

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

MARCH 2014
VOLUME 21, NO. 7

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On March 13th, Supreme Court announced following actions (per curiams included in weekly mailout):

- **Amended Administrative Order Number 5**
- **Announced amendments to various rules in response to recommendations of Civil Practice Committee (effective July 1, 2014)**
- **Published for comment proposals from the Criminal Practice Committee (Comment period expires May 1, 2014)**

CRIMINAL

Hayes v. State, 2014 Ark. 104 [Rule 37] When a circuit court fails to rule on an allegation raised in a Rule 37 petition, the petitioner may file a writ of mandamus with the Supreme Court to compel the circuit court to rule. The failure to seek a writ of mandamus bars further action on the allegation. (Storey, W.; CR-12-60; 3-6-14; Hart, J.)

Campbell v. State, 2014 Ark. App. 171 [**juror misconduct**] Knowledge obtained by a juror and brought into the jury room from the ordinary scope of his life experiences, including knowledge obtained through his profession or vocation, does not qualify as “extraneous prejudicial information” as contemplated by Rule 606 of the Arkansas Rules of Evidence. [**jury instruction**] Because there was no rational basis for acquitting appellant of first-degree terroristic threatening, the circuit court did not abuse its discretion when it refused to instruct the jury on the lesser included offense of second-degree terroristic threatening. (Fitzhugh, M.; CR-12-782; 3-12-14; Whiteaker, P.)

Aikens v. State, 2014 Ark. App. 168 [**revocation; probation**] Absent a knowing and intelligent waiver, an uncounseled district court conviction cannot be used as grounds upon which to revoke probation in circuit court. (Philhours, R.; CR-13-226; 3-12-14; Glover, D.)

Jones v. State, 2014 Ark. App. 167 [**revocation; suspended sentence**] The trial court’s finding that appellant inexcusably violated a condition of his suspended sentence was supported by a preponderance of the evidence. [**sentencing**] Even after pronouncing sentence from the bench, the circuit court retains jurisdiction and may modify its pronounced sentence prior to entry of the sentencing order. [**probation**] Pursuant to Ark. Code Ann. § 5-4-307 (b)(1), multiple periods of suspension or probation must run concurrently. (Cox, J.; CR-13-642; 3-12-14; Gruber, R.)

Singleton v. State, 2014 Ark. App. 165 [**illegal sentence**] A request for jail-time credit is a request for a modification of a sentence imposed in an illegal manner. A claim that a sentence was imposed in an illegal manner must be raised in a petition filed pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. (Sutterfield, D.; CR-13-626; 3-12-14; Wynne, R.)

Martinez v. State, 2014 Ark. App. 182 [**amending criminal information**] The trial court erred by allowing the State to amend the information charging him with rape to include the charge of second-degree sexual assault after the State had rested its case. (Green, R.; CR-13-129; 3-12-14; Brown, W.)

Johnston v. State, 2014 Ark. 110 [**admission of evidence**] Because there was overwhelming evidence of appellant’s guilt, the Supreme Court applied the harmless-error doctrine to the facts of appellant’s case and determined that any error associated with the admission of certain evidence during appellant’s trial was harmless. (Wright, H.; CR-13-371; 3-13-14; Hoofman, C.)

State v. Khabeer, 2014 Ark. 107 [**termination of obligation to register as a sex offender**] The circuit court did not clearly err when it concluded that appellee had established by a preponderance of the evidence that he was not likely to pose a threat to the safety of others. Appellant was able to meet this burden based solely upon his own testimony. Accordingly, the circuit court’s decision to terminate appellee’s obligation to register as a sex offender was not clearly erroneous. (Sims, B.; CR-13-784; 3-13-14; Corbin, D.)

Montgomery v. State, 2014 Ark. 122 [**Rule 37**] Appellant's trial counsel was ineffective when he failed to object to various witnesses' testimony that improperly bolstered the child victim's credibility. (Halsey, B.; CR-12-1129; 3-20-14; Danielson, P.)

Thomas v. State, 2014 Ark. 123 [**Rule 37**] While there is no constitutional right to a post-conviction proceeding, when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. Fundamental fairness requires that stringent filing deadlines not be applied to an inmate under a death sentence when his counsel timely filed his initial Rule 37 petition, the circuit court granted extensions of time for revising the petition, appellant complied with the circuit court's deadlines, and additional delays that occurred were not within appellant's control. (Capeheart, T.; CR-10-545; 3-20-14; Baker, K.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Frazier v. State, 2014 Ark. App. 191 (aggravated assault) CR-13-735; 3-19-14; Harrison, B.

Beaver v. State, 2014 Ark. App. 188 (rape) CR-13-337; 3-19-14; Pittman, J.

T.N. v. State, 2014 Ark. App. 186 (rape) CR-13-817; 3-19-14; Gladwin, R.

CIVIL

Heritage Physician Group v. Minton, 2014 Ark. App. 155 [**malpractice**] Doctor contended that plaintiff did not establish the local standard of care. However, on cross-examination, expert testified as to the differences between the locality where he practiced and Hot Springs; he testified that he was one of the primary teaching faculty for general surgical residents and that surgeons who graduate in that residency program go throughout the country; and he testified that for purposes of the problem at issue in this case, there are no situations where the patient would be treated differently in a different locality. The locality rule was satisfied. In addition, evidence was sufficient for the jury to find that defendant's negligence proximately caused the death of patient. (Williams, L.; CV-13-727; 3-12-14; Gladwin, R.)

Osborn v. Tennison, 2014 Ark. App. 175 [**easement**] Mere nonuse does not constitute abandonment. Property owner had the right to maintain a fence between the parties' property, so long as the gate on the road was constructed in a way so as to not interfere with the others' use of their right of passage. The gate constructed was only four feet wide, and the trial court did not err in permitting construction of a wider gate for access to farm the property. The easement was conveyed to the grantees and their heirs and assigns and was not personal only to the grantee. (Womack, S.; CV-13-740; 3-12-14; Hixson, K.)

Swindle v. Southern Farm Bureau, 2014 Ark. App. 157 [**attorney/rule 11 sanctions**] There was evidence that defendant offered to reissue the checks after they had been rejected for improper endorsement, but attorney issued an ultimatum: unless he had the money in his hands by the close of the business day, he would sue. Attorney sued; soon thereafter, defendant reissued the checks, as it had offered to do prior to suit. The purpose of the rule is to deter litigation abuse, and the undisputed evidence is that defendant did everything required of it, that immediate payment was not procured solely because of repeated mistakes by attorney, and that attorney appears to have filed suit out of anger rather than any need to do so. The trial court was within its discretion in awarding sanctions on its own motion. (Duncan, X.; CV-13-753; 3-12-14; Pittman, J.)

Select Concrete Co. v. Cane Creek Concrete, Inc., 2014 Ark. App. 161 [**garnishment**] Writ of garnishment was issued to contractor in effort to collect money that its subcontractor owed judgment creditor. While any unpaid progress payments can be withheld if there is a problem with acceptance of the work or if the owner has yet to pay, here, all conditions precedent were fulfilled for the payments actually made. The contractor had determined that the prerequisites had been met and that the payments were owed to the subcontractor under the contract. Thus, garnishment served on contractor was not improper. (Glover, D.; CV-13-677; 3-12-14; Walmsley, B.)

Reed v. Adamec, 2014 Ark. App. 170 [**trial**] Contention that attorney-client privilege was violated when witness had to testify that her attorney was the one who referred her to the physical therapist for treatment (not a doctor referral) had been waived by failing to timely object. It was not error to give the comparative fault instruction in light of the facts of the case. (Fitzhugh, M.; CV-13-726; 3-12-14; Glover, D.)

Trakru v. Mathews, 2014 Ark. App. 154. Directed verdicts were properly denied on breach of contract, breach of fiduciary duty, and fraud. [**contract**] Option contract was sufficiently definite, there was consideration, and as long as there is consideration, a unilateral option contract does not require mutuality. [**fraud**] Even if representations were promissory in nature, they may support a fraud claim if the promisor had no intention of carrying them out. (Harkey, A.; CV 13-619; 3-12-14; Gladwin, R.)

Pine Hills Health & Rehab. LLC v. Matthews, 2014 Ark. 109 [**arbitration**] The arbitration agreement does not establish that nursing home manifested its assent to it. Because there was no manifestation of mutual assent, it is unenforceable against the resident. (Guthrie, K.; CV-13-756; 3-13-14; Hart, J.)

Valley v. Pulaski Cnty. Cir. Ct., 2014 Ark. 112 [**legislative subpoena**] Circuit court found appellant in criminal contempt and issued a \$250 fine for failing to appear and answer a valid legislative subpoena. The rules of civil procedure do not apply in a criminal contempt proceeding, including the provisions for service of the summons. Statutory notice for a legislative subpoena was complied with. The statute does not require that a witness fee be tendered with the

subpoena; it only requires compensation for attendance but no provisions for how it is to be paid. The subpoena was valid. (Moody, J.; CV-13-450 ; 3-13-14; Hoofman, C.)

Kolbek v. Truck Ins. Exch., 2014 Ark. 108 [**insurance**] The circuit court properly granted summary judgment in favor of insurer regarding its duty to defend in case brought by seven women arising out of activities related to Tony Alamo Miniserries. The alleged injuries and damages stem from the abuse suffered by the plaintiffs. However, the apartment-liability contract issued by TIE/FIE simply does not exist to provide an insured coverage for this type of alleged harm. (Cox, J.; CV-13-356; 3-13-14; Danielson, P.)

Hurt-Hoover Investments, Inc. v. Fulmer, 2014 Ark. App. 197 [**venue**] Section 16-55-213(a) repealed by implication section 16-60-111(a)(1). It took up the entire subject matter of venue anew and was intended as a substitute for the former statute.

[**parol evidence**] Attorney who drafted document was properly not permitted to testify about its meaning. Because the proffered parol evidence was intended to show only what one party to the contract believed the provision meant, the circuit court did not abuse its discretion in refusing to admit the testimony. (Weaver, T.; CV- 13-104; 3-19-14; Whiteaker)

Ortho-McNeil-Janssen Pharm. v. State, 2014 Ark. [**drug labeling**] The State filed suit against Janssen alleging violation of the Arkansas Medicaid Fraud False Claims Act (“MFFCA”). The State’s theory of the case was that Janssen failed to comply with a federal labeling requirement, 21 C.F.R. § 201.57(e) (2002). The State further theorized that the alleged labeling violations triggered a violation of the MFFCA when the Arkansas Medicaid program paid for reimbursement of Risperdal prescriptions. The Code Revision Commission substantively altered act when it codified the act. The State has no claim against Janssen under MFFCA because Janssen is not a healthcare facility and applying for certification or re-certification as described in the statute. The State also sued under the Deceptive Trade Practices Act and relied on a warning letter. This letter was inadmissible hearsay and its introduction was prejudicial. (Fox, T.; CV-12-1058; 3-20-14; Baker. K.)

DOMESTIC RELATIONS

Bohannon v. Robinson, 2014 Ark. App. 179 [**order of protection**]. In this appeal from an entry of an order of protection for three years against the appellant, the Court of Appeals said that if timely service is made upon a defendant under the Domestic Abuse Act, any objections, claims, or arguments that the defendant desires to make should be made at or before the hearing on the final order of protection. If the defendant fails to do so, the issues are not preserved for review on appeal. The appellant failed to file any pleading in the case, and the record indicates that she did not attend the hearing or request a continuance. (Pierce, M.; No. CV-13-983; 3-12-14; Wood, R.)

Marks v. Marks, 2014 Ark. App. 174 [**divorce—real and personal property; alimony**] The Court of Appeals found that the trial court did not clearly err (1) in awarding the appellee wife a home that was nonmarital property in which she had lived without paying rent for 19 years; (2) in

awarding the appellee bedroom furniture and a firearm upon finding that the appellant gave them to her as a gift; and (3) in awarding the appellee alimony for three years after the court stated that it had considered all of the relevant factors in awarding alimony. After noting the considerable disparity in the parties' income and resources, the court concluded that the appellee had the need for financial support and that the appellant had the resources to pay. (Benton, W.; No. CV-13-822; 3-12-14; Vaught, L.)

Horton v. Freeman, 2014 Ark. App. 166 [**grandparent visitation; subject-matter jurisdiction**]

The appellant mother of the child argued on appeal that the circuit court was without subject-matter jurisdiction to decide this case because an order of paternity had not been entered before the filing of the petition for grandparent visitation. The Court of Appeals said that appellant provided no authority for her proposition, that the appellant had agreed and acknowledged at the hearing that he was the father of the child, and that the circuit court did have subject-matter jurisdiction. The court affirmed the award of grandparent visitation to the appellee, the mother of the child's deceased father. However, the court reversed the award of "the standard visitation schedule that the circuit court uses," which was the same visitation that a non-custodial parent would be given, and remanded for the circuit court to determine what amount of visitation is reasonable under the circumstances. (Hill, V.; No. CV-13-952; 3-12-14; Wynne, R.)

Wainwright v. (Wainwright) Merryman, 2014 Ark. App. 156 [**divorce-marital property**] The Court of Appeals affirmed the trial court's denial of appellant husband's motion to compel the appellee wife to account for the disposition of all of her personal income from the date of their marriage until the time of trial, a period of about eight years, and the equal division of marital property. On the appellee wife's cross appeal, she argued that the trial court erred in dividing two items of property that she had acquired by gift. One was real property, three parcels with a warranty deed indicating that the property had been sold to the appellee by her aunt for ten dollars, ten dollars, and one dollar, respectively. The trial court did not consider the appellee's testimony that no money was exchanged and that the property was a gift, because that would contradict the recitation in the deed that the property had been sold for a few dollars. The Court of Appeals said it had held previously that the fact that the face of a deed recites that valuable consideration has been paid for land does not preclude a finding that the property was a gift when the consideration is nominal, the parties to the transaction are family members, and there is testimony that no consideration was actually paid. The court reversed and remanded for the trial court to reconsider in light of *Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004). The other property was a mattress and box springs which the appellee purchased with a gift card that the appellant admittedly gave her. The court found no error on this point because the appellee had left the mattress and box springs when she entered the marital home during the proceedings, in violation of an order not to do so, and took other objects she claimed as hers, both inside and outside the house. The court said that property is abandoned when its possession is voluntarily forsaken by the owner. (Clark, D.; No. CV-13-386; 3-12-14; Pittman, J.)

Myers v. McCall, 2014 Ark. App. 158 [**child support agreement-modification by the court**]

The parties had an agreement. The appellant mother appealed from an order of the circuit court modifying child support; the order said that the appellee father was not required to pay child support after the parties' children began attending college. While the general rule is that a court

cannot modify the parties' contract that is incorporated into the decree, an exception exists for issues relating to child-custody and child-support matters. Such provisions in independent contracts are not binding. The trial court always retains jurisdiction over child support as a matter of public policy, no matter what an independent contract states, and either party has the right to request modification of a child-support award. Therefore, the court did not lack authority to modify the agreement, and the appellant did not argue that the modifications were not supported by a material change in circumstances. The appellant also appealed the court's refusal to pay half the finance charges the appellant incurred to pay for a veneer treatment for their daughter to remedy discoloration of her teeth caused by medications she was required to take to combat a serious respiratory disease. The court found that the treatment was desirable and not unnecessary, but that less expensive treatments existed and the appellee had not been consulted before the expense was incurred. (Spears, J.; No. CV-13-871; 3-12-14; Pittman, J.)

Rogers v. Rogers, 2014 Ark. App. 192 [**divorce—marital retirement benefits**] This case involved certain marital retirement benefits, and the circuit court ruled that the appellant husband owed the appellee wife \$40,709.85 in retirement benefits. That figure was based upon the testimony of the appellee's expert witness, an accountant, the only expert who testified in the case. Because the witness's calculations were erroneous with respect to two accounts, all of his computations that followed were erroneous. The court's reliance on the expert's testimony resulted in an award that was likewise erroneous, so the decision was reversed and remanded. (Moore, R.; No. CV-12-1093; 3-19-14; Harrison, B.)

Levey v. Levey, 2012 Ark. App. 198 [**child custody—modification; child support; continuance**] In the parties' 2011 decree of divorce, they were awarded joint legal and physical custody of their child, with an equal and rotating custody schedule. The parties subsequently filed motions for modification of custody and the appellant mother filed a motion for a continuance before the hearing so she could hire an attorney. The judge denied that motion and awarded custody of the parties' child to the appellee father. On appeal, the appellant asserted that the court erred in denying her motion for continuance. The Court of Appeals noted that the original hearing date was delayed for a month to accommodate the appellant, and that, before the hearing from which she appealed, she had over a month to obtain a lawyer. There is no Sixth Amendment right to counsel in ordinary civil cases, and pro se litigants are held to the same standards as attorneys. The court found no abuse of discretion in denying the continuance. The appellant also claimed that the trial court erred in awarding custody to the appellee father. The court noted its deference to the trial court's evaluation of witnesses, their testimony, and the child's best interests, the primary consideration of the court. It was undisputed that joint custody was no longer a viable option. When the parents cannot cooperate and share decision-making concerning the child's best interests, a material change of circumstances has occurred. The court observed the two parties, noted that the appellant mother was unemployed and did not have a stable home, and found the father the more stable of the two. The decision to change custody to the father was affirmed. Appellant's last contention involved the monthly child-support award to appellee. However, because the appellant did not object to the trial court, as the decision was made or after it was reduced to an order, the issue was not preserved for appeal, and the appellate court did not address it. (Henry, D.; No. CV-13-717; 3-19-14; Vaught, L.)

PROBATE

In the Matter of the Estate of Douglas Kemp, Deceased, U.S.Trust, Bank of America, N.A. v. First National Bank & Trust, Mountain Home, as Special Administrator, et. al., 2014 Ark. App. 160 [**inter vivos trust**] An express inter vivos trust failed when the settlor died without any readily ascertainable heirs. On appeal, the petitioner Bank of America argued that the probate court lacked jurisdiction over the trust assets and that those assets did not become part of the decedent's estate upon his death. The Court of Appeals disagreed, saying that a probate court, in the exercise of its jurisdiction to administer the estates of decedents, is authorized to determine what property belongs to the estate. When the express trust failed for lack of a dispositive provision, a resulting trust arose in favor of the settlor or the settlor's estate. The probate court correctly determined that the trust res became an asset of the estate upon the settlor's death. Secondly, the petitioner argued that the probate court erred in ordering it to reimburse the estate for expenses it incurred in the administration of the trust. However, the Court of Appeals pointed out that the court actually considered the expenses the petitioner incurred (the trustee's fees for itself, its attorney's fees, and the fees for the heir-locator service it hired) to be improper expenses. The petitioner had first filed a case involving issues surrounding the trust in Craighead County. That circuit court acquired jurisdiction of the subject matter, and its authority continued until the matter was resolved and disposed of. This case was filed in Randolph County more than a year later. Under the common law on concurrent jurisdiction, Craighead County had exclusive jurisdiction to administer the trust, including determining what were and were not appropriate trust expenses. On the issue of attorney's fees, a probate court may award fees only if authorized by statute, and it has no jurisdiction to award those fees to individual beneficiaries. The trial court had jurisdiction to determine that the trust's res became an asset of the estate upon the settlor's death, and that decision was affirmed, but no jurisdiction to determine the propriety of the expenses paid out of the trusts or to award attorney's fees to the heirs, so the case was reversed on that issue. (Smith, P.; No. CV-13-493; 3-12-14; Walmsley, B.)

JUVENILE

F.C. v. State, 2014 Ark. App. 196 [**Delinquency Adjudication**] Appellant argued that there was not sufficient evidence to support his adjudication as an accomplice to theft of property (phone), a Class A misdemeanor. Mere presence at the scene of a crime is not enough to make a person an accomplice. Relevant factors to be considered are the presence of the accused in the proximity of the crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. Evidence that identified appellant on a video near the phone bending down and two juveniles nearby was not of sufficient evidence to compel a conclusion one way or the other without speculation or conjecture. (Smith, T.; CV-13-829; 3-19-14; Glover, D.)

Ark. Dep't of Human Servs. v. White, 2014 Ark. App. 193 [**FINS – DHS family services**] DHS appealed a circuit court order directing DHS to provide assistance to appellee's family to purchase furniture for their home. On appeal, DHS argued that there was insufficient evidence to support the circuit court's findings and that the circuit court failed to make written findings as

required by Arkansas Code Annotated section 9-27-332(a)(1)(B)(ii). The court of appeals reversed, holding that the case was an exception to the mootness doctrine. There was no evidence presented to support the court's finding that these services were necessary to prevent the child's removal, and that the circuit court failed to provide the required written findings. (Brown, E.; CV-13-988; 3-19-14; Harrison, B.)

Ragsdale v. Ark. Dep't of Human Servs., 2014 Ark. App. 159 [PPH – grandparent custody] Appellant appealed from a permanency-planning and closure order granting her parents permanent custody of her two-year-old child. She argued that the circuit court erred because the evidence showed that she complied with the case plan and that, within three months, she would have been fit for the child to return to her. The court of appeals affirmed, holding that there was sufficient evidence for the circuit court to find that placement, pursuant to Arkansas Code Annotated section 9-27-338(c)(3), which authorizes the court to create a plan to return the juvenile to the parent within three months of the permanency-planning hearing, was not in the best interest of the child. The court of appeals also held that the circuit court properly found that appellant had not complied with the case plan or the orders regarding drug use, stable housing, stable employment, and that she had not made substantial progress toward remedying the conditions causing removal. (Elmore, B.; CV-13-1029; 3-12-14; Pittman, J.)

Carroll v. Ark. Dep't of Human Servs., 2014 Ark. App. 199. [TPR – No Merit] Appellant appealed from the termination of her parental rights to her two daughters after finding that termination was in the best interest of the children and that DHS had proven statutory grounds. The court of appeals affirmed and granted appellant's counsel's motion to withdraw. (James, P.; CV-13-1024; 3-19-14; Hixson, K.)

Tony v. Ark. Dep't of Human Servs., 2014 Ark. App. 92. [TPR - Failure to Remedy] Appellant appealed the termination of her parental rights of her five children and argued that there was insufficient evidence for the failure to remedy statutory ground. She argued that her instability and poor judgment with relationships had no relevance to the two issues (physical abuse and sex abuse) as to why her children were removed. The court of appeals affirmed finding that the underlying cause of the conditions was a lack of appellant's stability. (Sullivan, T.; CV-13-961; 2-12-2014; Harrison, B.)

DISTRICT COURT

Robinson v. State, 2014 Ark. 101 [DWI] [probable cause for traffic stop] [motion to suppress]. The Supreme Court granted appellant's petition for review from a court of appeals' decision affirming the circuit court's denial of his motion to suppress evidence. Appellant was convicted in district court of DWI, refusal to submit, having a broken windshield, and having defective equipment. He appealed to circuit court and filed a motion to suppress, alleging that there was no probable cause for the initial traffic stop. The issue before the Supreme Court was whether a partially broken taillight that displays both white light and red light creates probable cause to initiate a traffic stop. It was held that the fact that appellant's taillight was visible broken is sufficient probable cause to believe that he may have committed a traffic violation. The circuit

court correctly concluded that there was probable cause for the traffic stop. (Pope, S.; CR 13-843; 3/06/2014; Goodson, C.)

EIGHTH CIRCUIT

Boehm v. Eli Lilly Co. [**Products liability**] In action alleging defendant failed to warn treating and prescribing physicians of the risk that long-term use of the antipsychotic drug Zyprexa could lead patients to develop tardive dyskinesia, the district court did not abuse its discretion by excluding plaintiff's expert's testimony that 15% of users would develop the condition as the testimony was not supported by sufficient scientific data or sources. The district court did not err in granting defendant's motion for summary judgment on plaintiff's failure-to-warn claim based on Arkansas's learned intermediary doctrine. Assuming Arkansas would recognize an "over-promotion" exception to the learned intermediary doctrine, there was no evidence that defendant over-promoted the drug, thereby negating an otherwise adequate warning of risk. (E.D. Ark.; # 13-1350; 3-10-14)