**Speculation**

When your client or counsel is testifying about what they would have done had they known a different fact:

Ford is correct that where, as here, no warning is given, then evidence of what a person would have done had a warning been given inherently is hypothetical in character. Yet, to show causation, a plaintiff must show that the absence of a warning was the proximate cause of the injury. As a matter of logic, to accomplish this a plaintiff must show that she did not have the information the warning would have imparted already and that, if she had the information, it would have affected her conduct. This creates a “Catch–22” in which the plaintiff must prove what she would have done had a warning been given to prove causation, but evidence on this issue must be precluded as speculative.

This dilemma is avoided in Missouri and other states by the use of a presumption that had an adequate warning been given, it would have been heeded. For that reason, the trial court did not err in holding during the direct examination of Ms. Moore that her testimony as to what she might have done had a warning been given was speculative. Arnold, 908 S.W.2d at 763.

The heeding presumption is a rebuttable one, however. Tune, 883 S.W.2d at 14. Here, Ford chose to try to rebut it by obtaining concessions from Ms. Moore on cross-examination that she really did not look for warnings and that she would have driven the vehicle once purchased. She agreed that she did not look specifically at this manual or at prior vehicle manuals with the purpose of seeing whether there was a seat weight limit.

The Moores did not attempt to question Ms. Moore further about whether she would have looked for or heeded the warning on redirect, after such evidence became relevant once Ford tried to rebut the presumption. Nonetheless, earlier portions of her testimony that did come in without objection, set out at length above, supported the Moores' position that she would have heeded a warning about the risks the seats posed for persons of greater than normal weight. It would be up to a jury to weigh all of this testimony. A jury may find persuasive the implication from Ford's questions that the Moores' testimony was self-serving and should not be accorded much weight. But a jury instead might find it entirely credible. Such a credibility determination is for the jury.

*Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762–63 (Mo. banc 2011)

**Hearsay**

“Hearsay is defined as ‘any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.’” State v. Reynolds, 456 S.W.3d 101, 104 (Mo.App.W.D.2015) (quoting State v. Sutherland, 939 S.W.2d 373, 376 (Mo. banc 1997)).

**Explaining why your client did something – effect on the listener**

“‘[T]estimony of what another said, when offered in explanation of conduct rather than as proof of the facts in the other's statement, is not inadmissible hearsay.’” *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 400 (Mo. App. W.D. 2015) (quoting *State v. Leisure*, 796 S.W.2d 875, 880 (Mo. banc 1990)).

**That trial counsel said something – not hearsay, just establishing it was said**

“‘[E]vidence is hearsay only if its evidentiary value depends on drawing an inference from the truth of the statement. If the relevance of the statement lies in the mere fact that it was made, no reliance is placed on the truth of the statement or the credibility of the out-of-court declarant, and the statement is not hearsay.’” *State v. Sutherland*, 939 S.W.2d 373, 377 (Mo. banc 1997) (quoting John C. O'Brien & Roger L. Goldman, Federal Criminal Trial Evidence 345 (1989)

**Relevance**

The claim in the amended motion alleges X, this evidence is relevant to establishing X. A determination of it’s relevance at the underlying trial is a finding distinct from this evidentiary hearing.

**Refreshing recollection improperly**

If you are asking them about an exhibit, then you are not refreshing their recollection

**Automatic Foundation**

If it is available on Case.Net

§ 490.130 Records of proceedings of any court of this state contained within any statewide court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party.

§ 490.130 court records from other jurisdictions

Must be “attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice or presiding associate circuit judge of the court to be attested in due form”

§ 490.220 government reports

All records and exemplifications of office books, kept in any public office of the United States, or of a sister state, not appertaining to a court, shall be evidence in this state, if attested by the keeper of said record or books, and the seal of his office, if there be a seal.

§ 490.220 business records affidavits

Must serve the opposing party with the records and affidavit at least seven days prior to the hearing

Affidavit “may be in form and content substantially” similar to the example affidavit in the statute

Weekend days count in the computation: “When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.” Rule 44.01(a)