigation of issues that were raised and either could or should have been addressed in the first proceeding, but were not.”

2. On page 19, add as a footnote after the citation to *Lucido* but before the final sentence:

“16. Noting an injury-in-fact standing requirement based on Article III of the United States Constitution was applied by federal courts to plaintiffs asserting section 17200 claims prior to adoption of Proposition 64 (see, e.g., *Lee v. American Nat’l Ins. Co.* (9th Cir. 2001) 260 F.3d 997, 1001-1002), in its petition for rehearing GSK argues the *Paxil II* putative class representatives asserted they had standing to pursue their claims because they had encountered the allegedly deceptive, nonhabit-forming advertisements, just like Johnson. We do not question the accuracy of GSK’s summary of the evidentiary material and arguments presented to the district court in *Paxil II*, but the fact remains the court decided the class certification issue on the express premise the named representatives were individuals who may never have been exposed to the allegedly deceptive statements.”

Respondent’s petition for rehearing is denied. There is no change in the judgment.

PERLUSS, P. J.

WOODS, J.

ZELON, J.